June 9, 2010

Ms. Shawn Woodhead Werth
Secretary
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments on Draft Advisory Opinion 2010-08 (Citizens United)

Dear Ms. Werth:

These comments are filed on behalf of Democracy 21 and the Campaign Legal Center with regard to Draft Advisory Opinions 2010-08 A and B, which have been issued in response to a request for an advisory opinion by Citizens United. The two draft opinions are on the agenda for the Commission's meeting on June 10, 2010.

In its AOR, Citizens United seeks recognition as a member of the "media" for purposes of the media exemption in 2 U.S.C. § 431(9)(B)(i); 11 C.F.R. § 100.132. The media exemption applies to:

> A communication appearing in a news story, commentary or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned by any political party, political committee, or candidate.

We disagree with the analysis set forth in both draft opinions. For the reason set forth below, we urge the Commission to reject both drafts, and to conclude that Citizens United is not a "press entity" – but rather is, as it describes itself, an advocacy organization – and accordingly that its activities do not qualify for the media exemption.

Let us be clear: if the Commission determines that a classic advocacy organization like Citizens United acquires the protections of the press exemption merely by producing a handful of films in furtherance of its advocacy mission, the unbounded nature of that determination will open the door for any and all advocacy groups to obtain an exemption from the campaign finance laws. And that, in turn, would seriously undermine the campaign finance laws, in direct contravention of the Commission's obligation to protect the integrity and efficacy of the laws it is charged with administering.

i.

Following the Supreme Court's decision in *Citizens United v. FEC,* 130 S.Ct. 876 (2010), the principal import of the press exemption is to shield a corporation from disclosure of money spent to influence federal elections. Yet in *Citizens United*, the Supreme Court made clear that federal disclosure and disclaimer requirements <u>do apply – and constitutionally can be applied – to the filmmaking and related advertising activities of Citizens United itself</u>. 130 S.Ct. at 914-16.

Citizens United now asks the Commission to bestow media status on its "documentary" filmmaking. In the *Citizens United* case, as the Supreme Court noted, the group "argue[d] that *Hillary* is just 'a documentary film that examines certain historical events.' We disagree." *Id.* at 890. Instead, the Court said the group's documentary "in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President." *Id.*

The Court held that that requiring Citizens United to comply with disclosure requirements does not limit or inhibit its speech, and does not chill its donors. *Id.* at 915-16. Instead, the Court found that "prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. . . .This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 916.

Now, in the immediate wake of the *Citizens United* decision, with no change in its activities and having lost its claim that it should not be subject to the disclosure requirements of the law, Citizens United attempts to re-cast itself from an advocacy organization into a "press entity" in order to seek an exemption from the same disclosure requirements that the Court held can and do apply to it.

This is a bold face effort by Citizens United to circumvent the disclosure laws that the Supreme Court found were constitutionally applicable to the organization. And the vehicle for this circumvention are the so-called "documentaries" produced by Citizens United that, in one case, the Court labeled "a feature-length negative advertisement" that expressly advocated against a candidate. The Court flatly rejected Citizen United's suggestion that this was just a "documentary."

The FEC should have better things to do than serve as the enabler for Citizens United to evade the campaign finance disclosure laws.

ii.

The Commission has a developed body of law through advisory opinions that construe and apply the news media exemption. The Commission has repeatedly said that "several factors must be present for the press exemption to apply." Ad. Op. 2004-07 (April 1, 2004) (citing advisory opinions). They are:

> First, the entity engaging in the activity must be a press entity described by the Act and Commission regulations. Second, an application of the press exemption depends upon the two-part framework presented in *Reader's Digest Association v. FEC,* 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981): Whether the press entity is owned or controlled by a political party, political committee or candidate; and (2) Whether the press entity is acting as a press entity in conducting the activity at issue (i.e., whether the entity is acting in its "legitimate press function").

Ad. Op. 2004-07 (citations omitted) (emphasis added)

This is consistent with the test that is set forth in both draft opinions here. *See* Draft A at 6; Draft B at 7 (both setting forth "a two-step analysis to determine whether the media exemption applies.").

As both Draft A and Draft B provide, "First, the Commission asks whether the entity engaging in the activity is a press or media entity." *Id.*

Citizens United fails this first prong of the test: it is an advocacy organization, not a "press entity." Indeed, Citizens United describes itself as an advocacy organization. On its website, it says:

> Citizens United is an organization dedicated to restoring our government to citizens' control. 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. Citizens United's goal is to restore the founding fathers' vision of a free nation, guided by the honesty, common sense, and good will of its citizens.[1]

This is not the description of a "press entity." Indeed, by this depiction, it appears that not even Citizens United considers itself a "press entity."

