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August 13, 2004

Lawrence Norton, Esq.  
General Counsel  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463

Comments  
AOR 2004-30

Comments on Advisory Opinion Request 2004-30

Dear Mr. Norton:

These comments are filed on behalf of Democracy 21, the Campaign Legal Center and the Center for Responsive Politics in regard to Advisory Opinion Request 2004-30, a request for an advisory opinion by Citizens United, which seeks advice on a proposed broadcast of a self-described documentary film it is producing that refers to Senator John Kerry, the Democratic nominee for President. The AOR also seeks a ruling on proposed broadcast advertisements that Citizens United seeks to sponsor and that it claims are intended to promote its film, as well as a related book also about Senator Kerry.

1. The broadcast of the film. The Commission's regulations provide that an "electioneering communication" is a (i) broadcast ad that refers to a clearly identified candidate, (ii) "is publicly distributed" within 30 days of a primary election or 60 days of a general election for an office sought by that candidate, and (iii) is "targeted" to the electorate of the candidate. 11 C.F.R. § 100.29(a). "Publicly distributed," in turn, is defined to mean "aired, broadcast, cablecast or otherwise distributed *for a fee* through the facilities of a television station...." *Id.* at § 100.29(b)(3)(i) (emphasis added).

Thus, if a broadcaster airs the Citizens United film "The Many Faces of John Kerry" without charging a "fee" for doing so, the broadcast of the film will not fall within the definition of "electioneering communication." On the other hand, if Citizens United pays a fee to have the film aired, and if it is aired within the pre-election window, it would

2. The broadcast of advertisements about the book or the film. If Citizens United pays for advertisements about its book or its film, and those advertisements, as described in the AOR, meet the basic definition of “electioneering communication” – they refer to Senator Kerry, and they are broadcast within 60 days of the general election – then they constitute “electioneering communications” under the law. This is consistent with the Commission’s recent ruling in Ad.Op. 2004-15 (June 25, 2004) (holding that the broadcast of advertisements about a documentary by a nonprofit corporation would constitute an “electioneering communication”).

3. The press exemption. Citizens’ United requests an opinion on whether its paid broadcast of its film, or paid advertisements about its film or book, all of which constitute “electioneering communications,” would be exempt from the statute because they fall under the “press exemption” set forth in 2 U.S.C. § 434(f)(3)(B)(i); 11 C.F.R. § 100.29(c)(2). This 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.

This exemption from the definition of electioneering communication is essentially identical to a comparable press exemption from the definition of “expenditure.” 2 U.S.C. § 431(9)(B)(i), 11 C.F.R. § 100.132.

