

February 17, 2023

VIA EMAIL: elections@denvergov.org

Hon. Paul D. López, Clerk and Recorder
City and County of Denver, Elections Division
200 W. 14th Ave.
Denver, CO 80204

RE: Advisory Opinion Request – Mike Johnston for U.S. Senate

Dear Clerk and Recorder López,

Federal, state, and local campaign finance law allow a former federal candidate to transfer unexpended funds out of his or her federal candidate committee to an entity supporting his or her candidacy in a state or local election. We are pursuing such a transfer in the near future and, in order to promote transparency and compliance with Denver’s campaign finance rules, are seeking an advisory opinion to confirm that an entity’s use of such funds to pay for an independent expenditure in support of the candidate is not controlled by or coordinated with that candidate.

Providing an advisory opinion on this issue will provide certainty to candidates across elections, which will benefit the public and the candidates themselves. For this reason, and pursuant to Denver’s Election and Campaign Finance Rule 3.6, we request an advisory opinion on the following question:

Can a municipal candidate’s federal candidate committee transfer unexpended funds to an entity that may make independent expenditures in support of the candidate without controlling or coordinating with that entity?

The relevant facts, law, and analysis are set forth below.

Relevant Facts

Mike Johnston, now a candidate for Mayor, was a candidate for U.S. Senate in 2020. In connection with his federal candidacy, Mike established a federal candidate committee: Mike Johnston for U.S. Senate. Mike eventually withdrew from Colorado’s 2020 U.S. Senate race. His federal candidate committee has retained certain unexpended funds in accordance with federal campaign finance law.

Recently, we became aware of an entity that supports Mike’s mayoral candidacy. Mike’s federal candidate committee seeks to transfer some of its unexpended funds to this separate and independent entity.

Relevant Law and Analysis

As an initial matter, federal campaign finance rules allow a federal candidate committee to transfer unexpended funds to an entity that may make independent expenditures in a non-federal election.¹

Given that federal law allows unexpended funds to be transferred out of the federal candidate committee to an entity that may make independent expenditures in a local election, the next question is whether an independent expenditure made by the entity in support of the former federal candidate's municipal candidacy, and paid for with funds received from the federal candidate committee, implicate Denver's campaign finance rules regarding control or coordination.²

Under Denver's campaign finance rules, an independent expenditure is "controlled by or coordinated with a candidate . . . when: (a) [t]he communication is made in cooperation or consultation with, or at the request or suggestion of, a candidate, . . . including any general or particular understanding with, or pursuant to any non-public communication with, the candidate . . . ; (b) [t]he communication is made by a person or committee that was directly or indirectly formed by, or at the request of the candidate; or (c) [t]he candidate . . . solicit[s] funds or appear[s] at fundraising events on behalf of the person or committee making the communication during the same election cycle as the communication is made."³

This definition of control and coordination essentially distills down to three distinct questions: (1) was the expenditure made after cooperation or consultation with the candidate?; (2) was the entity that made the expenditure directly or indirectly formed by the candidate?; and (3) did the candidate solicit funds or fundraise for the entity that made the expenditure?

If the answer to any of these questions is yes, then there is control or coordination. Here, however, the answer to each of these questions is no. As such, there would be no control or coordination between the entity and Mike or his federal candidate committee.

First, there has not been, and will not be, any cooperation or consultation between the entity and Mike or his federal candidate committee regarding any expenditures that the entity may make. There has not been, and will not be, "any general or particular understanding" between the entity and Mike or his federal candidate committee regarding any expenditure the entity may make.⁴

¹ 11 CFR 113.2(e): "In addition to defraying expenses in connection with a campaign for federal office, funds in a campaign account, . . . may be used for any other lawful purpose." Though not a binding legal interpretation, the Federal Election Commission's information hotline confirmed our reading of this code provision that transferring unexpended funds from a federal candidate committee to an entity that supports the former federal candidate in a local election is an allowable "lawful purpose."