Instead, this is the description of an advocacy organization that is dedicated to the public policy goals of, *inter alia*, "limited government" and "freedom of enterprise," and that advocates for these legislative objectives by means of "education, advocacy and grass roots organization."

Simply put, this is what "advocacy groups" like the National Rifle Association or the Sierra Club do, not what "press entities" like the New York Times or Fox News do.

That Citizens United is an advocacy group, not a press entity, is further evidenced by the fact that it spends only 25 percent of its budget on the production and distribution of its films. *See* Draft A at 3; Draft B at 3. Whereas press entities like the New York Times or Fox News are dedicated entirely to the business of producing and distributing news, Citizens United's

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[1] *See* http://www.citizensunited.org/about.aspx (emphasis added).

production and distribution of documentaries is a small part of its overall purpose of political advocacy.

The description of Citizens United as an advocacy group, not a press entity, is also consistent with other public statements about its purpose and activity.

In a recent news article, Citizens United President David Bossie described Citizens United as an "interest group." In commenting on the Supreme Court's ruling in *Citizens United*, Bossie said that unions have long been able to participate in campaigns but, "Who hasn't been able to fully participate are other interest groups like Citizens United, the NRA [National Rifle Association] and the U.S. Chamber of Commerce."[2]

Citizens United was a plaintiff in *McConnell v. FEC,* 540 U.S. 93 (2003). In findings of fact made in that case, the district court described Citizens United as follows:

> Citizens United is a not-for-profit, tax exempt corporation governed by section 501(c)(4) of the Internal Revenue Code. Bossie Decl. ¶2. It is dedicated to the principles of limited government and national sovereignty and to defending the rights its members believe are secured in the United States Constitution; its principle function is the dissemination of information concerning such beliefs and advocacy. *Id.* ¶3.

McConnell v. FEC, 251 F. Supp. 2d 176, 224 (D.D.C. 2003) (three judge court). Citizens United maintains a separate segregated fund, Citizens United Political Victory Fund. *Id.*

As part of its lawsuit in *McConnell*, Citizens United described itself as an advocacy organization:

> Citizens United is a nonpartisan organization, dedicated primarily to principles of limited government and national sovereignty and to the defense of rights secured under the United States Constitution…. Citizens United accepts contributions from individuals and business entities, including corporations, and represents its views, and the views of its members and contributors, on legislative and public policy issues before federal, state and local officials and the general public….[3]

Indeed, Citizens United conceives of its filmmaking as part of its advocacy effort. In an article about Citizens United's documentaries, Bossie is quoted as describing himself as an "accidental filmmaker" who uses the group's documentaries as "offensive political tools":

> David Bossie, a veteran conservative operative and self-described "accidental filmmaker," provided one of the event's most memorable offerings. "We need to

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[2] D. Weil, "Bossie Claims Court 'Victory' for Americans," *Newsmax* (Feb. 3, 2010) (emphasis added) at http://newsmax.com/Newsfront/bossie-campaign-finance-citizens/2010/02/03/ id/348904.

[3] Declaration of David N. Bossie at ¶3 in *McConnell v. FEC, supra* (emphasis added).

> use all the political tools available to us," Bossie told me. "Whether it's a thirty-second TV spot or a full-length feature, we need offensive political tools."[4]

Thus, Citizens United is, by its own account, an advocacy group, and as such, is not a "press entity." Its status is akin to the situation addressed in Ad. Op.1989-28, where the Commission concluded that a similarly organized section 501(c)(4) advocacy group, the Maine Right to Life Committee, Inc., also did not qualify for the media exemption. In terms similar to the description of Citizens United, above, the Commission described MRLC as follows:

> You explain that MRLC is a statewide, nonprofit, section 501(c)(4) membership organization incorporated in the State of Maine in 1974. It was formed "to promote the sanctity of all human life, including unborn children, and to educate the public on issues relating to abortion, infanticide, and euthanasia."

Ad. Op. 1989-28 at 1. Like Citizens United, MRLC had an affiliated separate segregated fund. MRLC claimed the benefit of the press exemption based on its activities in distributing voter guides and newsletters to educate the public. But the Commission rejected the claim:

> The Commission has previously concluded that the news media exemption, 2 U.S.C. § 431(9)(B)(i), applies to a press entity engaged in the normal press-business of covering and commenting on political campaigns …. [W]hile MRLC's specific corporate purposes include publication and distribution of articles on particular subjects from a "prolife" viewpoint, MRLC is essentially a nonprofit, tax exempt corporation with charitable, social, benevolent, and educational purposes. It is not engaged in the news media business, and is not the type of entity contemplated by Congress when it adopted the cited press exemption in 1974.