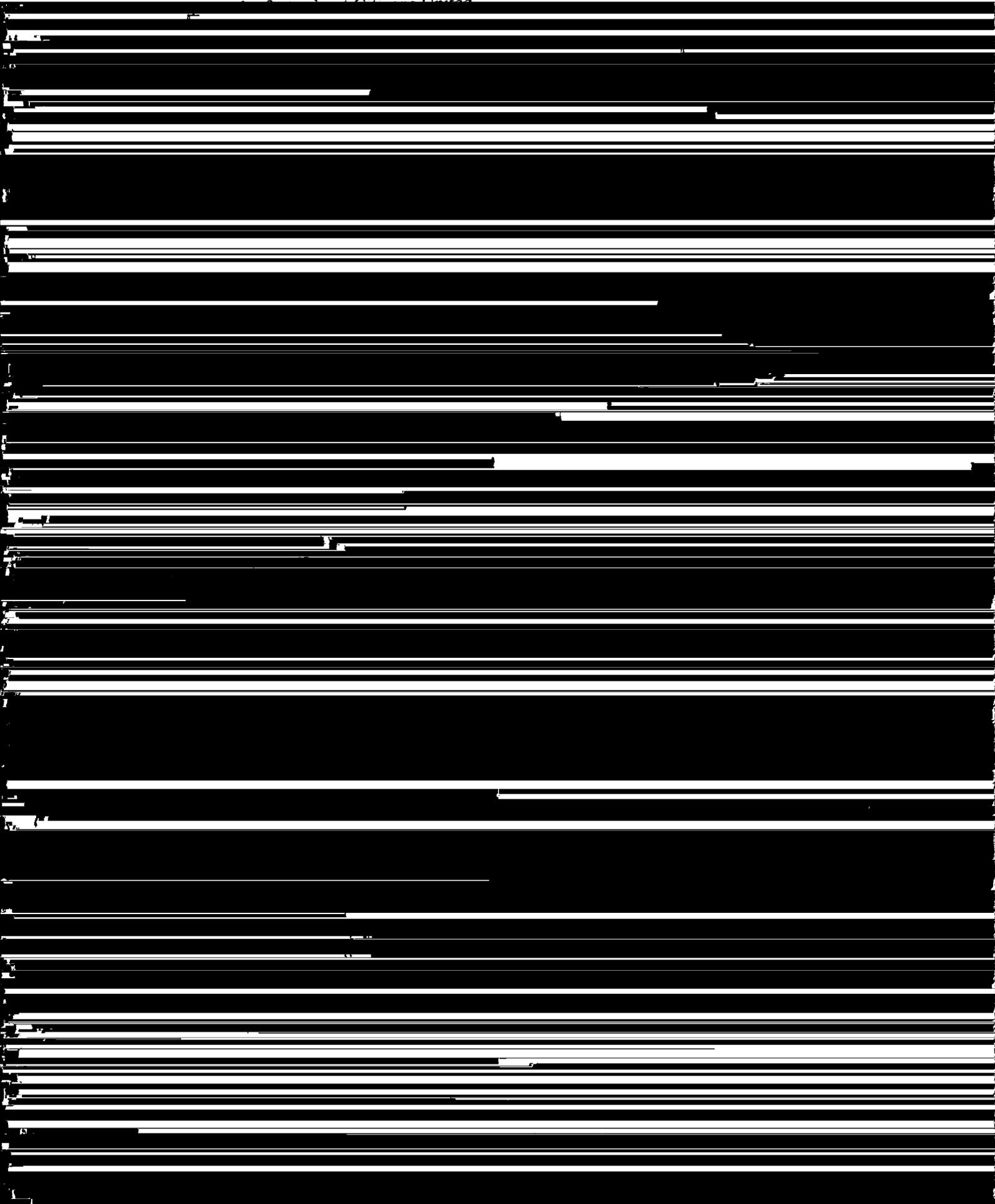
The Commission has a developed body of law through advisory opinions that construe and apply the press exemption similarly in both contexts. The Commission has repeatedly said that “several factors must be present for the press exemption to apply.” Ad.Op. 2004-07 (April 1, 2004) (citing advisory opinions). 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)

As we discuss below, Citizens United fails the first prong of this test: it is not a “press entity” as the Commission has construed and applied that term in the past. Therefore, any electioneering communications which it sponsors are not exempt from the statutory regulations, including disclosure requirements and source prohibitions, that apply to such electioneering communications.

Citizens United is an advocacy organization, not a "press entity." This conclusion is based on the standards developed by the Commission in past cases on this question, as



founding father's vision of a free nation, guided by the honesty, common sense, and good will of its citizens.<sup>3</sup>

Thus, Citizens United is 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 press 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.

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.

