No. 14-1387

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CITIZENS UNITED,

Plaintiff-Appellant,

v.

SCOTT GESSLER and SUZANNE STAIERT,

Defendant-Appellees,

and

COLORADO DEMOCRATIC PARTY, GAROLD A. FORNANDER, LUCÍA GUZMÁN, and DICKEY LEE HULLINGHORST,

Intervenor-Defendant-Appellees.

On Appeal From The United States District Court For The District Of Colorado
Honorable R. Brooke Jackson
In No. 1:14-CV-02266-RBJ

EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL, OR, IN THE ALTERNATIVE, FOR EXPEDITED REVIEW

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September 25, 2014

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Citizens United, a Virginia non-stock corporation, has no parent corporation and there are no publicly held corporations that own 10% or more of Citizens United's stock.

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INTRODUCTION

Plaintiff-Appellant Citizens United hereby moves for an emergency injunction pending appeal pursuant to Federal Rule of Appellate Procedure 8(a)(2) and Tenth Circuit Rule 8, or, in the alternative, for expedited briefing and argument.

Citizens United filed this suit to secure its First Amendment right to disseminate its forthcoming documentary film about Colorado politics—which will be marketed and distributed beginning in the first week of October 2014—unencumbered by the discriminatory reporting and disclosure requirements that Colorado imposes on political speech by all speakers *except* the print media and broadcast facilities. Colorado's reporting and disclosure requirements force speakers to file detailed reports with the State and make burdensome public disclosures about the sources of their funding simply to exercise the fundamental right to discuss political candidates before an election. Those requirements do *not* apply, however, to speakers who own newspapers, magazines, or radio or television stations. *Those* favored speakers—the so-called "institutional press"—may engage in electioneering communications and independent expenditures free from state regulation, while speakers such as Citizens United who do not own a periodical publication or broadcast facility may do so only if they comply with the State's extensive reporting and disclosure requirements. Such unequal burdens on political

speech discriminate among speakers based on their status, identity, message, and viewpoint, and are flatly unconstitutional. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("government regulation may not favor one speaker over another").

The District of Colorado nonetheless denied Citizens United's motion for a preliminary injunction to prohibit the State from enforcing its discriminatory reporting and disclosure requirements. *See* Ex. A.[1] Thus, absent an injunction pending appeal, Citizens United's core First Amendment rights—and those of all other Colorado speakers who lack the resources to purchase a printing press or broadcast station—will be profoundly impaired. For Citizens United, that injury is imminent and irreparable: It will be suffered as soon as Citizens United begins, in less than ten days, to advertise and distribute its forthcoming documentary film, *Rocky Mountain Heist*. Because Citizens United cannot publish its film in a newspaper and does not own a broadcast facility, it will be subjected to regulatory burdens and the chilling threat of enforcement liability not imposed on speakers in the traditional media.

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[1] Citations to "Ex. _" refer to exhibits to the accompanying Declaration of Theodore B. Olson.

An injunction pending appeal is necessary to enable Citizens United to engage in core political speech and media activities on equal footing with all other speakers. At a bare minimum, the Court should set this case for briefing and argument on a highly expedited schedule to facilitate its resolution well in advance of the fast-approaching November 4 general election.

Pursuant to Tenth Circuit Rule 27.3(C), counsel for Citizens United conferred with counsel for Defendant-Appellees (the "Secretary") and Intervenor-Defendant-Appellees ("Intervenors") regarding the relief requested in this motion. The Secretary stated that he opposes an injunction pending appeal and takes no position on the alternative request for expedited review. Intervenors stated that they oppose the relief requested.

BACKGROUND

Colorado's reporting and disclosure requirements are set forth in Sections 2, 5, and 6 of Article XXVIII of the Colorado Constitution, and Sections 1-45-103, 1-45-107.5, and 1-45-108 of the Colorado Revised Statutes.

A. Registration, Reporting, And Disclosure Requirements

Section 2 of Article XXVIII defines the relevant terms. "Electioneering communication" is defined as:

[A]ny communication broadcasted by television or radio, printed in a news-

> paper 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.

Colo. Const. art. XXVIII, § 2(7)(a); *see also* Colo. Rev. Stat. § 1-45-103(9). An "expenditure" is:

> [A]ny 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.

Colo. Const. art. XXVIII, § 2(8)(a); *see also* Colo. Rev. Stat. § 1-45-103(10). An "independent expenditure" is an expenditure "not controlled by or coordinated with any candidate or agent of such candidate." Colo. Const. art. XXVIII, § 2(9); *see also* Colo. Rev. Stat. § 1-45-103(11).

Sections 5 and 6 of Article XXVIII set forth the specific reporting and disclosure requirements that govern independent expenditures and electioneering communications, respectively. Under Section 5, any person making independent expenditures in excess of $1,000 per calendar year must file a notice with the Sec-

retary of State describing the independent expenditure and identifying the candidate it is intended to support or oppose. *See* Colo. Const. art. XXVIII, § 5(1). Each independent expenditure in excess of $1,000 requires a new notice. *Id.* The person making the expenditure must also "prominently" disclose its identity in the resulting communication. *Id.* § 5(2).

Section 6 of Article XXVIII provides that any person expending more than $1,000 per calendar year on electioneering communications must report to the Secretary of State the amount spent on those communications and the name, address, occupation, and employer of any person that contributed more than $250 to fund the communications. Colo. Const. art. XXVIII, § 6(1). In the months before a general election, those reports must be submitted every two weeks beginning on the first Monday in September. Colo. Rev. Stat. § 1-45-108(2).

Section 1-45-107.5 of the Colorado Revised Statutes imposes additional requirements. For example, any person expending more than $1,000 per calendar year on independent expenditures must register as an independent expenditure committee within two business days and designate an agent for service of process. Colo. Rev. Stat. § 1-45-107.5(3)(a) & (b)(III)). Such persons must also report to the Secretary of State any donation in excess of $20 received during the reporting period for purposes of making an independent expenditure. *Id.* § 1-45-107.5(8).

Speakers face the threat of litigation and harsh penalties for failing to comply with these reporting and disclosure requirements. "Any person" who believes that a speaker has violated these requirements may file a complaint with the Secretary, who in turn refers the matter to an administrative law judge for adjudication. Colo. Const. art. XXVIII, § 9(2)(a). Speakers found to have violated Colorado's reporting and disclosure requirements shall be liable for a civil penalty ranging from "fifty dollars per day" (Colo. Const. art. XXVIII, § 10(2)(a)) to as much as "one thousand dollars per day" (Colo. Rev. Stat. § 1-45-111.5(c)) for each day a report or disclosure is overdue. Judgments are enforceable either by public enforcement action or private lawsuit. Colo. Const. art. XXVIII, § 9(2)(a).

B. Colorado's Media Exemptions

These burdens and penalties do not apply evenhandedly to all speakers. Rather, Colorado's reporting and disclosure requirements expressly exempt traditional print media and broadcast facilities.

Specifically, Colorado excludes from the definition of "electioneering communication":

> (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;

> . . . .

Colo. Const. art. XXVIII, § 2(7)(b); *see also* Colo. Rev. Stat. § 1-45-103(9). The media exemption from the definition of "expenditure" similarly excludes:

> (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;
> . . . .

Colo. Const. art. XXVIII, § 2(8)(b); *see also* Colo. Rev. Stat. § 1-45-103(10).

C. Citizens United's Political And Media Activities

Citizens United is a non-profit organization that engages in education, advocacy, and grassroots activities, including regular political speech and media and press communications. *See* Ex. B, ¶¶ 9, 24; Ex. E, at 7; Ex. F, ¶ 4. Among its activities, Citizens United produces, markets, and distributes documentary films, including award-winning films that explore controversial political organizations, personalities, and policies. Ex. B, ¶ 24; Ex. E, at 7; Ex. F, ¶ 4.

In 2010, the Federal Election Commission concluded that Citizens United's films and advertising promoting its films are exempt from the definitions of "expenditure" and "electioneering communication" under federal campaign finance law because "Citizens United's films constitute a legitimate press function." Ex.

C, at 7. Therefore, like other press entities, Citizens United is exempt from federal reporting and disclosure requirements when distributing and advertising documentary films about candidates for federal office. Ex. B, ¶ 26.

Citizens United's latest documentary film, *Rocky Mountain Heist*, explores the impact of various advocacy groups on Colorado government and public policy. Ex. B, ¶ 27; Ex. F, ¶ 6. The Film has a budget of $773,975, including $548,975 for production and $225,000 for marketing. Ex. B, ¶¶ 27-29; Ex. F., ¶¶ 7-9. Production is nearly completed, and the Film will be marketed and distributed across the United States, including in Colorado, beginning in the first week of October 2014. Ex. B, ¶ 30; Ex. F, ¶ 6. Distribution of the Film will be through DVD sales, television broadcast, and online digital streaming and downloading; advertising will include television, radio, and Internet ads. Ex. B, ¶ 30; Ex. F, ¶¶ 6 & 10. The Film and some of its advertising will include unambiguous references to elected Colorado officials running for office in this year's general election, as well as video footage that meets the statutory definition of express advocacy. Ex. B, ¶ 27; Ex. E, at 8-9; Ex. F, ¶ 7.

On April 18, 2014, Citizens United filed a Petition for Declaratory Order with the Colorado Secretary of State seeking clarification as to whether Citizens United's distribution and advertising of *Rocky Mountain Heist* qualified for Colo-

rado's media exemptions. Ex. B, ¶ 32. The Secretary concluded that the Film and related advertising did not fall within any enumerated exemption to the definition of "electioneering communication" under Colorado law—including Colorado's exemptions for print media and broadcast facilities. Ex. D, at 5-11. In concluding that Citizens United must comply with the reporting and disclosure requirements, the Order explained that "the Secretary lacks the authority to apply well-reasoned, settled First Amendment law to Colorado." *Id.* at 9 (italics omitted).

D. Citizens United's Complaint

Citizens United thereafter filed this suit for declaratory and injunctive relief invalidating Colorado's reporting and disclosure requirements, as well as a motion for a preliminary injunction against their enforcement, because those requirements apply to certain speakers but not others on a discriminatory basis in violation of the First Amendment to the U.S. Constitution and Article II, Section 10 of the Colorado Constitution. *See* Ex. B; Ex. E. The Secretary opposed Citizens United's motion, as did the Colorado Democratic Party and several individuals who intervened as defendants in the case. After holding a hearing on the motion (*see* Ex. H), the district court denied preliminary injunctive relief. *See* Ex. A.

The district court reasoned that Colorado's reporting and disclosure requirements "distinguish[] based on the form of speech, not on the identity of the

speaker" (Ex. A, at 12), and therefore applied an intermediate, "exacting scrutiny" standard (*id.* at 12-13). In the district court's view, there need be "only a reasonable fit" (*id.* at 16) between Colorado's proffered interest in "ensuring its electorate is informed" (*id.* at 14) and Colorado's disclosure regime, including its exemptions for traditional media entities. Finding no reason to conclude that the "scope of the disclosure scheme, including its exemptions, is not in proportion to the interest of informing the electorate" (*id.* at 16), the district court concluded that Citizens United's facial and as-applied challenges did not have a substantial likelihood of success. *Id.* at 17-19. Absent a law that "actually infringes a constitutional right" (*id.* at 20), the district court also concluded that the remaining requirements for a preliminary injunction were not satisfied. *Id.* at 19-21.

Citizens United filed this appeal one day after the district court issued its order.[2] Because the district court denied preliminary injunctive relief, and because Citizens United is poised to begin distributing *Rocky Mountain Heist* in the next ten days, it would be futile and impractical for Citizens United to move in the dis-

[2] The district court had subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1332 because the parties are diverse and Citizens United's claims raise a federal question. This Court has jurisdiction over this appeal from the district court's denial of Citizens United's motion for a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1).

trict court for an injunction pending appeal. *See* Fed. R. App. P. 8(a)(2)(A)(i); *see also Sindicato Puertorriqueño v. Fortuño*, 699 F.3d 1, 7 (1st Cir. 2012) (per curiam) (granting injunction pending appeal under similar circumstances).

ARGUMENT

"[R]estrictions distinguishing among different speakers, allowing speech by some but not others," are presumptively "[p]rohibited" because they are "all too often simply a means to control content." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). Accordingly, "heightened judicial scrutiny is warranted" whenever government "imposes a burden based on the content of speech and the identity of the speaker." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664, 2665 (2011).

By misapplying a relaxed form of "exacting scrutiny" and conjuring up constitutionally irrelevant distinctions between Citizens United and the "institutional media," the district court permitted the Secretary to continue enforcing a blatantly discriminatory speech restriction that cannot withstand *any* level of scrutiny. This Court should grant an injunction pending an appeal; alternatively, the Court should set this appeal for briefing and argument on a highly expedited schedule that provides for oral argument to be held no later than October 12.

I. An Injunction Pending Appeal Is Warranted.

An injunction pending appeal is necessary to prevent irreparable injury to

the First Amendment rights of Citizens United and other Colorado speakers who do not qualify for a media exemption. Each of the equitable factors for an injunction pending appeal is satisfied. *See* 10th Cir. R. 8.

A. Citizens United Has A Significant Likelihood Of Success On Appeal.

The "'likelihood of success on the merits will often be the determinative factor'" in cases involving laws that burden fundamental First Amendment rights. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (en banc) (citation omitted), *aff'd*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). And there can be no question that Colorado's discriminatory reporting and disclosure requirements burden protected speech.

Those requirements force Citizens United and other disfavored speakers to make an unconstitutional choice. They can either refrain from core political speech prior to the general election, or submit to burdensome state regulations—and the attendant threat of administrative enforcement and penalties—that are inapplicable to Colorado's preferred class of speakers: the traditional print and broadcast media. Just last Term, the Supreme Court reiterated that "prompt judicial review" is necessary when a state forces speakers "to choose between refraining from core political speech on the one hand, or engaging in that speech and risking costly

[administrative] proceedings and criminal prosecution on the other." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014).

Colorado's discriminatory reporting and disclosure requirements are impossible to reconcile with the settled principle that "government regulation may not favor one speaker over another." *Rosenberger*, 515 U.S. at 828. Those requirements are facially discriminatory because they apply only to certain speakers, including Citizens United, who, in the words of the Secretary, lack a sufficient "track record" of "trustworthiness" to enjoy unfettered freedom of political expression. Ex. G, at 16. For "institutionalized and longstanding press entities" (*id.*), on the other hand, Colorado imposes no such burdens. Speakers with access to a newspaper or their own broadcast facility are categorically exempt from Colorado's regulation of electioneering communications and independent expenditures. Colo. Const. art. XXVIII, § 2(7)(b), (8)(b). Such identity-based distinctions among speakers are presumptively "[p]rohibited." *Citizens United*, 558 U.S. at 340; *see also*, *e.g.*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2820-21 (2011); *Rosenberger*, 515 U.S. at 828; *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978).

The district court seriously misconstrued these principles. In that court's view, it is perfectly appropriate for Colorado to impose burdens on documentary

filmmakers, bloggers, pamphleteers, and other relative newcomers to the political debate, but not members of the institutional press who engage in exactly the same political speech, because such discriminatory burdens are merely distinctions "based on the form of speech." Ex. A, at 12. But when a law favors a "form of speech" that is expressly limited to certain speakers—members of the traditional media who own a printing press or who have successfully navigated the lengthy process of securing one of the limited number of broadcast licenses made available by the FCC—then the distinction is one based on identity because only members of the favored class have access to the preferred "form" of communication.

It is no answer, as the district court hypothesized, that Citizens United could choose to limit its expression to publishing op-eds, or that the content of certain communications by the *Denver Post* might trigger disclosure requirements. Ex. A, at 18. Forcing a speaker to "change its message" to avoid regulation of core political speech "contravenes the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Ariz. Free Enter.*, 131 S. Ct. at 2819, 2820 (internal quotation marks omitted). Based on that principle, the First Circuit enjoined the enforcement of a similar law that imposed "procedures that juridical persons such as corporations and unions must follow if they wish to make either campaign contributions or in-

dependent expenditures." *Sindicato*, 699 F.3d at 5. Plaintiffs had a strong likelihood of success on the merits, the court of appeals concluded, because the law "impose[d] substantial burdens on the very process through which a juridical person determines whether and how to exercise its free speech rights." *Id.* at 12. So too here: Colorado's reporting and disclosure requirements place substantial burdens—including regulatory obligations and onerous sanctions for noncompliance—on the exercise of First Amendment freedoms by speakers who do not enjoy the favored status of newspaper owners and broadcasters.

Nor does Citizens United's substantial likelihood of success require additional factual development. The Supreme Court has made clear that whether a law constitutes an impermissible burden on core political speech is a "purely legal" question that "will not be clarified by further factual development." *Susan B. Anthony List*, 134 S. Ct. at 2347 (internal quotation marks omitted). The district court's speculation about what newspapers and broadcasters would have to disclose if the media "exemptions did not exist" (Ex. A, at 15), and what type of funding arrangements might "violate journalists' professional ethical standards" (*id.*), simply has no relevance to the legal question of whether Colorado's reporting and disclosure requirements place an impermissible burden on disfavored speakers.

See Sindicato, 699 F.3d at 11 (district court's denial of preliminary injunction to allow for "further factual development" was legal error).

B. Citizens United And Other Colorado Speakers Will Be Irreparably Injured Absent An Injunction Pending Appeal.

The irreparable injury prong is indisputably satisfied. With the November 4 general election six weeks away, a decision not to enjoin enforcement of Colorado's reporting and disclosure requirements would permit the Secretary to continue denying Citizens United—and all other speakers not entitled to invoke the State's media exemptions—their First Amendment right to engage in political speech on the same terms as other speakers. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *Hobby Lobby*, 723 F.3d at 1145.

This Court will "assume that plaintiffs have suffered irreparable injury when a government deprives plaintiffs of their commercial speech rights." *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1235 (10th Cir. 2005). That presumption has even greater force when core political speech is at stake. Here, the Secretary has determined that Citizens United's Film will be subject to Colorado's discriminatory reporting and disclosure requirements. *See* Ex. D, at 6. As the Secretary

himself acknowledges, "the irreparable harm element would be satisfied" if the reporting and disclosure requirements violate Citizens United's constitutional rights. Ex. G, at 26 n.10.

C. The Secretary And Intervenors Will Not Be Injured By An Injunction Pending Appeal.

Neither Colorado nor its citizens—including Intervenors—"have an interest in enforcing a law that is likely constitutionally infirm." *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010). Where a "plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment." *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001). Even for commercial speech, a First Amendment injury "outweighs any prospective injury" to the government caused by enjoining the enforcement of an invalid statute. *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001).

Moreover, even if the Secretary and Intervenors could assert a cognizable injury from an injunction against enforcement of Colorado's discriminatory reporting and disclosure requirements, they cannot plausibly explain why they are not similarly injured by wholesale exemptions from those requirements for the institutional print and broadcast media. Quite the contrary, the Secretary and Intervenors are

defending those exemptions, which have the effect of denying the public information about the sources of funding for periodicals, newspapers, and radio and television broadcasts. In light of these gaping exceptions to the reporting and disclosure requirements, any incremental injury from enjoining the enforcement of those requirements is vastly outweighed by the irreparable constitutional injury suffered by Citizens United and other disfavored speakers.

D. The Public Interest Favors An Appellate Injunction.

It "is always in the public interest" to issue an injunction pending appeal where core First Amendment rights are at stake. *Hobby Lobby*, 723 F.3d at 1145 (internal quotation marks omitted); *see also Pac. Frontier*, 414 F.3d at 1237 ("Vindicating First Amendment freedoms is clearly in the public interest."). Absent an injunction pending appeal, Colorado will continue to enforce a discriminatory reporting and disclosure regime that violates the constitutional rights of Citizens United and other speakers not eligible for a media exemption.

In finding that a preliminary injunction would be "adverse to the public interest," the district court believed it sufficient that Colorado voters "must have seen a significant benefit" in enacting the existing disclosure regime. Ex. A, at 20-21. But popular referenda may never be used to deprive citizens of fundamental constitutional guarantees. *See*, *e.g.*, *Romer v. Evans*, 517 U.S. 620, 625-26, 635 (1996);

Reitman v. Mulkey, 387 U.S. 369, 374-75, 380-81 (1967). Indeed, the same voter referendum that produced Colorado's reporting and disclosure requirements also purported to ban corporations and labor unions from funding electioneering communications—a ban that the Supreme Court of Colorado later declared unconstitutional in light of *Citizens United*.[3]

II. In The Alternative, This Court Should Expedite Appellate Review.

If this Court does not grant an injunction pending appeal, Citizens United respectfully requests, in the alternative, that the Court order expedited briefing and hear oral argument by October 12. "[T]he First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (citation omitted). Here, the constitutionality of Colorado's reporting and disclosure requirements is a matter of utmost urgency for speakers and participants in the upcoming general election.

Citizens United will begin advertising and marketing *Rocky Mountain Heist* in Colorado in less than two weeks so that it is publicly available ahead of the No-

[3] *See In re Interrogatories Propounded by Governor Ritter, Jr., Concerning Effect of* Citizens United v. Fed. Election Comm'n*, 558 U.S. ---- (2010) on Certain Provisions of Article XXIII of Constitution of State*, 227 P.3d 892, 894 (Colo. 2010) (per curiam).

vember 4 general election. Absent a ruling on the important constitutional issues raised in this case, Citizens United and other speakers would be denied their right to debate matters of public importance on equal footing with those speakers who qualify for Colorado's media exemptions. Highly expedited review is needed to ensure that the campaign of ideas that precedes the November 2014 election is conducted on a level playing field that does not grant a privileged class of speakers special rights not available to others. *See*, *e.g.*, *Hobby Lobby*, 723 F.3d at 1125; *Aman v. Handler*, 653 F.2d 41, 47 (1st Cir. 1981) (Breyer, J.).

CONCLUSION

This Court should enjoin enforcement of Colorado's reporting and disclosure requirements for electioneering communications and independent expenditures, as contained in Sections 2, 5, and 6 of Article XXVIII of the Colorado Constitution, and Sections 1-45-103, 1-45-107.5, and 1-45-108 of the Colorado Revised Statutes, pending appeal. In the alternative, this Court should expedite briefing and appellate review.

Respectfully submitted.

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Counsel for Plaintiff-Appellant Citizens United

DECLARATION OF THEODORE B. OLSON

I, Theodore B. Olson, attorney for Plaintiff-Appellant Citizens United, declare as follows:

1. Attached hereto as **Exhibit A** is a true and correct copy of the Order entered by the United States District Court for the District of Colorado on September 22, 2014 (Dkt. 26), denying Citizens United's motion for a preliminary injunction prohibiting enforcement of Colorado's reporting and disclosure requirements for electioneering communications and independent expenditures, as contained in Sections 2, 5, and 6 of Article XXVIII of the Colorado Constitution, and Sections 1-45-103, 1-45-107.5, and 1-45-108 of the Colorado Revised Statutes.

2. Attached hereto as **Exhibit B** is a true and correct copy of Citizens United's Complaint for Declaratory and Injunctive Relief, filed in this matter on August 14, 2014 (Dkt. 1).

3. Attached hereto as **Exhibit C** is a true and correct copy of the Federal Election Commission's Advisory Opinion 2010-08 (Citizens United) (June 11, 2010), filed in this matter on August 14, 2014 as Exhibit A to the Complaint (Dkt. 1-1).

4. Attached hereto as **Exhibit D** is a true and correct copy of the Colorado Secretary of State's Declaratory Order, *In re Citizens United's Petition for*

Declaratory Order (June 5, 2014), filed in this matter on August 14, 2014 as Exhibit B to the Complaint (Dkt. 1-2).

5. Attached hereto as **Exhibit E** is a true and correct copy of Citizens United's Motion for Preliminary Injunction, filed in this matter on August 14, 2014 (Dkt. 4).

6. Attached hereto as **Exhibit F** is a true and correct copy of the Declaration of David N. Bossie, filed in this matter on August 14, 2014 as Exhibit A to Citizens United's Motion for Preliminary Injunction (Dkt. 4-1).

7. Attached hereto as **Exhibit G** is a true and correct copy of the Secretary's Brief in Opposition to Motion for Preliminary Injunction, filed in this matter on September 4, 2014 (Dkt. 12).

8. Attached hereto as **Exhibit H** is a true and correct copy of the certified transcript from the hearing on Citizens United's motion for preliminary injunction, held in the United States District Court for the District of Colorado on September 16, 2014 (*see* Dkt. 30).

Executed on September 25, 2014, in Washington, D.C.

s/ Theodore B. Olson
THEODORE B. OLSON

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No 14-cv-002266-RBJ

CITIZENS UNITED, a Virginia Non-Stock Corporation,

Plaintiff,

v.

SCOTT GESSLER, in his official capacity as Secretary of State of the State of Colorado; and SUZANNE STAIERT, in her official capacity as Deputy Secretary of State of the State of Colorado,

Defendants,

and

COLORADO DEMOCRATIC PARTY,
GAROLD A. FORNANDER,
LUCÍA GUZMÁN, and
DICKEY LEE HULLINGHORST,

Intervenor-Defendants.

ORDER

The case presented today is rather straightforward. Citizens United argues that its free speech rights are violated when the law requires it to disclose its donors while effectively exempting traditional print media and broadcasters from the same requirement. It contends that Colorado's reporting and disclosure exemptions are a form of content- or viewpoint-based discrimination compelling the invalidation of the entire disclosure scheme. I am not convinced and therefore deny plaintiff's motion for a preliminary injunction.

BACKGROUND

The plaintiff, Citizens United, is a Virginia non-stock corporation that regularly engages in political speech and media activities. 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." *See* Federal Election Commission Advisory Opinion 2010-8 [ECF No. 1-1] at 1. Citizens United produces, markets, and distributes films on various political topics as part of its effort to advocate, recruit members, and disseminate information. One of those films, *Rocky Mountain Heist* (hereinafter "the Film"), is set to be completed by September 24, 2014 and to be released and distributed in the first week of October. The Film concerns various Colorado advocacy groups and their impact on Colorado government and public policy. Complaint [ECF No. 1] at ¶ 27. It will include "unambiguous references to elected Colorado officials who are candidates for office in this year's general elections . . . ." *Id.* Although the Film will not editorially endorse specific candidates, it will "likely include events where participants expressly advocate the election or defeat of one or more candidates in the November 4, 2014 elections." *Id.* In total, $548,975 has been dedicated to the production of the Film, and $225,000 has been set aside for marketing. *Id.* at ¶ 29.

In 2002, Colorado's voters overwhelmingly approved Amendment 27 to the state constitution, which has been incorporated as Article XXVIII. Section 1, entitled "Purposes and findings," states:

> The people of the state of Colorado hereby find and declare that large campaign contributions to political candidates create the potential for corruption and the appearance of corruption; that large campaign contributions made to influence election outcomes

> allow wealthy individuals, corporations, and special interest groups to exercise a disproportionate level of influence over the political process; that the rising costs of campaigning for political office prevent qualified citizens from running for political office; that because of the use of early voting in Colorado timely notice of independent expenditures is essential for informing the electorate; that in recent years the advent of significant spending on electioneering communications, as defined herein, has frustrated the purpose of existing campaign finance requirements; that independent research has demonstrated that the vast majority of televised electioneering communications goes beyond issue discussion to express electoral advocacy; that political contributions from corporate treasuries are not an indication of popular support for the corporation's political ideas and can unfairly influence the outcome of Colorado elections; and that the interests of the public are best served by limiting campaign contributions, establishing campaign spending limits, providing for full and timely disclosure of campaign contributions, independent expenditures, and funding of electioneering communications, and strong enforcement of campaign finance requirements.

Colo. Const. art. XXVIII, § 1. Colorado has also enacted the Fair Campaign Practices Act ("FCPA"), which declares:

> The people of the state of Colorado hereby find and declare that large campaign contributions to political candidates allow wealthy contributors and special interest groups to exercise a disproportionate level of influence over the political process; that large campaign contributions create the potential for corruption and the appearance of corruption; that the rising costs of campaigning for political office prevent qualified citizens from running for political office; and that the interests of the public are best served by limiting campaign contributions, establishing campaign spending limits, full and timely disclosure of campaign contributions, and strong enforcement of campaign laws.

C.R.S. § 1-45-102. These constitutional and statutory provisions impose various reporting and disclosure requirements on speakers engaged in electioneering communications and independent expenditures.

Article XXVIII and the FCPA define an "electioneering communication" as:

> [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.

Colo. Const. art. XXVIII, § 2(7)(a); C.R.S. § 1-45-103(9). 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 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.

Colo. Const. art. XXVIII, § 2(7)(b); C.R.S. § 1-45-103(9).

> Article XXVIII and the FCPA define an "expenditure" as:
>
> > [A]ny 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.

Colo. Const. art. XXVIII, § 2(8)(a); C.R.S. § 1-45-103(10). The term "expenditure" 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 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.

Colo. Const. art. XXVIII, § 2(8)(b); C.R.S. § 1-45-103(10). Article XXVIII and the FCPA define an "independent expenditure" as "an expenditure that is not controlled by or coordinated with any candidate or agent of such candidate." Colo. Const. art. XXVIII, § 2(9); C.R.S. § 1-45-103(11).

Section 6 of Article XXVIII provides that any person expending $1000 or more per calendar year on electioneering communications must submit reports to the Colorado Secretary of State, which include spending on the electioneering communication as well as the name, address, occupation, and employer of any person that contributed more than $250 to fund the communication. Colo. Const. art. XXVIII, § 6(1). Section 1-45-108 of the Colorado Revised Statutes governs the timing and contents of such reports.

Section 5 provides that any person making an independent expenditure in excess of $1000 per calendar year must file a notice with the Secretary of State describing the independent expenditure and disclosing the candidate who it is intended to support or oppose. Colo. Const. art. XXVIII, § 5(1). The person making the independent expenditure must also prominently

disclose its identity in the resulting communication. *Id.* § 5(2). C.R.S. 1-45-107.5 governs the timing and contents of such notice. Just as in the case of electioneering communications, any person expending more than $1000 on an independent expenditure must report to the Secretary of State the amounts spent and the name, address, occupation, and employer of any person that contributed more than $250 to fund it. C.R.S. § 1-45-107.5(4)(b). The person is also required to disclose any donation in excess of $20 received during the reporting period for purposes of making an independent expenditure. C.R.S. § 1-45-107.5(8).

The Colorado Secretary of State is responsible for enforcing and promulgating rules in furtherance of these campaign finance provisions. *See* Colo. Const. art. XXVIII, §§ 8–9. In addition, any person, private or public, who believes that there has been a violation of these provisions may file a written complaint with the Secretary of State, who shall promptly refer the complaint to an administrative law judge for a hearing on the matter. *Id.* § 9(2)(a). Any person found to have violated the disclosure provisions of Sections 5, 6, or 7 will be liable for fifty dollars per day for each day the required information fails to be filed. *Id.* § 10(2)(a); *see also* C.R.S. § 1-45-111.5(c).[1] Any person who fails to file three or more successive reports concerning contributions, expenditures, or donations will be subject to a civil penalty of up to five hundred dollars for each day the reports are not filed. C.R.S. § 1-45-111.5(c). Lastly, any person who knowingly and intentionally fails to file three or more reports will be subject to a civil penalty of up to one thousand dollars for each day the reports are not filed. *Id.*

[1] The plaintiff claims that it would also be subject to civil penalties of at least double and up to five times the amount contributed, received, or spent in violation of the applicable provision pursuant to Article XXVIII, § 10(1). *See* Motion for Preliminary Injunction [ECF No. 4] at 7. However, Section 10(1) concerns penalties for persons who exceed contribution or voluntary spending limits under Sections 3 and 4 of Article XXVIII. Citizens United has put forward no claim that it is subject to either of these spending limits.

On April 18, 2014 Citizens United filed a Petition for Declaratory Order with the Colorado Secretary of State, one of the defendants in this action, seeking clarification as to whether its communications and expenditures related to the Film qualified as exceptions to the definitions of "electioneering communication" and "independent expenditure," thereby obviating the need for Citizens United to comply with the various reporting and disclosure requirements. The Secretary published notice of a hearing and collected written comments from the public. A public hearing was held on June 3, 2014. On June 5, 2014 the Deputy Secretary, the other defendant in this action, issued a Declaratory Order concluding that the Film and related activities did not fall within any of the enumerated exemptions to the definition of "electioneering communication." Declaratory Order [ECF No. 1-2] at 5–8. Since the Film had not yet been made, Deputy Secretary Staiert was unable to determine whether the distribution and marketing of the Film qualified as "expenditures," and as such did not address whether the exemptions would apply. *Id.* at 10. The declaratory order constituted a final agency decision, which Citizens United chose not to appeal. Citizens United now brings this suit to challenge the constitutionality of Colorado's reporting and disclosure requirements.

The matter currently before the Court is the plaintiff's Motion for Preliminary Injunction [ECF No. 4]. A hearing was held on the motion during the morning of September 16, 2014 and included counsel for the plaintiff, defendants, and intervenor-defendants. Argument was heard from all parties, with the defendants also choosing to put on evidence in the form of witness testimony.

LEGAL STANDARD

"It is well settled that a preliminary injunction is an extraordinary remedy, and that it should not be issued unless the movant's right to relief is 'clear and unequivocal.'" *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003) (quoting *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001)). To succeed on a motion for a preliminary injunction, the movant must demonstrate "(1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction; and (4) the injunction is not adverse to the public interest." *Kikumura*, 242 at 955. In First Amendment cases "the likelihood of success on the merits will often be the determinative factor." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1128 (10th Cir. 2013) (en banc) (quoting *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012)).