Id. at 6 (citations omitted) (emphasis added).

Citizens' United similarly is "essentially a nonprofit, tax exempt corporation with charitable, social, beneficial and educational purposes." It too "is not engaged in the news media business," and is not the "type of entity contemplated by Congress" for the press exemption.

An advocacy group like MRLC or Citizens United stands in stark contrast to the kinds of clearly identified "press entities" which the Commission has previously recognized as being within the scope of the press exemption. These include, for instance: Viacom/MTV Networks (Ad. Op. 2004-07; Ad. Op. 2003-34); Daniels Cablevision (Ad. Op. 1998-17); C-SPAN (Ad. Op. 1996-48); A.H. Belo Corp. (Ad. Op. 1996-41), and Bloomberg (Ad. Op. 1996-16).

The fact that Citizens United produces documentary films as "offensive political tools" in furtherance of its advocacy purposes does not suffice to convert it from an advocacy organization into a "press entity" for purposes of the press exemption.

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[4] M. Blumenthal, "Hooray for Right Wing Hollywood," *The Nation* (Dec. 4, 2006) at http://www.thenation.com/article/hooray-right-wing-hollywood (emphasis added).

Nor does the fact that, for purposes of this advisory opinion request, Citizens United considers itself to be part of the news media. As the district court in *McConnell* noted in an analogous context (in part about Citizens United), litigants cannot benefit from the Press Clause of the First Amendment "merely by characterizing themselves in their complaints as members of the 'press' because their purpose is to disseminate information to the public." 251 F. Supp.2d at 236.

iii.

The analysis presented in both Draft A and Draft B essentially ignores this crucial threshold question of whether Citizens United is a "press entity." To be more precise, both drafts engage in an entirely circular analysis that assumes Citizens United is a "press entity" because it engages in some functions which are akin to functions that are done by the press.

Thus, the drafts first state that "neither the Act nor Commission regulations use or define the term 'press entity.'" Draft A at 6; Draft B at 7. Therefore, the drafts continue, "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." *Id.* The drafts note that Citizens United produces documentaries, *i.e*., "commentary," and "is therefore considered a press entity for purposes of this advisory opinion." *Id.*

But this reasoning simply collapses the question of whether a group is a "press entity" into the question of whether the group engages in press-like activities. Under that analysis, no group that seeks an exemption for any press-like activities will ever be found not to be a "press entity" because the Commission takes the fact that it engages in those activities as sufficient to prove that it is a "press entity." By this reasoning, any advocacy group that distributes "commentary" in furtherance of its advocacy function is *per se* a "press entity" that qualifies for the press exemption. There is no limiting principle here – every group is "the press."

That cannot be what the press exemption is intended to be, nor does it give any content to the threshold inquiry of "whether the entity engaging in the activity is a press entity." The fact that the Commission asks this threshold question at all presupposes that a group may engage in press-like activity yet not be a "press entity" – in other words, that there is some independent determination to be made as to whether a group is in the media business, not just whether it is engaged in political or campaign advocacy that involves its use of "offensive political tools" that include press-like activities.

Further, as discussed above, the drafts rely on the fact that Citizens United produced "documentaries" as the sole evidence that Citizens United is a "press entity." Yet, at least with regard to the so-called *Hilary* "documentary," the Supreme Court said that the film was no more than "a feature-length negative advertisement that urges viewers to vote against" a political candidate. 130 S.Ct. at 890. That Citizens United sponsored what even the Supreme Court saw as nothing more than an extended campaign ad does not support a claim that Citizens United is therefore a "press entity." It just supports the conclusion that it runs campaign ads.

By this reasoning, any group running campaign ads could point to those ads as evidence it is a "press entity" and thereby should be exempt from the campaign finance laws. Such logic is not only circular; it is nonsensical.

iv.

Because Citizens United is not a "press entity" within the meaning of the media exemption, it does not meet the first standard for application of the exemption. Drafts A and B should accordingly both be rejected.[5]

We appreciate the opportunity to provide these comments to you.

Sincerely,

/s/ Fred Wertheimer *(/s/ J. Gerald Hebert)*

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[5] By cloaking a narrower set of Citizens United's activities with the press exemption, Draft B is preferable to Draft A. However, for reasons set forth above, we believe the analysis in both drafts is wrong.