

<p>COURT OF APPEALS, STATE OF COLORADO 2 East 14th Ave. Denver, Colorado 80203</p>	
<p>Appeal from Secretary of State Agency Decision Honorable Judge Robert N. Spencer Office of Administrative Courts Case No. OS 2008-0028</p> <p>Appellant-Cross-Appellee: COLORADO ETHICS WATCH</p> <p>v.</p> <p>Appellee-Cross-Appellant: SENATE MAJORITY FUND, LLC and</p> <p>Appellees: COLORADO LEADERSHIP FUND, LLC and OFFICE OF ADMINISTRATIVE COURTS</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Attorneys for Colorado Ethics Watch: Luis Toro, #22093 Chantell Taylor, # 33059 Colorado Ethics Watch 1630 Welton Street, Suite 415 Denver, Colorado 80202 Telephone: (303) 626-2100 Fax: (303) 626-2101 E-mail: ctaylor@coloradoforethics.org; ltoro@coloradoforethics.org</p>	<p>Case No. 08CA2689</p>
<p style="text-align: center;">COLORADO ETHICS WATCH'S SUPPLEMENTAL BRIEF</p>	

<p>Court of Appeals, State of Colorado 2 East 14th Avenue, Denver, CO 80203 Name of Lower Court: Office of Administrative Courts Trial Court Judge: Administrative Law Judge Robert N. Spencer Case Number: OS 2008-0028</p>	<p style="text-align: center;">▲ ▲</p> <p style="text-align: center;">COURT USE ONLY</p>
<p>Appellant(s): COLORADO ETHICS WATCH</p> <p>v.</p> <p>Appellee(s): SENATE MAJORITY FUND, LLC, COLORADO LEADERSHIP FUND, LLC and OFFICE OF ADMINISTRATIVE COURTS</p>	
<p>Attorney : Luis Toro, #22093</p> <p>Phone Number: 303-626-2100 E-mail: ltoro@coloradoforethics.org</p> <p>FAX Number: _____ Atty. Reg. #:22093</p>	<p>Case Number: 08CA2689</p>
<p>CERTIFICATE OF COMPLIANCE</p>	

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32 and the Court’s January 26, 2010 Order, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the Court’s January 26, 2010 Order.

Choose one:

- It contains 1,908 words.
- It does not exceed 7 pages.

By: S/Luis Toro
Luis Toro, #22093

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
I. Citizens United Reaffirmed That Ads Can Be Regulated As “Express Advocacy” Even If They Do Not Contain “Magic Words.”	1
II. Ethics Watch Is Not Suing To Enforce Bans On Corporate Expenditures	4
III. Citizens United Reaffirmed The Constitutionality Of Requiring Disclosures Regarding Independent Expenditures	7

TABLE OF AUTHORITIES

Cases

<i>Austin v. Michigan Chamber of Commerce</i> , 494 U.S. 652 (1990).....	2
<i>Buckley v. Valeo</i> , 424 U.S. 1, 20-21 (1976).	7
<i>Citizens United v. Federal Election Comm’n</i> , 530 F. Supp. 2d 274 (D.D.C.), appeal dismissed, ___ U.S. ___, 128 S. Ct. 1732 (2008)	2
<i>Citizens United v. Federal Election Comm’n</i> , No. 08-205 (U.S., Jan. 21, 2010).....	passim
<i>Colo. Citizens for Ethics in Gov’t v. Comm. for the Am. Dream</i> , 187 P.3d 1207 (Colo. App. 2008).....	6
<i>Federal Election Comm’n v. Wisconsin Right to Life</i> , 551 U.S. 449 (2007) 2, 3, 4, 8	
<i>Lambert v. Ritter Inaugural Comm., Inc.</i> , 218 P.3d 1115, 1122 (Colo. App. 2009).....	7
<i>McConnell v. Federal Election Comm’n</i> , 540 U.S. 93 (2003)	2, 3, 4

Statutes

2 U.S.C. § 441b.....	1
----------------------	---

Constitutional Provisions

Colo. Const. art. XXVIII, § 2(8).....	1, 3, 8
Colo. Const. art. XXVIII, §§ 3(4)(a)	5
Colo. Const. art. XXVIII, § 3(5).....	6
Colo. Const. art. XXVIII, § 5	7
Colo. Const. art. XXVIII, § 6(2).....	5
U.S. Const., amend. I	4, 6, 7, 8

Appellant/Cross-Appellee, Colorado Ethics Watch (“Ethics Watch”), pursuant to the Court’s order dated January 26, 2010, respectfully submits its supplemental brief regarding the impact of *Citizens United v. Federal Election Comm’n*, No. 08-205 (U.S., Jan. 21, 2010) on the issues in this case. This case presents questions of first impression regarding the interpretation of the definition of “expenditure” in Section 2(8) of Article XXVIII of the Colorado Constitution, enacted by the voters in 2002 as part of Amendment 27.

I. *Citizens United* Reaffirmed That Ads Can Be Regulated As “Express Advocacy” Even If They Do Not Contain “Magic Words.”

