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October 3, 2016

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**BY HAND DELIVERY**

Attn: Adav Noti  
Associate General Counsel for Policy  
Office of the General Counsel for Policy  
Federal Election Commission  
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Washington, D.C. 20463

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
2016 OCT -3 PM 1: 53  
OFFICE OF GENERAL  
COUNSEL

**Re: Comments on Draft Advisory Opinion Request 2016-13 (Martins for Congress II)**

Dear Mr. Noti:

Earlier this year, not wanting to face competition for the Republican nomination in New York’s Third Congressional District, Jack Martins sought to disqualify his one opponent, Philip Pidot, from the Republican primary ballot. Although Mr. Pidot was later found to have submitted a sufficient number of petitions, Mr. Martins took advantage of New York’s ponderous election law regime to delay the validation process until it was too late for Mr. Pidot’s name to appear. As a result, Mr. Martins stood “unopposed” in the June 28 primary and won the nomination without having to earn a single vote. For this “election,” Mr. Martins enjoyed a separate contribution limit.

To correct this undemocratic turn of events, a federal district court ordered that the primary election be rescheduled for October 6. Refusing to accept the court’s decision, Mr. Martins filed a motion for reconsideration seeking either cancellation of the October primary or a rescheduling of the general election to December. This demand was strenuously opposed by the state and local boards of election, which correctly noted that it would cost substantial sums of taxpayer money and result in voter confusion. The court rejected Mr. Martins’ request.

Continuing his seemingly endless journey through federal and state tribunals, Mr. Martins then petitioned the Federal Election Commission (the “Commission”) for a separate contribution limit for the October primary, even though he had already enjoyed a distinct limit for the June primary balloting that never occurred. The Commission granted his expedited request. The very next day, Mr. Martins entered an appearance before the Second Circuit Court of Appeals to argue that this October primary – the one for which he had, just a day earlier, received permission to raise under a separate contribution limit – should be cancelled. To end the chaos, the Second Circuit granted Mr. Martins’ request; overturned the order calling for an October election; and allowed

Mr. Martins to appear on the general election ballot against Democratic nominee, Tom Suozzi, on November 8.

Following this development, we expected that Mr. Martins would drop his endless game of legal challenges and finally put his campaign before the voters. But, alas, no. Mr. Martins has now returned to the Commission to ask if he may retain the separate contribution limit that the Commission awarded him prior to the Second Circuit decision canceling the October election. Having already enjoyed one contribution limit for a primary election (in June) where balloting never took place, Mr. Martins now seeks yet another contribution limit for a primary election (in October) where no votes will be cast.

Enough is enough. On behalf of the DCCC, we file these comments strongly opposing Mr. Martins' outrageous attempt to circumvent federal contribution limits.

**A. There is no "election" taking place in October and therefore Mr. Martins does not enjoy a separate contribution limit.**

A candidate enjoys a separate contribution limit for "any election for Federal office" in which he is a candidate.<sup>1</sup> Mr. Martins cites to several advisory opinions in support of his contention that the erstwhile October primary still qualifies as such an "election," notwithstanding the fact that it has been cancelled.<sup>2</sup> But these advisory opinions are materially distinguishable. In those cases, the requestor sought a separate contribution limit for an upcoming primary election scheduled to be held, which had been ordered to supplant the results of a primary election that had already been held. Here, the "election" for which the new limit is sought is not being held. It has been cancelled. And it was cancelled before the voting had commenced in earnest and before boards of election had engaged in most of the tasks necessary to hold the election.<sup>3</sup>

This request is instead analogous to a separate line of cases in which the Commission held that campaigns may accept contributions under a separate limit on the contingency that an election might take place, but must refund or redesignate those contributions if the election is not held. In Advisory Opinion 2009-15, the Commission looked at this specific issue of how a campaign should treat funds raised for a special election that does not take place. In that opinion, the

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<sup>1</sup> 52 U.S.C. § 30116(a)(1)(A).

