



FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 4, 2023

ADVISORY OPINION 2023-03

Christopher O. Murray
Brownstein Hyatt Farber Schreck, LLP
410 Seventeenth Street
Suite 2200
Denver, CO 80202

Dear Mr. Murray:

We are responding to your advisory opinion request on behalf of the Colorado Republican State Central Committee (the “Committee”) and its Chair, David Williams, regarding the application of the Federal Election Campaign Act, 52 U.S.C. § 30101 *et seq.* (the “Act”), and Commission regulations to the Committee’s proposal to establish a legal fund to challenge Proposition 108, a Colorado law that requires major political parties to nominate candidates for the general election either through a semi-open primary or a closed convention process. The Commission concludes that, under the facts presented here, the funds received and spent to litigate the constitutionality of Proposition 108 would not be contributions and expenditures under the Act because they would not be made for the purpose of influencing any election for federal office. The Commission further concludes that, under the facts presented here, the legal fund would not be engaged in federal election activity or otherwise engaged in activity in connection with a federal election.

Background

The facts presented in this advisory opinion are based on your letter received on March 20, 2023, and publicly available information.

In Colorado, the Committee is a “major political party” and the state central committee empowered to make all rules for Republican party government in the state.¹ The Committee states that its primary objectives are “to elect duly nominated or designated Republican candidates to office, to promote the principles and achieve the objectives of the Republican Party at national and state levels, and to perform the

¹ Advisory Opinion Request (“AOR”) at 001, 9; Colo. Rev. Stat. § 1-3-105(1).

functions required of it under the laws of the State of Colorado.”² The Committee maintains several segregated funds, which include a federal account, registered with the Commission, for “contributions for federal election and related activity under the Act.”³

In 2016, Colorado adopted Proposition 108, a law that changed the process for political parties to nominate a candidate for a general election.⁴ As enacted, Proposition 108 created a semi-open primary system that permits unaffiliated voters to vote in a major party’s primary election.⁵ Major parties can opt out of the semi-open primary and nominate candidates in a closed party assembly or convention if the party’s state central committee secures a vote of at least three-fourths of its membership.⁶

The Committee seeks to establish a legal fund to challenge the constitutionality of Proposition 108.⁷ The Committee’s Chair would establish the fund and appoint an independent governing board to manage the fund’s operations.⁸ The board members would not be federal candidates or federal officeholders.⁹ The board would make all solicitations for the legal fund separately from solicitations for the Committee or any other federal political committee.¹⁰ Additionally, all solicitations would include a letter “stating the purpose of the [f]und and noting that no amounts given to the [f]und would

² AOR001.

³ *Id.*

⁴ *See* Colo. Rev. Stat. §§ 1-2-218.5(2), 1-4-101(2)(b), 1-4-104, 1-4-702(1), & 1-7-201(2.3) (collectively “Proposition 108”). The law applies to both state and federal candidates. *Id.* § 1-4-702.

⁵ AOR002-3; Colo. Rev. Stat §§ 1-2-218.5(2), 1-4-101(2)(b), & 1-7-201(2.3).

⁶ AOR001, 3; Colo. Rev. Stat § 1-4-702(1). Colorado law defines an “assembly” as “a meeting of delegates of a political party, organized in accordance with the rules and regulations of the political party, held for the purpose of designating candidates for nominations.” *Id.* § 1-1-104(1.3). Colorado law defines a “convention” as “a meeting of delegates of a political party, organized in accordance with the rules and regulations of the political party, held for the purpose of selecting delegates to other political conventions, including national conventions, making nominations for presidential electors, or nominating candidates to fill vacancies in unexpired terms of representatives in congress or held for other political functions not otherwise covered in this code.” *Id.* § 1-1-104(6).

⁷ AOR001. The Committee is seeking to challenge an existing state law, codified through the ballot initiative process. *Id.* It is not seeking to support or challenge a ballot initiative. *Id.* Individual members of the Committee and a public interest group previously filed a lawsuit to challenge Proposition 108, which was dismissed in part for lack of standing. *PARABLE, et al. v. Griswold*, No. 22-cv-00477-JLK (D. Colo. Apr. 8, 2022). In its Memorandum Opinion, the court noted that the requestor was the entity with standing. Mem. Op. & Order on Mot. to Dismiss at 9, *PARABLE, et al. v. Griswold*, No. 22-cv-00477-JLK (D. Colo. Apr. 8, 2022), ECF No. 61.

⁸ AOR003.