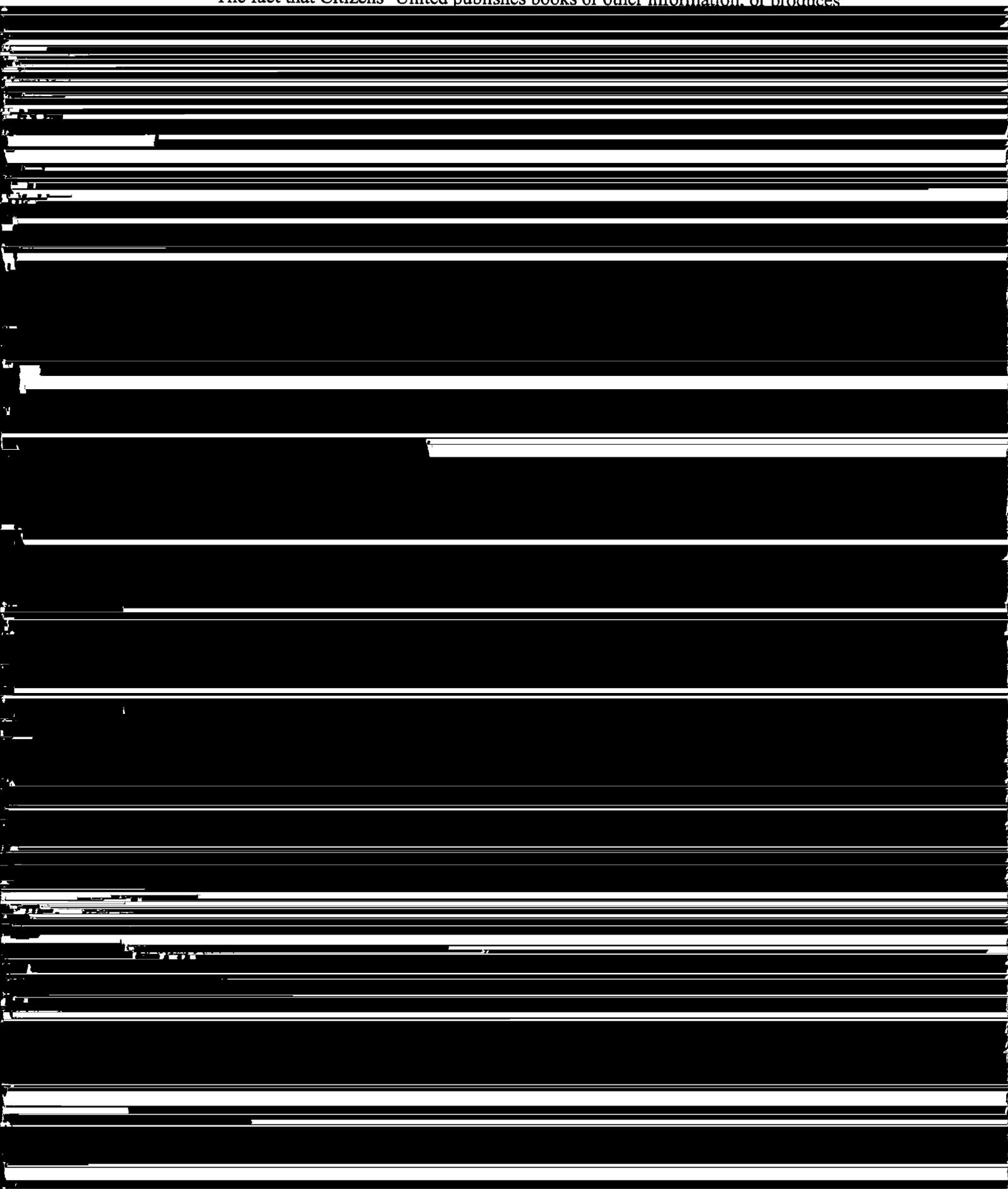
*Id.* (citations omitted) (emphasis added).

Citizens' Union 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 stand in contrast to the kinds of clearly identified "press entities" which the Commission has previously recognized as being within the coverage 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).

<sup>3</sup> See [http://www.citizensunited.org/citizens\\_united.html](http://www.citizensunited.org/citizens_united.html) (emphasis added).

The fact that Citizens' United publishes books or other information, or produces



We appreciate the opportunity to provide these comments to you.

Sincerely,



Donald J. Simon  
SONOSKY, CHAMBERS, SACHSE  
ENDRESON & PERRY, LLP  
1425 K STREET, N.W.  
Suite 600  
Washington, D.C. 20005  
(202) 682-0240

*Counsel for Democracy 21*

Trevor Potter  
J. Gerald Hebert  
CAMPAIGN LEGAL CENTER  
1640 Rhode Island Avenue, N.W.  
Suite 650  
Washington, D.C. 20036  
(202) 736-2200

*Counsel for the Campaign Legal  
Center*

Lawrence Noble  
CENTER FOR RESPONSIVE  
POLITICS  
1101 14<sup>th</sup> Street, N.W.  
Suite 1030  
Washington, D.C. 20005  
(202) 857-0044

*Counsel for Center for Responsive Politics*

Fred Wertheimer  
DEMOCRACY 21  
1825 I Street, N.W.  
Suite 400  
Washington, D.C. 20005  
(202) 429-2008

*Counsel for Democracy 21*