Citizens United arose from the planned airing of a video-on-demand “documentary” film (“*Hillary*”) about then-presidential candidate Hillary Clinton and television commercials promoting the film, to be paid by a nonprofit corporation with general treasury funds that included funds received from for-profit corporations. *Id.*, slip op. at 2-3. The plaintiff corporation sought declaratory and injunctive relief barring the Federal Election Commission (“FEC”) from enforcing 2 U.S.C. § 441b’s ban on corporate funded independent expenditures in connection with the proposed airing of *Hillary*. *Id.*, slip op. at 4. It also contended that federal law disclosure and disclaimer requirements were unconstitutional as applied to the film and the television commercials. *Id.*

At the district court level, plaintiff moved for a preliminary injunction, arguing among other things that *Hillary* was immune from regulation as issue speech because it “does not expressly say how a viewer should vote.” *Citizens United v. Federal Election Comm’n*, 530 F. Supp. 2d 274 (D.D.C.), *appeal dismissed*, ___ U.S. ___, 128 S. Ct. 1732 (2008).¹ As Ethics Watch noted in its briefing below and before this Court, the federal district court rejected that argument, holding that *Hillary* could only be interpreted as an appeal to vote against Senator Clinton for President, and therefore, was subject to regulation under the “functional equivalent of express advocacy” test articulated in *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003) and *Federal Election Comm’n v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (“*WRTL*”). 530 F. Supp. 2d at 279-80 & n.12.

The key to understanding the impact of the U.S. Supreme Court’s decision in *Citizens United* on this case is to realize that the reason the Supreme Court ordered re-argument on the question of whether to overrule *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) and a portion of *McConnell* is that it could not resolve the case on narrower grounds. *Citizens United*, slip op. at 5. One of the narrower grounds that

¹ The District Court later entered summary judgment based on the reasoning of the preliminary injunction order; that order was reviewed on direct appeal to the Supreme Court. *Citizens United*, slip op. at 4-5.

was considered and rejected by the majority was the argument that *Hillary* was not “equivalent to express advocacy” under *McConnell* and *WRTL*. *Citizens United*, slip op. at 7-8. On this point, the Supreme Court held:

Citizens United argues that *Hillary* is just "a documentary film that examines certain historical events." Brief for Appellant 35. We disagree. The movie's consistent emphasis is on the relevance of these events to Senator Clinton's candidacy for President. The narrator begins by asking "could [Senator Clinton] become the first female President in the history of the United States?" App. 35a. And the narrator reiterates the movie's message in his closing line: "Finally, before America decides on our next president, voters should need no reminders of . . . what's at stake -- the well being and prosperity of our nation." *Id.*, at 144a-145a.

As the District Court found, there is no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton. Under the standard stated in *McConnell* and further elaborated in *WRTL*, the film qualifies as the functional equivalent of express advocacy.

Id., slip op. at 8. In other words, the Supreme Court concluded that under the objective, functional test, “*Hillary* is equivalent to express advocacy. The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President.” *Id.*, slip op. at 7-8 (*citing WRTL*, 551 U.S. at 481).

The primary significance of *Citizens United* to the interpretation of the definition of “expenditure” in Colo. Const. art. XXVIII, §2(8), is the Supreme Court’s reaffirmation that there is no constitutional requirement

that ads that can be interpreted only as an appeal to vote for or against a candidate be treated as issue speech, merely because those ads avoid the use of so-called “magic words.” *Citizens United*, slip op. at 8. Ethics Watch submits that the ads attached to its complaint, like *Hillary*, can only be reasonably interpreted as appeals to vote for the specified candidates. Moreover, the ads in this case were paid for by organizations whose major purpose is the nomination of election of candidates for state office. *See* Complaint at ¶¶ 3-4, 10 (I:2-3). That being the case, spending on these ads must necessarily be considered to be “for the purpose of expressly advocating the election or defeat of a candidate” unless there is a constitutional reason to narrow the definition so as not to include ads that advocate without the use of so-called “magic words.” *Citizens United* reaffirms that there is no constitutional requirement that the definition be so limited. *Citizens United*, slip op. at 8; *WRTL*, 551 U.S. at 481; *McConnell*, 540 U.S. at 206.

II. Ethics Watch Is Not Suing To Enforce Bans On Corporate Expenditures.

The principal holding of *Citizens United* is that “the government may not suppress political speech on the basis of the speaker’s corporate identity.” *Id.*, slip op. at 50. The Court did not rule that the First Amendment prohibits all restrictions on corporate election-related spending.

It held that the “outright ban on corporate political speech during the critical preelection period” contained in the statute at issue was “asymmetrical to preventing quid pro quo corruption.” *Id.*, slip op. at 45. This holding is of only tangential relevance to this case because none of Ethics Watch’s claims are based on those portions of Article XXVIII of the Colorado Constitution that involve bans on corporate funded independent expenditures or electioneering communications. *See* Colo. Const. art. XXVIII, §§ 3(4)(a), 6(2). Instead, Ethics Watch has a claim for failure to register as a political committee, a claim for accepting contributions in excess of the limits applicable to political committees, and a claim for failure to file independent expenditure reports. (I:3-5.)