Where the last three factors "tip strongly" in favor of granting the injunction, courts in the Tenth Circuit apply a modified test in lieu of proof of likelihood of success on the merits. *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002). This modified test requires the movant to demonstrate only "that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberative investigation." *Id.* (quotation marks omitted). Put another way, "[p]laintiffs may carry their burden of demonstrating likelihood of success on the merits . . . by demonstrating a 'fair ground for litigation' of one or more of their claims." *Colo. Wild Inc. v. U.S. Forest Serv.*, 523 F. Supp. 2d 1213, 1223 (D. Colo. 2007) (quoting *Heideman*, 348 F.3d at 1189). However, "[w]here . . . a preliminary injunction seeks to stay governmental action taken in the public interest pursuant to a

statutory or regulatory scheme, the less rigorous fair-ground-for-litigation standard should not be applied." *Heideman*, 348 F.3d at 1189 (internal quotation marks omitted). Here, the plaintiff seeks to enjoin governmental action taken in the public interest pursuant to Colorado's campaign finance laws. Therefore, the fair-ground-for-litigation standard does not apply. Citizens United maintains the burden of showing a substantial likelihood of success on the merits.

Three types of injunctions are specifically disfavored by the Tenth Circuit: (1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits. *See, e.g.*, *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc) *aff'd and remanded sub nom. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (citation omitted). A request for a preliminary injunction falling within one of these three categories "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *Id.* Furthermore, even if the fair-ground-for-litigation standard would otherwise apply, movants seeking one of these three types of injunctions may not rely on the modified standard and must instead "make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms . . . ." *Id.* at 976.

"[T]he status quo is the last uncontested status between the parties which preceded the controversy until the outcome of the final hearing." *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1155 (10th Cir. 2001) (citation and internal quotation marks omitted). "In determining the status quo for preliminary injunctions, this court looks to the

reality of the existing status and relationship between the parties and not solely to the parties' legal rights." *Id.* Currently, Citizens United is bound to comply with the reporting and disclosure laws whose constitutionality has been called into question in this suit. In requesting that the Court enjoin Colorado from enforcing these laws, the plaintiff seeks to significantly alter the status quo. Furthermore, granting the injunction would afford Citizens United all the relief that it could recover at the conclusion of a full trial on the merits. For these reasons, the Court must more closely scrutinize the motion to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course.

ANALYSIS

The Supreme Court was forced to balance two interests when it decided the pivotal case *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010): the interest of political speakers and the interest of their audience, the electorate. As relevant to the present case, the Court came to the conclusion that while "[t]he First Amendment protects political speech," disclosure "permits citizens and shareholders to react to the speech of corporate entities in a proper way." 558 U.S. at 371. "This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* In *Citizens United,* the Court found "no constitutional impediment to the application of" disclaimer and disclosure requirements to Citizens United's advertisements of the movie *Hillary* or to the movie itself. *See id.* And yet, Citizens United is here today asking this Court to find such an impediment with regard to its new film, *Rocky Mountain Heist*.

A. Level of Scrutiny.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. "Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United*, 558 U.S. at 340 (quoting *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 464 (2007) (*WRTL*)). Restrictions that distinguish among different speakers, "allowing speech by some but not others," are highly disfavored under the First Amendment because they "are all too often simply a means to control content." *Id.* However, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech *because of* disagreement with the message it conveys." *Id.* (citing *Clark v. Cmty. for Creative Non-Violance*, 468 U.S. 288, 295 (1984) (emphasis added). "Beyond doubt, disparate impact alone is not enough to render a speech restriction content- or viewpoint-based." *Pahls v. Thomas*, 718 F.3d 1210, 1235–36 (10th Cir. 2013). "The government's purpose is the controlling consideration." *Ward*, 491 U.S. at 791.

"[I]t is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes." *Citizens United*, 558 U.S. at 341. The public's interest in determining how to cast their votes naturally extends to an interest in knowing who is speaking. *See, e.g.*, *id.* at 368; *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) ("Identification of the source of advertising may be

required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected."); *Buckley v. Valeo*, 424 U.S. 1, 66–67 (1976). Because "disclosure is a less restrictive alternative to more comprehensive regulations of speech," *Citizens United*, 558 U.S. at 369, the Supreme Court "has subjected these requirements to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest," *id.* at 366–67 (quoting *Buckley*, 424 U.S. at 64, 66).

Citizens United frames its argument as a challenge to laws burdening speech on the basis of the speaker's identity, claiming that the State is effectively picking winners and losers in the battle of ideas. The State is doing no such thing. First, the disclosure regime distinguishes based on the form of speech, not on the identity of the speaker. Second, even acknowledging that the effect of the law is commonly to exempt press entities from Colorado's reporting requirements, nothing suggests that the intent (or effect) is to discriminate on the basis of content or viewpoint. In fact, Citizens United complains time and again that the law is unfair because it would allow for newspapers and broadcast facilities to publish the exact same information it seeks to distribute without subjecting those entities to the disclosure requirements.[2] The plaintiff hopes that using the words "identity-based discrimination" will transform this claim into one demanding strict scrutiny review. However the words, without more, are not enough. The

[2] For example, the introduction to the plaintiff's Reply protests, "There is no dispute that Citizens United would be required to make extensive disclosures regarding the funding and other aspects of its forthcoming Film . . . yet a traditional media entity engaging in *exactly* the same speech 'in a newspaper, magazine or other periodical' or 'aired by a broadcast facility' would be exempt from those requirements." [ECF No. 20 at 1] (emphasis in original).

claim, which in earnest challenges the disclosure rules because they are underinclusive, is subject to review under the exacting scrutiny framework.[3]

B. Application.

The plaintiff asks that the Court "enjoin enforcement of Colorado's discriminatory reporting and disclosure requirements for electioneering communications and independent expenditures." [ECF No. 4 at 1]. The Court denies the motion on the grounds that the plaintiff has failed to meet its burden of showing a substantial likelihood of success on the merits, that it will suffer irreparable injury if an injunction does not issue, that the balance of harms falls in its favor, and that such an injunction would not be adverse to the public interest.

1. Substantial Likelihood of Success

Citizens United has not shown that it is likely to succeed on the merits under exacting scrutiny review. To reiterate, exacting scrutiny requires a "substantial relation" between the disclosure requirements and a "sufficiently important" governmental interest. *Citizens United*, 558 U.S. at 366–67 (quoting *Buckley*, 424 U.S. at 64, 66). In the First Amendment context, this standard entails "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1456 (2014) (citation and internal quotation marks omitted).

[3] At least one circuit court has held that even where a disclosure exemption can be said to be content- or viewpoint-based, it remains subject to exacting scrutiny review. *See Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 287 (4th Cir. 2013). The Court need not address this question as the plaintiff's contention that the exemptions are content-based has proven unavailing.

a. Facial Challenge

Campaign disclosure laws vindicate three important interests: "providing the electorate with relevant information about the candidates and their supporters; deterring actual corruption and discouraging the use of money for improper purposes; and facilitating enforcement of the prohibitions in the Act." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 121 (2003) (citing *Buckley*, 424 U.S. at 66–68); *see also Republican Party of New Mexico v. King*, 741 F.3d 1089, 1095 n.3 (10th Cir. 2013) ("The Court upheld disclosure requirements at issue in *Citizens United* because they provided the electorate with information about the identity of the speaker and did not impose a chill on political speech, even for independent expenditures."). The defendants argue that the disclosure regime is necessary to Colorado's interest in ensuring its electorate is informed, and that the disclosure laws are substantially related to this objective.

According to the defendants, "the justifications for requiring disclosure apply more strongly to isolated instances of political advocacy than they do to speech by institutionalized and longstanding press entities." Defendants' Response [ECF No. 12 at 16]. The long-term, repeat nature of newspapers, periodicals, and recurring television broadcasts allows voters to, over time, "gauge the trustworthiness of a particular source based on their perception of its ideology and [its] track record." *Id.* This informational advantage of periodic press sources does not apply to the viewer or reader of "drop-in political advocacy like a standalone film, a single election mailer, or an anonymous website that appears for only a few weeks before an election." *Id.* Without identifying the speaker, these isolated incidents leave voters without the means to evaluate the integrity or credibility of the message.

Citizens United challenges that this depiction of traditional media shows that the State prefers one speaker over another, that it finds the traditional press more credible than other sources of information. But the plaintiff considerably mischaracterizes the defendants' position. What's more, it isn't clear to me exactly what type of information newspapers and broadcast facilities would be required to disclose if these exemptions did not exist. In Colorado, the only contributors that speakers must disclose are those who earmark their donations for the purpose of funding the independent expenditure or the electioneering communication. During the hearing, plaintiff's counsel tried to convince the Court that without the exemptions newspapers would be obligated to disclose the names of individual subscribers, advertisers, and financial lenders. Of course, no showing was made that any of these "contributors"—if they can be called such—earmark their funds for the purpose of making independent expenditures or electioneering communications. Frankly put, the position was rather nonsensical, and it is clearly at odds with the operation of the disclosure laws.

Citizens United also insists that if the public has a right to know who funds its films, it likewise has a right to know whether a political candidate, public-advocacy group, or political party funded an investigative journalist's news story. [ECF No. 4 at 16]. Again, no showing has been made that this type of arrangement exists between journalists and political advocates. If anything, I would imagine the funding of advocacy pieces would violate journalists' professional ethical standards. Since there is no reason to suspect, based on this statement alone, that political groups fund news stories by paying off journalists, the Court disregards this contention as unfounded.

Next, Citizens United argues that there is no substantial relation between Colorado's interest in informing its electorate and its requiring disclosures from "an established documentary filmmaker" while in theory exempting "a new press entity that suddenly 'began distributing a periodical newsletter in Colorado.'" Plaintiff's Reply [ECF No. 20 at 7]. First and foremost, this position undermines the primary argument plaintiff's counsel put forward during the hearing, that through the use of exemptions the State is preferring and promoting *traditional* press entities over upstarts.[4] Furthermore, the argument ignores the real issue, which is whether there is a substantial relation between the State's interest and the disclosure scheme as a whole, not a single hypothetical. As noted above, the test requires only a reasonable fit, one whose scope is in proportion to the interest served. The provision of this one hypothetical has not persuaded the Court that the scope of the disclosure scheme, including its exemptions, is not in proportion to the interest of informing the electorate.

The plaintiff's final argument was relegated to a footnote in its original motion: "Even if the reporting and disclosure requirements do not violate the First Amendment, they violate Article II, Section 10 of the Colorado Constitution, which provides equal, if not greater, protections against speaker-based discrimination." [ECF No. 4 at 18 n.1]. The statement is followed by a citation to two Colorado Supreme Court cases. The first, *Lewis v. Colorado Rockies Baseball Club, Ltd.*, 941 P.2d 266 (Colo. 1997), explicitly limits its analysis to the federal constitution. 941 P.2d at 271–72. The second, *Colorado Education Association v. Rutt*, 184 P.3d 65 (Colo. 2008), says nothing more about the Colorado Constitution than it being "bound to give at least equivalent protection to expressive freedoms as that which is mandated"

[4] This contradictory assertion—that the Secretary of State prefers "institutionalized and longstanding press entities" over all others—is also found earlier in the Reply brief. [ECF No. 20 at 3].

by the United States Constitution. 184 P.3d at 76–77. Neither citation provides independent support for the plaintiff's position, that disclosure requirements that differentiate based on the form of speech constitute an unconstitutional abridgement of speech. In addition, if the plaintiff found this argument necessary to its case, it should not have entrusted it to one generic sentence in a footnote. The Court cannot serve as plaintiff's advocate. Counsel for Citizens United focuses its entire likelihood-of-success section on First Amendment jurisprudence. As such, the Court will make no findings as to whether the plaintiff could make a showing that it is likely to succeed on any other legal basis, including the Colorado Constitution.

The Supreme Court has ruled time and again that there is a sufficiently important government interest supporting disclosure regimes. The plaintiff does not argue otherwise. The question comes down to whether Citizens United has met its burden of showing that there is no substantial relation between the disclosure regime as a whole and the government's interest in maintaining an informed electorate. The Court finds that it has not.

b. As-Applied Challenge

Citizens United argues that, in the alternative, it should be entitled to the disclosure exemptions. In particular, the plaintiff contends that it engages in media activities substantially similar to the activities of traditional press entities such that there is no constitutional basis for distinguishing between the two. By making a distinction, it argues, the law disregards Citizens United's status as a press entity.

The "press entity" status that the plaintiff seeks does not exist in Colorado. As the defendants and defendant-intervenors discuss, the disclosure exemptions are not premised on the type of entity but on the form of speech. In fact, Citizens United admits that such is the case,

noting that "Colorado's media exemptions *turn primarily on the medium of transmission—i.e.*, whether speakers express their views via a print publication or speaker-owned broadcast facility." [ECF No. 20 at 8] (emphasis added). Because the exemptions are based on the form of speech, not on the speaker, it is possible for a press entity to create content not subject to an exemption. In those cases, the press entity must disclose its contributors just like anyone else. *See* [ECF No. 12 at 19 n.8] (citing *Reader's Digest Ass'n. v. Fed. Election Comm'n*, 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981); *Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 250–51 (1986) (*MCFL*)). For example, if Citizens United publishes an op-ed in a newspaper, it will not be required to disclose the funding behind the piece. Likewise, if the Denver Post produced a film expressly advocating for the reelection of Governor John Hickenlooper, it would be forced to comply with the disclosure requirements.

Citizens United looks to an advisory opinion issued by the Federal Election Commission in 2010 in support of its position. Advisory Opinion 2010-8 [ECF No. 1-1]. However, this advisory opinion only concerns whether Citizens United is eligible for exempt status under the Federal Election Campaign Act of 1971 ("FECA"), not whether it is exempt under the First Amendment. Moreover, while the FEC has construed the federal statute as creating a "press entity status"—which it admits is a term not used or defined in FECA, *id.* at 6—Deputy Secretary Staiert declined to create a similar status based on a plain-language reading of Colorado's disclosure regime, Declaratory Order [ECF No. 1-2] at 8–10.[5]

[5] While the plaintiff is free to argue that a proper analysis of the statute mandates the recognition of a "press entity" status, it has not done so in its motion. It is possible that such an argument would have had to have been made through appellate review of the Declaratory Order, though the Court has not researched this procedural question.

Refocusing the argument on the First Amendment, the plaintiff argues that if the disclosure exemptions are *compelled* by the First Amendment protections for freedom of the press, they must be construed to extend to Citizens United. *See* [ECF No. 4 at 21, 23]. Yet this case has nothing to do with whether the exemptions are in any way "compelled" by the First Amendment, and the Court has made no finding, or even a suggestion, that such is the case. It has only found that the plaintiff has not carried its burden in showing there exists no substantial relation between the disclosure regime (as a whole) and the sufficiently important government interest of informing the electorate.

Citizens United has not persuaded this Court to declare it a "press entity" exempt from Colorado's disclosure requirements, and it has not put forward any argument that there is a substantial likelihood that it would be able to convince the Colorado Supreme Court to read such a status into the law.

2. Irreparable Harm

There is a presumption of irreparable harm when First Amendment rights have been infringed. *See Oklahoma Corr. Prof'l Ass'n Inc. v. Doerflinger*, 521 Fed. App'x. 674, 677 (10th Cir. 2013) (citing *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1235 (10th Cir. 2005)). The plaintiff relies on this presumption to make a showing of irreparable harm. However, because the Court found that the plaintiff failed to demonstrate a likelihood of success on the merits, the presumption does not apply. Moreover, the plaintiff has put forth no evidence that it would suffer irreparable harm if it had to comply with the disclosure requirements. Of course, the plaintiff would be required to file reports disclosing its independent expenditures and electioneering communications along with the contributors (if any) who earmarked funds for

such speech in excess of the statutorily prescribed amount. But, as discussed earlier, the *Citizens United* Court has already found that these types of reporting and disclosure requirements are not unduly burdensome under the First Amendment. In putting forth no other evidence of irreparable harm, the plaintiff has not met its burden of proof.

3. Balance of Equities & Public Interest

The defendants suggest, and I agree, that in this case the balance of equities and public interest prongs should be considered together. Citizens United contends that the balance of equities falls in its favor because "[i]t is axiomatic that a State does not 'have an interest in enforcing a law that is likely constitutionally infirm.'" [ECF No. 4 at 25] (quoting *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010)). However, as Citizens United points out, the balance only tips in its favor once it shows a substantial likelihood that the challenged law is unconstitutional, a showing which the plaintiff has not made. It also argues that "a preliminary injunction vindicating constitutional rights is always in the public interest." *Id.* at 26. Once again, such a contention is only true if the law actually infringes a constitutional right, a presumption which the plaintiff incorrectly relies upon.

The defendants, on the other hand, focus on the purpose behind the disclosure scheme and the effect of enjoining its enforcement. In particular, the defendants point out that the law was enacted to further a public interest—transparency in political speech—and that enjoining the enforcement of the scheme would harm the entire electorate of Colorado, who may not be able to make informed choices come election day. The plaintiff would like the Court to ignore the public's motivations in passing the disclosure laws and the benefits they entail, but I cannot do that. Amendment 27 was passed by a 2-1 margin in 2002. Voters must have seen a significant

benefit, not only in having a disclosure regime, but also in memorializing it in the State constitution. The Court likewise cannot ignore the potential for irreparable harm that will befall the voters of Colorado come election day should they be forced to vote without pertinent information on which to base their decisions.

Four prongs have to be met in order to win a motion for preliminary injunction. Citizens United relies on winning its first prong in order to show that it would succeed on the other three prongs. Thus, failing to persuade the Court of its likelihood of success makes denial of the motion all but inevitable. In any event, the Court has considered the four requirements for the issuance of a preliminary injunction and concludes that they have not been established. In short, the defendants have persuaded the Court that the plaintiff is unlikely to succeed on the merits, that the balance of harms falls in their favor, and that the issuance of an injunction would be adverse to the public interest.

CONCLUSION

The marketplace of ideas does not function as well if listeners are unable to discern the private interests behind speech when determining how much weight to afford it. Aware of this problem, in 1976 the Supreme Court declared that "disclosure requirements certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Buckley*, 424 U.S. at 68. Thirty-four years later the *Citizens United* Court reaffirmed this sentiment by a vote of eight to one. *See* 558 U.S. at 366–71. Today, Citizens United comes before this Court hoping to unravel forty years of precedent by reframing the issue as one of content and viewpoint discrimination. The Court is not persuaded.

ORDER

For the foregoing reasons, Plaintiff's Motion for Preliminary Injunction [ECF No. 4] is DENIED.

DATED this 22nd day of September, 2014.

BY THE COURT:

R. Brooke Jackson
United States District Judge

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-2266

CITIZENS UNITED, a Virginia Non-Stock Corporation,

Plaintiff,

v.

SCOTT GESSLER, in his official capacity as Secretary of State of the State of Colorado; and SUZANNE STAIERT, in her official capacity as Deputy Secretary of State of the State of Colorado,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Citizens United, a Virginia non-stock corporation, for its complaint against Defendants Scott Gessler, in his official capacity as Secretary of State of the State of Colorado; and Suzanne Staiert, in her official capacity as Deputy Secretary of State of the State of Colorado, alleges as follows:

INTRODUCTION

1. Citizens United brings suit to challenge the constitutionality of Colorado's reporting and disclosure requirements for electioneering communications and independent expenditures, which apply discriminatorily to certain speakers but not others based on their identity. That discrimination is directly attributable to Colorado's "media exemptions," which carve out traditional "print media" entities and "broadcast facilit[ies]" from complying with the burdensome reporting and disclosure requirements. As a result of these "media exemptions,"

newspapers, magazines, and radio and television stations are exempt from Colorado's reporting and disclosure requirements, while speakers who engage in political expression in non-print formats and who do not operate their own broadcast facilities must comply with those requirements.

2. Colorado's Secretary of State has determined that Citizens United's marketing and distribution of a documentary film about various Colorado advocacy groups and their impact on Colorado government do not qualify for the media exemptions because the film does not appear in print and because Citizens United is not a broadcast facility. Citizens United therefore must comply with Colorado's burdensome reporting and disclosure requirements, or suppress its speech in order to avoid sanctions under Colorado law. In contrast, a media entity that engaged in the same political expression in a print publication would be exempt from the reporting and disclosure requirements under Colorado's media exemption. Similarly, a media entity that operated its own broadcast facility could produce and air the exact same documentary as Citizens United without complying with Colorado's reporting and disclosure requirements.

3. Speech restrictions that discriminate "based on the identity of the speaker" are highly disfavored under the First Amendment because they "are all too often simply a means to control content." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). It is therefore unconstitutional for a State to discriminate between the speech of non-media entities and media entities. *See id.* at 353 ("differential treatment" of media entities and other speakers "cannot be squared with the First Amendment"). It is equally impermissible for a State to discriminate between the speech of different categories of media entities. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 659 (1994) ("Regulations that discriminate among media, or among

different speakers within a single medium, often present serious First Amendment concerns."). The Colorado Constitution extends similar—if not greater—protections from discrimination based on a speaker's identity. *See Lewis v. Colo. Rockies Baseball Club, Ltd.*, 941 P.2d 266, 271 (Colo. 1997) (en banc).

4. Colorado's reporting and disclosure requirements for electioneering communications and independent expenditures are unconstitutionally discriminatory because, through the operation of the media exemptions, they discriminate between the "print media" and "broadcast facilit[ies]," on the one hand, and all other speakers engaged in similarly protected, and equally important, public discourse, on the other. This Court should declare Colorado's discriminatory reporting and disclosure requirements unconstitutional, and permanently enjoin Defendants from enforcing those provisions.

NATURE OF ACTION

5. Citizens United brings this action to obtain declaratory and injunctive relief invalidating Colorado's reporting and disclosure requirements for electioneering communications and independent expenditures. Citizens United seeks a declaratory judgment that Colorado's reporting and disclosure requirements are facially unconstitutional under the First and Fourteenth Amendments to the United States Constitution and Article II, Section 10 of the Colorado Constitution because they operate in a manner that discriminates based on a speaker's identity. Colorado's reporting and disclosure scheme contains media exemptions that exempt traditional "print media" and "broadcast facilit[ies]" from its burdensome reporting and disclosure requirements, but not other speakers—including other media entities—that are engaged in similar political speech. Such discriminatory distinctions based on a speaker's

identity are unconstitutional. Moreover, the media exemptions cannot be severed from the reporting and disclosure requirements because they are integral to that regulatory scheme. Accordingly, Colorado's reporting and disclosure requirements must be declared facially invalid.

6. At a minimum, Citizens United seeks a declaratory judgment that Colorado's reporting and disclosure requirements are invalid as applied to Citizens United and its marketing and distribution of its forthcoming documentary film about Colorado advocacy groups because it is unconstitutional to discriminate between Citizens United and the print-media entities and broadcast facilities that are entitled to invoke a media exemption.

7. In the alternative, if the media exemptions are compelled by the First Amendment's protection of freedom of the press, then this Court should construe the media exemptions to apply to Citizens United.

8. Citizens United also requests injunctive relief to prevent Defendants from enforcing Colorado's unconstitutional reporting and disclosure requirements, and any other relief that this Court deems just and proper, including attorneys' fees and costs.

PARTIES

9. Plaintiff Citizens United is a Virginia non-stock corporation with its principal place of business in Washington, D.C. 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 U.S. 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. Citizens United is not a political committee, nor is it owned or controlled by any candidate, political party, or political committee.

10. Defendant Scott Gessler, in his official capacity as Secretary of State of the State of Colorado, is the primary public officer responsible for enforcing the campaign finance laws of the State and for promulgating rules necessary for the proper administration and enforcement of those laws. Among other things, Secretary Gessler directs and manages the Office of the Secretary of State for the State of Colorado. Secretary Gessler is a resident of Denver, Colorado.

11. Defendant Suzanne Staiert, in her official capacity as Deputy Secretary of State of the State of Colorado, is the deputy public officer responsible for enforcing the campaign finance laws of the State and for promulgating rules necessary for the proper administration and enforcement of those laws. Deputy Secretary Staiert issued the Declaratory Order at issue in this suit. Deputy Secretary Staiert is a resident of Denver, Colorado.

JURISDICTION AND VENUE

12. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 1331, 1332, 2201, and 2202, and 42 U.S.C. §§ 1983 and 1988.

13. This Court has personal jurisdiction over Defendants because Defendants reside in Colorado.

14. Venue is proper in the District of Colorado under 28 U.S.C. § 1391(b) because Defendants reside in this district and a substantial part of the events and omissions giving rise to these claims occurred in this district.

STATUTORY AND REGULATORY BACKGROUND

15. Article XXVIII of the Colorado State Constitution and the Fair Campaign Practices Act ("FCPA"), Colorado's primary campaign finance laws, impose various reporting

and disclosure requirements on speakers engaged in electioneering communications and independent expenditures.

16. Article XXVIII and the FCPA define an "electioneering communication" as:

> [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.

Colo. Const. art. XXVIII, § 2(7)(a); *see also* Colo. Rev. Stat. § 1-45-103(9).

17. Article XXVIII and the FCPA define an "expenditure" as:

> [A]ny 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.

Colo. Const. art. XXVIII, § 2(8)(a); *see also* Colo. Rev. Stat. § 1-45-103(10). Article XXVIII and the FCPA further define an "independent expenditure" as an expenditure "that is not controlled by or coordinated with any candidate or agent of such candidate." Colo. Const. art. XXVIII, § 2(9); *see also* Colo. Rev. Stat. § 1-45-103(11).

18. Section 6 of Article XXVIII provides that any person expending more than $1000 per calendar year on electioneering communications must submit reports to the Secretary of State, which include spending on electioneering communications and the name, address,

occupation, and employer of any person that contributed more than $250 to fund the electioneering communication. Colo. Const. art. XXVIII, § 6(1). Section 1-45-108 of the Colorado Revised Statutes governs the timing and contents of such reports. *See* Colo. Rev. Stat. § 1-45-108.

19. Similarly, Section 5 of Article XXVIII provides that any person making independent expenditures in excess of $1000 per calendar year must file a notice with the Secretary of State describing the independent expenditure and the candidate whom it is intended to support or oppose. *See* Colo. Const. art. XXVIII, § 5(1). The person making such expenditure must also "prominently" disclose its identity in the resulting communication. *Id.* § 5(2).

20. Section 1-45-107.5 imposes additional registration, reporting, and disclosure requirements on persons making independent expenditures in excess of $1000. *See* Colo. Rev. Stat. § 1-45-107.5. Among other requirements, any person expending more than $1000 per calendar year on independent expenditures must report to the Secretary of State the amounts spent and the name, address, occupation, and employer of any person that contributed more than $250 to fund the independent expenditure. *Id.* § 1-45-107.5(4)(b). Additionally, any person that expends more than $1000 per calendar year on independent expenditures must report to the Secretary of State any donation in excess of $20 received during the reporting period for purposes of making an independent expenditure. *Id.* § 1-45-107.5(8).

21. Article XXVIII and the FCPA exclude from the definition of "electioneering communication":

> (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.

Colo. Const. art. XXVIII, § 2(7)(b); *see also* Colo. Rev. Stat. § 1-45-103(9).

22. Similarly, Article XXVIII and the FCPA exclude from the definition of "expenditure":

> (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.

Colo. Const. art. XXVIII, § 2(8)(b); *see also* Colo. Rev. Stat. § 1-45-103(10).

23. The Secretary of State is responsible for enforcing and promulgating rules in furtherance of these campaign finance provisions. *See* Colo. Const. art. XXVIII, § 9. Among

other penalties, persons in violation of these provisions "shall be subject to a civil penalty of at least double and up to five times the amount contributed, received, or spent in violation of the applicable provision." *Id.* § 10(1); *see also id.* § 10(2) (imposing penalty of $50 per day for failure to file statement or other information required under campaign finance provisions).

FACTUAL BACKGROUND

24. Citizens United is a non-profit organization that engages in education, advocacy, and grassroots activities, which include regular political speech and media and press communications. Among other activities, Citizens United produces, markets, and distributes documentary films, including films that explore controversial political organizations, personalities, and policies in the United States and abroad. Since 2004, Citizens United has produced and released twenty-four documentary films, some of which are award-winning.

25. Citizens United distributes its films in a variety of formats including theatrical release, DVDs, television, and online digital streaming and downloads. In order to promote the sale of its films, Citizens United advertises them on television, on billboards, in newspapers, via direct mail and electronic mail, and on the Internet.

26. In 2010, the Federal Election Commission, which is the federal agency that administers and enforces federal campaign finance law, issued Advisory Opinion 2010-08 to Citizens United. Advisory Opinion 2010-08 (Citizens United) (June 11, 2010) (attached as Exhibit A). That Advisory Opinion concludes that Citizens United's films and advertising promoting its films are exempt from the definitions of "expenditure" and "electioneering communication" under federal campaign finance law pursuant to the federal exemptions for news media and press activities.

27. Citizens United is currently producing a documentary film about various Colorado advocacy groups and their impact on Colorado government and public policy (hereinafter, the "Film"). The working title of the Film is "Rocky Mountain Heist." The Film will be approximately thirty minutes in length. The Film will include unambiguous references to elected Colorado officials who are candidates for office in this year's general elections, which will be held on November 4, 2014. While the Film will not editorially endorse any candidates, background footage appearing in the Film will likely include events where participants expressly advocate the election or defeat of one or more candidates in the November 4, 2014 elections.

28. The Film will include visual and audio content of Governor John Hickenlooper, who is the Democratic Party candidate for the Office of Governor of Colorado in the November 4, 2014 elections. The Film will also include visual and audio content of other candidates for federal and state office in Colorado, including candidates for Congress and the state legislature.

29. The overall production and marketing budget for the Film is $773,975. Of this amount, $548,975 is dedicated to production, and $225,000 is dedicated to marketing to occur in October 2014. These costs far exceed the $1,000 thresholds for mandated reporting of "electioneering communications" and "independent expenditures" under Colorado's campaign finance laws.

30. The Film is scheduled to be completed by September 24, 2014, and will be marketed and distributed across the United States, including in Colorado. Citizens United has concrete plans to begin distributing the Film nationwide, including in Colorado, by the first week of October 2014. Initial modes of distribution will include DVD sales over the Internet.

Citizens United also intends to license the Film for television broadcast and online digital screening and downloading. Advertising promoting the Film will include television ads, radio ads, and Internet ads, and will begin no later than the first week of October 2014. Marketing and distribution of the Film in Colorado will occur within the 60-day period immediately preceding the November 4, 2014 general elections.

31. Citizens United intends to continue producing films in the future that include unambiguous references to candidates in Colorado's elections, and to market and distribute those films in Colorado during the 60-day periods immediately preceding future general elections.

PROCEDURAL BACKGROUND

32. On April 18, 2014, Citizens United filed a Petition for Declaratory Order with the Secretary of State, seeking clarification as to whether Citizens United's communications and expenditures related to the Film qualified under the media exemptions, which would exclude those activities from the definition of "expenditure" or "electioneering communication" under Colorado law and thereby obviate the need for Citizens United to comply with the various reporting and disclosure requirements that would otherwise apply.

33. The Secretary published public notice of a hearing and collected written comments from the public. On June 3, 2014, the Secretary held a public hearing on Citizens United's petition.

34. On June 5, 2014, the Secretary issued a Declaratory Order concluding that the Film and related activities did not fall within any of the enumerated exemptions to the definition of "electioneering communication" under Colorado law, including the media exemptions.

Declaratory Order, *In re Citizens United's Petition for Declaratory Order*, at 5-11 (June 5, 2014) (hereinafter, "Declaratory Order") (attached as Exhibit B).

35. Specifically as to the media exemption contained in Section 2(7)(b)(I) of Article XXVIII, the Secretary concluded that the Film "*does not meet the first exemption* ***because it is not print media***." Declaratory Order, at 5 (italics in original, bolding added); *see also id.* ("Here, the forthcoming documentary is a film, which cannot be printed in a newspaper, magazine, or other periodical."). Likewise, as to the media exemption contained in Section 2(7)(b)(II) of Article XXVIII, the Secretary concluded that Citizens United "**is not a broadcast facility** and, as such, does not fall within this exemption." *Id.* at 6 (emphasis added).

36. Despite acknowledging that federal law and the Federal Election Commission recognize a media exemption that would exclude the distribution and marketing of the Film from the nearly identical federal definition of "electioneering communication," the Secretary refused to "read such an exemption into the plain language of Colorado law." *Id.* at 8. "Whether or not the Secretary of State agrees with the FEC's logic and reasoning in creating the 'press exemption,'" the Order explained, "the Secretary lacks the authority to apply well-reasoned, settled First Amendment law to Colorado." *Id.* at 9 (italics omitted).

37. The Secretary also determined that the Film and related activities did not qualify under the exemption for communications made by a person in the "regular course and scope of their business." *Id.* at 6-8.

38. The Secretary did not address whether the distribution and marketing of the Film qualify as "expenditures" under Colorado law. "Because the film has not yet been made," the Secretary declared that she was "not in a position to state whether the film falls within the

definition" of "expenditure." *Id.* at 10. The Secretary therefore did not address whether any of the exemptions to the definition of "expenditure" would apply. *Id*.