² Different from state campaign finance law, Denver's campaign finance rules do not require an entity that makes independent expenditures to register as an independent expenditure committee. Instead, Denver's rules require a person or entity who makes an independent expenditure to report the expenditure and to include, among other information, the source of the funds used to pay for the expenditure. D.R.M.C. Sec. 15-35.5(c)(8)(a).

³ D.R.M.C. Sec. 15-32(g)(1).

⁴ D.R.M.C. Sec. 15-32(g)(1)(a).

To the contrary, the entity will be entirely in control of the transferred funds and no expenditures, if the entity makes any, will be “pursuant to any non-public communication” with Mike or his federal candidate committee.⁵ Second, neither Mike nor his federal candidate committee had any role, directly or indirectly, in forming the entity, and the entity was not formed at the request of Mike or his federal candidate committee.⁶ Third, neither Mike nor his federal candidate committee has solicited funds or “appear[ed] at fundraising events” for the entity, and Mike and his federal candidate committee will not do so.⁷

Other than taking the necessary action to authorize the transfer of unexpended funds from Mike’s federal candidate committee to the entity, neither Mike nor his federal candidate committee will interact with the entity. In other words, the entity will have full and independent control over the funds, including whether and how to spend them and there would be no control or coordination with Mike or his federal candidate committee.

Analogous Federal Precedent

Analogous federal precedent provides further persuasive guidance that there would be no control or coordination here.

In 2022, the Hispanic Leadership Trust sought advisory opinion guidance from the Federal Election Commission as to whether HLT had been directly or indirectly established, financed, maintained, or controlled by two members of Congress who were appointed chair and vice chair of HLT’s board of directors and whose leadership PACs contributed to HLT.⁸

In its advisory opinion, the FEC concluded that the two members of Congress had not established, financed, maintained, or controlled HLT because: (1) the formation of HLT was initiated and managed by someone other than the two members of Congress; (2) the contributions from the members’ leadership PACs to HLT did not constitute a majority of HLT’s total funds; (3) neither member of Congress was providing ongoing financial support to HLT; and (4) HLT’s fundraising activities had to be approved by the entire board of directors and not just by the two members of Congress who were chair and vice chair.⁹

⁵ *Id.*

⁶ Nor was the entity “established, financed, directed or controlled by a member” of Mike’s immediate family. D.R.M.C. Sec. 15-32(g)(1)(b).

⁷ D.R.M.C. Sec. 15-32(g)(1)(c). Denver’s rules do not further define what it means to solicit funds, but the state campaign finance rule prohibiting pre-candidacy coordination defines “solicits” to mean: “[o]rganizes, directs, or plans a fundraising event . . . or asks for, encourages, or suggests a donation” Colorado Secretary of State, Rules Concerning Campaign and Political Finance, 8 CCR 1505-6, Rule 21.2. This definition belies any strained argument that funds transferred from Mike’s federal candidate committee to the entity were somehow solicited and, thus, coordinated. Because Mike’s federal candidate committee has not raised funds since his federal candidacy in 2019, there have been no fundraising events that Mike could have organized, directed, or planned for the benefit of the entity and there have been no donations that Mike could have asked for, encourage, or suggested for the benefit of the entity.

⁸ Federal Election Commission, Advisory Opinion 2022-06 re Hispanic Leadership Trust (Jul. 29, 2022), available at: <https://www.fec.gov/files/legal/aos/2022-06/2022-06.pdf>.

⁹ *Id.* at pp. 5-12.