Ethics Watch has argued that one consequence of a ruling in favor of Appellees is that corporations and labor unions could easily circumvent the bans contained in Sections 3(4)(a) and 6(2) of Article XXVIII by running ads that function as express advocacy but avoid the use of so-called “magic words.” In view of the Supreme Court’s holding, this particular policy argument may be reduced in force, but other policies behind Amendment 27 are now more critical after the ruling. For example, a ruling in favor of Appellees in this case would render meaningless another important part of Amendment 27, that is, the contribution limits applicable to political

committees that are not called into question by *Citizens United*. See Colo. Const. art. XXVIII, § 3(5). If Appellees’ interpretation of the term “expenditure” is accepted, a 527 could disregard political committee contribution limits and yet run ads that can only be interpreted as appeals to vote for or against a candidate. Indeed, the record reflects that Appellees have accepted contributions in excess of political committee limits from individuals as well as corporations. (I:53, 58, 65, 77-79, 91.)

Ethics Watch’s position, that Amendment 27 should be interpreted in light of the objectives it seeks to achieve and the mischief it seeks to avoid, remains vibrant. See *Colo. Citizens for Ethics in Gov’t v. Comm. for the Am. Dream*, 187 P.3d 1207, 1215 (Colo. App. 2008). Nothing in *Citizens United* calls into question contribution limits such as Colo. Const. art. XXVIII, §3(5), that apply uniformly to “any person” and do not draw distinctions based on the speaker’s corporate identity. The Supreme Court noted that it had not been asked to “reconsider whether contribution limits should be subject to rigorous First Amendment scrutiny.” *Citizens United*, slip op. at 43. It has previously approved of contribution limits, holding that “[b]y contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the

contributor's ability to engage in free communication.” *Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976).

The Court should avoid interpreting Amendment 27 in a self-defeating way that would permit Appellees to accept contributions in excess of political committee limits to run ads that function as express advocacy. *See Lambert v. Ritter Inaugural Comm., Inc.*, 218 P.3d 1115, 1122 (Colo. App. 2009) (rejecting interpretation of Amendment 27 that would “would significantly undermine the contribution limits stated in the state constitution”).

III. Citizens United Reaffirmed The Constitutionality Of Requiring Disclosures Regarding Independent Expenditures.

The Supreme Court’s second holding in *Citizens United* is directly relevant to Ethics Watch’s third claim for relief for failure to report independent expenditures as required by Colo. Const. art. XXVIII, § 5. (I:5.) Eight justices agreed that the First Amendment does not invalidate the disclaimer and disclosure requirements applicable to independent expenditures under federal law. *Citizens United*, slip op. at 50-51.² Ethics Watch submits that in view of this holding, the disclosure requirement for

² The four justices who signed on to Justice Stevens’ concurrence and dissent joined Part IV, which upheld the disclaimer and disclosure requirements, while Justice Thomas dissented from Part IV. *Citizens United*, slip op. at 3 (opinion of Stevens, J.), 1 (opinion of Thomas, J.).

independent expenditures in Colo. Const. art. XXVIII, § 5 is unquestionably constitutional and takes on increased importance in the wake of *Citizens United*.

In a post-*Citizens United* Colorado in which corporations and labor unions may feel free to spend unlimited amounts of money independently to support candidates, independent expenditure disclaimer and disclosure requirements may be the only way for voters to know who is attempting to influence the election through such spending. An overly restrictive interpretation of the definition of “expenditure” would defeat the beneficial purpose of the independent expenditure disclosure requirement, without any corresponding protection of First Amendment rights. On the other hand, judicial recognition that an ad is purchased “for the purpose of expressly advocating the election or defeat of a candidate” when the ad is “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate” would be faithful to the plain language and manifest purpose of the Colorado Constitution without violating the First Amendment. *See* Colo. Const. art. XXVIII, § 2(8); *WRTL*, 551 U.S. at 470; *see also Citizens United*, slip op. at 8. As the *Citizens United* court stated:

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.

Citizens United, slip op. at 55. Ethics Watch submits that it would be contrary to the language and purpose of Amendment 27 to allow SMF and CLF to spend money on ads that can only be reasonably interpreted as an appeal to vote for their favored candidates without filing required independent expenditure reports.

DATED: February 10, 2010.

By: S/Luis Toro
Luis Toro, #22093

Original Signature on File Pursuant to
C.A.R. 30

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2010 a true and correct copy of the foregoing COLORADO ETHICS WATCH'S SUPPLEMENTAL BRIEF was served via LexisNexis File and Serve as follows:

Scott E. Gessler, Esq.
Hackstaff Gessler LLC
1601 Blake Street, Suite 310
Denver, CO 80202

Jason R. Dunn, Esq.
Brownstein Hyatt Farber Schreck LLP
410 17th Street, Suite 2200
Denver, CO 80202

John W. Suthers, Esq.
Attorney General of Colorado
1525 Sherman St., 7th floor
Denver, CO 80203

S/Luis Toro
Luis Toro

Original Signature on File Pursuant to
C.A.R. 30