CLAIMS FOR RELIEF

39. The First Amendment protects free speech and association for all speakers, regardless of race, creed, ideology, or corporate form. This constitutional protection has its "fullest and most urgent application to speech uttered during a campaign for political office." *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (internal quotation marks omitted); *see also McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (plurality opinion). Such political speech ensures democratic self-government and is constitutionally protected even when it takes the form of spending money to influence the outcome of elections. *Buckley v. Valeo*, 424 U.S. 1, 19-21 (1976) (per curiam). In *Citizens United v. FEC*, 558 U.S. 310 (2010), the Supreme Court recognized that these First Amendment protections apply with equal force to corporations, reaffirming long-established precedent protecting the right of individuals to use the corporate form to engage in political speech. *See, e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776-77 (1978); *Time, Inc. v. Hill*, 385 U.S. 374, 388-89 (1967).

40. The First Amendment also prohibits the government from imposing speech restrictions that discriminate based on the identity of the speaker because such discrimination often serves as an improper restriction on viewpoints. *Bellotti*, 435 U.S. at 776-77; *see also Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2665 (2011). The First Amendment thus protects even highly controversial, and widely condemned, speech from favored and disfavored speakers

alike. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Texas v. Johnson*, 491 U.S. 397 (1989).

41. Because it is unconstitutional to discriminate based on a speaker's identity, "differential treatment" of businesses that own media interests and those that do not "cannot be squared with the First Amendment." *Citizens United*, 558 U.S. at 353; *see also id.* at 352-53 (describing as "most doubtful" the "proposition that a news organization has a right to speak when others do not"). Similarly, "[r]egulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 659 (1994).

FIRST CLAIM FOR RELIEF
(Colorado's Reporting and Disclosure Requirements Violate the First and Fourteenth Amendments to the United States Constitution)

42. Plaintiff realleges the allegations stated in paragraphs 1 through 41 as though fully set forth herein.

43. On their face, Colorado's reporting and disclosure requirements violate the First Amendment to the United States Constitution (as incorporated to apply to the States under the Fourteenth Amendment). Colorado's reporting and disclosure requirements apply to Citizens United and other speakers who engage in constitutionally protected electioneering communications and independent expenditures, but do not apply to speakers who satisfy one of the media exemptions. *See* Colo. Const. art. XXVIII, §§ 2(7)(b), 2(8)(b). The Secretary's Declaratory Order reaffirms the discriminatory nature of the reporting and disclosure framework; only speakers defined as traditional "print media" or "broadcast facilit[ies]" qualify for the

media exemptions. Declaratory Order, at 5-6. Such discrimination based solely on a speaker's identity is unconstitutional. *See Citizens United*, 558 U.S. at 352-53.

44. Colorado's reporting and disclosure requirements impose a significant burden on the exercise of Citizens United's right to engage in political speech and media and press activities. Among other requirements, Citizens United will be required to prepare and file multiple reports disclosing amounts spent and disclose the identity of any person that contributed more than $250 to fund an electioneering communication or independent expenditure. Colo. Const. art. XXVIII, § 6(1); Colo. Rev. Stat. § 1-45-107.5(4)(b). Compliance with these requirements is costly and burdensome, and their enforcement is likely to chill the speech of Citizens United and those individuals who wish to support Citizens United's speech through monetary contributions. These constitutional harms are irreparable.

45. By contrast, entities that satisfy the media exemptions—in particular, traditional "print media" and "broadcast facilit[ies]"—face none of the costs and burdens associated with Colorado's reporting and disclosure requirements.

46. Accordingly, Colorado's reporting and disclosure requirements, as contained in Sections 2, 5, and 6 of Article XXVIII of the Colorado Constitution, and Sections 1-45-103, 1-45-107.5, and 1-45-108 of the Colorado Revised Statutes, facially violate the First and Fourteenth Amendments to the United States Constitution.

47. The specific provisions of Colorado's reporting and disclosure requirements that unconstitutionally discriminate against certain speakers—the media exemption provisions found in Article XXVIII, Section 2 of the Colorado Constitution and Section 1-45-103 of the Colorado Revised Statutes—cannot be severed from the remainder of the reporting and disclosure

framework because they are integral to the operation of that scheme. The entire reporting and disclosure framework therefore must be declared invalid on its face.

48. At a minimum, Colorado's reporting and disclosure requirements cannot be applied to Citizens United because it is unconstitutional to discriminate between Citizens United and those traditional "print media" entities and "broadcast facilit[ies]" that are entitled to a media exemption. Like those media entities, Citizens United is engaged in constitutionally protected political discourse on matters of public importance. There is no legitimate basis for applying Colorado's reporting and disclosure requirements to Citizens United in such a discriminatory manner.

49. In the alternative, if the media exemptions are compelled by the First Amendment's protection of freedom of the press, then this Court should construe the media exemptions to apply to Citizens United and exempt the Film and related activities from Colorado's reporting and disclosure requirements. Citizens United is engaged in press and media activities that are not materially different from the speech of the entities that are entitled to invoke the media exemptions.

SECOND CLAIM FOR RELIEF
(Colorado's Reporting and Disclosure Requirements Violate Article II, Section 10 of the Colorado Constitution)

50. Plaintiff realleges the allegations stated in paragraphs 1 through 49 as though fully set forth herein.

51. The Colorado Constitution "provides greater protection of free speech than does the First Amendment." *Bock v. Westminster Mall Co.*, 819 P.2d 55, 59 (Colo. 1991) (en banc). And the Colorado Constitution recognizes protections—like those under the federal

constitution—against governmental discrimination based solely on the identity of a speaker. *See, e.g.*, *Lewis v. Colo. Rockies Baseball Club, Ltd.*, 941 P.2d 266, 272 (Colo. 1997) (en banc).

52. Accordingly, for the reasons stated above, Colorado's reporting and disclosure requirements, as contained in Sections 2, 5, and 6 of Article XXVIII of the Colorado Constitution, and Sections 1-45-103, 1-45-107.5, and 1-45-108 of the Colorado Revised Statutes, violate Article II, Section 10 of the Colorado Constitution.

53. The entire reporting and disclosure framework therefore must be declared invalid on its face. At a minimum, Colorado's reporting and disclosure framework cannot be applied to Citizens United. In the alternative, this Court should construe the media exemptions to apply to Citizens United and exempt the Film and related activities from Colorado's reporting and disclosure requirements.

PRAYER FOR RELIEF

54. WHEREFORE, Plaintiff Citizens United requests that this Court grant all appropriate relief for the violations alleged above, including:

a. An order and judgment declaring that Colorado's reporting and disclosure requirements, as contained in Sections 2, 5, and 6 of Article XXVIII of the Colorado Constitution, and Sections 1-45-103, 1-45-107.5, and 1-45-108 of the Colorado Revised Statutes, violate the First and Fourteenth Amendments to the United States Constitution;

b. An order and judgment declaring that Colorado's reporting and disclosure requirements, as contained in Sections 2, 5, and 6 of Article XXVIII of the Colorado Constitution, and Sections 1-45-103, 1-45-107.5, and 1-45-108 of the

Colorado Revised Statutes, violate Article II, Section 10 of the Colorado Constitution.

c. An order and judgment preliminarily and permanently enjoining Defendants from enforcing Colorado's reporting and disclosure requirements in their entirety, or in the alternative, from enforcing Colorado's reporting and disclosure requirements as applied to Citizens United;

d. Attorneys' fees and costs pursuant to any applicable statute or authority, including 42 U.S.C. § 1988; and

e. Any other relief that this Court in its discretion deems just and proper.

Dated: August 14, 2014

Respectfully submitted,

s/ Theodore B. Olson
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EXHIBIT C

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 three[2] 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:

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[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]

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[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 (Melothé, 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 (Melothé, 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.

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[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

EXHIBIT D

OFFICE OF THE SECRETARY OF STATE

STATE OF COLORADO

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

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.[1]

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.[2] 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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[1] 8 Colo. Code Regs. §1505-3.

[2] 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.[3] 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.[4] 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.[5] 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.

[3] Colo. Rev. Stat §24-4-105(11).
[4] 8 Colo. Code Regs. §1505-3.
[5] 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.[6]

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.[7]

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."[8] 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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[6] 8 Colo. Code Regs. §1505-3.
[7] Petition, p. 5.
[8] *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.[9]

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.[10]

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."[11] 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."[12] Lastly, Petitioner states that the film "will be marketed and distributed across the United States, including in Colorado."[13]

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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[9] Petition, p. 5, FN 2.
[10] Colo. Const. Article XXVIII, Sec. 2(7)(a).
[11] Petition, p. 3.
[12] *Id.* at p. 4.
[13] *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.[14]

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.[15] 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."[16] (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.

[14] Colo. Const. Article XXVIII, Sec. 2(7)(b).
[15] Petition, p. 10.
[16] 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."[17]

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.[18]

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.[19] The court also found that CAD's goal was to influence elections.[20] 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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[17] *Colo. Citizens for Ethics in Gov't v. Comm. for the Am. Dream*, 187 P.3d 1207, (Colo. Ct. App. 2008).
[18] Colo. Const. Article XXVIII, Sec. 2(7)(b)(3).
[19] *Colo. Citizens for Ethics in Gov't,* 187 P.3d at 1216.
[20] *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.[21]

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.[22]

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.[23] 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.[24]

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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[21] *Id.*
[22] *Id.*
[23] Petition p. 15.
[24] *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 Petitioners 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."[25] 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

[25] 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."* [26] (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.[27]

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.[28]

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

[26] FEC Advisory Opinion 2010-08 p. 3.
[27] *Id.* at 4.
[28] *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.[29]

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.[30] There are other examples of Colorado courts invalidating the Secretary's clarifying rules or advisory opinions in the realm of campaign finance.[31]

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;

[29] *Colo. Ethics Watch v. Gessler*, 2013 Colo. App. LEXIS 2056.
[30] *Colo. Common Cause & Colo. Ethics Watch v. Gessler,* 2012 COA 147.
[31] *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 5th day of June, 2014.

_____

Suzanne Staiert
Deputy Secretary of State
1700 Broadway, Suite 200
Denver, CO 80290
(303) 894-2200

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-2266

CITIZENS UNITED, a Virginia Non-Stock Corporation,

Plaintiff,

v.

SCOTT GESSLER, in his official capacity as Secretary of State of the State of Colorado; and SUZANNE STAIERT, in her official capacity as Deputy Secretary of State of the State of Colorado,

Defendants.

CITIZENS UNITED'S MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65, Plaintiff Citizens United respectfully requests that this Court issue a preliminary injunction to enjoin enforcement of Colorado's discriminatory reporting and disclosure requirements for electioneering communications and independent expenditures. Those provisions require Citizens United and all other speakers—except the traditional print media and owners of radio and television stations—to make onerous public disclosures whenever they exercise their constitutionally protected right to discuss political candidates in the period preceding an election. Such discriminatory regulation of speech based on a speaker's identity violates both the United States and Colorado Constitutions.

Pursuant to Local Rule 7.1(a), counsel for Citizens United has conferred with counsel for Defendants regarding the relief requested in this motion, and Defendants have not stated whether they will oppose the relief sought.

INTRODUCTION

Speech restrictions that discriminate "based on the identity of the speaker" are highly disfavored under the First Amendment because they "are all too often simply a means to control content." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). But Colorado's campaign finance laws engage in precisely such differential treatment based on speakers' identity. Under Colorado law, speakers who make electioneering communications and independent expenditures—speech that references political candidates in the weeks leading up to an election—are required to submit burdensome reports to the State that disclose the amount spent on those constitutionally protected communications and the identities of donors who funded the speech. Those reporting and disclosure requirements do not apply, however, to speakers who qualify for Colorado's "media exemptions." Whether or not a speaker can invoke those exemptions turns primarily on the medium in which its opinions appear. Speakers who make electioneering communications and independent expenditures in print publications are exempt from the reporting and disclosure requirements, but speakers who express the same opinions in other formats, such as documentary films distributed on DVD or through digital streaming, are not. Similarly, speakers who own "broadcast facilit[ies]" are exempt, while speakers who disseminate a political opinion over the airwaves but do not operate their own radio or television station are not.

Citizens United—a non-profit organization that regularly engages in political speech and media activities—plans to distribute a documentary film about elected officials in Colorado that the Colorado Secretary of State has determined does not qualify for the media exemptions because the speech does not appear in print and because Citizens United does not operate its own "broadcast facility." Thus, when Citizens United begins to advertise that film in the upcoming

weeks, and then distributes the film in October 2014, it will be required to comply with Colorado's reporting and disclosure requirements—even though a similarly situated media entity that expressed the same views in print or through its own radio or television station would be exempt from those requirements. Such discrimination between the "print media" and "broadcast facilit[ies]," on the one hand, and all other speakers (including other media entities), on the other, is unconstitutional under both the U.S. Constitution and the Colorado Constitution.

Citizens United therefore respectfully seeks a preliminary injunction against the enforcement of Colorado's reporting and disclosure requirements. Citizens United is likely to succeed on the merits of its constitutional challenge, and will face irreparable harm if required to comply with a discriminatory reporting and disclosure regime that burdens its First Amendment rights, but not the rights of similarly situated speakers. The balance of equities and public-interest considerations also tip resoundingly in favor of vindicating Citizens United's First Amendment freedoms.

STATUTORY AND REGULATORY BACKGROUND

Colorado's campaign finance laws are primarily contained in Article XXVIII of the Colorado State Constitution, which was enacted by the voters of Colorado through a ballot initiative in 2002, and in Colorado's Fair Campaign Practices Act ("FCPA"), which was enacted by Colorado voters in 1996. At issue here are the reporting and disclosure requirements contained in Sections 2, 5, and 6 of Article XXVIII of the Colorado Constitution, and Sections 1-45-103, 1-45-107.5, and 1-45-108 of the Colorado Revised Statutes. Among other things, the reporting and disclosure provisions require speakers engaged in "electioneering communications" and "independent expenditures" to disclose the amount spent on those

communications and the name, address, occupation, and employer of any person that contributed more than $250 to fund the speech. *See* Colo. Const. art. XXVIII, § 6(1); Colo. Rev. Stat. § 1-45-107.5(4)(b).

"Electioneering communication" is defined in Article XXVIII as:

> [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.

Colo. Const. art. XXVIII, § 2(7)(a); *see also* Colo. Rev. Stat. § 1-45-103(9). An "expenditure" is defined as:

> [A]ny 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.

Colo. Const. art. XXVIII, § 2(8)(a); *see also* Colo. Rev. Stat. § 1-45-103(10). Article XXVIII and the FCPA further define an "independent expenditure" as an expenditure "that is not controlled by or coordinated with any candidate or agent of such candidate." Colo. Const. art. XXVIII, § 2(9); *see also* Colo. Rev. Stat. § 1-45-103(11).

The specific reporting and disclosure requirements that apply to electioneering communications and independent expenditures are extensive. Section 6 of Article XXVIII provides that any person expending more than $1000 per calendar year on electioneering

communications must submit reports to the Secretary of State that disclose the amount spent on electioneering communications and the name, address, occupation, and employer of any person that contributed more than $250 to fund the electioneering communication. Colo. Const. art. XXVIII, § 6(1). Section 1-45-108 of the Colorado Revised Statutes governs the timing and contents of such reports. *See* Colo. Rev. Stat. § 1-45-108. In the months before a general election, these reports must be submitted on the first Monday in September and then each Monday every two weeks until the election. *Id.* § 1-45-108(2).

Section 5 of Article XXVIII applies similar reporting and disclosure requirements to independent expenditures. Specifically, any person making independent expenditures in excess of $1000 per calendar year must file a notice with the Secretary of State describing the independent expenditure and the candidate whom it is intended to support or oppose. *See* Colo. Const. art. XXVIII, § 5(1). The person making the expenditure must also "prominently" disclose its identity in the resulting communication. *Id.* § 5(2).

These provisions are supplemented by Section 1-45-107.5, which imposes additional registration, reporting, and disclosure requirements on persons making independent expenditures in excess of $1000. *See* Colo. Rev. Stat. § 1-45-107.5. Among other requirements, any person expending more than $1000 per calendar year on independent expenditures must report to the Secretary of State the amounts spent and the name, address, occupation, and employer of any person that contributed more than $250 to fund the independent expenditure. *Id.* § 1-45-107.5(4)(b). Any person that expends more than $1000 per calendar year on independent expenditures must also report to the Secretary of State any donation in excess of $20 received

during the reporting period for purposes of making an independent expenditure. *Id.* § 1-45-107.5(8).

These significant burdens do not apply equally, however, to all speakers. Colorado law contains "media exemptions" that carve out traditional "print media" and "broadcast facilit[ies]" from complying with the reporting and disclosure requirements.

Specifically, Article XXVIII and the FCPA exclude from the definition of "electioneering communication":

> (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.

Colo. Const. art. XXVIII, § 2(7)(b); *see also* Colo. Rev. Stat. § 1-45-103(9). The media exemption from the definition of "expenditure" is nearly identical:

> (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.

Colo. Const. art. XXVIII, § 2(8)(b); *see also* Colo. Rev. Stat. § 1-45-103(10).

Speakers face harsh penalties for failing to comply with the reporting and disclosure requirements. Among other penalties, persons in violation of these provisions "shall be subject to a civil penalty of at least double and up to five times the amount contributed, received, or spent in violation of the applicable provision." Colo. Const. art. XXVIII, § 10(1).

FACTUAL BACKGROUND

Citizens United is a non-profit organization that engages in education, advocacy, and grassroots activities, which include regular political speech and media and press communications. *See* Complaint ¶¶ 9, 24 (Aug. 14, 2014) (hereinafter "Compl."); Declaration of David N. Bossie ¶ 4 (Aug. 12, 2014) (hereinafter "Bossie Decl.) (attached as Exhibit A). Among other activities, Citizens United produces, markets, and distributes documentary films, including films that explore controversial political organizations, personalities, and policies in the United States and abroad. Compl. ¶ 24; Bossie Decl. ¶ 4. Since 2004, Citizens United has produced and released twenty-four documentary films, some of which are award-winning. Compl. ¶ 24; Bossie Decl. ¶ 4.

Citizens United distributes its films through a variety of formats including theatrical release, DVDs, television, and online digital streaming and downloading. Compl. ¶ 25; Bossie Decl. ¶ 5. To promote the sale of its films, Citizens United advertises them on television, on

billboards, in newspapers, via direct and electronic mail, and on the Internet. Compl. ¶ 25; Bossie Decl. ¶ 5.

In 2010, the Federal Election Commission—the federal agency that administers and enforces federal campaign finance law—issued Advisory Opinion 2010-08 to Citizens United. Advisory Opinion 2010-08 (Citizens United) (June 11, 2010) (*see* Compl. ¶ 26 & Ex. A). That Advisory Opinion concludes that Citizens United's films and advertising promoting its films are exempt from the definitions of "expenditure" and "electioneering communication" under federal campaign finance law pursuant to the federal media exemption because "Citizens United's films constitute a legitimate press function." Advisory Opinion 2010-08, at 7. Citizens United therefore is not required to comply with federal reporting and disclosure requirements when distributing and advertising documentary films and disseminating other communications about candidates for federal office. Compl. ¶ 26.

Citizens United is currently producing a documentary film about various Colorado advocacy groups and their impact on Colorado government and public policy. Compl. ¶ 27; Bossie Decl. ¶ 6. The Film's working title is "Rocky Mountain Heist." Compl. ¶ 27; Bossie Decl. ¶ 6. The Film will be approximately thirty minutes in length and has an overall budget of $773,975. Compl. ¶¶ 27-29; Bossie Decl. ¶¶ 7-9. Of this amount, $548,975 is dedicated to production, and $225,000 is dedicated to marketing to occur in October 2014. Compl. ¶ 29; Bossie Decl. ¶ 9.

The Film is scheduled to be completed on or about September 24, 2014, and will be marketed and distributed across the United States, including in Colorado. Compl. ¶ 30; Bossie Decl. ¶ 6. Citizens United plans to begin marketing and distributing the Film nationwide by the

first week of October 2014, through DVD sales, television broadcast, and online digital streaming and downloading. Compl. ¶ 30; Bossie Decl. ¶ 6. Advertising for the Film will include television ads, radio ads, and Internet ads. Compl. ¶ 30; Bossie Decl. ¶¶ 6 & 10. Marketing and distribution of the Film in Colorado will occur within the 60-day period immediately preceding the November 4, 2014 general elections. Compl. ¶ 30; Bossie Decl. ¶ 10.

The Film—as well as at least some of the advertising for the Film—will include unambiguous references to elected Colorado officials who are candidates for office in this year's general elections, which will be held on November 4, 2014. Compl. ¶ 27; Bossie Decl. ¶ 7. While the Film is not expected to editorially endorse any candidates, it will include audio and video content of events where participants expressly advocate the election or defeat of one or more candidates in the November 4, 2014 elections. Compl. ¶ 27; Bossie Decl. ¶ 7. The Film will include visual and audio content of Governor John Hickenlooper, who is the Democratic Party candidate for the Office of Governor of Colorado in the November 4, 2014 elections. Compl. ¶ 28; Bossie Decl. ¶ 8. The Film will also include visual and audio content of other candidates for federal and state office in Colorado, including candidates for Congress and the state legislature. Compl. ¶ 28; Bossie Decl. ¶ 8.

Unless subject to an exemption, Citizens United's distribution and advertising of the Film will constitute electioneering communications and independent expenditures under Colorado law because the Film and at least some of the advertising include unambiguous references to, and express advocacy regarding, candidates for office and will be aired within sixty days of the general election. On April 18, 2014, Citizens United therefore filed a Petition for Declaratory Order with the Colorado Secretary of State, seeking clarification as to whether Citizens United's

distribution and advertising of the Film qualified for the media exemptions, which would obviate the need for Citizens United to comply with the various reporting and disclosure requirements that would otherwise apply. Compl. ¶ 32.

After notice and comment and a public hearing, the Secretary issued a Declaratory Order concluding that the Film and related marketing activities did not fall within any of the enumerated exemptions to the definition of "electioneering communication" under Colorado law, including the media exemptions. Declaratory Order, *In re Citizens United's Petition for Declaratory Order*, at 5-11 (June 5, 2014) (hereinafter, "Declaratory Order"). Specifically as to the "print media" exemption contained in Section 2(7)(b)(II) of Article XXVIII, the Secretary concluded that the Film "*does not meet the first exemption* ***because it is not print media***." Declaratory Order, at 5 (italics in original, bolding added); *see also id.* ("Here, the forthcoming documentary is a film, which cannot be printed in a newspaper, magazine, or other periodical."). Likewise, as to the "broadcast facility" exemption contained in Section 2(7)(b)(II) of Article XXVIII, the Secretary concluded that Citizens United "*is not a broadcast facility* and, as such, does not fall within this exemption." *Id.* at 6 (emphasis added). The Secretary acknowledged that Citizens United would be entitled to the media exemption to the nearly identical federal definition of "electioneering communication," but refused to "read such an exemption into the plain language of Colorado law." *Id.* at 8. "Whether or not the Secretary of State agrees with the FEC's logic and reasoning in creating the 'press exemption,'" the Order explained, "the Secretary lacks the authority to apply well-reasoned, settled First Amendment law to Colorado." *Id.* at 9 (italics omitted).

The Secretary also determined that distribution of, and advertising for, the Film did not qualify under the exemption for communications made by a person in the "regular course and scope of their business" because "the regular-business exemption is for businesses whose service is primarily to distribute content" and "Citizens United is primarily the content developer." *Id.* at 5, 7. The Secretary did not address whether the Film and related activities qualify as "expenditures" under Colorado law. "Because the film has not yet been made," the Secretary declared that she was "not in a position to state whether the film falls within the definition" of "expenditure." *Id.* at 10. The Secretary therefore did not address whether any of the exemptions to the definition of "expenditure"—which closely track the exemptions to the definition of "electioneering communication"—would apply. *Id*.

Citizens United thereafter filed this suit to obtain declaratory and injunctive relief invalidating Colorado's reporting and disclosure requirements because they apply to certain speakers but not others on a discriminatory basis in violation of the First Amendment to the United States Constitution and Article II, Section 10 of the Colorado Constitution.

ARGUMENT

When seeking a preliminary injunction, the moving party must demonstrate: (1) likelihood of success on the merits; (2) likelihood that the movant will suffer irreparable harm absent a preliminary injunction; (3) that the balance of equities tips in the movant's favor; and (4) that the injunction is in the public interest. *See Republican Party of N.M. v. King*, 741 F.3d 1089, 1092 (10th Cir. 2013); *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1231 (10th Cir. 2005). In the First Amendment context, the preliminary-injunction inquiry focuses predominantly on the first prong: likelihood of success on the merits. *See King*, 741 at 1092;

see also Quinly v. City of Prairie Village, 446 F. Supp. 2d 1233, 1237 (D. Kan. 2006) ("When a party seeks a preliminary injunction on the basis of a potential First Amendment violation, the likelihood of success on the merits will often be the determinative factor."). Citizens United is entitled to a preliminary injunction because it is likely to succeed on the merits of its constitutional challenge to Colorado's discriminatory reporting and disclosure requirements, and because each of the three other factors also weighs overwhelmingly in favor of an injunction.

I. Citizens United Is Likely To Succeed On The Merits Because Colorado's Discriminatory Reporting And Disclosure Requirements Violate The First Amendment And Article II, Section 10 Of The Colorado Constitution.

Citizens United is likely to succeed on the merits because Colorado's discriminatory reporting and disclosure requirements violate both the First Amendment to the United States Constitution and Article II, Section 10 of the Colorado Constitution. Speech regulations that discriminate on the basis of a speaker's identity are subject to strict scrutiny, and the State cannot identify any legitimate—let alone compelling—interest in applying its reporting and disclosure requirements to Citizens United and other media entities that engage in public discourse through the production and distribution of documentary films, but not to media entities that express identical views in print or through broadcast facilities that they own themselves. Such discrimination between the print and broadcast media, on the one hand, and all other speakers, on the other, is flatly unconstitutional. Moreover, even if some form of media exemption to Colorado's reporting and disclosure requirements were mandated by the First Amendment's Freedom of the Press Clause, Citizens United—which is similarly situated to those media entities that communicate with the public in print format and through broadcast facilities—would be entitled to that constitutionally compelled exemption.

A. Speaker-Based Discrimination That Burdens Speech Is Subject To Strict Scrutiny.

It is well-settled that "restrictions distinguishing among different speakers, allowing speech by some but not others," are presumptively "[p]rohibited." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010); *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("In the realm of private speech or expression, government regulation may not favor one speaker over another."). In *Citizens United*, for example, the Supreme Court struck down a federal prohibition on independent expenditures by corporations because, among other reasons, that prohibition imposed a burden solely on "certain disfavored speakers." 558 U.S. at 341. Similarly, in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Court invalidated a statute that prohibited corporations—but no other speakers—from making political expenditures in support of, or in opposition to, ballot initiatives. *Id.* at 784-85. And, in *Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173 (1999), the Supreme Court struck down restrictions on casino advertising that applied to private casino owners but not tribal casino owners because the government lacked a sufficiently compelling interest to justify that discriminatory treatment. *Id.* at 195; *see also id.* at 191-92 ("[T]he Government presents no convincing reason for pegging its speech ban to the identity of the owners or operators of the advertised casinos.").

Because "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source," *Bellotti*, 435 U.S. at 777, speech restrictions that burden the speech of some speakers, but not others, based on the speakers' identity are subject to strict scrutiny. *See Okla. Corr. Prof'l Ass'n v. Doerflinger*, 521 F. App'x

674, 678-79 & n.4 (10th Cir. 2013); *see also Chandler v. City of Arvada*, 292 F.3d 1236, 1241 (10th Cir. 2002) (applying strict scrutiny to strike down an ordinance that prohibited petition circulation by non-city residents). Strict scrutiny is required in this setting because restrictions based on a speaker's identity often facilitate viewpoint discrimination, an especially disfavored form of speech regulation that is "presumed to be unconstitutional." *Rosenberger*, 515 U.S. at 828; *see also Citizens United*, 558 U.S. at 340 ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content."). Indeed, the Tenth Circuit has recognized that any distinction between speaker-based discrimination and viewpoint discrimination "may as a practical matter be illusory." *Doerflinger*, 521 F. App'x at 679. These concerns about viewpoint discrimination are triggered whenever "a law or policy, though facially legitimate, is selectively enforced or *subject to exceptions*," *Pahls v. Thomas*, 718 F.3d 1210, 1238 (10th Cir. 2013) (emphasis added); *see also City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) ("Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place.").

Colorado's reporting and disclosure requirements are subject to strict scrutiny because they apply to all speakers who exercise their constitutional right to engage in electioneering communications or independent expenditures—except speakers who qualify for one of the narrow statutory exceptions, such as the exceptions for print media and broadcast facilities. Accordingly, Citizens United will be required under Colorado law to make burdensome disclosures regarding the funding, and other aspects, of its forthcoming film about candidates for

Colorado political office, but a media entity that engaged in the same examination of public candidates "in a newspaper, magazine or other periodical" would be exempt from those reporting and disclosure requirements. Colo. Const. art. XXVIII, § 2(7)(b)(I). Similarly, a media entity that operated its own "broadcast facility" would be exempt from Colorado's reporting and disclosure requirements even if it produced and aired the exact same film as Citizens United. *See id.* § 2(7)(b)(II). Colorado must demonstrate that it has a compelling basis for distinguishing between speakers like Citizens United who express political views through documentary films but do not operate their own "broadcast facilit[ies]" and those who engage in political discourse in print and other formats covered by a statutory exemption. As discussed below, the State cannot muster any legitimate basis for this pernicious distinction.

B. Colorado Does Not Have A Compelling Interest In Applying Its Discriminatory Reporting And Disclosure Requirements To Some Speakers Who Make Electioneering Communications And Independent Expenditures But Not Others.

The Supreme Court has upheld reporting and disclosure requirements where they "provid[e] the electorate with information about the sources of election-related spending." *Citizens United*, 558 U.S. at 367 (internal quotation marks omitted). But the question here is not whether Colorado's reporting and disclosure requirements further the informational interest identified by the Supreme Court. The question instead is whether Colorado has a *compelling* interest in applying its reporting and disclosure requirements in a discriminatory manner to some speakers who engage in electioneering communications and independent expenditures but not to others. The State cannot conceivably identify a constitutionally adequate basis for this discriminatory treatment of Citizens United and those other speakers who do not qualify for the

media exemption, because the print media and broadcast facilities do not have any greater First Amendment rights than other speakers.

The Tenth Circuit has identified three interests that may be sufficient to sustain disclosure and reporting requirements regarding political speech: (1) providing for an informed electorate; (2) deterring corruption and the appearance of corruption; and (3) gathering data necessary to detect violations of campaign finance laws. *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1197 (10th Cir. 2000). Even if the Colorado reporting and disclosure requirements further those interests, however, none of those state interests provides a legitimate, let alone compelling, reason to apply those requirements to Citizens United's distribution and marketing of its documentary film but not to other media entities engaged in indistinguishable public discourse about candidates for public office.

Colorado could not contend, for example, that its reporting and disclosure requirements permissibly "provide[ ] the electorate with information as to where political campaign money comes from and how it is spent by the candidate" (*Citizens for Responsible Gov't*, 236 F.3d at 1197) when applied to Citizens United's documentary film, but not when applied to a magazine exposé about a political candidate or a local television station's investigation into a candidate's background and qualifications for office. If the public has a right to know who funded Citizens United's Film, it equally has a right to know whether a political candidate, public-advocacy group, or political party helped fund an investigative journalist's magazine piece or television story. Informing the electorate, deterring corruption, and detecting campaign-finance violations are no less important when the political speech is disseminated by a newspaper, magazine, or television or radio station—rather than by a media entity engaged in the production and

distribution of documentary films—and reporting and disclosure requirements are no less effective at attaining those ends in the print and broadcast settings.

Indeed, one is hard-pressed to hypothesize any basis for the discriminatory operation of Colorado's reporting and disclosure regime other than the view that some members of the media should hold a privileged position in the public forum and be exempted from the burdens imposed on other speakers who seek to opine on matters of public importance. But the Supreme Court has made clear that the "differential treatment" of media entities and non-media entities "cannot be squared with the First Amendment." *Citizens United*, 558 U.S. at 353. The "press," the Court has emphasized, "does not have a monopoly on either the First Amendment or the ability to enlighten." *Bellotti*, 435 U.S. at 782. Colorado therefore cannot create exemptions from its reporting and disclosure requirements that free a subset of speakers from these onerous burdens based simply on their "media" status but that leave all other speakers—including other, less-favored media entities—saddled with those requirements.

Because Colorado cannot identify any compelling justification for the distinctions it draws "based on the identity of the speaker," *Citizens United*, 558 U.S. at 340, its reporting and disclosure requirements unconstitutionally discriminate between those speakers required to comply with the reporting and disclosure obligations and those speakers entitled to invoke the media exemptions. Discrimination among speakers is constitutionally suspect in all contexts, but is especially pernicious and corrosive where it burdens the political speech of a disfavored class

with onerous obligations inapplicable to a privileged subset of speakers. *See, e.g.*, *Bellotti*, 435 U.S. at 777.[1]

C. The Media Exemptions Cannot Be Severed From The Reporting And Disclosure Requirements.

This unconstitutional discrimination is fatal to Colorado's reporting and disclosure regime because the discriminatory media exemptions cannot be severed from the remainder of the reporting and disclosure requirements. The media exemptions are an integral part of Colorado's campaign-finance framework, and severing them from the other aspects of the reporting and disclosure regime would lead to absurd results not contemplated by the Colorado legislature. The reporting and disclosure requirements therefore must be invalidated in their entirety.