⁹ *Id.*

¹⁰ *Id.*

be used for the purpose of influencing any federal election.”¹¹ The Committee intends for the fund to accept “unlimited amounts from individuals, political committees, corporations, and labor organizations.”¹² The board would have final authority over disbursements, which would be made exclusively to fund the lawsuit challenging Proposition 108.¹³ The Committee would terminate the fund when all legal costs are paid, and “any excess funds will be refunded or donated to charity.”¹⁴

Questions Presented

- (1) Does a donation to the proposed legal fund, established for the sole purpose of challenging the constitutionality of Colorado’s Proposition 108, constitute a “contribution” to the Committee under the Act?*
- (2) Does the payment of legal fees from the proposed legal fund, established for the sole purpose of challenging the constitutionality of Colorado’s Proposition 108, constitute an “expenditure” from the Committee under the Act?*
- (3) Would the Commission’s answer to either question (1) or question (2) change if the Committee initiated legal proceedings challenging the constitutionality of Proposition 108 after Colorado’s 2024 Primary Election (to be held on June 25, 2024)?*
- (4) Would disbursements from the proposed legal fund, established for the sole purpose of challenging the constitutionality of Colorado’s Proposition 108, constitute federal election activity or otherwise be considered to be made “in connection with a federal election” under the Act?*

Legal Analysis

- (1) Does a donation to the proposed legal fund, established for the sole purpose of challenging the constitutionality of Colorado’s Proposition 108, constitute a “contribution” to the Committee under the Act?*
- (2) Does the payment of legal fees from the proposed legal fund, established for the sole purpose of challenging the constitutionality of Colorado’s Proposition 108, constitute an “expenditure” from the Committee under the Act?*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

(3) *Would the Commission’s answer to either question (1) or question (2) change if the Committee initiated legal proceedings challenging the constitutionality of Proposition 108 after Colorado’s 2024 Primary Election (to be held on June 25, 2024)?*

No, donations to and disbursements from the Committee’s proposed legal fund would not constitute contributions or expenditures under the Act because such donations and disbursements would not be made “for the purpose of influencing any election for Federal office.” The date that the Committee initiates its proposed litigation in relation to Colorado’s primary is not a factor in the Commission’s conclusion.

A contribution includes “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.”¹⁵ Similarly, an expenditure includes “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.”¹⁶

The Commission has previously considered whether donations to and disbursements from legal funds established to finance litigation about the political process were made “for the purpose of influencing any election for federal office.” For example, in Advisory Opinions 1982-35 (Hopfman), 1983-37 (Massachusetts Democratic State Committee), and 1996-39 (Heintz), the Commission considered proposals to establish legal funds to finance litigation concerning the procedure for federal candidates to qualify for primary election ballots. In Advisory Opinion 1983-30 (Joyner), the Commission considered a federal candidate’s proposal to establish a legal fund to challenge a state constitutional provision restricting his candidacy. In each of these advisory opinions, the Commission concluded that, to the extent the legal funds were used exclusively for the purposes of defraying legal costs, donations to and disbursements from the legal funds were not made for the purpose of influencing any federal election and, therefore, were not contributions or expenditures under the Act.

Additionally, in Advisory Opinions 1982-14 (Michigan Republican State Committee) and 1990-23 (Frost), the Commission determined that donations to and disbursements from legal funds to be used solely in connection with reapportionment matters were not contributions or expenditures under the Act.¹⁷ In each of these advisory

¹⁵ 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R. § 100.52(a).

¹⁶ 52 U.S.C. § 30101(9)(A)(i); 11 C.F.R. § 100.111(a).

¹⁷ *Id.* In Advisory Opinion 1990-23 (Frost), the Commission concluded that a federal officeholder’s authorized committee could not set up a separate reapportionment account, because, unlike state party committees, an authorized committee “is established and operated only to receive funds for the purpose of influencing the election of its authorizing candidate.” *Id.* at 2. The Commission noted, however, that the federal officeholder could set up a fund independent of his authorized committee to pay reapportionment

opinions, the Commission observed that influencing reapportionment decisions, “although a political process, is not considered election-influencing activity subject to the requirements of the Act.”¹⁸

Further, in Advisory Opinion 2018-03 (Gilmore), the Commission concluded that the value of free legal services provided by the requestor, a federal candidate and attorney, to plaintiffs in a lawsuit challenging the constitutionality of the date of the primary election in which the requestor was running for office was not an in-kind contribution to his campaign. The requestor had recruited the plaintiffs and asserted that the lawsuit would not have existed had he not been a candidate. While recognizing that the outcome of the litigation might incidentally benefit the requestor’s campaign, the Commission concluded that the purpose of the free legal services was to assert the plaintiffs’ constitutional rights, not to influence a federal election.¹⁹