Likewise, the case of former U.S. Senator and Louisiana gubernatorial candidate David Vitter is instructive.¹⁰ Senator Vitter transferred a total of \$950,000 from his U.S. Senate candidate committee to Fund for Louisiana’s Future, a super PAC that had been established for the sole purpose of supporting Senator Vitter’s reelection campaign to the U.S. Senate or his campaign for governor of Louisiana, or both.¹¹ FFLF made independent expenditures in support of Senator Vitter’s gubernatorial bid (and successfully overturned Louisiana’s \$100,000 cap on contributions to independent expenditure committees), with a federal court finding “the record does not disclose any coordination [between FFLF] and Senator Vitter or any other specific candidate or campaign.”¹²

There is far more daylight between the entity and Mike and his federal candidate committee than there was between HLT and the two members of Congress who chaired and vice chaired HLT and whose leadership PACs contributed to HLT. Moreover, the case of FFLF and Senator Vitter demonstrates that a transfer of funds from a federal candidate committee to an entity that makes independent expenditures in support of that candidate for a non-federal office does not, on its own, equate to control or coordination. Accordingly, if there was no control or coordination between HLT and the two members of Congress or between FFLF and Senator Vitter, surely there would be no control or coordination between the entity and Mike or his federal candidate committee here.¹³

Additional and Voluntary Safeguards Against Control or Coordination

To further insulate the entity’s independent expenditures from any control by or coordination with Mike or his federal candidate committee, we will take the following additional and voluntary safeguards:

- Other than taking the necessary action to transfer the unexpended funds, neither Mike nor his candidate committee will interact with the entity. (This is distinct from HLT, where the two members of Congress chaired and vice chaired HLT’s board and participated in decisions on fundraising activities.)
- There will be no staff or consultants shared between the entity and Mike and his candidate committee. (This is distinct from FFLF, where FFLF and Senator Vitter shared the same fundraising consultants.)

¹⁰ See note 15, “Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter,” *In the Matter of David Vitter et al.*, Federal Election Commission, MUR 6798 (Aug. 30, 2019), available at: https://eqs.fec.gov/eqsdocsMUR/6798_2.pdf.

¹¹ *Id.*

¹² *Fund for Louisiana’s Future v. Louisiana Bd. of Ethics*, 17 F. Supp. 3d 562, 575 (E.D. La. 2014) (finding that FFLF had “demonstrated that it is indeed an independent Super PAC”).

¹³ See also *Colorado Republican Party v. Williams*, 370 P.3d 650, 654 (Colo. 2016) (holding that a state political party can establish an independent expenditure committee that is not subject to state limits on political party contributions and does not implicate campaign finance rules on control or coordination).

- Mike will give the contributors to his federal candidate committee the opportunity to request that their contributions not be transferred to the entity. (Because the entity will have full and independent control over the funds, the contributors to Mike’s federal candidate committee should be given this choice.)

Conclusion and Considerations for Issuing an Advisory Opinion

Finally, the three considerations set forth in Rule 3.6.1 strongly weigh in favor of issuing an advisory opinion here: (1) will the advisory opinion remove uncertainties as to the application of any law?; (2) does the request involve a question that concerns a pending complaint?; and (3) is the request a moot or hypothetical question?

First, an advisory opinion will remove uncertainty as to whether Denver’s campaign finance rules regarding control or coordination are implicated if an entity uses funds from a federal candidate committee to pay for an independent expenditure in support of the candidate. Second, there is no pending complaint regarding this question because we are seeking this advisory opinion proactively. Last, this request is neither moot nor hypothetical because we are pursuing a transfer of funds from Mike’s federal candidate committee to an entity that supports Mike’s mayoral candidacy.

For these reasons, and in light of the fact that the election is approximately six weeks away, we respectfully request an expedited review of and advisory opinion on this request. Expedited consideration and proactive guidance in the form of an advisory opinion will preserve public and private resources alike by preventing a campaign finance complaint in the future.

Please do not hesitate to reach out with any questions or for any additional information.

Sincerely,

Mike Johnston
Former U.S. Senate Candidate
& Denver Mayoral Candidate

Sarah Mercer
Volunteer Legal Counsel
Mike Johnston for U.S. Senate