"Severability is an issue of state law." *Am. Target Adver., Inc. v. Giani*, 199 F.3d 1241, 1250 (10th Cir. 2000) (citing *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam)). Under Colorado law, severability depends on two factors: "(1) the autonomy of the portions remaining after the defective provisions have been deleted and (2) the intent of the enacting legislative body." *City of Lakewood v. Colfax Unlimited Ass'n*, 634 P.2d 52, 70 (Colo. 1981) (en banc).[2] If

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[1] Even if the reporting and disclosure requirements do not violate the First Amendment, they violate Article II, Section 10 of the Colorado Constitution, which provides equal, if not greater, protections against speaker-based discrimination. *See Lewis v. Colo. Rockies Baseball Club, Ltd.*, 941 P.2d 266, 271 (Colo. 1997) (en banc); *Colo. Educ. Ass'n v. Rutt*, 184 P.3d 65, 76-77 (Colo. 2008) (en banc).

[2] Although the standard for evaluating severability is a question of state law, Colorado applies a standard that is essentially equivalent to the standard under federal law. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) ("The standard for determining the severability of an unconstitutional provision is well established: 'Unless it is evident that the Legislature would

[Footnote continued on next page]

a statute contains a severability clause, such a clause "creates a presumption that the legislature would have been satisfied with the portions of the statute that remain after the offending provisions are stricken as being unconstitutional." *People v. Seven Thirty-Five E. Colfax, Inc.*, 697 P.2d 348, 371 (Colo. 1985) (en banc). *But see United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968) (noting that "the ultimate determination of severability will rarely turn on the presence or absence of such a clause"). That presumption of severability is rebutted, however, "if what remains is so incomplete or riddled with omissions that it cannot be salvaged as a meaningful legislative enactment." *Colfax Unlimited Ass'n*, 634 P.2d at 70 (internal quotation marks and alterations omitted).

A clause should not be severed if it will compromise the "integrity or coherence of the statute in any way." *Davidson*, 236 F.3d at 1196. As a general matter, provisions containing exceptions from a statutory scheme are not severable because the remaining provisions would not serve the intent of the legislature. *See Davis v. Wallace*, 257 U.S. 478, 484 (1922) (striking down a state tax scheme that contained an unconstitutional exception because "the excepting provision was in the statute when it was enacted, and there can be no doubt that the legislature intended that the meaning of the other provisions should be taken as restricted accordingly"); *Spraigue v. Thompson*, 118 U.S. 90, 95 (1886) (refusing to sever invalid provisions because, "by rejecting the exceptions intended by the legislature . . . the statute is made to enact what

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[Footnote continued from previous page]
not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'") (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam)).

confessedly the legislature never meant" and "confers upon the statute a positive operation beyond the legislative intent").

The Colorado Constitution and the FCPA contain severability clauses, which provide that if any portion is deemed invalid, the invalidity of those provisions will not affect the validity of other provisions of Article XXVIII or the FCPA. *See* Colo. Const. art. XXVIII, § 14; Colo. Rev. Stat. § 1-45-118. That presumption of severability, however, is readily rebutted with respect to the media exemptions because the exemptions are integral to Colorado's reporting and disclosure regime. *See Davidson*, 236 F.3d at 1197 (refusing to sever unconstitutional twenty-four hour notice requirement in the FCPA because it was "integral to the statutory scheme"). Eliminating the exemptions—while leaving the remainder of the reporting and disclosure framework intact—would extend the reporting and disclosure requirements on a nondiscriminatory basis to *all* speakers, including the print media and broadcast facilities. While that is the constitutionally compelled approach that the Colorado legislature, or the Colorado voters, must take if they apply reporting and disclosure requirements to *any* speaker, it is far different from the exemption-riddled regime that was actually enacted. There is no indication that Colorado's voters would have enacted a reporting and disclosure framework without the media exemptions. *See In re Great Outdoors Colo. Trust Fund*, 913 P.2d 533, 540 (Colo. 1996) (en banc) ("When courts construe a constitutional amendment that has been adopted through a ballot initiative, any intent of the proponents that is not adequately expressed in the language of the measure will not govern the court's construction of the amendment.").

Without the media exemptions, any newspaper, magazine, or television or radio station disseminating content that qualifies as an electioneering communication or independent

expenditure would be required to file regular reports with the State disclosing the amount spent and the sources of their funding. Moreover, if a communication qualifies as an independent expenditure and more than $1000 has been spent on it, the newspaper, magazine, or broadcast facility would have to "prominently featur[e]" "the name of the person making the expenditure" and a statement that the expenditure "is not authorized by any candidate." Colo. Const. art. XXVIII, § 5(2). Because Colorado's voters never would have enacted such a disruptive campaign-finance regime, the reporting and disclosure requirements must be invalidated in their entirety.

D. If The Media Exemptions Are Constitutionally Compelled, They Would Have To Be Construed To Apply To Citizens United.

Even if some form of media exemption were constitutionally compelled to protect the freedom of the press, Citizens United—an organization devoted to disseminating information about issues of public importance, including candidates for political office—would be entitled to the same constitutional protections as the media entities encompassed by the Secretary's interpretation of the exemptions. The Court would therefore be required to construe the media exemptions to apply to Citizens United.

Citizens United regularly engages in media activities that are substantially similar to the activities of the print-media organizations and broadcast facilities entitled to invoke Colorado's media exemptions. Like newspapers, magazines, and radio and television stations, Citizens United critically examines matters of public importance—including candidates for office, elected officials, and the role of advocacy groups in elections and government—in order to inform the public debate on issues with both local and national significance. The only difference is that

Citizens United generally communicates its message through documentary films and does not operate its own broadcast facility to disseminate those films.

There is no conceivable basis for affording media entities that own magazines, newspapers, and broadcast facilities greater constitutional freedoms than media organizations engaged in documentary filmmaking. Indeed, the FEC has construed the parallel media exemption in federal law to apply to Citizens United. By its terms, that exemption excludes from the definition of electioneering communication and expenditure "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication." 2 U.S.C. § 431(9)(B)(i). According to the FEC, the federal media exemption is not limited to traditional publishing outlets, but instead extends to "news stories, commentaries, and editorials no matter in what medium they are published." Advisory Opinion 2010-08, at 4 (quoting Advisory Opinion 2008-14 (Melothé, Inc.) (Nov. 13, 2008)) (emphasis omitted). The federal exemption therefore extends to "cable television, the Internet, satellite broadcasts, and rallies staged and broadcast by a radio talk show." *Id.* (footnotes omitted).

Courts have likewise recognized that "the core values of the First Amendment clearly transcend the particular details of the various vehicles through which messages are conveyed." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1448 (D.C. Cir. 1985). As a result, "[r]egulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 659 (1994). In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), for example, the Court struck down a tax exemption that applied only to "religious, professional, trade, and

sports" publications, but not others, because it was "both overinclusive and underinclusive." *Id.* at 232; *see also Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 582 (1983) (invalidating a tax on the use of paper and ink because, among other reasons, it applied only to a small subset of newspapers).

There is no constitutional basis for distinguishing between the media activities of Citizens United and the activities of those media entities covered by the Secretary's interpretation of Colorado's media exemptions. If those exemptions are compelled by the First Amendment's protections for freedom of the press, then they must be construed to extend to Citizens United because its media activities are no less vital to the public discourse than those of the print media and broadcast facilities. Excluding Citizens United from the media exemption disregards its status as a media entity and draws an unconstitutional distinction between different classes of media organizations.

II. The Remaining Factors—Likelihood Of Irreparable Harm, Balance Of Equities, And The Public Interest—All Favor A Preliminary Injunction.

Although likelihood of success on the merits is the critical factor in determining eligibility for a preliminary injunction—and weighs decisively in favor of an injunction here—the remaining factors also support Citizens United's request for a preliminary injunction. Citizens United will suffer the irreparable deprivation of its First Amendment rights in the absence of an injunction, and the balance of equities tips squarely in favor of safeguarding those constitutional rights. Likewise, an injunction to prevent enforcement of these requirements while the merits of this case are resolved will serve the public interest by removing a discriminatory impediment to robust political discourse in Colorado.

A. Citizens United Will Suffer Irreparable Harm Absent An Injunction.

Any deprivation of constitutional rights constitutes irreparable harm. This is especially true in the First Amendment setting, where "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). There is accordingly a presumption of irreparable harm "when First Amendment rights have been infringed." *Doerflinger*, 521 F. App'x at 677; *see also Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1235 (10th Cir. 2005) ("[W]e therefore assume that plaintiffs have suffered irreparable injury when a government deprives plaintiffs of their commercial speech rights."); *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001) (same). "The harm is particularly irreparable where, as here, a plaintiff seeks to engage in political speech, as timing is of the essence in politics and a delay of even a day or two may be intolerable." *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (internal quotation marks and alteration omitted).

Citizens United's First Amendment rights will be irreparably infringed if it is forced to comply with Colorado's discriminatory reporting and disclosure requirements. The Secretary has already determined that the Film that Citizens United intends to release in October 2014 qualifies as an electioneering communication and will therefore be subject to the State's extensive reporting and disclosure requirements. The Film will also likely constitute an independent expenditure, exposing Citizens United to additional reporting and disclosure obligations. Because those requirements are inapplicable to media entities that publish newspapers and magazines, or operate radio or television stations, Citizens United is being targeted for unjustified and unconstitutional discrimination in the exercise of its First

Amendment rights. Once Citizens United is compelled to shoulder the unequal burdens of that discriminatory disclosure and reporting regime, the injury to its constitutional rights would be immediate and irreparable.

B. The Balance Of Equities Favors An Injunction.

The balance of equities also favors an injunction. It is axiomatic that a State does not "have an interest in enforcing a law that is likely constitutionally infirm." *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010). Thus, where a "plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment." *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001).

In the First Amendment context, the Tenth Circuit has concluded that a First Amendment injury—even one arising in the commercial-speech setting—"outweighs any prospective injury" to the government caused by enjoining the enforcement of an invalid statute. *Utah Licensed Beverage Ass'n*, 256 F.3d at 1076. The Tenth Circuit therefore reversed the denial of a preliminary injunction against the enforcement of state laws restricting alcohol advertising because the court found "no reason to think that" the harm to the government's interests through increased alcohol consumption would outweigh the harm to the plaintiff's First Amendment rights. *Id.* at 1076-77.

Similarly, here, any speculative injury to Colorado's interests in regulating elections is heavily outweighed by the irreparable harm to Citizens United's First Amendment rights from the enforcement of Colorado's discriminatory reporting and disclosure requirements. In fact, any potential harm to the State is called into question by the existence of the media exemptions,

which permit print-media organizations and broadcast facilities to comment on political candidates without complying with the reporting and disclosure requirements that would otherwise apply. In light of those exemptions, there could not conceivably be any harm to the State from permitting Citizens United and other speakers similarly situated to the print media and broadcast facilities to engage in public discourse without enduring the burdens of the reporting and disclosure requirements.

C. An Injunction Enjoining Violation Of The First Amendment Is In The Public Interest.

Finally, a preliminary injunction vindicating constitutional rights is always in the public interest. *See Pac. Frontier*, 414 F.3d at 1237 ("Vindicating First Amendment freedoms is clearly in the public interest."); *see also Utah Licensed Beverage Ass'n*, 256 F.3d at 1076 (concluding that enjoining enforcement of unconstitutional speech restrictions "is an appropriate remedy not adverse to the public interest"); *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) ("[S]ecuring First Amendment rights is in the public interest."). Here, Colorado is enforcing a discriminatory reporting and disclosure regime that violates the First Amendment rights of Citizens United and other speakers ineligible for the media exemption. A preliminary injunction will serve the public interest by strengthening First Amendment freedoms and facilitating a robust public discourse where all speakers operate on a level playing field.

CONCLUSION

For the foregoing reasons, this Court should enjoin Defendants from enforcing Colorado's reporting and disclosure requirements, as contained in Sections 2, 5, and 6 of Article XXVIII of the Colorado Constitution, and Sections 1-45-103, 1-45-107.5, and 1-45-108 of the Colorado Revised Statutes, against Citizens United and all other persons, pending resolution of

the merits of Citizens United's claims. At a minimum, the Court should enjoin enforcement of Colorado's reporting and disclosure requirements as applied to Citizens United.

Dated: August 14, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2014, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, and I hereby certify that I have mailed the document to the following non CM/ECF participant in the manner indicated by the non-participant's name:

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EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. _

CITIZENS UNITED, a Virginia Non-Stock Corporation,

Plaintiff,

v.

SCOTT GESSLER, in his official capacity as Secretary of State of the State of Colorado; and SUZANNE STAIERT, in her official capacity as Deputy Secretary of State of the State of Colorado,

Defendants.

DECLARATION OF DAVID N. BOSSIE

I, David N. Bossie, hereby declare as follows:

1. I am currently President of Citizens United, a Virginia non-stock corporation with its principal place of business in Washington, D.C. I have served in this capacity since November 2001.

2. As President, I am responsible for overseeing and supervising the day-to-day operations of Citizens United. In this capacity, I have personal knowledge of Citizens United's press and media activities, including its filmmaking activities.

3. My filmmaking duties include serving as "executive producer" of all Citizens United films. I have final decision-making authority over the content of all Citizens United films. I also oversee and supervise all distribution and marketing for Citizens United's films.

4. Citizens United is a non-profit organization that engages in education, advocacy, and grassroots activities, which include regular political speech and media and press communications. Among other activities, Citizens United produces, markets, and distributes documentary films, including films that explore controversial political organizations, personalities, and policies in the United States and abroad. Since 2004, Citizens United has produced and released twenty-four documentary films, some of which are award-winning.

5. Citizens United distributes its films in a variety of formats including theatrical release, DVDs, television, and online digital streaming and downloads. In order to promote the sale of its films, Citizens United regularly advertises them on television and radio, on billboards, in newspapers, via direct mail and electronic mail, and on the Internet.

6. Citizens United is currently producing a documentary film about various Colorado advocacy groups and their impact on Colorado government and public policy (hereinafter, the "Film"). The working title of the Film is "Rocky Mountain Heist." The Film is scheduled to be completed on or about September 24, 2014. Citizens United has concrete plans to begin marketing and distributing the Film nationwide, including in Colorado, by the first week of October 2014. The initial mode of distribution will be DVD sales over the Internet. We also intend to license the Film for television broadcast and online digital streaming and downloading.

7. The Film will be approximately thirty minutes in length and will include unambiguous references to elected officials and others who are candidates for office in this year's general elections, which will be held on November 4, 2014. While the Film will not editorially endorse any candidates, background footage appearing in the Film will likely include

events where participants expressly advocate the election or defeat of one or more candidates in the November 4, 2014 elections.

8. The Film will include visual and audio content of Governor John Hickenlooper, who is the Democratic Party candidate for the Office of Governor of Colorado in the November 4, 2014 elections. The Film will also include visual and audio content of other candidates for federal and state office in Colorado, including candidates for U.S. Congress and the state legislature. Interviews with several candidates for the state legislature whose names will appear on the November 4, 2014 ballot are scheduled to occur over the next couple of weeks, and excerpts of those interviews will appear in the Film.

9. The overall production and marketing budget for the Film is $773,975. Of this amount, $548,975 is dedicated to production, and $225,000 is dedicated to marketing to occur in October 2014.

10. The Film will be marketed and distributed across the United States, including in Colorado. Citizens United will distribute and market the Film in a manner similar to its previous films. Modes of distribution will include DVD sales, television broadcast, and online digital streaming and downloading. Advertising to occur in October 2014 will include television ads, radio ads, and Internet ads. Marketing and distribution in Colorado will occur within the 60-day period immediately preceding the November 4, 2014 general elections.

11. Citizens United intends to continue producing films in the future that include unambiguous references to candidates in Colorado's elections, and to market and distribute those films in Colorado during the 60-day periods immediately preceding future general elections.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 12, 2014.

s/ David N. Bossie
David N. Bossie
President, Citizens United

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-cv-02266-RBJ

CITIZENS UNITED, a Virginia Non-Stock Corporation,

Plaintiff,

v.

SCOTT GESSLER, in his official capacity as Colorado Secretary of State; and SUZANNE STAIERT, in her official capacity as Colorado Deputy Secretary of State,

Defendants.

SECRETARY'S BRIEF IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION [DOC. 4]

If the Supreme Court has woven a single unifying thread into the past several decades of its campaign finance jurisprudence, it is this: while bans on political speech – in whatever form – are constitutionally suspect, disclosure requirements are typically not. Because this case involves disclosure, and disclosure alone, it is important to recognize this distinction from the outset.

The constitutional parameters of campaign finance law are ever-evolving, and as a consequence the Supreme Court has laid out only a few hard and fast rules since its seminal opinion in *Buckley v. Valeo*, 424 U.S. 1 (1976). Among those are the application of strict scrutiny to outright prohibitions on campaign-related expenditures, accompanied by a less rigorous examination of laws that require only disclosure of spending on those same activities. Because "disclosure requirements impose no ceiling on campaign-related activities," *id.* at 64, they "do not prevent anyone from speaking." *McConnell v. Federal Election Comm'n,* 540 U.S. 93, 201

(2003). Disclosure requirements are thus subject to exacting scrutiny, which "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United v. FEC,* 558 U.S. 310 366-67 (2010); *Free Speech v. Fed. Election Comm'n,* 720 F.3d 788, 792-93 (10th Cir. 2013).[1]

There can be no doubt that most ordinary disclosure requirements satisfy this test. Indeed, Plaintiff is certainly aware that the Supreme Court has already strongly endorsed mandatory disclosure and disclaimer provisions applicable to "electioneering communications" that are qualitatively identical to the speech at issue here. *Citizens United*, 558 U.S. at 371 ("We find no constitutional impediment to the application of BCRA's disclaimer and disclosure requirements to a movie broadcast via video-on-demand"). In this lawsuit, Plaintiff has thus shifted its tack by reframing its challenge to Colorado's disclosure laws as a complaint about the allegedly unequal coverage of Colorado's press exemption. Rather than arguing as it did in *Citizens United* that Colorado's substantial interest in ensuring that its electorate is informed does not justify compulsory disclosure, Plaintiff instead asserts that it is unfair for Colorado to compel disclosure from Citizens United while simultaneously exempting the *Denver Post*, the *New York Times*, and other

[1] In *McCutcheon v. Federal Election Comm'n,* 134 S.Ct 1434, 1444 (2014), the Supreme Court applied "exacting scrutiny" somewhat more stringently in the context of a limitation on contributions. In the wake of *McCutcheon,* the federal circuit courts of appeals have not imported this stricter formulation of "exacting scrutiny" into the disclosure context. *See, e.g. Libertarian Party of Ohio v. Husted,* 751 F.3d 403, 413-14 (6th Cir. 2014); *Wisconsin Right to Life v. Barland,* 751 F.3d 804, 840-41 (7th Cir. 2014); *Vermont Right to Life Comm., Inc. v. Sorrell,* 2014 WL 2958565, at *36-37, Case No. 12-2904-cv (2d Cir. July 2, 2014)).

traditional media organizations. Curiously, Plaintiff manages to articulate this argument without ever uttering the phrase "equal protection," either in its complaint or its motion for a preliminary injunction. Terminology aside, the reason for this shift is transparent – having lost its challenge under the *exacting* scrutiny standard applicable to disclosure requirements under the First Amendment in *Citizens United*, Plaintiff has developed a new legal theory designed to secure the application of *strict* scrutiny to Colorado's allegedly differential treatment of political speakers.

This Court should deny the Plaintiff's motion for a preliminary injunction. At the threshold, the United States Supreme Court has repeatedly suggested its approval of the lines drawn between the traditional press and entities like Citizens United. Binding Supreme Court precedent therefore strongly suggests that Plaintiff is unlikely to prevail on the merits of its claim. Nor will compliance with Colorado's disclosure requirements for electioneering communications irreparably injure Citizens United. And finally, the issuance of an injunction – especially one that suspends Colorado's disclosure requirements across the board – would substantially harm the ability of Colorado's electorate to properly evaluate the political messages that, as the general election approaches, have already begun to flood the airwaves and pervade public consciousness.

I. Preliminary injunction standards.

When seeking a preliminary injunction, a plaintiff must show that the right to relief is clear and unequivocal. *Schrier v. University of Colorado*, 427 F.3d 1253,

1258 (10th Cir. 2005). Plaintiff, as movant, must establish that (1) it will suffer irreparable injury unless the injunction issues; (2) the threatened injury outweighs damage the proposed injury may cause the opposing party; (3) the injunction would not be adverse to the public interest; and (4) there is a substantial likelihood of success on the merits. *Id.* A request for a preliminary injunction seeking to alter the status quo is disfavored and, as such, is to be more closely scrutinized. *Id.* at 1259.

It is the movant's burden to establish that each of the first three factors tips in the movant's favor. *Heideman v. South Salt Lake City*, 348 F.3d at 1182, 1188-89 (10th Cir. 2003). Where the moving party has established that the first three facts "tip *decidedly* in its favor, the 'probability of success requirement' is somewhat relaxed." *Heideman v. South Salt Lake City*, 348 F.3d at 1189. In such cases, the court must employ a "fair ground for litigation standard." *Id.* However, the Tenth Circuit has also stated that, in cases in which a party seeks to enjoin governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the court must apply the more rigorous "substantial likelihood of success" requirement regardless of the determination of the first three factors. *Id.* Here, Plaintiff seeks to enjoin governmental action taken in the public interest pursuant to Colorado's Constitution and statutory campaign finance code. Therefore, any award of a preliminary injunction must be based on a finding that Citizens United has a substantial likelihood of success on the merits.

The Tenth Circuit applies a heightened standard to three types of preliminary injunctions: (1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief it could recover at the conclusion of a full trial on the merits. *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1048 (10th Cir. 2007). A preliminary injunction falling into one of these categories "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *Id.* 1048-49 (quoting *O Centro Espirita Beneficiente União Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc), *aff'd and remanded, Gonzales v. O Centro Espirita Beneficiente União Do Vegetal*, 546 U.S. 418 (2006). Plaintiff must "make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms." *Id.* at 1049 (quoting *O Centro*, 389 F.3d at 976).

The status quo is "the last uncontested status between the parties which preceded the controversy until the outcome of the final hearing." *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.,* 269 F.3d 1149, 1155 (10th Cir. 2001) (quoting *SCFC ILC, Inc. v. Visa USA, Inc.,* 936 F.2d 1096, 1098 (10th Cir. 1991)). To assess the status quo, the court must look "'to the reality of the existing status and relationship between the parties and not solely to the parties' legal rights.'" *Schrier* at 1260 (quoting *SCFC ILC, Inc.* 936 F.2d at 1100, n. 8). Here, by requesting that the Court enjoin Colorado's long-standing disclosure laws, Plaintiff seeks to radically alter the status quo. As explained in more detail below, taken to

its logical conclusion, Citizen United's complaint seeks nothing less than an end to campaign finance disclosure in its entirety.

II. Factual and legal background.

The parties appear to be in agreement on many of the facts. For example, there is no dispute that, among other things, Citizens United produces, markets, and distributes films on various topics, including some political figures. These films are often released shortly before an election in which the political figure is a candidate, and historically have amounted to "a feature-length negative advertisement that urges viewers to vote against" the candidate. *Citizens United,* 558 U.S. at 325. There is likewise no dispute that prior to 2010, Citizens United was required to comply with federal disclosure and disclaimer requirements for films and associated advertising that related to federal candidates. *See* FEC Advisory Opinion No. 2004-30. In 2010, and notwithstanding the Supreme Court's endorsement of disclosure in *Citizens United,* the Federal Election Commission reversed itself, finding that FECA's press exemption applied to Plaintiff's films. *See* FEC Advisory Opinion No. 2010-08.

It is unclear from the complaint when Citizens United decided to make a film touching on Colorado politics, but in April 2014 Plaintiff filed a petition for a declaratory order with the Colorado Secretary of State ("the Secretary"), requesting that the Secretary affirm that it was exempt from disclosure under Colorado law. As the state's chief elections officer, the Secretary is empowered to administer and enforce Colorado's campaign finance laws, which appear both in article XXVIII of

the Colorado Constitution ("Amendment 27") and in the Fair Campaign Practices Act ("FCPA"). *See* Colo. Const. art. XXVIII, § 9(1)(b); *see also* C.R.S. § 1-45-111.5. Under Colorado law, however, the Secretary's interpretive latitude is limited where the language of Amendment 27 and the FCPA is clear. *See, e.g., Colorado Ethics Watch v. Gessler,* 2013 COA 172M (Colo. App. Dec. 12, 2013), *petition for writ of certiorari pending*.

As the Secretary's declaratory order stated, Colorado law on this point is clear. *See Complaint* Ex. B [Doc. 1-2] at 5-8. Plaintiff's planned half-hour film, *Rocky Mountain Heist,* is an electioneering communication because it will: 1) unambiguously refer to a candidate for the office of Governor, and 2) be distributed to members of Colorado's electorate within sixty days before the general election. Colo. Const. art. XXVIII, §2(7)(a); C.R.S. § 1-45-103(9). Whether the film would also amount to an "expenditure" was less clear at the time of the declaratory order,[2] but either way *Rocky Mountain Heist* does not qualify for Colorado's press exemption because it is not print media, will not be produced by a broadcast facility, and does not meet the requirements of the "regular business" exception as that provision has been interpreted by Colorado courts. *See Complaint* Ex. B [Doc. 1-2] at 5-8, *citing Colorado Citizens for Ethics in Gov't v. Comm. for the American Dream,* 187 P.3d 1207 (Colo. App. 2008) (interpreting Amendment 27's "regular business" exception

[2] Because the film was not complete at the time of the declaratory order, the Secretary offered no opinion as to whether it amounted to an "expenditure" under Colorado law. Plaintiff's complaint sheds no additional light on this question, but its motion for preliminary injunction states that the film and/or its advertising will contain express advocacy. Doc. 4 at 9.

"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").

Under the status quo, Citizens United will be required to file reports disclosing its electioneering communications once it has spent more than $1000 on distribution and/or advertising of the film. Colorado's definition of "electioneering communications" does not encompass Citizens United's production budget. Thus, assuming that the film does not contain express advocacy, the $548,975 that Plaintiff alleges is "dedicated to production" would not be subject to disclosure. *Complaint* ¶ 29. Likewise, if the film is only an electioneering communication, Plaintiff would be required to disclose only the identity of its contributors who contributed more than $250 *and* specifically earmark that amount for the film project. *See* 8 Colo. Code of Regulations 1505-6, Campaign Finance Rule 11.1.

If the film amounts to an "expenditure" – *i.e.,* if the production of *Rocky Mountain Heist* involves the money spent "for the purpose of expressly advocating the election or defeat of a candidate," Colo. Const. art. XXVIII, § 5(8)(a)[3] – then Citizens United's disclosure obligations would be more comprehensive. Assuming an absence of candidate coordination, Citizens United would be required to register

[3] To qualify as an expenditure under Colorado law, the film must contain actual express advocacy in the form of *Buckley*'s "magic words." *See Colo. Ethics Watch v. Senate Majority Fund,* 269 P.3d 1248, 1250-51 (Colo. 2012), *citing Buckley,* 424 U.S. at 44, n.52. Thus, even if the film is the "functional equivalent of express advocacy," it will not amount to an expenditure unless it "explicitly exhort[s] the viewer or reader to vote for or against a candidate in the upcoming election." *Senate Majority Fund,* 269 P.3d at 1255.

as an independent expenditure committee, periodically report the committee's activities,[4] and place a disclaimer identifying itself on the film and its advertising. C.R.S. § 1-45-107.5. Identification of contributors would be required only where a contributor, "for the purpose of making an independent expenditure, donates more than two hundred fifty dollars per year to the person expending one thousand dollars or more on an independent expenditure." C.R.S. § 1-45-107.5(3)(b)(I).

III. Standard of review and burden of proof.

A. Standards applicable to as-applied and facial challenges.

Citizens United raises both facial and as-applied challenges to Colorado's disclosure scheme for electioneering communications and independent expenditures. In an as-applied challenge to a law that might infringe on the exercise of First Amendment rights, the proponent of the law (i.e., the government) "bears the burden of establishing its constitutionality." *Colorado Right to Life Committee v. Coffman,* 498 F.3d 1137, 1146 (10th Cir. 2007) ("*CRLC*").

A facial constitutional challenge, in contrast, seeks to invalidate a statute or regulation itself, rather than focusing on a particular unconstitutional application of the statute or regulation. *United States v. Frandsen,* 212 F.3d 1231, 1235 (11th Cir. 2000). Because a facial challenge seeks such broad relief, it requires a plaintiff to make a correspondingly broad showing of unconstitutionality in order to succeed. *See Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 449 (2008)

[4] This would not involve Citizens United opening its books to the public. Here, the independent expenditure committee would simply be required to report the spending associated with the production and distribution of *Rocky Mountain Heist.*

("a plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.,* that the law is unconstitutional in all of its applications"), *quoting United States v. Salerno,* 481 U.S. 739, 745 (1987). The Tenth Circuit has "left undecided whether a plaintiff making a facial challenge must establish that no set of circumstances exists under which the Act would be valid," instead holding that "it is clear a litigant cannot prevail in a facial challenge to a regulation or statute unless he at least can show that it is invalid in the vast majority of its applications." *See Hernandez-Carrera v. Carlson,* 547 F.3d 1237, 1255-56 (10th Cir. 2008) (internal quotations and citations omitted).

B. Plaintiff's claims should be analyzed under, at most, intermediate or exacting scrutiny.

Plaintiff maintains that strict scrutiny should apply because Colorado's press exemption "burden[s] the speech of some speakers, but not others, based on the speakers' identity[.]" Doc. 4 at 13. This argument has elements of both equal protection and First Amendment law, but irrespective of the framework employed this Court should decline to apply strict scrutiny. Even if Colorado's disclosure laws were identity-focused – and they are not – they impose a form of regulation entirely distinct from speech bans. Except under very limited circumstances not alleged here,[5] disclosure requirements place no limit on the amount or quantity of speech

[5] In *Brown v. Socialist Workers Party*, 459 U.S. 87 (1974), for example, the Court held that applying a disclosure law to an unpopular minor political party would unconstitutionally chill political participation due to the risk of threats, harassment, or reprisals from either Government officials or private parties. *See*

that an individual or organization may disseminate. For that reason, the Supreme Court has declined to import the strict scrutiny standard that it applies to contribution and expenditure limits into the disclosure context, instead applying the more relaxed "exacting scrutiny" standard in cases involving challenges to disclosure laws. This Court should follow the Supreme Court's lead.

1. Colorado's disclosure laws neither ban any speech nor discriminate based on the identity of the speaker.

In support of its strict scrutiny argument, Plaintiff relies primarily on *Citizens United* and *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978). Citizen United's examination of these cases is undermined by its elision of several key aspects of the Supreme Court's analysis.

First, neither *Citizens United* nor *Bellotti* involved a simple "burden" on corporate political speech.[6] Rather, both cases struck down an outright ban on speech, while simultaneously extolling the virtues of compelled disclosure. *See Bellotti,* 435 U.S. at 792, n.32 ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected"); *Citizens United,* 558 U.S. at 370

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also Doe v. Reed, 561 U.S. 186 (2010). Plaintiff does not allege that it faces these challenges, instead offering only a conclusory allegation that compliance with Colorado's disclosure laws "is likely to chill the speech of Citizens United and those individuals who wish to support Citizen United's speech[.]" Doc. 1 ¶ 44.

[6] *Bellotti* was also decided solely in the context of speech regarding a ballot measure, rather than a candidate election. The Tenth Circuit has held that corruption concerns are attenuated with respect to ballot issues and that public interest in disclosure is somewhat diminished as a result, particularly where "contributions and expenditures are slight." *Sampson v. Buescher,* 625 F.3d 1247, 1259 (10th Cir. 2010).

("The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."). Here, by contrast, no provision of Colorado law prohibits Plaintiff from making its film, distributing it, and spending unlimited amounts of money promoting it. All that Colorado law requires is compliance with the state constitution's modest disclosure requirements for electioneering communications and expenditures. Thus, to the extent that Plaintiff's challenge arises under the First Amendment, this Court should distinguish it from cases involving speech bans, and decline to apply strict scrutiny for that reason.

Second, Plaintiff's complaint about identity-based discrimination hinges on its assumption that its identity is the determinative factor as to whether it qualifies for the media exemption. This assumption is incorrect. As explained in more detail *infra*, Colorado's laws are identity-neutral. The *Denver Post*'s newspaper or website would normally be regarded as press, but if that same organization changed its manner of speech, releasing a movie identical to *Rocky Mountain Heist*, the press exemption would likely not apply and Amendment 27 would require disclosure. *See, e.g., Reader's Digest Assn. v. Federal Election Comm'n,* 509 F.Supp. 1210, 1214 (S.D.N.Y. 1981) (rejecting assertion that the press exemption would "exempt any dissemination or distribution using the press entity's personnel or equipment, no matter how unrelated to its press function"). Likewise, if an organization that had

not previously been recognized as a press entity in Colorado began distributing a periodical newsletter in Colorado that interspersed news and commentary, that communication would very likely qualify as press irrespective of the organization's identity or ideology.