Here, the Committee’s proposal to establish a legal fund for the exclusive purpose of challenging the constitutionality of Proposition 108 is consistent with these prior advisory opinions. Proposition 108 governs how Colorado conducts primary elections. A state’s procedure for conducting primary elections is a political process that may have an incidental effect on federal elections, much like the processes for determining how a candidate qualifies to be on a ballot addressed in Advisory Opinions 1982-35 (Hopfman), 1983-37 (Massachusetts Democratic State Committee), and 1996-39 (Heintz)²⁰; how many representatives are in a congressional district addressed in Advisory Opinions 1982-14 (Michigan Republican State Committee) and 1990-23 (Frost); and the date of a congressional election addressed in Advisory Opinion 2018-03 (Gilmore). Here, the purpose of the proposed fund — indeed the sole purpose as the Committee asserts — is to finance a lawsuit in which it will seek to assert its constitutional rights as a major party and state central committee in Colorado, not to influence any federal election.

Further, the procedures the Committee proposes to use in administering the fund support its assertion that the purpose of the fund is to challenge a state law, not to influence any federal election. As proposed, the legal fund would be segregated from the

expenses. *Id.* at 3. Alternatively, the authorized committee could use its funds for reapportionment expenses and report any such payments as disbursements, not expenditures. *Id.*

¹⁸ Advisory Opinion 1982-14 (Michigan Republican State Committee) at 2; Advisory Opinion 1990-23 (Frost) at 2.

¹⁹ *Id.* at 4-5.

²⁰ In Advisory Opinion 2003-15 (Majette), discussed more fully in the text, the Commission recognized that the litigation at issue in Advisory Opinion 1996-39 (Heintz) was substantially similar to litigation regarding an open primary election system, and relied on Advisory Opinion 1996-39 (Heintz), Advisory Opinion 1983-07 (Massachusetts Democratic State Committee), and certain other advisory opinions rendered prior to the enactment of the Bipartisan Campaign Reform Act of 2002 in reaching its conclusion.

Committee’s other accounts and managed by an appointed board,²¹ none of whose members would be federal candidates or officeholders.²² The board would make all solicitations on behalf of the legal fund separately from solicitations for the Committee or any other federal political committee.²³ Solicitations for the fund would include a letter stating that “no amounts given to the [f]und would be used for the purpose of influencing any federal election.”²⁴ The fund’s disbursements would be made exclusively to fund the lawsuit challenging Proposition 108.²⁵ Finally, the Committee would terminate the fund when all legal costs are paid, and “any excess funds will be refunded or donated to charity.”²⁶

Accordingly, the Commission concludes that, under the facts presented here, donations to and disbursements from the proposed legal fund would not be made for the purpose of influencing any election for federal office and, therefore, would not constitute contributions or expenditures under the Act. The relationship between the date that the Committee initiates its proposed litigation and the date of Colorado’s primary election is not a factor in the Commission’s conclusion.

(4) Would disbursements from the proposed legal fund, established for the sole purpose of challenging the constitutionality of Colorado’s Proposition 108, constitute federal election activity or otherwise be considered to be made “in connection with a federal election” under the Act?

No, under the facts presented here, disbursements from the proposed legal fund would not constitute federal election activity and would not be considered to be made “in connection with a Federal election” under the Act.

The Committee seeks to establish a legal fund, maintained in a segregated account, that would accept “unlimited amounts from individuals, political committees, corporations, and labor organizations.”²⁷ State party committees generally are not prohibited from soliciting or receiving funds outside the Act’s amount limitations and source prohibitions for their segregated accounts to finance nonfederal activity.²⁸

²¹ AOR0003.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ See 11 C.F.R. §§ 102.5, 300.30(b)(1); see also Advisory Opinion 1990-23 (Frost) at 2 (recognizing that, unlike candidate committees, “the establishment by a state party committee of a separate

However, state party committees may finance federal election activity only with funds that are subject to the limitations, prohibitions, and reporting requirements of the Act.²⁹ Additionally, a state party committee that engages in federal election activity, like the Committee, must not make any disbursements, contributions, expenditures or transfers “in connection with Federal elections” from a nonfederal account.³⁰