Third, even assuming *arguendo* that Plaintiff is correct, and that Amendment 27 differentiates between certain speakers based on their identity, Plaintiff's argument ignores not only substantial precedent to the contrary, but also the focus of the *Citizens United* opinion itself. As such, even if Plaintiff is correct that Colorado's disclosure laws draw distinctions based on the identity of the speaker, binding precedent forecloses the application of strict scrutiny here.

Plaintiff conflates *Citizen United*'s criticisms of the corporate independent expenditure ban, and the Court's grounds for invalidating it, with its 8-1 endorsement of the accompanying disclosure provisions. Plaintiff's argument rings hollow with respect to both points. First, as Justice Stevens' *Citizens United* dissent pointed out, identity-based distinctions are a regular feature of both First Amendment law in general, and campaign finance in particular. 558 U.S. at 419-423 (Stevens, J., dissenting). This trend has continued in the years after *Citizens United* was decided. Both federal and state law, for example, provide that an organization owned or controlled by a political party cannot claim the press exemption. 2 U.S.C. § 431(9)(B)(i); Colo. Const. art. XXVIII, § 7(b)(I). And in the wake of *Citizens United,* courts have continued to uphold bans on direct corporate

contributions to candidates. *See, e.g., United States v. Danielczyk,* 683 F.3d 611 (4th Cir. 2012).

2. Because the disclosure requirements do not limit the quantity of Plaintiff's speech, they should be analyzed under exacting scrutiny or a "time, place, manner" framework.

While exacting scrutiny remains the most obvious alternative in challenges of the type presented here, Colorado's disclosure requirements for electioneering communications and independent expenditures can also be analogized to "time, place, and manner" restrictions on speech, because rather than acting as a prior restraint, they simply impose reasonable, content-neutral conditions on the dissemination of electioneering communications and express advocacy.[7] Because Colorado's exemptions are content and identity neutral, they are not, virtually by definition, an "attempt to give one side of a debatable public question an advantage in expressing its views to the people." *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994). As "a less restrictive alternative to more comprehensive regulations of speech," *Citizens United,* 558 U.S. at 369, the indirect impact of the disclosure laws on a speaker's engagement in the political process does not warrant strict scrutiny.

The standards under exacting scrutiny and for time, place, and manner restrictions are remarkably similar. Exacting scrutiny "requires a 'substantial

[7] The Secretary acknowledges that *Buckley* explicitly rejected a "time, place, and manner," analysis for the across-the-board limitations on contributions and expenditures that were at issue in that case. *See Nixon v. Shrink Missouri Gov't PAC,* 528 U.S. 377, 386 (2000), *citing Buckley*, 424 U.S. at 15-16. However, the Court has not extended that portion of its analysis to any type of disclosure requirements, including those that are issue here.

relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Free Speech,* 720 F.3d at 792-93. Likewise, intermediate scrutiny that is applied to content-neutral time, place and manner restrictions requires a showing of 1) a substantial governmental interest, that 2) is "'narrowly drawn' to serve that interest 'without unnecessarily interfering with First Amendment freedoms." *American Target Advertising, Inc. v. Giani,* 199 F.3d 1241, 1247 (10th Cir. 2000). Where the regulatory requirements are reasonable and leave open "ample alternative channels of communication," they will satisfy the time, place, and manner standard. *Wells v. City & County of Denver,* 257 F.3d 1132, 1145 (10th Cir. 2001). Whichever of these standards the Court applies, Plaintiff is unlikely to prevail on the merits of its challenge.

IV. Plaintiff is unlikely to prevail on the merits of its First Amendment claim.

Colorado's disclosure requirements pass constitutional muster under either exacting scrutiny or a "time, place, and manner" approach. At the threshold, there can be no serious dispute that disclosure of electioneering communications and independent expenditures is closely related to Colorado's substantial interest in ensuring that its electorate is informed. *See Republican Party v. King,* 741 F.3d 1089, 1095 n.3 (10th Cir. 2013) ("The Court upheld disclosure requirements at issue in *Citizens United* because they provided the electorate with information about the identity of the speaker and did not impose a chill on political speech, even for independent expenditures."). "[P]rompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and

elected officials accountable for their positions and supporters." *Citizens United* 558 U.S. at 370. While the First Amendment protects Citizens United to release its film without governmental interference, "disclosure permits citizens and shareholders to react" to its advocacy "in a proper way." *Id.* at 371.

Amendment 27's press exemption is crafted in a way that sufficiently links the scope of disclosure – and what speech triggers it – with that governmental interest. Generally speaking, the justifications for requiring disclosure apply more strongly to isolated instances of political advocacy than they do to speech by institutionalized and longstanding press entities. Newspapers, periodicals, and recurring television broadcasts all require, by definition, long-term, repeat participation. Voters can track these messages and determine who is responsible for them by, for example, examining the masthead or the editorial page of a newspaper, and observing the publication's advertising practices. Over time, Colorado's citizens can gauge the trustworthiness of a particular source based on their perception of its ideology and track record. Interested electors can even respond to reporting or opinions they take issue with, by calling a news station, writing letters to the editor, or even by founding their own competing press entity.

None of these informational advantages accrue to the viewer or reader of drop-in political advocacy like a standalone film, a single election mailer, or an anonymous website that appears for only a few weeks before an election. A speaker's identity often matters to evaluating the credibility of the speech. *Bellotti,* 435 U.S. at 792, n.32; *see also Citizens Against Rent Control/Coalition for Fair*

Housing v. Berkeley, 454 U.S. 290, 299-300 (1981) ("The integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed; if it is thought wise, legislation can outlaw anonymous contributions."). Isolated instances of anonymous political advocacy leave voters adrift, without the means of evaluating the message that are associated with the established, institutional reputations of those entities that would qualify for Colorado's press exemption. While there are certainly exceptions, exacting scrutiny requires only "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *McCutcheon v. Federal Election Comm'n*, 124 S.Ct. 1434, 1456-57 (2014) (internal quotation omitted)

Applying a "time, place and manner" analysis would yield the same result. As already noted, there is a substantial governmental interest in promoting disclosure, and compliance with Colorado's law not only places a minimal burden on Citizen United's proposed activities, but also leaves open multiple disclosure-free avenues of communication should Citizens United choose to take advantage of them. These reasonable requirements "do not prevent anyone from speaking." *McConnell,* 540 U.S. at 201. Indeed, *Citizens United* expressly rejected such a claim in any event, "find[ing] no constitutional impediment to the application of BCRA's disclaimer and disclosure requirements to a movie broadcast via video-on-demand." 558 U.S. at 371. Plaintiff is thus unlikely to prevail on the merits of its First Amendment claim.

V. To the extent Plaintiff's argument is grounded in equal protection principles, it is unlikely to succeed on the merits.

A review of the preliminary injunction motion makes plain Plaintiff's belief that Colorado's application of the press exemption to traditional press entities, but not to Citizens United, amounts to unequal and unfair treatment of the laws. Assuming that Plaintiff does not ground its argument solely in First Amendment principles, the Fourteenth Amendment's Equal Protection Clause becomes equally important. In fact, Plaintiff's advocacy for the application of strict scrutiny suggests that it is, in fact, asserting an equal protection claim—as already discussed, if Plaintiff's claim were a pure First Amendment challenge to Colorado's disclosure requirement, strict scrutiny would be off the table. *See, e.g., Republican Party v. King,* 741 F.3d 1089, 1095 n.3 (10th Cir. 2013) ("Disclosure and disclaimer requirements…are subject to 'exacting scrutiny'"); *Olson v. City of Golden,* 541 Fed. Appx. 824, 830 (10th Cir. 2013) ("In cases such as this one, which involve challenges to the constitutionality of disclosure requirements, the relevant constitutional test is "exacting scrutiny…").

This makes it all the more remarkable that both Plaintiff's complaint and preliminary injunction motion virtually ignore the fundamental prerequisites for asserting an equal protection claim, offering little more than oblique and conclusory assurances that "[t]here is no conceivable basis" for applying the press exemption to some entities, but not to Citizens United's documentary filmmaking. Doc. 4. at 22. Even this brief reference, however, misses the point. *Of course* it is possible for

differently situated speakers to produce virtually identical products. But in an equal protection challenge, one does not pull out a slide rule in order to measure the degree of similarity between two different types of *speech*. Rather, the relevant inquiry requires the Court to first examine the *speakers themselves* to determine whether they are similarly situated.[8] While Plaintiff spends pages and pages preemptively disparaging Colorado's justifications for requiring disclosures associated with *Rocky Mountain Heist*, neither the complaint nor the preliminary injunction motion ever even attempts to show that Citizens United is similarly situated to those entities that qualify for the press exemption. Assuming that Plaintiff intends to advance an equal protection claim at all, this is a significant oversight, and one that should prove fatal to Plaintiff's claim.

A. Plaintiff is not similarly situated to those entities that qualify for the press exemption.

"The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn,* 505 U.S. 1, 10 (1992). Although Plaintiff suggests otherwise, there are principled and meaningful distinctions between Citizens United and those entities covered by Colorado's press exemption.

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[8] It is possible for a press entity to create content that is not covered by the media exemption. *See, e.g., Reader's Digest Assn. v. Federal Election Comm'n,* 509 F.Supp. 1210, 1214 (S.D.N.Y. 1981) (rejecting assertion that the press exemption would "exempt any dissemination or distribution using the press entity's personnel or equipment, no matter how unrelated to its press function"); *see also MCFL,* 479 U.S. at 250-51 (while pro-life group's regular newsletter may have been subject to press exemption, "Special Edition" was not). Irrespective of a particular publication's content or look, however, it is not exempt unless it has been created by an entity that fits within the criteria established by Colo. Const. art. XXVIII.

The most in-depth analysis of this question appears in *Bailey v. State of Maine Comm'n on Governmental Ethics and Election Practices,* 900 F.Supp.2d 75 (D.Me. 2012). *Bailey* involved a challenge by an anonymous blogger who created a website, called "The Cutler Files," that was devoted to attacking gubernatorial candidate Elliot Cutler. *Id.* at 78-79. The blog was an independent expenditure, but did not comply with applicable disclosure and disclaimer laws. *Id.* at 80. After the state election commission imposed a fine for violation of Maine's campaign finance laws, the blogger sued, arguing in part that the state's refusal to apply the press exemption to his website violated the Fourteenth Amendment's guarantee of equal protection.

The *Bailey* court rejected the blogger's position at the threshold, finding that he was not similarly situated to the type of traditional press entity that was covered by the media exemption. The court freely acknowledged that the advent of the internet has changed the media landscape – by, for example, substantially shortening the news cycle. This was consistent with FEC's acknowledgement that "periodical" should not cover just print publications that are issued on a regular schedule, but also websites and other similar outlets that "are covering and reporting news stories in the same way that traditional media entities have reported on newsworthy events[.]" 71 Fed. Reg. 18589, 18610.

Press status is thus not dependent on the medium of transmission. Instead, consistent with the Supreme Court's guidance in *MCFL,* "courts must look to a combination of factors pertaining to the form of a publication to distinguish

'campaign flyers from regular publications.'" *Bailey*, 900 F.Supp.2d at 90, *quoting MCFL*, 479 U.S. at 251. Thus, to support its conclusion that "The Cutler Files" website did not qualify for the media exemption, the *Bailey* court looked to the fact that the website was only live for two months, that the content was static, and that "at the time of the publication, Bailey was a paid political consultant for an opposing candidate." *Bailey,* 900 F.Supp.2d at 90-91. No one of these factors was dispositive on its own, but after reviewing the totality of the circumstances the Court concluded that "the undisputed facts of this case establish that the Cutler Files was more like a negative campaign flyer than a periodical publication," and thus "rightfully did not fall within the press exemption for a periodical publication." *Id.* at 91.

Rocky Mountain Heist does not purport to be a periodical publication, but this Court should nonetheless adopt the same multi-factor approach as *Bailey* to determine whether the film's creator qualifies as a press entity. One sharp distinction between Plaintiff and most traditional press entities is its corporate form and mission. Unlike most traditional media, Citizens United is a 501(c)(4) social welfare organization with an overtly ideological focus. It does not hold itself out as a news organization, instead stating that: "Through a combination of education, advocacy, and grass roots organization, Citizens United seeks to reassert the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security."[9] Unlike many traditional media

[9] http://www.citizensunited.org/who-we-are.aspx, *last visited* September 2, 2014.

organizations, which commonly receive monetary support from advertisers, Citizens United solicits monetary donations from individuals – donations that are shielded from public view – in order to fund its advocacy. And unlike traditional press entities, Citizens United's films are not released on a normal periodic schedule. Traditional press entities report on the news as it happens, rather than publishing their content only in the weeks leading up to the election.

This is not to say that any one of these factors is dispositive. Other nonprofits, for example, receive more funding through member donations than through advertising, but those who regularly report the news would presumptively qualify for the press exemption regardless of their corporate status. The plaintiff in *MCFL*, is a good example of this. That ideological non-profit published a regular newsletter that the Supreme Court suggested would have been entirely exempt from the challenged expenditure ban had it been the source of the editorial material that triggered the FEC's complaint. *MCFL,* 479 U.S. at 250-51. Similarly, traditional press entities – for-profit and non-profit alike – regularly editorialize and take positions on political races, although this type of commentary is typically interspersed with more standard news coverage. When it is not, however, as was the case in *MCFL* and *Readers Digest,* even a traditional press entity's activity will not meet the requirements of the press exemption. *See McConnell,* 540 U.S. at 208 (press exemption "does not afford *carte blanche* to media companies generally to ignore FECA's provisions"); *San Juan County v. No New Gas Tax,* 157 P.3d 831, 841 (Wash. 2007) ("The distinction between 'political advertising' and 'commentary' may

be relevant in deciding whether a media entity is performing a legitimate press function.").

Thus, it cannot be Citizen United's non-profit status, or even its ideological bent, that alone distinguishes it from an entity that is considered press. Rather, it is the totality of the circumstances surrounding its organization and practices. When those circumstances are considered together with the advocacy in and timing of the subject film, the distinctions between Citizens United and the traditional press are undeniable. As the Supreme Court noted when evaluating a similar film in *Citizens United*: "Citizens United argues that Hillary is just 'a documentary film that examines certain historical events.' We disagree. The movie's consistent emphasis is on the relevance of these events to Senator Clinton's candidacy for President," and as a consequence "there is no reasonable interpretation of Hillary other than as an appeal to vote against Senator Clinton." 558 U.S. at 325-26 (internal citation omitted). This Court should apply similar reasoning here. There are genuine differences between entities and activities that are clearly covered by the press exemption and those that are not. Those differences establish that Citizens United is not similarly situated to the traditional press. To the extent Plaintiff raises an equal protection challenge, it fails at the threshold.

B. Even if Plaintiff is similarly situated to entities that qualify for the press exemption, Colorado has ample justifications for the distinctions that it has drawn.

Assuming *arguendo* that Plaintiff is able to show that it is similarly situated to entities covered by the press exemption, rational basis should apply. Under this

level of review, the provision is presumed valid, and the classification must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313 (1993).

Relying solely on cases that involved outright speech bans, as opposed to disclosure requirements, Plaintiff argues that Colorado must advance a "compelling interest in applying its reporting and disclosure requirements in a discriminatory manner to some speakers…but not to others." Doc. 4. at 14. As the Supreme Court has often stated, however, disclosure requirements "do not prevent anyone from speaking." *Citizens United,* 558 U.S. at 365 (internal quotation omitted). Caselaw on the burdens associated with speech bans is therefore inapposite.

Instead, assuming that there is a need to reach the merits of an equal protection claim at all, this Court should apply a standard of review that is commensurate with the lesser nature of the burden imposed by Colorado's disclosure requirements. In the equal protection context, that standard is rational basis review. As the court noted when considering an equal protection challenge to a law on lobbying disclosures in *Many Cultures One Message v. Clements,* 830 F.Supp.2d 1111, 1192-93 (W.D. 2011), "while the exemptions plaintiffs challenge here may be directed at specific types of speakers, as discussed above they do not regulate speech *per se*, given that they are only exemptions from the reporting and disclosure requirements contained in" Washington law. While political speech is certainly a fundamental right, content-neutral disclosure requirements such as

those at issue here come nowhere near the "speech *restrictions* based on the identity of the speaker" that the *Citizens United* court suggested were "all too often simply a means to control content." 558 U.S. at 340.

For many of the reasons already discussed, the classifications set by Colorado's press exemption easily pass this test. Despite the advent of new media and distribution methods, there were and are real differences between an organization that provides periodic reports of happenings on the campaign trail and one that produces and distributes "feature-length negative advertisements that urge viewers to vote against" a particular political candidate. *Citizens United,* 558 U.S. at 325.

Moreover, as recently as *McConnell,* the Supreme Court recognized that "[a] valid distinction exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public." 540 U.S. at 208 (internal quotation and alteration omitted). Thus, the Court held that FECA's "narrow [press] exception is wholly consistent with First Amendment principles"). *Id.* at 209. This is consistent not only with the Court's earlier analysis in *MCFL,* but also with "[n]umerous federal statutes" that have distinguished between the institutional press and entities like Citizens United. *McConnell,* 540 U.S. at 208, *citing* 15 U.S.C. §§1801-1804 (providing limited antitrust exemption for newspapers); 47 U.S.C. §315(a) (excepting newscasts, news interviews, and news documentaries from the requirement that broadcasters provide equal time to candidate for public office); *see also Federal*

Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238, 244 (1986) (reviewing factors that distinguished one-off newsletter from institutional press).

VI. Because a preliminary injunction would run against the public interest, the balance of harms favors the State.

Plaintiff asserts that enjoining Colorado's disclosure requirements would be in the public interest, and that the balance of equities likewise tips in its favor.[10] These elements are best considered together because the public interest in this case is expressed in Amendment 27 itself: "…the interests of the public are best served by…providing for full and timely disclosure of campaign contributions, independent expenditures, and funding of electioneering communications[.]" Colo. Const. art. XXVIII, § 1.

Plaintiff asserts that the Tenth Circuit has held that a "First Amendment injury… 'outweighs any prospective injury' to the government caused by enjoining the enforcement of an invalid statute." Doc. 4 at 25, *quoting Utah Licensed Beverage Assn. v. Leavitt,* 256 F.3d 1061, 1076 (10th Cir. 2001). Here, however, the injury caused by enjoining the disclosure scheme would not be to the "government," it would be to the entire electorate of Colorado, prospective voters who would deprived of their ability to "make informed choices in the political marketplace." *McConnell,* 540 U.S. at 197. Colorado's voters recognized this when they approved Amendment 27 by a 2-1 margin in 1992. The voter information guide for that

[10] Plaintiff also alleges that it will suffer irreparable harm absent an injunction. The Secretary agrees that the irreparable harm element would be satisfied if, and only if, Plaintiff is able to show that the challenged disclosure laws actually violate its constitutional rights.

election pointed out that one goal of the amendment was providing "more information about who is spending money to influence elections." Exhibit A (Blue Book) at 6. The Blue Book, which "provides important insight into the electorate's understanding of the amendment when it was passed and also shows the public's intentions in adopting the amendment," *Grossman v. Dean,* 80 P.3d 952, 962 (Colo. App. 2003), advised voters that before 2002, "some types of political advertisements [were] not regulated and therefore [could] be paid for anonymously. The proposal gives people information about who is paying for these advertisements right before an election." Exhibit A (Blue Book) at 6. Amendment 27 was explicitly designed to ensure that disclosure accompanies the type of communications that *Rocky Mountain Heist* represents; enjoining Colorado's disclosure provisions immediately before an election would therefore run substantially counter to the public interest.

Make no mistake, Plaintiff's facial challenge is a frontal attack on *all* campaign finance disclosure – at least for spending by individuals and entities unaffiliated with candidates. If a "feature-length negative advertisement" qualifies for the press exemption, then so too would a qualitatively identical 30-second advertisement. To accept Plaintiff's broad view of the press exemption would allow the exception to swallow the rule and, in doing so, would harm not only Colorado's electorate but also the institution of the press itself. Indeed, the institutional press examines and relies on disclosures made by groups like Citizens United as part of the fact gathering process for its journalistic endeavors. *See* Exhibit A (Blue Book) at 7 (arguments against adoption of Amendment 27 note that "Press reports and

opposition campaigns already make the sources of candidates' funding public"). It would run substantially counter to the public interest to hastily erase the lines drawn by the press exemption – lines that on the federal level have been recognized and upheld for more than 40 years – and in so doing deprive Colorado's voters of the "transparency [that] enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 558 U.S. at 370. Yet that is precisely the relief that the Plaintiff demands.

CONCLUSION

For these reasons, Defendant respectfully requests that the Court deny Plaintiff's motion for a preliminary injunction.

Respectfully submitted this 4th day of September, 2014.

JOHN W. SUTHERS
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s/ Matthew D. Grove
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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2014, I served a true and complete copy of the within **BRIEF IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION** upon all parties through ECF-file and serve or as indicated below:

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/s Matthew D. Grove
Matthew D. Grove

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-cv-02266-RBJ

CITIZENS UNITED, a Virginia non-stock corporation,

Plaintiff,

v.

SCOTT GESSLER, in his official capacity as Secretary of State of the State of Colorado, and SUZANNE STAIERT, in her official capacity as Deputy Secretary of State of the State of Colorado,

Defendants,

and

COLORADO DEMOCRATIC PARTY, GAROLD A. FORNANDER, LUCÍA GUZMÁN, and DICKEY LEE HULLINGHORST,

Intervenor-Defendants.

REPORTER'S TRANSCRIPT
Hearing on Motion for Preliminary Injunction

Proceedings before the HONORABLE R. BROOKE JACKSON, Judge, United States District Court for the District of Colorado, commencing at 9 a.m., on the 16th day of September, 2014, in Courtroom A902, Alfred A. Arraj United States Courthouse, Denver, Colorado.

Proceeding Reported by Mechanical Stenography, Transcription Produced via Computer by Kara Spitler, RMR, CRR, 901 19th Street, Denver, CO, 80294, (303) 623-3080

APPEARANCES

THEODORE OLSON, AMIR TAYRANI, and LUCAS TOWNSEND, Gibson, Dunn & Crutcher, LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036 for plaintiff.

MATTHEW GROVE, LEEANN MORRILL, and KATHRYN STARNELLA, Colorado Attorney General's Office, 1300 Broadway, Denver, CO 80203, for defendants.

MARTHA TIERNEY, Heizer Paul, LLP, 2401 15th Street, Suite 300, Denver, CO 80202, for intervenors.

P R O C E E D I N G S

(In open court at 9 a.m.)

THE COURT: Good morning.

MR. OLSON: Good morning.

THE COURT: Have a seat, please.

14-cr-643, Citizens United vs. Scott Gessler, *et al.*

Appearances for the plaintiff.

MR. OLSON: Theodore Olson, Your Honor, Gibson, Dunn & Crutcher.

THE COURT: Good morning.

MR. OLSON: I'll have my colleagues introduce themselves.

MR. TAYRANI: I'm Amir Tayrani also from Gibson Dunn.

THE COURT: Thank you, sir.

MR. TOWNSEND: Lucas Townsend, also from Gibson, Dunn & Crutcher.

THE COURT: Mr. Townsend.

MR. BOOS: Michael Boos, vice president and general counsel, Citizens United.

THE COURT: Good morning, sir.

MR. BOOS: Thank you.

THE COURT: For the defendant.

MR. GROVE: Matthew Grove, Your Honor. With me are LeeAnn Morrill and Kathryn Starnella for the Secretary.

THE COURT: Thank you. Good morning.

And for the intervenors.

MS. TIERNEY: Thank you, Your Honor. Martha Tierney on behalf of the intervenor defendants, Colorado Democratic Party, Garold Fornander, Dickey Lee Hullinghorst, and Lucia Guzman.

All right. Thank you, all.

Mr. Olson or your colleagues, do you wish to make your argument.

MR. OLSON: Thank you, Your Honor.

Your Honor, this is a case -- and thank you for the privilege of being here in your court and for being able to participate in a hearing in this district court.

Your Honor, this is a case about the First Amendment. The most fundamental value in our Constitution, perhaps the most important of the protections given by the Bill of Rights, it's not unimportant that the First Amendment is the first

amendment, guaranteeing the rights of -- individual citizens the liberty and freedom to speak their points of view, speak their minds, to advocate and participate in the political process in this country. This is a straightforward First Amendment case.

Our opponents in their papers have done everything they possibly can to make this something else in order to defend a patently unconstitutional law, but it is impossible to defend the indefensible here. The attorney general wants to make this case into a equal protection case or a case about the benefits of financial disclosures. The Democratic party essentially ignores all of the real issues to stress the benefits they reap from disclosure under this law.

These arguments are what people who engage in the teaching of rhetoric call red herrings and straw men. Distract from the real issues, red herring; build a false structure and tear it down, a strawman.

The real issue in this case is whether Colorado can prefer some speakers over others and burdensome speakers, disadvantage them compared to other speakers. Government pick winners and losers in the battle of ideas.

The Court -- we have objected to witnesses and testimony and expert opinion and the Court has ruled on that, and of course we accept the ruling and will go forward. But we submit that the Court does not need witnesses, exhibits,

lengthy arguments, to decide the answer to the First Amendment question here. The government may not pick winners and losers in the game of ideas in this -- in the battle of who gets to say what.

THE COURT: What winners and losers are they picking? If you weren't representing Citizens United but were representing some far left group or Michael Moore, for example, the rules would be the same.

MR. OLSON: Yes, they would. But if we were representing a television station, a broadcaster, a periodical, we would not be making the same arguments because those -- the burdens of the statute are placed upon the Michael Moores, the Citizens United. It does not matter whether it's left or right. It's a burden upon certain types of speakers who have certain types of ideas, who have certain types of financing, who have certain status in the community. Those are the ones that have the burden.

The winners are the traditional -- and I will come back to this -- but the traditional, established, means of communication. The people that have the money to have a printing press and a regular publication. The people that have the money to have a broadcasting station and an FCC license and all the resources that go with that. Those are the winners under these statutes. They do not have the same burdens, obligations, and responsibilities that Citizens United or

Michael Moore, people on the right or left, it's really nothing about right or left.

THE COURT: The issue is whether Citizens United or any other group has to reveal their donors, right?

MR. OLSON: Yes. Reveal their donors, file reports, and that sort of thing.

THE COURT: Well, how would *The Denver Post* be expected to reveal its donors? What donors does *The Denver Post* have?

MR. OLSON: Precisely. *The Denver Post* receives revenue from subscribers who may be considered to be donors. Advertisers who may be considered to be donors, people that lend them money to put out their newspapers, who may be considered to be donors. *The New York Times* received an enormous amount of money in the form of a loan from Carlos Slim, one of the wealthiest people in Mexico, one of the wealthiest people in the world. He could be called a donor.

THE COURT: That's not in the record here.

MR. OLSON: That is a matter of public knowledge. But aside from that specific fact --

THE COURT: It's a matter of public knowledge that you wrote a piece in *The Wall Street Journal* or somewhere, *The New York Times*, that said Citizens United is open to disclose who they are.

MR. OLSON: Well, on an equal footing, Your Honor.

Where this case is not about the disclosure requirements. Now, because this case is --

THE COURT: It's not?

MR. OLSON: It is about the -- it's about whether or not the burdens of disclosure, the responsibilities of disclosure, the intrusiveness of disclosure will be applied even-handedly to different types of speakers. Speakers with different ideas, with different ways of presenting those ideas. Who are in the different -- have a different means of communication.

THE COURT: What's the burden of disclosure? I didn't see anything in the record that indicated there was much of any burden at all.

MR. OLSON: The burden is that it's required to file reports and list disclosures and list contributors. That's a burden. That's a requirement of the law that is imposed upon certain types of speakers --

THE COURT: Are we here because they have to file a report, or are we here because they don't want to disclose to the public who they are?

MR. OLSON: We are here because they do not want to have obligations imposed upon them that are not imposed upon other speakers. The, the -- if one reads the brief of the, of the attorney general, my client, and others like my client, are selected out because they are, for example, not traditional.

Because they are not established. Because they are not a part of the institutional press, because they are overtly ideological. This is what the attorney general says in, in the attorney general's papers.

THE COURT: But you will admit it's not content-based.

MR. OLSON: It is content-based because --

THE COURT: No, it's not based on the message. As you said earlier, I agree, it could be a right wing, it could be a left wing, it could be neutral. It's not based on the viewpoint.

MR. OLSON: It is based upon the viewpoint because the, the government, government of Colorado says it's not a traditional speaker. It is not a trustworthy speaker. Those are integrally related with the point of view. The words "overtly," "ideologically," Your Honor, that's a part of the point of view.

THE COURT: Where did the State of Colorado say that it's not a trustworthy speaker or that the newspapers are trustworthy? Where did they say that?

MR. OLSON: In their points and authorities in opposition to this preliminary injunction. I don't have a page number --

THE COURT: I'm not talking about what some lawyers are saying. I'm talking about what the constitution of the state of Colorado is saying.

MR. OLSON: I'm referring -- what the constitution and the laws of the state of Colorado put periodicals, newspapers, and broadcasters in one box. And the attorney general, the official spokesperson for the state of Colorado, in an attempt to justify that differential burden on speech, makes the points I was just making.

THE COURT: Are you suggesting that if *The Denver Post* wanted to create a movie which takes positions on candidates, that they wouldn't have to comply?

MR. OLSON: If, if -- no. If the broadcaster did that and broadcast it over the air, they would not have to comply. If *The Denver Post* -- and I don't know whether *The Denver Post* has a broadcasting facility, but many newspapers in the United States do -- if *The Denver Post* put the same content on the pages of their newspaper, and could illustrate it with pictures, they would not have to comply. And the attorney general's defense --

THE COURT: Well, let me ask about that.

This movie that we're talking about here that's about to come out includes, quote, unambiguous references to elected Colorado officials who are candidates for office in this year's general elections, true?

MR. OLSON: Correct.

THE COURT: And it doesn't endorse any particular person, true?

But it, quote, Likely includes events or participants expressly advocate the election or defeat of one or more candidates in the upcoming election.

So, if *The Denver Post* created a movie that did that and wanted to broadcast the movie, whether they have a broadcast facility or not, wanted to broadcast the movie in the same way that Citizens United is going to broadcast its movie, wouldn't *The Post* have to comply with this requirement?

MR. OLSON: It's my understanding that it would not. If it has a broadcast facility and the movie is broadcast over that facility, the requirements do not apply.

And the reasons -- I'd like to get into this some more.

THE COURT: Okay. Go ahead.

MR. OLSON: I'm happy to, of course, answer whatever questions you have in whatever order they occur, but I think it's important because we are talking about the discrimination takes place on the basis of the status of the speakers. Are you traditional. Are you a part of the institutional press. The point of view.

The points that the attorney general makes in the attorney general's opposition is that Citizens United is overtly ideological. Now, yesterday, I went back to the dictionary and looked up the word "ideological." It means, relating to ideas. But because Citizens United has a point of

view which the attorney general refers to as negative, criticizing --

THE COURT: Well, I don't know how they refer to it, but I don't refer to it as negative. I refer to it as a point of view that ought to be heard. But to me that isn't the issue I'm facing here.

No one's trying to keep Citizens United from being heard. The question is whether they have to disclose their donors. That's just as simple as it is.

MR. OLSON: It is as simple as that if you put all the speakers on equal footing. The United States Supreme Court has said again and again, discrimination between speakers based upon their status, their ideology, the manner in which they speak, and their point of view are highly, highly suspect --

THE COURT: Didn't the Supreme Court say, in your very case -- I don't mean you, maybe it was you, Citizens United's very case, the well-known case in the Supreme Court -- that disclosing donors wasn't an unreasonable burden?

MR. OLSON: The, the imposition of a disclosure requirement is not standing alone necessarily, it may depend upon the circumstances, it may depend upon the burden. The Supreme Court in that very case talked about the burdens imposed upon political action committees and how much that cost and how much that burden is. So it was discussed in the majority opinion in that case. With respect to the disclosure

requirements, the Supreme Court did indeed uphold those disclosure requirements. And we're not quarreling in that context with those requirements, Your Honor.

THE COURT: You can't quarrel with the Supreme Court.

MR. OLSON: Of course not.

THE COURT: At least I can't.

MR. OLSON: Of course not. But that is not, I submit, respectfully submit, the issue in this case. Because the issue in that case was not to disclosure requirements that were imposed on some speakers and not imposed on other speakers.

And the issue, I submit, is whether it be disclosure requirements or other things that the State might legitimately choose to do, if they choose to impose burdens or handicaps or some obstacles in some way upon some speakers, however reasonably they might be, the Supreme Court over and over again has talked about sign cases, people that go door to door, people that communicate in various different ways. Differentiation between commercial speech and noncommercial speech. Signs that are put up, persons that might want to put a sign in the window.

When the, when the, when the government says that you must have obstacles before you speak or when you speak, you must face different obligations and different requirements than other speakers, those kind of requirements are presumptively unconstitutional. They must be justified by the State under,

we submit, strict scrutiny, which means a compelling governmental interest which is addressed in a narrowly fashioned way.

Now --

THE COURT: If every person, entity that wanted to make a movie like this movie, including the government, including *The Denver Post*, including *The New York Times*, if every entity that wanted to put out one of these movies had to comply with these requirements, would you be happy to make your disclosures?

MR. OLSON: No, we think that the statute, this selecting out certain media, is an inseverable part of the entire scheme of things. That the government of Colorado -- and I would be surprised if the government or the Democratic party said anything inconsistent with this -- that the people would have intended to want the statute in place if it didn't impose those burdens on newspapers. Let's see how that would play out. Would the newspaper have to disclose, because it regularly engages in the kind of speech, the substance, same substance, maybe from a different point of view, maybe presented slightly differently, but the newspapers, talk radio, broadcasters, present these same sorts of ideas and would they have to be, would they have to disclose --

Let's say NPR, National Public Radio, which receives contributions every year from people that are contributing to

their expression of that point of view. Would NPR have to disclose all of those people that contributed. With respect to their broadcast. Would the talk radio stations here in Denver have to disclose the people that contribute or the people that subscribe or the people that use advertising, because they're financing the speech. That is a burden.

It may be a tolerable burden if it's applied evenhandedly under the right circumstances, but that's not the issue. This is a burden that is not imposed on a evenhanded basis, and we have cited case after case from the Supreme Court, including the Citizens United case -- one of the things that, if I may, Your Honor, the Citizens United court said is that discrimination -- laws that burden political speech are subject to strict scrutiny which requires the government to prove that the -- there's a compelling governmental interest and laws that distinguish under the First Amendment stands against attempts to disfavor certain subjects or viewpoints, distinguishing among different speakers, allowing speech by some or speech by others.

And that includes burdens upon speech by some, burdens upon speech by others, or not burdens on some. Are viewed with the highest disfavor because that is a way to prefer certain types of ideas.

And the government should not be involved in that. The government would treat speakers equally. If *The New York*

Times wants to say the same thing that Michael Moore does -- and God bless him, it's his right -- we are enriched in society with people like the folks behind Citizens United and the people behind Michael Moore because they are sometimes really rugged and tough speakers. That's what the Supreme Court refers to as rigorous, robust debate in the marketplace of ideas.

The First Amendment stands for the proposition that the marketplace of ideas is an important place for -- to be open to different points of view, to aggressive points of view, to negative points of view, to ideological points of view.

THE COURT: You know, all of that sounds really good, but I come back to where I started. Nobody is suggesting that Citizens United can't make and display this movie. Nobody is suggesting that their ideas won't be heard. The question is are the people who hear the ideas entitled to know where they're coming from. That's it. Are they entitled to know who's behind them.

MR. OLSON: But not if those same ideas are in *The Denver Post*. The people of Colorado aren't entitled to know that. If they're in *The Denver Post* or if on the radio station or on NPR. They're not entitled to know those things. So at the end of the day --

THE COURT: Well, do you -- in a sense, don't you, you know who the editors of *The Denver Post* are; it's right on

their masthead.

MR. OLSON: We know who the producers of this movie are because that's disclosed in the movie. Citizens United has made a dozen, two dozen movies over the last ten years, documentaries over various subjects, some of which are political, some not, some cover various different subjects; and who's making those movies, the individual officers of Citizens United, are disclosed just like the editors of the newspaper are disclosed and the producers of the newspaper are disclosed. But they don't have to file a report containing that because it's in their newspaper.

THE COURT: The newspaper, *The Denver Post*, as far as I know, doesn't have donors. Do they?

MR. OLSON: Well, we do know --

THE COURT: There's nothing in the record that says they do.

MR. OLSON: They have contributors. People that subscribe to the magazine are paying for the dissemination of those ideas.

THE COURT: They're buying a product. You're talking about people who are donating money to an organization.

MR. OLSON: To contribute to the production of the product.

THE COURT: Okay.

MR. OLSON: The money that comes from subscriptions,

the money that comes from advertisers, stockholders, make that communication possible. The money that comes from contributors and the sale of these DVDs are what's makes the Citizens United documentaries possible. There's no difference on the basis and there should not be under the First Amendment a difference because of the speaker's source of revenue to make that speech. There should not be a discrimination because you get your money from a donor and you get your money from a subscriber. That is discrimination. On a basis of the identity of the speaker.

And what we're talking about here, even if it was a slight burden, it's a burden, there's no question.

THE COURT: There's no evidence in the record that it's any kind of a burden, slight or not slight.

MR. OLSON: Well, I think, Your Honor, if you were to write an opinion and said that there is no burden of having --

THE COURT: No, that's a burden, but I'm saying that the record doesn't tell me much about what the burden is. There's talk in cases about, for example, if there were going to be threats against the donors; but there's nothing like that in this record. In this record, is there a burden, yes; if you have to file a report, I suppose that's a burden. But beyond that, there's nothing in the record that tells me what the extent of the burden is.

MR. OLSON: I would, I would, I would say that it is self-evident. It's a matter of judicial notice that it is a

burden to compile this information and to disclose this information; and if you want to find out, I would submit rhetorically, if you want to find out whether or not *The Denver Post* would consider that a burden, apply this law to them. If you want to find out whether --

THE COURT: I can't do that. I have to decide this case. That's all I've got.

MR. OLSON: I know. And you may decide this case in a way that would apply that burden to them. And I submit that they would demonstrate --

THE COURT: And if I did, you'd be happy then, you'd disclose happily?

MR. OLSON: As we argued in our briefs, we think that this exemption is not severable, that if you strike this exemption, we submit, of the state of California -- Colorado would not have enacted this statute without those exemptions for the media, the so-called mainstream media, or the traditional media, the words in the brief, the traditional media. The people that are already there. The people that have already spent money to build a publishing company. The people that have already spent money to get a broadcast license, they don't have these burdens.

However slight those burdens are, it's a burden. We submit they're not trivial burdens. And one could only imagine what *The Denver Post*, *The New York Times*, *The Wall Street*

Journal, or anybody that publishes a newspaper in Colorado or a periodical or has a broadcast station would say about I don't want to do that, and you can't make me do that under the First Amendment. There would be those arguments here.

But those arguments are not necessary here because the burden, which it does exist, however slight, does not, the magnitude of the burden is not as important as the fact that the burden is imposed unequally.

THE COURT: It sounds like you're making an equal protection argument, and yet you keep telling us, no, we're not.

MR. OLSON: We don't need to make an equal protection argument because the -- we have cited case after case after case that under the First Amendment, the identity of the speaker cannot be used to discriminate against one -- one group of speakers or another. The point of view cannot be a basis for discrimination.

THE COURT: It isn't. It isn't.

MR. OLSON: Well, when the --

THE COURT: The point --

MR. OLSON: The point of view says overtly ideological. One of the reasons --

THE COURT: That's the government's brief. I'm not concerned about that.

The statute and the, more importantly, constitution,

do not discriminate based on any point of view. This happens to be Citizens United. It could be anybody.

MR. OLSON: When you, when you discriminate -- and it is discrimination -- on the basis of whether you're a traditional speaker or someone that's an episodic speaker, whether you've got -- whether -- here's -- this is the justification that's offered by the State of Colorado for the statute. They have to give a reason. Some reason.

Whether or not you agree with us with respect to strict scrutiny or exacting scrutiny or some other kind of scrutiny, there has to be a justification because this does involve speech. It does involve political speech which is at the very, very core of the First Amendment. So we're talking about the most important value, the most important type of speech under the most important value in the Bill of Rights.

So we're -- when the government is imposing a burden, however it might be, however slight it might be or however significant, they must justify that burden, under some standard. We cite Supreme Court cases that say you must impose strict scrutiny. It must be a compelling governmental interest.

So you turn to the State which must justify what they're doing --

THE COURT: You might be better served if you concentrate on exacting scrutiny. I'm going to have difficulty

buying your strict scrutiny argument.

MR. OLSON: Well, that's simply what the Supreme Court has said on the basis of discrimination on speaker or point of view or perspective.

THE COURT: And I just don't see it here. I can't conceive of how you see it here.

MR. OLSON: Well, then, let's turn -- I respectfully disagree, of course --

THE COURT: Explain why. I want to know why.

MR. OLSON: Because the Supreme Court has said discrimination between speakers is usually or often a cover for discriminating against points of view.

THE COURT: But it isn't here. I don't conceive of how it is here.

MR. OLSON: Well, I'm simply reporting what the Supreme Court has said with respect to the kind of action that's taking place here.

THE COURT: It can be a pretext for discriminating on point of view. I get that. But here, I don't see that that has anything to do with this constitutional issue.

MR. OLSON: Well, the reason -- because it can be a pretext for discrimination on the basis of point of view and that is precisely what is said in Citizens United and the other cases --

THE COURT: It can be, but here it is not.

MR. OLSON: Therefore, because it can be, you have to look at it with strict scrutiny to make sure that it isn't. So when you do, when -- and exacting scrutiny is pretty exacting itself. And so, so I would submit --

THE COURT: Seems like they invent a new type of scrutiny every time you have a new case. Intermediate, exacting scrutiny.

MR. OLSON: Intermediate scrutiny and so forth. I understand, as an advocate, I understand the position that judges must be in when they're supposed to be trying to do this.

But I think at the bottom, what, what the court is saying is you must look at, because it involves speech and because it involves a burden on speech and particularly because it involves a burden on political speech, you've got to look at the motivation or the justification or the rationale, whether it's an exacting rationale or a compelling rationale, you've got to look at it and then you have to look at whether the measure that's taken is narrowly or reasonably or in a limited way to address the problem.

We've got a alleged problem and then what is the government's effort to deal with that problem. You have to look closely or exactingly or whatever you do, strictly, with respect to the motive and the ultimate result, how the State has tailored the objective that has enacted. So you have to

look at both of those things.

When you look at both of those things, one place to look at it is to the State itself. What has the State said in their submission to you about why this distinction exists. That's their proposed justification on whatever the standard is, that's their proposed justification. So their justification -- and I keep coming back to that -- is, well, traditional media are more dependable. They're more trustworthy. That's what is --

THE COURT: Well, now you might be doing one of those rhetorical things. You might be setting up and knocking down a straw man. Because, again, I emphasize, I'm not going to decide this case based on what the government says in their brief. I'm going to decide this case based on my view of the Constitution and how it applies here. I have to do that. I get all kinds of things said to me in briefs.

MR. OLSON: Well, this is an official government defense. Of a statute and constitutional provision in the state of Colorado. And at some point, the courts have to look at, well, what is proffered by the government to defend what it is doing.

Now, I can't think of any other defenses --

THE COURT: Well, if the government says, by definition a newspaper is more trustworthy than Citizens United, I will tell you, I don't buy it.

MR. OLSON: Very well. Then that proposed justification is not acceptable.

THE COURT: But it could be that people, just because a newspaper comes out every day, and they write editorials all the time, develop a sense for where they're coming from. Whereas, as you call it, episodic speaker, they might not have that sense and they may wish to know who it is that's behind the mask.

MR. OLSON: Right. And Citizens United has put out 24 documentaries over the last ten years, some of which have received awards. Now, an individual citizen said, I might trust *The Denver Post* more than I trust Citizens United. They're more dependable than Citizens United. Some people might say, I trust Citizens United more. Some people might say I trust Michael Moore.

But is that a basis of who might be perceived to be more trustworthy to say you have these burdens and the other ones don't. If it isn't trustworthy, it's certainly an argument that the State makes that it's traditional. If it's a traditional form of communication, we don't know quite why documentaries aren't a traditional form of communication. They're some of the most important -- documentaries in the form of film documentaries or in the form of nonfiction books. Those are important means of communication of ideas in this country.

Then -- here are the other words that are in the State's purported justification, that Citizens United and its documentaries are overtly ideological. That is to say, they have ideas in them. They urge action. Well, whether this movie urges action or not, I submit that when a speaker is urging action is not a basis to handicap that speaker.

It is not part of the -- Citizens United is not part of the establishment.

THE COURT: Editorials urge action.

MR. OLSON: Right. Exactly. That's my point.

THE COURT: That's the point.

MR. OLSON: That is -- that's my point is that *Denver Post* editorials urge action and the Citizens United documentaries, we don't know whether it urges action or it urges inaction, but that is not a basis for saying, if you are urging action, you will have to take additional responsibilities. The government uses the phrase "negative"; they say these documentaries that are put out by Citizens United are often negative. That is to say they're criticizing elected officials or candidates. That is to say there is a point of view there.

That is -- and if the justification is, we don't want to make it as easy to put out negative communications or ideological communications or communications that urge action. Those are distinctions on the basis of point of view. And

perspective. All of those things are wrapped up in the same thing, Your Honor. And I think that at the end of the day, this case -- and I would like to reserve the balance of my time --

THE COURT: Sure no. Problem.

MR. OLSON: -- because we're going to be hearing from witnesses and that sort of thing, but at the end of the day, this will come down to a requirement that you decide whether the government of Colorado or any other state or the federal government can put its thumb on the scale and make it slightly easier or substantially easier for some people to communicate ideas in this country. Than other people. And that other people have slightly more or significantly more burdens, they have more obligations, they have to do more paperwork, they're more responsible to disclosing what they're up to, where their source of revenue comes from. Some people have to do that. And other people don't have to do that.

And if there's a, if compelling or exacting justification for that is the measure that's enacted sufficiently and narrowly tailored to that justification. And I submit at the end of the day, the, the -- you may not discriminate on the bases that are listed by the State as their justification and I don't know what other justification there could be. Why is Citizens United or Michael Moore picked out for those obligations.

THE COURT: Is there a difference between the identity of the speaker and the form of the communication?

MR. OLSON: Both are, I think, significantly, important to the First Amendment. In many cases, the form of communication is identical with the identity of the speaker. In many cases, it's different.

THE COURT: I'm talking about this case.

MR. OLSON: Yes. In this case I would think that the form of communication is, relates to the identity of the speaker in this sense, and I've said this before. Do you have a big building here in which you can put out a newspaper. Have you invested money in a printing press, in a distribution system to circulate your newspapers. Have you gotten a license from the FCC to enable you to be a broadcaster.

The identity of the speaker is identified with people that are upstarts. The people that are new in this business or haven't got the resources, that are less established, maybe they're more radical, maybe they're more forceful. Maybe they're more against the establishment. That's the identity of people that don't have big buildings and licenses from the FCC.

Not always, but that's certainly a coordination and a relationship between the identity of the speaker and the types of ideas that are there. Not always. But you can't -- by making it more difficult to speak for people who are not the establishment, you're making it a little bit more difficult to

communicate antiestablishment ideas. And the First Amendment does not tolerate that.

THE COURT: All right. Thank you, Mr. Olson.

MS. MORRILL: Good morning, Your Honor. On behalf of the Secretary --

THE REPORTER: If you're going to speak, please go to the lectern.

THE COURT: Good morning, Ms. Morrill.

The best thing I can suggest is to speak loudly and to speak slowly.

MS. MORRILL: Will do, thank you.

At this time the Secretary would waive his opening argument and proceed to calling his first witness.

THE COURT: Okay.

MS. MORRILL: The Secretary calls Seth Masket.

(**SETH MASKET, DEFENDANTS' WITNESS, SWORN**)

THE COURT: Have a seat, please.

Tell me your name again.

THE WITNESS: My name is Seth Masket.

THE COURT: How do you spell Masket?

THE WITNESS: M-A-S-K-E-T.

THE COURT: Okay. Thank you.

DIRECT EXAMINATION

BY MS. MORRILL:

Q What do you do for a living, sir?

A I'm sorry?
Q What do you do for a living?
A I'm a professor of political science, associate professor, at the University of Denver. I'm also the department chair in political science.
Q Are you tenured?
A Yes, I am.
Q And how long have you been a professor with the University of Denver?
A Just over ten years.
Q Please describe your educational background for the Court.
A I have a bachelor's in political science from the University of California at Berkeley in 1991. 1996, I received a master's in campaign management from the George Washington University, and I have a Ph.D. in political science from the University of California at Los Angeles in 2004.
Q Broadly speaking, can you describe what the study of political science entails?
A Well, very broadly, it's the study of politics from a scientific perspective. That is, we look for regularities in political events, how voters choose between candidates, how office holders behave in office, how institutional choices change people's behavior. We propose hypotheses about the way the world works. Like other scientists, and we try to collect some sort of objective data to evaluate whether those

hypotheses are true or false.

Q And you're trained in doing all of those things that you just talked about by virtue of your, not only your education but also your professional experience being a professor?

A Yes, that's correct.

Q Please describe your own areas of research and focus within the broader field of political science.

A My research focuses on American politics with a specific focus on political parties, on state and local politics, on campaigns and elections. Campaign finance comes into play in a lot of these different areas.

Q In the course of focusing on American politics and campaign finance, have you had the opportunity to obtain specialized knowledge about campaign-finance disclosures?

A Yes. I actually rely on campaign-finance disclosures in a good deal of my research. I have been working on a book that includes a study of campaign-finance disclosure and campaign-finance rules in Colorado. Including the State's responses to campaign-finance reform passed in 2002, in the form of amendment 27.

I have additionally used campaign-finance disclosures to study party polarization in California, Nebraska, and several other states.

Q And any reference that use of campaign-finance disclosures in connection with the writing of a book, what is the name of

that book?

A That book is called *The Inevitable Party*. It is currently under contract with Oxford University Press. Hopefully to come out next year. It's a case study of several different states, looking at how state parties have responded to reforms designed to rein them in or even eliminate them.

Q And reforms in what context?

A Usually reforms directed against partisanship or parties. Including, say, nonpartisan legislatures in Nebraska and in Minnesota, including a nonpartisan recall election in California and also including campaign-finance reform in Colorado, one of the goals of which was to undermine the strength of parties and partisanship.

Q So will *The Inevitable Party* address both campaign-finance reform nationally and in Colorado?

A More focused in Colorado but, yes, national as well.

Q In addition to *The Inevitable Party*, have you published any other books in your field of study?

A Yes. I published a book in 2009 called *No Middle Ground*. This was with the University of Michigan Press. Which was a focus, specifically on party polarization in California with attempted understanding of how that state went from being one of the least partisan states in the country to being one of the most partisan states in just a few decades.

Q You're a tenured professor, you've testified to that. In

addition to research and publishing your own scholarship, do you teach?

A Yes, I do teach a variety of classes. Mostly in American politics.

Q And have you taught courses that are relevant to the opinions that you have developed in this case?

A Yes. I teach a campaigns and elections class. That includes, usually at least a week or two with a discussion of campaign finance, understanding limits, understanding spending limits and donation limits and at least some use of disclosures.

This also comes into play in my course on political parties and interest groups, where we spend a good deal of time looking at patterns in campaign donations, and using it to understand how parties and interest groups behave.

Q I just want to go back briefly to your publications. In addition to the two books that you've authored, have you also published any articles?

A Yes. I have published a little over 20 peer-reviewed articles. Appear in a variety of journals, including the *American Journal of Political Science*, the *Journal of Politics*, *State Politics* and *Policy Quarterly*.

Q And what -- as it relates to campaign finance in particular, what, what have those articles addressed?

A I've had a few coauthor articles recently on

campaign-finance reform, and particularly focused on the use of so-called 527 organizations. And the role that they play in, in modern political party system and in funding candidates.

Q What compensation are you receiving from your work in this case?

A I'm receiving $200 per hour.

MS. MORRILL: Your Honor, at this point we would tender Professor Masket as an expert in the field of campaign-finance disclosure.

MR. OLSON: No objection, Your Honor. We've articulated our objections already. You've ruled on them. As long as that's in the record, we have no objection to this witness testifying under these circumstances.

THE COURT: Thank you.

Onward.

BY MS. MORRILL:

Q Professor, what is your understanding of Citizens United's claims in this case?

A My understanding is that Citizens United seeks to create a film to be run largely on the topic of Governor John Hickenlooper, who is, of course, a candidate for reelection this November. They are seeking to create and distribute this film without disclosing the source of their donations and that the State objects to that.

Q Given that Citizens United and your understanding is

seeking to avoid having to comply with Colorado campaign-finance disclosure requirements for expenditures and electioneering communications, do you have an opinion about the role of those requirements in campaign-finance regulatory schemes?

A Yes. Just generally speaking, campaign-finance disclosures are a main source of transparency. One of the, you know, chief values in our democratic system. That is, it -- just the existence of these disclosures helps to minimize situations of corruption, of conflict of interest, of bribery. It allows voters to have some way of evaluating advertisements that are run, of deciding for themselves whether claims are, are useful or less useful, and to ultimately make decisions between candidates.

Q And in particular, what is your understanding of how campaign-finance disclosures are used by the average citizen to make informed decisions at the voting booth?

A Well, they're used in a number of ways. To some extent, voters may rely on these campaign-finance disclosures in terms of, of understanding the -- basically how valid an advertisement or an attack ad is. There's been a few studies along these lines.

One by Dowling and Wichowski from 2013 that I can recall in which, I believe, the authors ran, they ran an ad and showed it to, I believe, 1200 volunteers. Some of these

volunteers saw the disclosure of the ad. That is, they saw who was financing it. Some of them did not see any of that information.

Those who did see the campaign-finance disclosure actually felt somewhat more positively toward the attacked candidate. That is, the attack ad was somewhat less effective.

So that was just, you know, that can be taken as some sort of evidence that voters do use this information, they rely on it to some extent in evaluating the ad and deciding whether it's useful or not.

Q Is it your understanding that the average voter routinely would access the campaign-finance disclosures through the secretary of state's website in order to make these informed decisions?

A Well, no. Actually, the vast majority of voters will never actually draw on this information directly. Most voters, as a great deal of political science research shows, just don't pay very close attention to politics. But they do rely on others to inform them.

So maybe 5 percent of voters will actually pay close enough attention to, to politics to actually go online, do some research, maybe even download a campaign disclosure, at least follow it closely in the media. Most voters will rely on the media to report any sort of improprieties to them. Voters, some political scientists have referred to these sorts of

people as information entrepreneurs. That is, the sort of people who are just unusually interested in politics and can sort of report to their friends and other people in their social networks things that they need to know about. Whether it's a scandal or an important upcoming law or some issue of importance in an upcoming election.

Q Putting aside for a moment the information entrepreneurs, in your opinion, how does the average citizen usually receive its information, if any, that may be gleaned from campaign-finance disclosures?

A Well, they'll certainly -- they usually receive some from the advertisements, themselves. That is, most campaign advertisements required to contain some source of information about the source of disclosure or who's funding the advertisement. And they'll find some out from the news media as well.

Q And in addition to the news media, do academics like yourself frequently get involved in the weeks leading up to elections to give commentary, give interviews to the media and to inform voters about information that can be gleaned from campaign-finance disclosures?

A Yes, academics are often called in the weeks prior to an election to discuss just these sorts of issues in the media.

Q I just want to go back very briefly to the first part of the opinion when you stated that one of the key purposes of

disclosure within a state's campaign regulatory scheme is to provide transparency and to avoid corruption. How do disclosures do that?

A Well, the existence of disclosure, talked about how they can allow voters some extra information in deciding whether an attack is useful or not. They can also provide, they can help -- well, they help in a number of other ways.

One is apparently improving voters' attitudes toward the political system. That is, there has been a study . . . trying to remember the authors of the study. Assuming that was Preem and Mileau from 2007, I believe, did a study looking at what is called efficacy, which is that's the term used to describe the belief that government is representing your views, government is responsive to you.

And what they found, they looked at -- they broke down the responses to the survey based on whether states had campaign-finance disclosure or did not. What they found is that in those with campaign-finance disclosure, at the time of this study, voters had greater feelings of efficacy; that is, they were more likely to feel that government was working for them, government was listening to them.

You could also see possibly some evidence that campaign-finance disclosure has some effects on the media; that is, on the way that, you know, the primary ways that voters learn about a political campaign. A study by Ray Laraja -- the

last name is L-A-R-A-J-A -- he examined how, how media coverage of campaigns varied by state. Based on the stringency of campaign-finance disclosures. And what he found was that in the states with more stringent campaign-finance disclosure, there tend to be somewhat less horse race coverage of campaigns, there's less coverage of who's ahead and who's behind, and more focus on issues of more substance.

Q In addition to the positive effect of disclosure on both individual voters and the media that you just explained, does disclosure have an effect on donors?

A Yes. There's a number of possible effects. One effect that has been found and argued is that it, campaign-finance disclosures, protects donors. That is, without disclosure, they can, at least in theory, be coerced by candidates. If there is no disclosure, in theory, the only two people who know about a campaign donation are the donor and the candidate themself; and in that case, you could have a situation where there's some sort of a shakedown where the candidate says, if you want me to take your issue seriously, you have to give me this amount of money. If there is campaign-finance disclosure, such a situation would be a political embarrassment. It would tend not to occur.

Q In your study of campaign-finance regulatory schemes and American political systems, including Colorado, have you seen any evidence of donors actually being harassed for disclosing

their campaign-finance contributions?

A No, I have not seen that. My understanding is that is extremely rare.

Q For your work on this case, Professor Masket, have you had the opportunity to study the relationship between disclosure requirements and the effect on the actual amount of donations in an election cycle?

A Sorry, the relationship between -- could you repeat that?

Q Sure.

What I'm basically trying to ask you is whether or not you've, from your understanding, based on your review of the literature and your study for this case, whether disclosure requirements have a dampening effect on the actual amount of donations in an election cycle?

A It certainly -- it's not my impression that there's any dampening effect on donations. We've seen actually over the last few decades, an increase in campaign-finance disclosure rules. It used to be about 40 years ago, only about half the states had campaign-finance rules; now basically all of them do to one level of stringency or another.

And in recent decades, we've seen pretty sharp increases in campaign spending. Just since the mid 1990s, we've seen spending in federal elections increase roughly 35 percent per election cycle. Here just in Colorado state elections, we've seen approximately 19 percent increase in

spending for each election cycle.

And so there's not much evidence that campaign-finance disclosures are discouraging people from donating to that.

Q I just want to talk now, focus on the Colorado spending on elections. I believe you said that fund-raising and Colorado state house elections has been increasing at an average rate of 19 percent per cycle?

A Yes, that's true.

Q And what period -- first of all, what is your source for that information?

A I'm drawing that from the National Institute on Money and State Politics. They main a website called followthemoney.org, that standardizes donations over states.

Q What was the period of data that you looked at?

A That was 1996 to 2012.

Q And what did that data set include, specifically?

A That was all contributions to state house candidates in Colorado. And that was just the contributions directly to the candidates themselves. So that does not include so-called outside money. Spending from, from 527s, from nonprofit groups that might be spending more broadly to influence turn-out, to influence an election but aren't seen as direct contributions to the candidates themselves.

Q Thank you.

Lastly, Professor Masket, I just want to ask you, in

your study and focus on campaign-finance regulation, is it your understanding that disclosure requirements are viewed as controversial within the political science field?

A Well, it was certainly not my impression until very recently to try and look at these things. There's obviously a lot of controversy and a lot of debate over campaign-finance regulations themselves, over where limits should be, whether there should be limits at all. Disclosure itself struck me as fairly noncontroversial.

Q Thank you.

MS. MORRILL: Nothing further.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. OLSON:

Q Professor Masket, my name is Ted Olson; I represent Citizens United.

You've testified about what's in the movie. Or the documentary?

A Yes.

Q You recall that? Your testimony?

A Yes, I testified --

Q You characterized the movie; am I correct?

A Yes, I did.

Q How do you know?

A I only know what I know about it from reading briefs,

from -- provided by the attorney general's and --

Q The briefs in this case?

A Yes.

Q Were you -- do you know that you were interviewed for the movie?

A No, sir.

Q Do you know that you're in the movie?

A No.

Q Would you call, based upon what you do know, would you call the movie ideological?

A I don't know enough to characterize it.

Q You don't know what that -- you don't know about the movie. You know what "ideological" means?

A Yes, I do.

Q Okay.

You don't know enough about the movie to know whether it's ideological?

A No, I don't.

Q Do you know whether it's negative?

A I do not know. I could hasten guesses, but --

Q We don't want guesses.

A Fair enough.

Q You mentioned the book that's coming out, *The Inevitable Party*.

A Yes, sir.

Q When is that going to be published?
A Well, assuming everything is on track, it should be published by around Labor Day of 2015.
Q And will it be, you hope, perhaps, in circulation throughout 2015 and 2016?
A That is my hope.
Q Does it identify candidates for office?
A It identifies past candidates for office. It won't identify anyone who is currently running.
Q How do you know?
A I'm not reviewing any current elections in it right now. The elections I've studied have all occurred.
Q But the people that you do -- do you name people that have been candidates?
A Yes.
Q You do name people that have held office.
A Yes.
Q You do name people that hold office today.
A Yes.
Q Are any of those people potential candidates for reelection or election in 2016?
A I suppose. Yes.
Q So that if you, if your book is in circulation then and some of those people that you mention are candidates for office, you'll be subject to the disclosure requirements of

this statute. Is that correct?

A No, I don't believe that's the case.

Q Why not?

A Well, I'm not advocating in one way or another for their election or reelection.

Q Well, have you read the definition?

A Of?

Q Of an electioneering communication?

A Not recently.

Q In connection with your testimony here today, you did not read the definition of electioneering communication?

A Well, I did, yes, last week I did.

Q Last week?

A Yes.

Q So does it say that any communication that's broadcasted, printed that unambiguously refers to a candidate, delivered to an audience that might include the electorate would cover the book that you're writing?

A I doubt would cover the book I'm writing.

Q Why?

A I've simply not heard of a case in which an academic book is considered a form of communication.

Q It would be a communication, right?

A If people buy it, yes.

Q Are you really quibbling about that?

A No.
Q It's a communication, that you're disseminating?
A Yes. Yes, it is.
Q And it might contain references, unambiguously, of people who are candidates. You have people there that might be running for office?
A That is possible.
Q And it's going to be delivered to an audience, assuming that your wish is fulfilled and it does get circulated, that includes an electorate, and it will be out within 30 or 60 days of the primary or general election.
A Yes.
Q So how is that not an electioneering communication? You're an expert. On this subject.
A Well, sir, if, if that is an electioneering communication, then a great many things are that I would say are not normally treated as electioneering communications. I would mention that basically all my funding sources are mentioned in the book.
Q You would not regard it as a burden, if your book is conceived as or characterized by the State of Colorado or people that file complaints as an electioneering, to name the source of your funding, to file reports, that would be okay?
A I would certainly fully disclose; and actually, I'm required by my publisher to disclose all the sources for my funding research, at any rate.

Q And based upon your expertise and what we've discussed, it might well be that your book is an electioneering communication and other books like it, that are published by academics that mention people that are unambiguously people running for office, they will have to go through these disclosure requirements. In your opinion, as an expert on this very subject.

A I'm sorry, could you repeat the question?

Q My question is, your book and other books like it, that study political science or election or current events, that name people who are unambiguously running for office, would be subject, in your opinion, to the requirements of the law that you're testifying about today.

A I doubt very much that my book would be considered a form of campaign communication.

Q And tell me why that is.

MS. MORRILL: Objection. Asked and answered.

THE COURT: Overruled.

THE WITNESS: Simply because I've never heard of a situation in the past in which an academic book about politics that mentions any potential candidates is treated as a form of campaign communication.

BY MR. OLSON:

Q And do you think that that's right, that academic books should be exempt? They're not mentioned in exemptions. You're

not a newspaper publisher, you're not a broadcaster; how would they be exempt under the statute, in your expert opinion?

A Simply because they do not in any way seek to influence the election. They're simply seeking to explain --

Q Is that in the definition of a electioneering communication, attempting to influence?

A No, that's not in the definition.

Q Then why would these books be exempt?

A Simply because they are studying an election and not in any way trying to insert themselves into the debate.

Q And there's an exemption in the statute for that?

A Not as you read it to me, no.

Q Well, do you know of any other exemptions that are afforded by this statute?

A Not other than the ones that you read to me, no.

Q Well, you've studied it, so you looked at the exemptions.

A Uh-huh.

Q I'm asking you as an expert, you were qualified as an expert to testify on this subject, in this case, so you don't know.

A I'm afraid I don't know.

Q Now, you mentioned that the disclosures that come out during these, this process of the requirement of these disclosures are then sometimes read by members of the public but often not read by members of the public. They get their

information in some other way about the contributions.

A Yes.

Q And you mentioned the media, and you mentioned people that provide information to other people. Information entrepreneurs?

A Yes.

Q So they would be passing along information about these disclosures to the electorate, correct?

A Yes.

Q The information entrepreneurs would be mentioning the names of the candidates?

A Yes.

Q And if they did it during this 30- or 60-day period before an election, that would be an electioneering communication, wouldn't it?

A Well, we're talking here basically about conversations between friends and colleagues and people at work.

Q Does the -- it's a communication, right?

A Yes.

Q Unambiguously referring to a candidate, right?

A Yes.

Q Delivered to an audience that includes the electorate, correct?

A Well, if a friend counts as the electorate, if that's a potential voter, then, yes.

Q All right.

So they would be subject to the requirements of these disclosures, the information entrepreneurs.

A I don't imagine that there's anything to disclose at that point.

Q Well, you don't imagine that. But perhaps they received money for running their blog or having their computer distribute this information. Would that be subject to disclosure?

A Well, which are we talking about? Where two people are talking at work --

Q We're talking about the information entrepreneurs that you defined and brought up. These are people that pass along information about disclosures. You said that the electorate gets information from the media and information entrepreneurs.

A Uh-huh.

Q We're talking about information entrepreneurs. If they're funneled in any way, they would have to meet the requirements of the statute.

A Trying to imagine a situation. A general information entrepreneur refers to people in someone's social network. If I have a friend at work who's very highly attuned to an election and just wants to tell me about it. That is a form of communication. That is about a candidate. But I can't see that there would be any sort of campaign-finance disclosure

burden on that person.