The term “federal election activity” includes four categories of activities: (1) voter registration activity within 120 days before a federal election; (2) voter identification, get-out-the-vote activity, and generic campaign activity conducted in connection with an election in which a candidate for federal office appears on the ballot; (3) a public communication that refers to a clearly identified candidate for federal office and promotes or supports a candidate for that office, or attacks or opposes a candidate for that office; and (4) services provided during any month by an employee of a state, district, or local committee of a political party who spends more than 25 percent of their compensated time during that month on activities in connection with a federal election.³¹

Here, the Committee explicitly represents that “[n]o monies received by the [f]und would be used for activities included in the definition of federal election activity under 52 U.S.C. § 30101(20).”³² The Committee’s proposed method of administering the legal fund supports this representation. The fund would be administered by an independent board made up of individuals who are not federal candidates or federal officeholders.³³ All solicitations for the fund would include a letter “stating the purpose of the [f]und and noting that no amounts given to the [f]und would be used for the purpose of influencing any federal election.”³⁴ All disbursements from the fund would be made exclusively to fund the lawsuit challenging the constitutionality of Proposition 108, which does not involve any of the activities included within the definition of federal election activity.³⁵ Accordingly, the Commission concludes that disbursements from the Committee’s proposed legal fund would not constitute federal election activity as defined in the Act.

account within the party organization for purposes that do not include the support of Federal candidates or political committees is explicitly permitted by Commission regulations.”).

²⁹ 52 U.S.C. § 30125(b)(1); 11 C.F.R. § 300.32(a)(2). This limitation on the use of nonfederal funds also applies to any entity directly or indirectly established, financed, maintained, or controlled by a state party committee or officers acting on the committee’s behalf. 52 U.S.C. § 30125(b)(1).

³⁰ 11 C.F.R. § 300.30(b)(1); *see also* 11 C.F.R. § 102.5.

³¹ 52 U.S.C. § 30101(20); 11 C.F.R. § 100.24.

³² AOR003.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

Additionally, the Commission concludes that disbursements from the Committee’s proposed legal fund would not be made “in connection with Federal elections” under 11 C.F.R. § 300.30(b)(1). The Commission has previously concluded that disbursements from funds analogous to the Committee’s proposed legal fund were not made in connection with a federal election. For example, in Advisory Opinion 2003-15 (Majette), the Commission approved a proposal by a federal officeholder to establish an independent legal fund to defend a challenge to Georgia’s open primary election system. The Commission reasoned that, although the litigation at issue was a “challenge [to] the lawfulness of the conduct of the election,” it was not “in connection with a Federal election” for the purposes of the Act.³⁶

Similarly, in Advisory Opinion 2010-03 (Democratic Redistricting Trust), the Commission concluded that federal officeholders could solicit funds that did not comply with the Act’s amount limitations or source prohibitions on behalf of an independent trust established to fund reapportionment and redistricting matters, because such matters were not “in connection with an election.”³⁷ The Commission observed that the trust sought to “engage in litigation over the electoral process that will govern how future elections are conducted, but its activities will not be a means to participate in those elections.”³⁸ Thus, the Commission concluded, “[a]lthough the outcome of redistricting litigation often has political consequences . . . spending on such activity is sufficiently removed that it is not ‘in connection with’ the elections themselves.”³⁹

Here, the Committee proposes to establish a legal fund for the sole purpose of litigating the constitutionality of a state law that established a semi-open primary system. If the Committee were to prevail in its proposed litigation, it would impact the procedure for conducting future primaries, but it would not affect the content of what appears on the ballot for a particular primary. The litigation at issue here is substantially similar to the litigation at issue in Advisory Opinion 2003-15 (Majette), in which the Commission concluded that the litigation was not “in connection with a Federal election.” Also, like the litigation at issue in Advisory Opinion 2010-03 (Democratic Redistricting Trust), the Committee seeks to engage in litigation over a process that will “govern how future elections are conducted, but its activities will not be a means to participate in those elections.”⁴⁰ Accordingly, the Commission concludes that under the facts presented here, disbursements from the proposed legal fund would not be considered to be “in connection with Federal elections.”

³⁶ Advisory Opinion 2003-15 (Majette) at 4.

³⁷ Advisory Opinion 2010-03 (Democratic Redistricting Trust) at 4.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 4.

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.⁴¹ 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.⁴² 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. Any advisory opinions cited herein are available on the Commission's website.

On behalf of the Commission,

A handwritten signature in black ink, appearing to read 'Dara Lindenbaum', with a stylized flourish at the end.

Dara Lindenbaum,

Chair

⁴¹ See 52 U.S.C. § 30108.

⁴² See *id.* § 30108(c)(1)(B).