Q If there's funding relating to the information entrepreneur's information, that would have to be disclosed.

Your counsel is shaking her head and encouraging you to say no to that, but you're not supposed to do that. You're supposed to give the opinion of your expertise.

THE COURT: All right, Mr. Olson. You didn't have to take a jab at her.

MR. OLSON: I wish she wouldn't be shaking her head when she wants a certain answer.

THE COURT: It's never good for counsel to display emotion like that. But stay professional.

MR. OLSON: Understood.

THE COURT: I'm observing what's going on.

MR. OLSON: Thank you, Your Honor.

THE WITNESS: I'm sorry, could you repeat the question.

BY MR. OLSON:

Q The entrepreneurs receive funding for their activity, the computer, the blog, the resources they use to put the information out to the public which you say is how they get this information, they would be subject to the statute?

A I don't believe so, no.

Q Why not?

A Again, this doesn't sound like any form of official

campaign activity that I've heard of. We're basically speaking about informal conversations between people --

Q All right.

So your answer is if it's not formal campaign activity, it's not subject to the statute?

A Yes.

Q All right.

And you don't know what's in the documentary.

A No, I do not.

Q And information -- voters also get information about these disclosures from the media.

A Yes.

Q And when the media reports this information, it names the candidates, presumably.

A Yes.

Q And when it does that during an election cycle, it would require subject to disclosure under these statutes.

A I'm sorry, could you repeat that?

Q If it, if the media is disclosing this information about candidates that you just described that are in those disclosure forms, they'd be subject to the statute?

A That's not my understanding.

Q And why not?

A Again, the media are not subject to the same rules that groups involved in campaign are.

Q Are you limiting the media to newspapers and broadcasters?
A Yeah, broadly defined, newspapers --
Q If someone puts out a pamphlet, that's not the media?
A No, I wouldn't believe so.
Q If someone distributes information in a blog, is that not the media?
A That's, I believe, somewhat of a gray area. Some blogs are considered part of the media. They're actually put out by -- they're actually funded by newspapers --
Q Did you read the Federal Election Commission opinion, advisory opinion, that's discussed in the briefs in this case?
A No, I did not.
Q Where the Federal Election Commission said what Citizens United does is indistinguishable from the media?
A I'm sorry, I did not read that.
Q This is part of your expertise. I would have thought before you testified here that you would have wanted to read -- you read the briefs?

THE COURT: He didn't read it. Next question.

BY MR. OLSON:

Q You said that disclosure, in your opinion, protects donors.
A Yes.
Q Universally are some donors bothered by disclosure, unhappy with disclosure? You said you'd never heard of anybody being harassed by the disclosure of their identity as a donor to a

political campaign.

A Correct.

Q Did you study the controversy about that very subject in California in connection with the proposition 8, same sex marriage initiative?

A Yes, I did.

Q And did you read anything about the arguments or allegations that were made with respect to pressure put on donors because of disclosures?

A My understanding is there were a few isolated incidents of some donors being, being singled out for that, being criticized publicly, but that a serious study found very -- very few incidences --

Q So you have heard of instances, but they weren't very many?

A Just not very many.

Q Did you read about the situation in the state of Washington, where the same issue came up?

A No, I did not read about that.

Q That, that case came to the United States Supreme Court. As did the proposition 8 case with respect to that very issue; you did not read those opinions or those briefs.

A Not about that one.

Q That was not about -- that's not a part of your study.

A No.

Q You say that there's increase in spending by candidates,

and you correlated that with disclosure requirements?

A Well, no. I'm saying that there has been an increase in spending over the last few decades. And that that has -- does not seem to have been deterred by the existence --

Q Well, you studied the cause/effect relationship between the increase in spending in political elections and disclosure of contributions.

A I have not studied that personally.

Q Have you read anything about it?

A I've read a few studies on the topic. There were, there have been a few studies in which candidates for office have been interviewed. To -- with, on the subject of campaign-finance disclosure. In one study I read on this topic, a candidate said that they were fearful of mentioning campaign-disclosure requirements to their potential donors because they were worried that the donors would be less likely to donate because of that.

Q So there's some burden involved in the disclosure?

A Well, there's at least a belief by candidates for office that there is such a burden.

Q Well, candidates would be the ones that would know that their prospective donors were more or less eager to contribute.

A In theory. But as far as I know, there's been no evidence that --

Q Or that it encouraged?

A True.

MR. OLSON: No further questions.

THE COURT: Redirect -- what about the intervenor. Do you have any other questions for him?

MS. TIERNEY: Thank you, Your Honor. No.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MS. MORRILL:

Q Professor Masket, Mr. Olson asked you several questions about your book that is set to be published in, I believe you said 2015; is that correct?

A Yes.

Q I understood your testimony on direct exam as indicating that that book was to be published by Oxford University Press; is that correct?

A That's correct.

Q So you're not publishing that book, somebody else is?

A That's correct.

Q Is it your understanding that Oxford University Press is in the regular business of publishing books such as yours and others?

A Yes.

Q Thank you.

Turning briefly to the questions that Mr. Olson asked you about proposition 8, you testified that you were aware of

public criticism of the supporters on both sides of that issue; is that correct?

A I'm sorry, on which topic?

Q Proposition 8?

A Oh, yes. Yes.

Q Is public criticism the same, in your opinion, based on your study of campaign-finance disclosure, as threats or harassment or actual reprisal?

A No. No. Definitely not. I mean, harassment I see as actually a crime. I mean, it's in the sense that it's trying to discourage someone, it's trying to attack someone. Whereas public criticism is essentially part of the political process in the sense that it's someone making a political stance and being subject to occasionally some kind of criticism for their stances.

Q So it's fair to say that public criticism is part of the debate and discourse leading up to an election?

A Yes.

Q Thank you.

MS. MORRILL: I have no further questions, Your Honor.

THE COURT: Thank you, sir. You may step down.

Let's take a ten-minute break here for the court reporter, please.

(Recess at 10:16 a.m.)

(Reconvened at 10:25 a.m.)

THE COURT: All right. Have a seat, please, folks.

Miss Morrill, what's next, or is it Mr.

MR. GROVE: Grove, Your Honor.

THE COURT: Grove, what's next.

MR. GROVE: The Secretary calls Jason Shepard.

THE COURT: All right. Jason Shepard.

Good morning, Mr. Shepard.

(**JASON SHEPARD, DEFENDANTS' WITNESS, SWORN**)

THE COURT: Thank you.

Go ahead.

DIRECT EXAMINATION

BY MR. GROVE:

Q And can you spell your last name for the record, please.

A S-H-E-P-A-R-D.

Q Professor Shepard, what do you do for a living?

A I'm a professor of communications at California State University, Fullerton. I'm also the chair of the department of communications.

Q Please describe your educational and professional background for the Court.

A I was a journalist for ten years. I have a Ph.D. in mass communications from the University of Wisconsin, school of journalism in mass communication.

Q Mass communications. Can you describe in broad terms what that means?

A Sure. Mass communications generally speaking is a field of study, is the study of messages, both from senders to receivers, and how that process of communication to the masses is mediated and interpreted.

Q And can you describe your own areas of research focus within this area.

A Sure. My area of research focus broadly could be defined as communications law. I have done several research projects in the area of journalists' privilege law, who is a journalist under privilege protections in this era of new media. I've done some research in campaign-finance disclosure issues. And I also have been working on a book project investigating a court case in the 1950s in Los Angeles involving the censorship of gay journalists publishing the first sustained periodical for gays and lesbians.

Q Has any of your work appeared in refereed journals?

A Yes, I've published in both law reviews and in peer-reviewed communication journals. Communication journals, *Communication Law and Policy* and the *Journal of Mass Media Law and Ethics*.

Q Do you do any teaching?

A Yes, I do. I teach primarily a course called communications law. But I also teach reporting and journalism courses, I teach a history of journalism course, and I also teach a course called journalism innovations that examines the

myriad of changes going through the journalism profession.

MR. GROVE: At this time we'd tender Professor Shepard and as expert in the field of journalism and mass communications.

MR. OLSON: No objection.

THE COURT: Thank you.

BY MR. GROVE:

Q Professor, what materials have you reviewed in your, in preparation for testimony in this case?

A I've reviewed a number of, of court documents that you have sent me. I have read the initial petitioner complaint to the secretary of state, and then several of the briefs in the case. In addition to reviewing my own research and -- my own research.

Q Have you ever watched any of the films that Citizens United has made?

A Yes. I have seen the film Hillary, I believe two or maybe three times. Not recently.

Q And you haven't seen Rocky Mountain Heist, have you?

A No. To my knowledge, nobody has.

Q What's your understanding of what the plaintiff in this case is arguing?

A Well, I basically understand the facts of the case to be that Citizens United wants to spend something like $700,000 on a film and related advertisements in the few weeks before the

Colorado governor's election and that the film has been characterized by Citizens United as express advocacy.

Q You said that Citizens United doesn't want to make disclosures with this -- associated with this --

A Yes, my understanding is that the reason we all are here today is because Citizens United does not want to disclose its funding sources or carry disclaimers in compliance with the Colorado constitution.

Q And what's your understanding; are there any types of communications that are exempt from the types of disclosures that Citizens United would be required to make?

A As I understand it, historically the law has included a press exemption, at the federal level; and my understanding is that the Colorado constitution has a similar, Colorado law has a similar press exemption that exempts some forms of communication from disclosure and disclaimer requirements.

Q What about campaign advertisements, do they generally fall within the press exemption, in your experience?

A No. My understanding is, you know, the intent of campaign-finance law generally is to regulate campaign advertisements so citizens and voters can have some knowledge about who is trying to persuade the voters on the eve of an election. So that's very different from other kinds of communication.

Q Okay.

Why don't we back up for just a second. From a communications perspective, what is an advertisement?

A Well, an advertisement is a particular form of communication that is aimed to persuade a viewer or reader or listener to either purchase a product or subscribe to a service or make, in the context of political advertisements, persuade them on a political choice. And, you know, advertising, the realm or field of advertising involves very sophisticated thinking about messaging and appeals to emotions that -- and those are some of the traits or two characteristics of advertising that advertising professionals spend an entire career honing.

Q Well, you said that you've watched Hillary a couple of times, right, Citizens United's previous film?

A Correct.

Q Have you also read the Citizens United opinion?

A Yes. The Supreme Court opinion?

Q And in that, do you recall reading a line in which the Supreme Court said, and I'm paraphrasing, we've watched this movie, and they think that it's a full-length negative advertisement?

A Yes, I clearly recall that line in the Supreme Court opinion.

Q And so they are not professors in communications, but you are. Do you agree with that assessment?

A Yes. I think when you watch the film in its entirety, you are left with a, a feeling that the purpose of this movie was clearly to persuade people that Hillary Clinton is a terrible political candidate, that you should not vote for Hillary Clinton under any circumstance. So I concur with the Supreme Court's characterization of what Citizens United does.

Q And you've also read the description of what Citizens United plans to do in Rocky Mountain Heist, right?

A Correct.

Q And do you have any reason to believe that the focus of, I guess -- let me put that a different way.

That the style of Rocky Mountain Heist will differ from Hillary?

A Well, I mean, it's hard to say since we have not seen the film, but from the characterizations that Citizens United has made in the, in the court filings, they have classified it as express advocacy, I recall maybe in one document, it maybe said it was a 30-minute documentary and in another it said it was perhaps a one-hour documentary, but it was a documentary and then related advertising that would also contain statements of express advocacy. So the film Citizens United has said will contain statements of express advocacy as well as the advertisements of the film containing express advocacy.

So, you know, in their characterizations that seems to parallel with what the Supreme Court, how the Supreme Court

characterized the Hillary film.

Q So under federal law, applying the federal press exemption, are you familiar with the way the Federal Election Commission has historically determined whether a particular communication qualifies or doesn't qualify?

A Yes. Generally speaking, I'm familiar with that the FEC has applied a two-part test to assess the applicability of a press exemption in federal law.

Q And what are those two parts?

A My understanding is that the first prong is to determine whether one is a qualifying press entity. And then the second prong is either a proper or -- is that entity then serving a proper or legitimate press function.

Q So let's break that down. First discuss what it means to be a qualifying press entity. Does the scholarly academy draw any distinctions between a newspaper and a group that is focused on electoral advocacy?

A Certainly, there is a big difference from a journalism point of view and a scholarly point of view between journalistic entities and campaigning entities.

When we think about a press entity from a scholarly point of view, we can look at an institutional frame or lens. We can look at the form or manner of expression. We can look at the practices of the particular people producing that content. And so those are a number of ways that we could

evaluate whether something is a press entity or institution.

Q So we've heard the word "ideology" a lot today, enough that I wish I had pulled out my thesaurus while writing the brief, to be honest, and I'm curious whether a group's ideological focus plays into whether they're part of the press?

A I suppose hypothetically speaking, ideology may play a role in thinking about a press entity, but I don't see that that is a significant distinction or issue. In Mr. Olson's definition of the exposition of ideas, that's what journalism does, exposes upon ideas. If that's the definition we're getting at, I don't see how that's relevant in determining whether something is press entity or not.

Q Is it fair to say it's one factor among many that somebody might consider?

A Sure. Sure.

Q So how can a reader or a viewer evaluate the quality and credibility of a communication that appears in, say, let's say a newspaper or a political blog?

A Well, I think that readers and viewers come to a known news entity with a particular frame to evaluate that content. So, and for better or worse. You know, if you are a regular reader of *The Denver Post* and you pick it up every day and you read the news pages, you might have a sense of whether you think the newspaper is a comprehensive, accurate, fair, truthful account of the day's events. You might not. But you've got an

experience and a frame from which to evaluate the credibility, who the speakers are, you're able to look at a masthead, you're able to go to the website and see a list of reporters, probably with phone numbers, so you can contact and complain about a particular issue.

The editorial page may include editorials, but you'll know, generally speaking, who is writing those. If you're a regular reader, that might be very persuasive or not, again depending on your perceptions and perspectives. But you've got a number of ways to evaluate credibility, accountability, ethical standards and practices by analyzing a known entity over period of time.

A blog, you know, a blog you can't physically touch in your hands, and we don't have, you know, 200 years of experience, as newspapers do with engaging citizens, but certainly websites can be press entities and readers can evaluate and interact and hold accountable websites in similar ways as traditional journalism.

Q Just as an aside, what are the start-up costs for something like a website?

A You can create a website for under a hundred dollars.

Q So you don't need millions of dollars necessarily to qualify for the press exemption?

A No.

If you spend a million dollars on a start-up website,

you're paying too much.

Q Back on topic, it sounds like what you're saying is that the context matters. Context matters. To how a reader or a viewer evaluates communication. Is that fair?

A Certainly.

Q And you also mentioned that, you know, a track record matters. Well, what if, what if I'm new to a town and I've never seen a newspaper before or if I'm in a town and somebody decides that they're going to start up a new sort of press entity, be it a blog or something they printed out on their home printer and distribute throughout the neighborhood and do it weekly. How am I to assess the credibility if there is no sort of track record for me to go on?

A Well, you know, you can, just if you're looking at product in front of you, you might evaluate whether the content and form is similar to other newspapers and make evaluations or judgments on the quality of the content.

You may look for disclosures or disclaimers of who these people are to evaluate the message.

You may talk to other people and say, do you have experience or familiarity with this communication.

You may look at whether the information being presented is being done so transparently or presenting multiple sides of issues.

So you can make judgments about the, the import or

quality of the content on the basis of applications of journalism standards or norms. And, you know, we have, we have, in my department, entire courses on news and media literacy, teaching students how to evaluate media messages. And so those are some of the ways that you might evaluate something that appears before you that you don't know what it is.

Q So in your view, if our goal is to ensure that potential voter can appropriately evaluate a political message, put it in context, how does the need for disclosure in terms of that voter information compare between an entity that is engaged in a traditional press function and what Citizens United is proposing to do in this case?

A Well, transparency and disclosure are fundamental values to journalists. And journalism ideology. The -- I don't know of a press entity or a journalistic organization that thinks it's a good idea to keep secret who is trying to influence elections or campaigns. It's just a value that's not part of the traditions or history of journalism. It's not part of any ethics code that I'm aware of.

In fact, most journalists and journalism organizations have codes of ethics that focus or that all include statements about the value, importance of journalism, journalists in informing citizens about public affairs. Nondisclosure of a million dollars of campaign funding is not part of, part of

that journalism tradition or practice.

Q Why isn't it enough that, you know, when I sit down to watch this movie, it says, Citizens United presents right before everything starts. Isn't that the same as me looking at a headline of *The Denver Post* and it says *The Denver Post*?

A Not really. I mean, you know, there are lots of very nice sounding political advocacy organizations that, that their names don't mean much. You know, America for a better America, or something like that, does not really tell you any useful cue or meaningful information to help you evaluate that, that message.

Citizens United as two words sounds wonderful, you know, let's all unite as citizens. It doesn't tell me much more.

Q So based on what you know about the film and the descriptions that you've read, in your opinion, does Rocky Mountain Heist, will Rocky Mountain Heist, to the extent that you can comment on it, not having seen it, qualify for the press exemption?

A From what I have read and from what's been explained about it, no.

MR. GROVE: Nothing further, Your Honor.

THE COURT: All right. Cross-examination.

CROSS-EXAMINATION

BY MR. OLSON:

Q Professor Shepard, I'm Ted Olson representing Citizens United.

Is it -- is there a fine line between who is a journalist and who is someone that's out there communicating information who isn't a journalist?

A Sometimes, yes.

Q Well, is there a fine line written in any law that says, this entity or this person is a journalist and others are not?

A In some circumstances, yes.

Q What law?

A I'm thinking about the area of journalist-privilege law and --

Q Yes, and what law defines, other than the state -- is there a federal law that defines a journalist privilege?

A Is there a federal --

Q Is there a federal statute on that subject?

A There's not a federal statute, to date, no.

Q There is not?

A There is not.

Q Are there state statutes?

A There are state statutes, and there have been more than a hundred bills introduced at the federal level.

Q Could you, could you, is it possible for you to summarize in a sentence or two what it is that makes a journalist under those statutes?

A Not easily.
Q It's, is it, is it difficult, is it -- is there a range of considerations? I think you've talked about you have to look at all these factors.
A Well, sir, put together a couple of issues. I don't have in my memory the statutory definitions of how each state defines journalists. So in that sense, there's a range of ways --
Q Don't most of them -- I'm sorry for interrupting, but don't most of them give the same definition of who's a journalist and who's entitled to this privilege for confidential communications?
A I -- could you ask that again.
Q Isn't it true that most of those state statutes to which you refer have a comparable definition of who is a journalist or who is entitled to a journalist privilege to confidential communication?
A I don't think that is true.
Q They're all over the lot?
A I wouldn't say that, either.
Q Well, but there's a very -- there's a variety in those definitions under state law; is that what you're saying?
A Yes.
Q So you might be a journalist in Alabama but not a journalist in Oklahoma or Colorado; is that correct?

A Correct.

Q So it varies. All right.

Now, you said that you were familiar with the way the Federal Election Commission and how the federal law, as interpreted by the Federal Election Commission, dealt with this issue.

A Generally speaking, yeah.

Q Well, did you read the advisory opinion 2010-08 that directly deals with this issue concerning Citizens United?

A I have read that.

Q And what conclusion did the Federal Election Commission come to with respect to this subject?

A The -- my understanding is the Federal Elections Commission in 2004 ruled that Citizens United was not a press entity and that in 2010, it changed its mind.

Q And so you read the decision in 2010. Dated June 11.

And what did -- and the Federal Election Commission interpreting this, resolving this very question we're talking about today, concluded that Citizens United and the work it does, the documentaries it produces entitles it to be treated as the press?

A Yes, that's their conclusion in a very circular exercise of logic that seemed to ignore the Supreme Court's decision in the Citizens United case.

Q Are you saying that the Citizens United decision in the

United States Supreme Court resolved this question?

A Which question are you asking?

Q Are you saying the United States Supreme Court decision in Citizens United addressed and resolved this question?

A Which question?

Q The question that I'm asking you here. That the FEC addressed in 2010 as to whether Citizens United was a press organization and engaged in journalism.

A Well, if I -- I'm a little confused by your question. What my understanding -- and you'll correct me if I'm wrong, I'm sure -- is that the Supreme Court in Citizens United said, on an eight-to-one vote, disclosure and disclaimer laws were constitutional and should be applied, could be applied to Citizens United because the film Hillary was a full-length feature advertisement in the weeks before an election.

Q The -- what the Supreme Court said, I put to you, is that objections to the disclosure requirements were not unconstitutional. The disclosure requirements were not unconstitutional.

And but you're not saying that the Supreme Court decided that the definition of what Citizens United did was, what the press does.

MR. GROVE: Objection, Your Honor. Calls for a legal conclusion.

THE COURT: Sustained.

BY MR. OLSON:

Q Are you aware of the statement in the federal election -- the Federal Election Commission has responsibility under federal statute to interpret the federal election laws. Is that correct?

A I believe that's the case, yes.

Q And it's entitled by Congress to render advisory opinions with respect to these legal issues that come up under the interpretation or application of federal election laws. Is that correct?

A I believe so, yes.

Q And you're aware that in that opinion that we've been talking about, the Commission stated, it concludes that Citizens United cost of producing and distributing this film, in addition to related marketing activities, are covered by the press exemption from the act's definition of expenditure and electioneering communications?

MR. GROVE: Objection. Relevance.

THE COURT: Overruled.

THE WITNESS: I hate to do this. But could you just, what was your question?

BY MR. OLSON:

Q You read the federal election opinion that we're referring to. And you've -- were aware that the Commission concluded that the costs of producing by Citizens United and its

marketing activities are covered by the press exemption from the election law definitions of expenditure and electioneering communication.

A Am I aware that that statement is in that document?

Q Yes.

A If you are reading that document, I trust that that's in there.

Q Well, you've read it.

A I have not read it in the last week. So I don't have that memorized.

Q Are you aware as you sit here today that that's the conclusion that was reached by the Federal Election Commission, or are you in doubt about that?

A I am aware that that's the conclusion --

Q Are you aware that in reaching that conclusion, the Federal Election Commission focused on those two considerations that you talked about, about as to whether the entity's materials are available to the general public and whether they were comparable in form to those ordinarily issued by a press entity?

A Am I aware that that's what the document says?

Q Are you aware that that's the test that the Federal Election Commission applied in reaching the conclusion we've been talking about?

A The two-prong test.

Q Yes.
A Yes.
Q And you're aware that its conclusion that based on those considerations, Citizens United films constitute a legitimate press function.
A I'm aware that that's what the FEC --
Q And you think that that was an erroneous legal decision, based upon your expertise?
A I think the FEC's opinion from 2004 to 2010, I don't think the FEC explained what, what, what would warrant a differing conclusion.
Q Are you disagreeing with the conclusion that the federal agency responsible for interpreting these laws on this subject came to the wrong conclusion?
A I believe they have that authority to come to that conclusion.
Q Are you, as an expert, as a professor of this subject, are you saying that this is a wrong conclusion, based upon what journalism is?
A I do not believe that from what I know and have been presented with about Citizens United's activities in classifying these communications as express advocacy in the window of time before an election, that that warrants a designation as a press entity performing a proper press function.

Q And you've seen one of Citizens United's movies?
A Correct.
Q Out of -- do you know how many of their documentaries have been produced and distributed?
A If I recall, you stated earlier this morning 24?
Q Do you know, yourself --
A No.
Q So you have not -- and you have not seen any of the other 19, 20, 21, 22 documentaries produced by Citizens United. So the only one you saw was the one made at the beginning of this century, called Hillary, The Movie, that's the only one you've seen.
A Correct.
Q And you didn't undertake to look at any of the other documentaries --
A I did not.
Q -- that Citizens United has produced over the last ten or 20 years, you didn't, knowing that you were going to be an expert here, testifying on this subject, about what Citizens United was, you didn't bother to look at any of those movies?
A No. I did not. This case seemed to be about one movie. Not about the --
Q Well, you were testifying, with respect, about what Citizens United was, and whether they were entitled to the designation of a press entity. So I would have -- that's the

reason I asked the question, have you considered in forming that conclusion any of the work that Citizens United has been doing over the last ten or 15 years?

MR. GROVE: Objection. Cumulative.

THE COURT: Overruled.

THE WITNESS: I'm sorry, could you ask the question again.

BY MR. OLSON:

Q So in forming the opinion about the kind of organization Citizens United was, you did not look at any of the overwhelming body of work that Citizens United has produced over the last 15 or so years.

A That's correct.

Q Now, you said that advertising was something that was intended to persuade. I'm summarizing. Feel free to disagree with that. That's what I took from your testimony. That that's what, that's what distinguishes advertising from journalism. That it's an effort to persuade.

A That would be one factor.

Q And there are a number of others? Can you name the next two or three most important distinguishing features?

A Distinguishing features between?

Q Between advertising and journalism.

A I think journalism could be described as factual -- presentation of factual information that might be verified and

the process of verification could be replicated and it's done in a number of different forms and mediums to communicate news and information of the day to citizens and --

Q Objective recitation or presentation of facts?

A That would be one definition of journalism. And I think following, you know, standards of journalistic behavior and conduct and norms would be another set of criteria that scholars might apply to, you know, assessing if a communication is journalistic or not.

Q Are the editorial pages of *The New York Times* journalism?

A I think by point of analysis you ask is a good question. I think *The New York Times* as an entity is a journalism entity and people wouldn't quarrel with that distinction.

Q And they attempt to inform in their paper.

A Does *The New York Times* attempt to inform?

Q Yes, sir.

A Yes.

Q And they attempt to persuade. On their editorial page.

A Correct.

Q And in their op-ed columns. And otherwise throughout the paper?

A Correct.

Q Correct.

So it's very difficult to say that the idea of attempting to persuade versus attempting to inform is some sort

of a line between journalism and advertising or persuasion.

A Correct. Persuasion could involve a number of kinds of communications.

Q Right.

And advertising can, can be purely informative. You may want to put an ad in the paper that tells about how many miles per hour your car makes under the EPA standards or something?

A Well, certainly, advertisements can include information as part of their persuasive message.

Q And what -- one of the reasons why you thought what Citizens United was doing was not journalism is that you saw the movie Hillary movie and you saw that that was overwhelmingly negative. With respect to her candidacy for president.

A That's what the Supreme Court characterized it as.

Q I mean, you saw it. You saw it a number of times. That was what I understood your definition also of why it fit into that category versus the other categories.

A I don't quibble with that characterization.

Q Well, is it also your opinion, sir?

A That it was negative.

Q Is it your opinion that because it was overwhelmingly negative with respect to Hillary Clinton, that that took out of the realm of journalism?

A Not entirely, no, that was --
Q What else.
A I think one of the issues that is getting lost here is that the film in this case is a one-time communication in the weeks before an election with $700,000 of donations funding it. That's different from typical press behavior.
Q And therefore it excludes it from the definition of press because it's, what, around the time of an election or because it was $700,000 or what?
A Well, my understanding of the law -- my understanding of the law is that it needs to be a qualifying press entity serving a proper press function to be exempt from the Colorado constitution's requirements that electioneering communications have complied with disclosure law so people know where that message is coming from.
Q Is it your understanding under the California -- the Colorado statutes that we're talking about here that if you added up the totality of circumstances that you've described and decided that the entity, Citizens United in this case, was performing a journalistic function, it would be exempt in the statute?
A Could you ask that again?
Q If you were to conclude that under the totality of circumstances that you've described, that Citizens United in connection with this movie was performing a function a lot like

journalists, informing the public, and expressing a point of view, would that Citizens United, with respect to this movie, be entitled to an exemption under the statute?

A I believe my answer is no. The question had a lot of elements. But, no, that would not automatically make this exempt under the --

Q Because why?

A Because the law, in my understanding, has two requirements: That you have to be a qualifying press entity engaging in a proper press function. And your question --

Q And a proper press function, you said, you used those words just now.

A Well, that's what the FEC has long used as the test for applying a press exemption. Proper -- I believe the FEC has used, at times interchangeably, or different terms, either proper press function or legitimate press function.

Q Well, we're talking now about Colorado, and we already went through what the FEC means.

A I was just trying to answer your question.

Q Well, let's move on.

And I wasn't sure whether you testified that a blog is a press entity. You said it was a hundred dollars to create a blog, that was no big deal and you could be a press entity.

A Potentially.

Q Right.

So a blog can be?

A Potentially. Not all blogs.

Q How -- which ones are and which ones aren't?

A I don't think the technology is determinative of the classification of communications. So journal --

Q It's the content?

A I'm sorry?

Q Would it be the content?

A Well, journalism can be practiced and disseminated and received in all sorts of mediums. You know --

Q What would make a blog a press entity versus one that was not a press entity? Would you have to look at the content?

A You would have to look at the totality of circumstances --

Q Would that include the content?

A Content is one factor, certainly.

Q Yes.

What else?

A Well, all of the things we've been talking about. The, the periodicity of the --

Q I didn't hear that?

A The periodicity, is it a periodical that is publishing on a regular interval. So if a website, let's say, sprung up next month here in Colorado that was critical of the governor of Colorado and included a lot of express advocacy and then was taken down the day after the election, that could be a blog on

a website that could not -- would likely not be considered journalistic in nature.

Q Even if the blogger was attempting to inform the Colorado electorate about facts relative to a particular candidate, and he only did it, or she, only once a month, or just once. That would take that blog out of characterization?

A That would be one of the factors because my understanding of applying the press exemption deals with whether something is a qualifying press entity, whether it's a magazine, newspaper, or other periodical or broadcast facility. And so I think, I would argue that a website could be classified as a periodical under some circumstances, but not all circumstances, not all websites.

Q But one of the factors would be if the website or the blog appeared on a periodic basis. Am I fairly summarizing what you just said?

A Can you repeat that once more.

Q I think that what you said it would be, a blog or a website could be a periodical if it appeared on a regular or somewhat regular basis, it could be?

A Yes, it certainly could be.

Q And a producer of documentaries on a regular basis would not be?

A I don't, I don't, I don't know.

Q Okay.

You said you would have a hard time determining who was behind Citizens United. You don't get enough information by just the title and who's putting it out; is that right?

A Do I get enough information?

Q Is that what you said?

A I think the State has determined that they want more information.

Q I'm asking you your opinion. You came in here to testify as an expert on this subject.

A I would certainly love to know enough information.

Q You don't know enough and you don't think enough is available to determine that about Citizens United. I thought I heard you testifying about that.

A About what about Citizens United?

Q About what their background, point of view is. You were testifying, I thought -- we can go back and read it. I thought you were testifying that there's just not enough you can know about Citizens United and what they have in the one movie out of 20 or so that you've seen.

A We don't know who is paying $770,000 to influence the Colorado election next month. I do think that that would be interesting and important to know.

Q And you don't know who's financing *The Denver Post*?

A Presumably if I did some digging, we could find out that advertisers probably pay large proportion of *The Denver Post*'s

budget; and so you, you know, I could open up *The Denver Post* and see, I don't know, Macy's maybe is advertising or, you know, which car dealership in town is trying to get rid of the most number of cars and we can make a determination that that's probably funding a large part of *The Denver Post*'s budget.

Additionally, people who buy and read or subscribe to *The Denver Post* are financing the next probably largest percentage of *The Denver Post*'s operation. And so, you know, that certainly tells you a lot right there about who's funding that --

Q Right. Knowing the identity of the subscribers would be the next thing after knowing the advertisers.

A Well, why do you think that's relevant?

Q I thought you just said that.

A Knowing the identities of those subscribers?

Q Yes. Who the subscribers were. Is that not your words? You talked about the -- you'd want to know --

A No, that subscribers pay the next largest percentage of the revenues. So therefore we know that -- I don't know what the circulation of *The Denver Post* is, presumably if it's like most other newspapers in this country, it's shrinking --

THE COURT: The advertising section isn't shrinking. Take a look at the Sunday *Post* sometimes.

THE WITNESS: That's very good news from a journalism perspective.

BY MR. OLSON:

Q Well, you wouldn't -- maybe if you wanted to know where Citizens United was coming from or *The Denver Post* was coming from or MSNBC or *The New Republic* or *The Nation* magazine, you might Google them, see what they've done over the years, and you could do that with Citizens United and you might even look at one of these other 19 movies.

A You know, I did try to look at the Citizens United website to try to find out what sorts of information, just voluntarily, an organization such as Citizens United discloses; and, you know, you just see a page about who we are, some names and then maybe four affiliated entities of Citizens United which do raise and spend direct contributions to influence particular candidates and support particular candidates.

And so from that page, I, I did learn that Citizens United was, you know, maybe a classic political advocacy organization that works closely to elect political candidates and that there's opportunities to donate to a variety of Citizens United funds to give directly to candidates and parties.

Q They're engaged in the business of advocacy and the distribution of ideas.

A That's what I gathered.

Q In order to distinguish -- this is just sort of a wrap-up question, but I want to make sure that I have it square in my

mind. In order to determine who's a journalist, aside from the word "broadcaster" or "periodical," you'd look to a totality of circumstances to decide who was a journalist and who wasn't a journalist?

A Would I use a totality-of-circumstances approach to make that decision?

Q You would do that?

A That's your question?

Q Yes.

A Yes.

Q Thank you.

MR. OLSON: No further questions, Your Honor.

THE COURT: All right. Thank you.

Intervenor.

MS. TIERNEY: Thank you, Your Honor. I have no questions for this witness, but I'm very mindful of the time and very protective of the 20 minutes that --

THE COURT: As am I. You'll get your time.

MS. TIERNEY: Thank you.

THE COURT: Redirect examination.

MR. GROVE: Very brief, Your Honor.

REDIRECT EXAMINATION

BY MR. GROVE:

Q Is a subscriber to the newspaper trying to fund a specific message?

A I can't think of a circumstance where that would be -- no. No. It's -- perhaps, perhaps somebody joins a group to support their message, but subscribing to a periodical or a news organization or a newspaper, no. They're subscribing for other reasons.

Q Have you ever heard of an organization like *The Denver Post* or *The New York Times* raising money specifically to put on an ideological -- strike that -- a film that contains express advocacy for or against a candidate?

A I am not aware of any traditional press organization that would spend this kind of money for a one-time express-advocacy piece in the weeks before an election.

Q In your view, if a traditional press organization did that, would that qualify as a traditional press function?

A Potentially, no. You know, there are -- in determining whether something's a proper, legitimate press function, you would look at what the entity's typical or traditional track record has been. So if *The Denver Post* did precisely that which Citizens United is doing right now, I think you could make the case that that is not a proper or legitimate press function. Because it's very atypical of what they have long been doing.

MR. GROVE: Nothing further, Your Honor.

THE COURT: All right. Thank you.

MR. GROVE: The Secretary rests, Your Honor.

And we'd ask that Dr. Shepard be excused.

THE COURT: Yes, he certainly is excused.

All right. Intervenor, your turn.

MS. TIERNEY: Thank you, Your Honor.

Given the time, Your Honor, we have circulated to all parties an affidavit which reflects testimony that Richard Palacio, the chair of the Colorado Democratic Party, would submit here --

THE COURT: Well, the affidavit wouldn't be subject to cross-examination, so I'm not that interested in it.

MS. TIERNEY: I understand that, Your Honor; but in the alternative, I could move to amend our response and attach it, which the plaintiffs attached an affidavit to their motion, and that witness is not presented here for cross-examination.

THE COURT: That would get the same treatment.

MS. TIERNEY: Okay. Fair enough.

MR. OLSON: May I be heard briefly, Your Honor?

THE COURT: In the middle of her time?

MR. OLSON: I'm just offering to stipulate that the -- what she's offering as evidence here, we would not object to going into the record and would not plan on cross-examination, if that would facilitate.

THE COURT: Do you want to accept that stipulation, then?

MS. TIERNEY: So long as the stipulation is that we do

not have to spend the time on the cross-examination, then, yes.

MR. OLSON: Your Honor, I don't plan to cross-examine and we already made our objections to this, this kind of evidence. So we're willing to stipulate --

THE COURT: We're spending time that isn't helpful here.

MR. OLSON: I was trying to help, Your Honor.

THE COURT: The affidavits on both sides will be considered for what they're worth.

MS. TIERNEY: Thank you, Your Honor.

THE COURT: Go ahead.

MS. TIERNEY: I'll tender when we're done here.

I think one of the things we have to remember what we're here for today, Your Honor, and that's on a preliminary injunction; and I submit to you that the plaintiffs have not carried their burden, and that's a heavy burden in the Tenth Circuit. Contrary to the plaintiff's contention, the Tenth Circuit's standard did not change after Winter vs. NRDC to eliminate the heightened scrutiny that applies to certain injunctions that are disfavored. Including one like this, which will change the status quo.

THE COURT: I agree with you.

MS. TIERNEY: Okay.

I'm going to move on, then.

The status quo, as we know, is disclosure.

I next want to point out that as Your Honor pointed out earlier, there's been no assertion by the plaintiff that it won't make the film or run the ads to support the film if it doesn't get the injunction. There's been no assertion that it has lost or will lose funding because donors don't want to be disclosed. In fact, in the Citizens United vs. FEC case, the court specifically found that Citizens United has been disclosing its donors for years. And has identified no instance of harassment or retaliation. That's in that case, 558 U.S. 310 at page 370.

Citizens United likens the media exemption to the Supreme Court's analysis in that earlier case, arguing that there the Supreme Court struck down a law that similarly would have required corporate speakers, except for entities that qualified for the federal media exemption, to form political action committees just to speak.

Here, however, Colorado law does not have any sort of ban that would prohibit Citizens United from speaking, as FECA did at the federal level with its ban on corporate treasury spending. Rather Citizens United can speak all it wants. It merely has to disclose who is funding its speech.

The Tenth Circuit in Republican Party vs. King, just last year, 741 F.3d 1089, stated that the Supreme Court upheld disclosure requirements at issue in Citizens United because they provided the electorate with information about the

identity of the speaker and did not impose a chill on political speech. Even for independent expenditures.

Indeed, even the Supreme Court in Citizens United acknowledged that any categorical approach to speaker identity is untenable. The court acknowledged there that it might be okay to distinguish speakers who are foreign individuals, for example, or associations, from influencing our nation's political process. That's at 558 U.S. 911.

This notion that there is a categorical ban on distinguishing amongst speakers I don't think is supported to the level that's Citizens United alleges here. As the Supreme Court has said over and over in Buckley and McConnell and Citizens United, disclaimer and disclosure requirements impose no ceiling on campaign-related activities and do not prevent anyone from speaking.

I think Your Honor has already determined that the standard --

THE COURT: I'm going to ask you about Buckley.

MS. TIERNEY: Sure.

THE COURT: Is there -- does it matter, when you're assessing whether donors have to be disclosed, what the donor is donating for? In other words, is it earmarked for some specific cause?

Put it a different way. Does it matter whether the donors to Citizens United earmarked their money for movie or

just give to Citizens United in general?

MS. TIERNEY: It does matter, Your Honor. And it depends on, in part, when the spending to support the movie is happening. So if donors are giving to -- let me back up.

So in the Colorado scheme, we have a requirement that if you are engaged in this kind of activity, you have to file reports and you are -- electioneering communication reports or independent expenditure committee reports. So if you are an entity engaging in independent expenditures, you have to register as a committee and file those reports.

If you are raising money for independent expenditures, those have to be disclosed. So all the money that's being raised for that spending, so here it would be all the money that they are raising for -- to show the ads and produce the movie, that contains the express advocacy in it, would have to be disclosed.

THE COURT: Okay.

But what I'm trying to ask you is, take NPR, for example; Mr. Olson used that as one of his comparisons, and it is a better one for him, I think, than *The Denver Post* or *The New York Times*. People donate to NPR. You've heard the advertisements again and again on the radio where they're soliciting funds, and people send in checks, let's say. Okay?

MS. TIERNEY: Yes.

THE COURT: The people that send in checks to the NPR,

I would suggest, are not earmarking those moneys for a particular NPR program necessarily. Right?

MS. TIERNEY: Correct.

THE COURT: They just like the NPR. They like the idea of a national public radio.

Okay. Now, take us to Citizens United and the facts that we've got here today. Are the donations that you want to have disclosed with the donors that you want to have disclosed anybody who contributes to Citizens United, or just those who earmarked their funds for this movie?

MS. TIERNEY: So they are only required under the law to disclose those who are giving the money for the spending.

THE COURT: And that's because of the Buckley case or it's because of what?

MS. TIERNEY: Well, it's because of the Colorado constitution and the way it's drafted. But it comes from a long line of Supreme Court jurisprudence, starting with Buckley.

THE COURT: So what you're saying is, if Citizens United received donations from individuals who designated that their donations were going to go to this movie, that has to be disclosed. But if they received donations just from some people that think Citizens United is a nice organization, may not even known about this upcoming movie, but just wanted to support the cause, let's say, in general, those don't have to

be disclosed?

MS. TIERNEY: Well, they have to report the contributions they've received that went into the spending for the movie. So they --

THE COURT: How -- funds are fungible.

MS. TIERNEY: But they can't say, well, this person, we didn't use that dollar for this, so we don't have to disclose that person.

THE COURT: Then how do they figure out what they're supposed to disclose?

MS. TIERNEY: Well, they have to disclose -- when they're raising money -- and you heard Professor Shepard talk about their website has all kind of different things you can contribute to. And I think, when they're raising money into Citizens United, they're raising money for particular functions, whether it be to give to candidates or to produce their movies.

THE COURT: Well, Citizens United may know that. Obviously they do know that. They know how they spend their money.

Look, when my college solicits me to donate as an alum, sometimes they offer you a choice. They say you can just give to the college or you can earmark your donation for a particular thing at the college that's of interest to you.

So, for example, I happen to have been in college

involved in debating. Something that may not be uncommon for the legal profession. And I have had the opportunities to designate my donation for that, if I wished, or just to the general fund, let's say.

I don't know whether Citizens United is like that or not. Does it matter for this case?

MS. TIERNEY: I don't think it does matter for this case, Your Honor, because when they are engaged in producing communications that trigger disclosure, and that is the only way -- and I'll talk about that in a minute; this whole notion of viewpoint is a red herring, I'll submit -- but when they are engaged in communication --

THE COURT: So you've got red herrings as well as straw men, just like Mr. Olson does.

MS. TIERNEY: That's right. Should have come up with a better term.

THE COURT: I've never seen a red herring. I don't even know exactly what they look like.

MS. TIERNEY: But when they are engaged in that kind of activity, producing communications that trigger the independent expenditure or electioneering communications disclosures, all funds raised for those disclosures, for those communications, must be disclosed.

THE COURT: All right. So let's work backwards. Everybody says this movie costs $700,000. Let's just say

hypothetically that's true.

MS. TIERNEY: It says that in the complaint, Your Honor.

THE COURT: Well, yes. It says numbers that are sort of adding up to 700,000. Let's just say that.

So what does Citizens United have to do, disclose the source of that $700,000? Is that, is that the idea?

MS. TIERNEY: Yes, Your Honor. The donors that contribute, that make up that 700,000 and then their spending that they engaged in to spend that 700,000.

THE COURT: Then how do they know where those $700,000 came from? Let's say Citizens United has an annual budget of several million dollars. They produce 24 movies over time. They do whatever they do. How do they know which of the donors they're supposed to disclose?

MS. TIERNEY: Well, I'll submit to you that I believe that they work on one of these projects at a time. But I could be wrong on that. They will have to track that.

THE COURT: Well, one problem I have is that no one put anything about that in the record.

MS. TIERNEY: Correct.

THE COURT: This is not a very complete record. I don't know how they do it.

MS. TIERNEY: I don't know how they do it, either, Your Honor. But they are supposed to disclose all donors who

gave, who contributed toward --

THE COURT: -- to the movie.

MS. TIERNEY: Yeah.

THE COURT: So let's say there's a donor that wasn't particularly excited about the movie. Maybe he doesn't care who wins the governor's race in Colorado. Because he doesn't live in Colorado. He lives in New Jersey. So he donates money to Citizens United but could care less about what happens out here.

Does he have to be disclosed?

MS. TIERNEY: I think it depends on whether they used his money to fund the film.

THE COURT: And again, I ask how do we find out where the New Jersey guy's money went. Maybe they could have a very good accounting system and know exactly where the dollars go. I just don't know.

Okay. I've beaten that one to death. Onward.

MS. TIERNEY: Thank you, Your Honor.

I also want to raise the notion that the plaintiff's complaint for declaratory and injunctive relief asks this Court to declare virtually all of the campaign-finance disclosure and reporting requirements in the constitution and in the statutes invalid, to be in violation of the First and Fourteenth Amendments.

THE COURT: Sounds like it.

MS. TIERNEY: And to preliminarily and permanently enjoin their enforcement.

THE COURT: Sounds like it.

MS. TIERNEY: When that is the case and they come into this court asking that, I think there loom large concerns about Pullman and Burford abstention where this is a matter of, unique matter of state law that has never been interpreted by the Colorado Supreme Court.

THE COURT: That sounds like a good idea. I can just duck the whole thing.

MS. TIERNEY: When anticipatory relief is sought in federal court against a state statute, respect for the place of the states in our federal system calls for close consideration of that core question. The Supreme Court has opined in Arizonans for Official English vs. Arizona, 520 U.S. 43, both Pullman abstention and more efficiently and available here, the Colorado Supreme Court's direct certification procedure under Colorado appellate Rule 21.1 allows a federal court faced with a novel state-law question to put the question directly to the state's highest court.

Because the plaintiff seeks to invalidate Colorado's entire reporting and disclosure framework, Burford, the Burford abstention doctrine may be implicated as well. Where timely and adequate state court review is available, a federal court sitting in equity must decline to interfere with the

proceedings or orders of state administrative agencies when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case and at the bar or the exercise of federal review of question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

That's coming from the U.S. Supreme Court in New Orleans Public Service, Inc., vs. Council of the City of New Orleans, 491 U.S. 350.

THE COURT: Okay. Now you're sounding, to me, the way you're expressing this, more like an academic than a advocate.

Is the Colorado Democratic Party, the intervenor here, arguing that the Court should duck this and send these people to state court? Or are you just saying, one could argue, but one could argue.

MS. TIERNEY: Well, Your Honor, I think it raises an important question. The state court has never examined these exceptions to the electioneering communication provision or the independent expenditure provision in the state constitution. And here the plaintiffs started in the state system. They went to the secretary of state to ask for a declaratory order. They apparently started planning the movie back in December, they tell us now in their reply; but they didn't go there until

April, they went to the secretary of state and said, can we do this, can we be exempt.

The Secretary said no.

But rather than appeal that ruling, which was the -- available to them under a 106 action from an administrative agency, final agency order, they decided they'd rather come here. And they waited several months to do that.

So now we are in a hurry-up, must decide this or we are going to be harmed; and it's a matter that the state court has never decided. Has never even looked at. And it is not identical to the federal law. The plaintiff repeatedly makes reference to the FEC advisory opinion that we should all fall in line with. But it is not, our law is not the same as federal law. Our law expands the electioneering and independent expenditure to print, which the federal law does not.

All right. I know I'm running behind here, so I'm going to go quickly.

THE COURT: Well, you've got, you know, a minute.

MS. TIERNEY: Okay.

So on that point, I do want to make the point that I think their irreparable harm, as it were, in terms of delays, is self-inflicted.

I think it can -- the Court can take judicial notice that disclosure is in the public interest. And the Supreme

Court has said over and over and over what the strong governmental interests are in disclosure of campaign-finance spending.

Finally, I want to make the distinction about the book on the electioneering communications, the colloquy between Mr. Olson and --

THE COURT: All right; make it in 30 seconds or less, please.

MS. TIERNEY: Like in the Citizens United vs. FEC case, plaintiff raises the book as the specter of how it's going to take down the whole scheme. By its plain terms, the book is not covered in the definition of electioneering communication.

THE COURT: I know.

MS. TIERNEY: Okay.

THE COURT: Thank you.

All right.

MS. TIERNEY: Thank you, Your Honor.

THE COURT: Let me see what time people have left.

Plaintiff has six minutes left, and the defendant has 19 minutes left.

MS. TIERNEY: And Your Honor, with your permission, I will tender that affidavit to your clerk.

THE COURT: Fine.

19 minutes, Mr. Grove.

MR. GROVE: May it please the Court. I'd like to start off by disagreeing with the intervenor on a couple of points about the long colloquy that the Court had about what is required to be disclosed and what is not required to be disclosed by Citizens United when the funds are earmarked, when they're not earmarked.

This is addressed at pages 8 and 9 of our response to the preliminary injunction. And in campaign finance Rule 11.1, when it comes to electioneering communications, there is a specific earmarking requirement.

Now, if the film is an expenditure, then the statute is 1-45-107.53B Roman numeral one. And that says, Identification of contributors would be required only where a contributor, quote, for the purpose of making an independent expenditure donates more than $250 to the person making it.

And so the Secretary's position on this is that there is not a book opening or go back in time and tracking fungible sources of money that Citizens United would be required to do, should the expenditure or electioneering communication come about.

To the contrary, there would have to be, particularly in the case of an electioneering communication, it would have to be somebody who wrote a check and on the bottom of it wrote, this is for Rocky Mountain Heist. That's earmarking in the Secretary's view. And so any concern that the Court has

that --

THE COURT: And you're saying that that doesn't matter.

MR. GROVE: I'm sorry. I don't understand.

THE COURT: Well, you're disagreeing with her.

MR. GROVE: Oh, yes, I'm disagreeing with that position, yes. But I'm not sure by why does it matter.

THE COURT: Does it matter whether the donor earmarked his funds or not.

MR. GROVE: It absolutely matters as to whether the identity of the doner would have to be disclosed in a public statement that's filed with the secretary of state.

THE COURT: Well, then, why aren't you in complete agreement with her? That's what she said.

MR. GROVE: That's one reason that we opposed intervention, Your Honor, is because the secretary of state is in charge of administering, enforcing, and interpreting the campaign-finance rules. Any look at recent history will demonstrate that Colorado citizens aren't necessarily in complete agreement with the way that those rules are interpreted.

THE COURT: Well, then, let me ask you my questions.

If the donor is this hypothetical gentleman in New Jersey who doesn't care about the Colorado election but just wants to support Citizens United and writes them a check for a

thousand dollars, doesn't say this should be used in Colorado or anywhere else, just gives them money. Does he have to be disclosed?

MR. GROVE: Our position is that, that contribution is not for an electioneering communication or an independent expenditure; therefore, the identity of that individual would not need to be disclosed.

However, the actual expenditure that Citizens United makes, the fact that they spent $50,000 on a commercial advertising or something like that, that would have to be disclosed. The expenditure itself. But the source of the money, unless it is a specifically, unless the contribution is specifically made for that purpose, that person wouldn't have to be disclosed. In my view, that comports with privacy concerns that are raised by NAACP vs. Button and Brown vs. Socialist Party Workers.

THE COURT: So we've got this $700,000 spent on this movie. You and I don't know where that money came from, right?

MR. GROVE: Correct.

THE COURT: You're saying that if that money, in whole or in part, came from people who wanted to support this project, it must be disclosed.

MR. GROVE: If it were donated for that purpose, yes. If it were a general-purpose donation to the Citizens United treasury, no.

THE COURT: All right. Then just to be clear, Miss Tierney, you're agreeing with that.

MS. TIERNEY: I do agree with that, Your Honor.

MR. GROVE: Okay. It sounded to me like we were not on the same page, but if --

THE COURT: If that's what the law is, then this comparison to *The Denver Post* or to NPR is kind of bogus, isn't it?

MR. GROVE: I agree, yes.

Putting them in the same, putting them in the same category is sort of what this, this case is premised on, and I don't think that they do fall, and I think that the evidence has demonstrated that.

THE COURT: Because, I'm assuming that people that support NPR don't earmark their funds. At least a lot of them don't.

MR. GROVE: I have no way -- I have no way of answering that. Like many other things, the record hasn't been developed in this case.

THE COURT: That's a problem here.

MR. GROVE: Moving on, the very first --

THE COURT: Do you agree with her that the Court ought to defer to the Colorado state courts and not decide this?

MR. GROVE: We're not making that argument, Your Honor.

THE COURT: Do you agree with it?

MR. GROVE: No.

In the long term, a Rule 21.1 certification might be possible, but frankly, we haven't had great luck with that in previous campaign-finance cases, and so our position is that Pullman and Burford abstention at least is not appropriate at this time. And certification is not a practical possibility given the short time frame. Perhaps in the long term it is.

The very first point that we made in our briefing in this case is also the next point that I'd like to make here, and that is this case isn't about a ban on speech. Nor has the Court heard any evidence today suggesting that Colorado's disclosure requirements even impose a substantial burden or any kind of significant burden on speech in this context.

Regardless of the context in which the claim is raised, courts have consistently declined the invitation of political speakers to apply strict scrutiny to disclosure requirements. Instead -- this is consistent with the Supreme Court's unwavering guidance on this issue over the last four decades -- courts have applied exacting scrutiny in disclosures requirements or challenge. Every single case that the plaintiffs have cited in their brief arguing differential requirements or speaker-based regulations demand strict scrutiny are all about who can speak or when they can speak, it's not disclosure requirements that are associated with them.

I have not found one.

In fact, the only case, the only case I've found on this, unfortunately I found after we filed our briefs; but it's a recent case from the Fourth Circuit, called Center for Individual Freedom, Inc. vs. Tennannt, 706 F.3d 270. The plaintiffs in that case raised a couple of challenges that are pertinent here, and the way that the Fourth Circuit addressed those challenges is also pertinent.

The first was a challenge to a disclosure exemption for expenditures associated with grass roots lobbying. The plaintiff argued there that the exemption discriminates based on content and viewpoint. In short, what it said was if you're engaging in grass roots lobbying that's going on during the legislative session, you don't have to disclose. Whereas other organization, you 501(c)(4)s do. What the plaintiff said was this is content, viewpoint discrimination.

The Fourth Circuit shrugged it off and said this is a disclosure challenge, we're not going to apply strict scrutiny. We're going to apply exacting.

Later on in the same case, there was a challenge, a speaker-identity challenge. The plaintiff in that case was a 501(c)(4). It said, well, this rule don't apply to 501(c)(3)s, and we think that is unfair.

And the court viewed that as a First Amendment underinclusiveness challenge and said, this is a disclosure

requirement. And we're going to apply exacting scrutiny. Now, in that case, the court did actually strike it down because there wasn't a substantial reason for differentiating between 501(c)(3)s and (c)(4)s in that context. But the important point is the level of scrutiny applied.

And indeed, the level of scrutiny that applies here, I think is determinative, even ignoring the evidence we put on today. In Citizens United itself, the Supreme Court upheld against a First Amendment challenge that, sure, it was postured a little bit differently than this, but it was consistent with the evidence that was put on today. Holding that the disclosure scheme that was challenged in that case, it was applicable to a film that, as far as I can tell, is almost identical to what we have here, and in fact, an entire circumstance, not only the film, but the associated advertisements are virtually identical. Said, requiring disclosure of that communication and the commercial communications that go along with that is perfectly constitutional. I think that as a matter of law, even ignoring the evidence we put on today, the Court can and should reach the same conclusion.

The evidence today, I think, only comes into play in the event that the Court decides that strict scrutiny is actually applicable. And that evidence demonstrates not only that there's a compelling reason for ensuring that Colorado's

voters are informed, but that the restriction, and it's not even really a restriction, that the disclosure requirement, the means that Colorado has used to ensure that its electorate is informed is narrowly tailored to the concerns that the voters had when they adopted amendment 27.

THE COURT: If the standard is exacting scrutiny, does it then matter whether journalistic articles are treated differently?

MR. GROVE: Under either standard, the reason that -- and this is the gravamen of Professor Shepard's testimony -- the reason that journalistic-type activities, what are considered to be traditional press activities and what would qualify, the reason that disclosure is less important for those sorts of activities is that voters have a way of assessing, of evaluating the message. They can put it in context. They understand that it is not purely focused on this one electoral advocacy issue, that if they see an editorial in the paper, that's alongside the business and the high school sports news and all those sorts of things. And they can look at the editorial page, they can call the reporter, they can look at the masthead, they can ask around their friends, they can say, well, *The Denver Post* is pretty liberal or pretty conservative, whatever your frame of reference is.

When you have drop-in political advocacy of the type that is at issue in this case, those same sorts of pieces of

contextual information is not available. That's the information that Colorado voters weighed in about when they passed amendment 27 and required disclosure of electioneering communication and express advocacy from organizations that do not meet the qualifications of the press exemption.

Now, that's not to say that the word "trustworthiness" has been thrown around a couple of times in this case, and we're not saying, and we've never said, and I don't think the voters of Colorado said when they passed amendment 27, that a newspaper is more trustworthy or less trustworthy or that what Citizens United has to say is more or less trustworthy than anyone else.

Nor have we said that having a ideological focus is determinative of whether or not something actually qualifies as press. Sure, those are all elements, those are all contextual considerations that a voter can take into account when he's considering whether to credit or discredit the message that is being broadcast to him.

When a voter is being bombarded by these -- and we are here six weeks before the elections. We've seen record advertising in all sorts of media, and as the Supreme Court has said, the identity of the speaker matters. Giving voters every opportunity that they can to sift through the various pieces of information and decide what is important, what should influence my vote, what should I discount, those are the sorts of things

that amendment 27 is aimed at allowing the electorate to consider when it's making its determinations.

THE COURT: So if I summarize your argument in one sentence, it would be, an exacting scrutiny standard applies and under that standard, the Citizens United decision by the Supreme Court decides the case.

MR. GROVE: I think you could go that way. I think that having more detailed findings than that, in fact showing a finding that says that the State of Colorado has a substantial interest in ensuring that its electors know who is trying to influence their vote and that --

THE COURT: Well, that's obvious from the constitutional amendment.

MR. GROVE: And that -- I agree with that. I think in fact, you could say it's compelling. You don't need to go that far in the disclosure context.

In the second step of the analysis, saying the means we have followed, that we have adopted as a state to ensure that that disclosure happens are substantially related to, to the method that we've chosen for reaching that goal. That's the two-step part of exacting scrutiny; and I think that you could as a matter of law, based on what the Supreme Court said in Citizens United, reach that.

We put on evidence today so that the Court wouldn't have to resort solely to making a decision as matter of law.

And in fact, I think that you can and should draw on that evidence in order to deny the motion for preliminary injunction here.

No matter whether you characterize this case as a pure First Amendment challenge or as coming at it from a more equal protection angle, which I still have trouble separating those two threads out, the plaintiff's argument here is essentially the same. They say, we are a press entity because in these modern times, there's no way to draw a line between what is a press entity and what isn't.

THE COURT: Well, the FEC apparently thinks they are, too.

MR. GROVE: And that's fine. Our law is somewhat different than the FEC's. But I think there is room for argument. There certainly is, since we have taken a different position.

For that reason, Citizens United, what they're really arguing is that this case is just like their first one. They say that Colorado's law discriminates against them because of who they are; that is, because of the form that they have chosen to take. Now, that was true in the first Citizens United case. But it's a false premise here.

The first Citizens United case involved a speech ban on corporations. Citizens United could not engage in political speech at all, in any manner at all, unless it underwent a

fundamental change in its corporate form. It could have shut down and become an MCFL corporation.

Here, the application of the press exemption in amendment 27 doesn't turn on Citizens United's corporate status. They can take whatever form they want. They could be a independent blogger, they could be a giant corporation that puts out a newsletter, or they could be a traditional press entity. It instead turns on a manner in which Citizens United chooses to express itself and the time that it has chosen to spread that message. If the plaintiff wanted to start a general-interest newspaper, it would do so and editorialize as much as it wanted. At the same time, if the film contains only electioneering communications, then Citizens United could choose to put it out more than 60 days before the election and have all its spending finished before that point.

THE COURT: Do you agree with Professor Shepard that if *The Denver Post* wanted to put out a movie like this, they would have to go through the same disclosure process?

MR. GROVE: I do. That's why I asked him that question, Your Honor.

THE COURT: But then I would have to wonder how they would do it.

MR. GROVE: I agree that there are practical difficulties. If you were talking about *The Denver Post*'s having to parse out specifically what, you know, what portion

of its budget went towards Joey Bunch's article following John Hickenlooper's campaign last week, that would be difficult. It would be a lot less difficult if *The Denver Post* put out a fund-raising appeal saying, hey, we're going to make this movie, if you contribute to this, give us money now and we will release the movie in three weeks and everybody will be happy. That would be pretty easy.

So if you were talking about everyday distinguishing between what is and what is not electioneering communication, what is and what might not be an expenditure in an op-ed or an editorial, those would be very difficult to parse out in terms of what *The Denver Post* budget does. But when you're talking about a more specific fund-raising appeal for an activity that doesn't fall within *The Denver Post*'s typical press function, and I think it becomes actually much easier.

THE COURT: Okay. You have about a minute left.

MR. GROVE: We'll rest on that, Your Honor.

THE COURT: All right. Mr. Olson. You have six minutes left. And actually, he's given you one. Take it as a gift. You have seven.

MR. OLSON: Thank you for the benefit of that, Your Honor.

Citizens United, the United States Supreme Court in Citizens United said that disclosure requirements under some circumstances are not unconstitutional. It does not say and it

does not stand for the proposition that discriminatory disclosure requirements, based upon the type or identity of the speaker, are constitutional. It did not resolve that question. So it does not stand for the proposition, which has been advanced here.

In fact, it also doesn't stand for, it doesn't involve a case where communication was totally prohibited. The argument was made and you can see this throughout the dissent's opinion, that Citizens United could use its resources through the instrument of a political action committee, a PAC. The majority opinion specifically said that is imposing a burden. There are requirements there. It involves quite a bit. That is a differential discriminatory requirement to make them communicate to the, through the form of a PAC as opposed to spending their own money.

THE COURT: If the Court enters a preliminary injunction, what does Citizens United do with respect to their movie?

MR. OLSON: If the Court issues a preliminary injunction, if the Court does issue a --

THE COURT: If the Court does, hypothetically, if I agree with the defendant, what happens to the movie?

MR. OLSON: If you agree with the defendant. I'm not sure -- I'm not quite sure I understand your question.

THE COURT: Do you go ahead and disclose and run the

movie?

MR. OLSON: I don't know.

THE COURT: Do you put the whole movie in the garbage can?

MR. OLSON: I don't know what Citizens United would do, Your Honor. What it would do, if it did decide to go forward with the movie, it would have to climb over a barrier that the other communications, newspapers and broadcasters, do not have to climb over.

My opponent just said a moment ago, Citizens United can do a movie and but it has to do 60 days before the election. That's not when people are listening. That's not when you try to engage in advocacy about the election.

THE COURT: Back to my question. If your answer is I don't, and it was, I don't know what Citizens United would do, is that relevant to the Court's determination of irreparable harm?

MR. OLSON: Yes, it is, Your Honor, because if they did decide to go forward and distribute the movie, through DVDs or whatever, video on demand, it would have to meet certain requirements. Those are barrier that is not imposed on other communicators and that is an irreparable injury.

THE COURT: Well, why is it an irreparable injury? They would have to fill out some forms and they would have to disclose, maybe, under your theory, maybe disclose some donors.

MR. OLSON: I would like to get to that point. It is totally unclear and that was illuminated by the colloquy. If people give money to Citizens United to make documentaries that have the effect of being electioneering communications, if the State of Colorado is saying, if they don't write something on their check, it doesn't have to be disclosed, that's not the way that we've thought that the statute was plainly would be interpreted, and citizens other than State of Colorado can bring a case, you mentioned NPR, some people, I think, it's probably public in the public domain, some people write a check and every once in a while you hear on NPR thank you for the support for coverage of science or coverage of Japan or something like that. So some people must identify that.

But the statute is written in a very vague way. It says contributions to Citizens United to support electioneering communications. Now, it could be that people give lots of money to Citizens United because they like what it does.

THE COURT: Does Citizens United know who the donors were that funded this movie?

MR. OLSON: No. Citizens United receives funds --

THE COURT: How do you know that they don't know that?

MR. OLSON: Well, it is not in the record, and I am answering your --

THE COURT: Oh, it's not in the record; that's clear.

MR. OLSON: That's right. And so there's nothing in

the record that says that they would know. What we are dealing with is a statute that has all of these vague standards in it. We've heard that you've got to know the totality of the circumstances to determine whether you're a media or you're in the journalism business. How can someone trying to communicate with the American people on a subject that's central to the issues that are important to the American people, how could you decide under the totality of the circumstances that some judge might decide later, I am a journalist, I am required to do these things or I'm a part of the media or I'm required to do this or however I get my money and have to know what's in the -- what are the motives of the contributors?

I mean, when the government gets into deciding certain requirements are dependent upon the motives, the purpose of the contribution, that's a very, very slippery slope. And I think that that is indicative of what is wrong with this statute.

THE COURT: Well, if, if they're right and you don't have to disclose anybody's identity unless they earmark their funds for the movie, then why aren't you just smiling and saying thank you very much, we can go home now.

MR. OLSON: Well, because any citizen can file a complaint with the secretary of state and take the opposite point of view and then afterwards, some court will decide one way or the other with respect to what that requirement is and the penalties will be imposed.

But I want to finish, because I'm sure I'm almost out of time, that this is the, the Supreme Court decisions which have discussed this over and over again between, about discriminatory burdens, based upon the nature or identity or point of view or status of the speaker, are presumptively unconstitutional. It takes a very grave burden on a state to justify those. So you have to ask the question, whether it's strict scrutiny or exacting scrutiny, why is this discrimination taking place.

THE COURT: What's your best case?

MR. OLSON: The Rosenberger vs. Rector, the Citizens United, and a number of other cases that are cited in our brief.

THE COURT: Once again, what's your best case?

MR. OLSON: I think Rosenberger vs. Rector, that was discriminating based on communication that a student was engaged in.

THE COURT: Thank you, Mr. Olson.

MR. OLSON: Thank you.

THE COURT: Thank you, folks, we're in recess.

(Recess at 12 noon.)

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 19th day of September, 2014.

s/Kara Spitler
Kara Spitler

WITNESSES

CERTIFICATION OF DIGITAL SUBMISSION AND ANTI-VIRUS SCAN

I hereby certify that I have scanned for viruses the Portable Document Format version of the attached document, using Microsoft Forefront (version 4.5.216.0, updated September 25, 2014), and according to that program, the document was free of viruses. I further certify that I have not made any privacy redactions in the attached document.

s/ Theodore B. Olson
THEODORE B. OLSON

CERTIFICATE OF SERVICE

I hereby certify that a copy of this EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL, OR, IN THE ALTERNATIVE, FOR EXPEDITED REVIEW and DECLARATION OF THEODORE B. OLSON was served on the following persons via email and next day delivery on September 25, 2014:

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