<sup>2</sup> FEC Adv. Op. 2016-13, Request by Martins for Congress (Martins for Congress II), at 4

<sup>3</sup> See *Pidot, et al. v. State Board Appeal No. 16-0859 - Brief of Appellee NY Board of Elections*, at 4 ("The Queens County portion of the 3rd Congressional district requires the use of 19 polls sites serving 12,478 voters enrolled in the Republican Party. To conduct an election at those 19 poll sites, the Board must deploy approximately 530 poll workers and the following equipment: 38 ballot scanners; 19 ballot marking devices; 61 privacy booths; 82 supply carts (or fewer if election districts are combined); 119 tables; and 400 chairs. The Board must also deploy equipment to render certain poll sites accessible to persons with disabilities: one 28-foot ramp; one 84-foot ramp; two 10-foot ramps; at least five mats to cover wires; and six traffic cones.")

Commission told the campaign: “If the White Committee raises money for a special election, and the special election does not occur, contributions designated for the special election must be refunded to the contributor . . . unless the White Committee receives a written redesignation or combined redesignation and reattribution.”<sup>4</sup>

The White opinion applies a long-standing Commission position regarding how to treat legally-raised funds for an election that does not take place. In Advisory Opinion 1986-17, the Commission stated that “contributions designated for a particular election such as a runoff or general election, may be accepted but become refundable to the contributors if the candidate does not participate in that election.”<sup>5</sup> Similarly, in Advisory Opinion 1982-49 (Weicker), the Commission approved the acceptance of runoff election contributions in anticipation of a runoff election, “provided that such runoff election contributions are separately accounted for and are returned to the donors in the event that no runoff election is held.”<sup>6</sup> The fact that the Weicker committee engaged in “planning and campaigning . . . for that contest,” as Mr. Martin also claims, was ultimately irrelevant.<sup>7</sup> So, too, was the fact that the candidate “had reason to believe” that a runoff election would occur based on the stated intentions of his opponent. Put another way, the expectation that an election would take place did not result in a separate contribution limit when the election ultimately did not take place. Instead, the Commission ordered that contributions accepted in anticipation of such an election must be refunded once it becomes apparent that no election would be held.

The case against an extra contribution limit is even stronger here. As noted, Mr. Martins has already been the beneficiary of a contribution limit for a primary election (in June) where there was no voting. To award him yet another contribution limit for a primary election (in October) where no voting will occur would be gravely unfair to Mr. Martins’ general election opponent, Mr. Suozzi – who played by the rules, faced a contested primary which he won, and then had only one contribution limit for the general election. Moreover, unlike other requestors who had their electoral prospects scrambled in court cases to which they were not parties, Mr. Martins instigated the chain of events that led to the erstwhile October election. To hand him another contribution limit as a reward for plunging the system into chaos would be inequitable.

**B. Mr. Martins’ alternative request is not a proper advisory opinion request.**

In order for the Commission to respond to an advisory opinion request, the requester must set forth “a specific transaction that the requesting person plans to undertake or is presently

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<sup>4</sup> FEC Adv. Op. 2009-15 (White).

<sup>5</sup> FEC Adv. Op. 1986-17 (Green)

<sup>6</sup> FEC Adv. Op. 1982-49 (Weicker). *See also* FEC Adv. Op. 1983-39 (Krueger); Adv. Op. 1980-68 (Miller); Adv. Op. 1980-122 (Myerson).

<sup>7</sup> FEC Adv. Op. 2016-13, Request by Martins for Congress (Martins for Congress II), at 4.

undertaking and intends to undertake in the future.”<sup>8</sup> Requests that do not qualify as valid advisory opinion requests include those “presenting a general question or interpretation.”<sup>9</sup>

Here, the Martins Campaign has provided no information at all regarding any “specific transaction” that the campaign has undertaken or will undertake. To the contrary, the Martins Campaign makes a vague request for the Commission to answer the “general question” of how to allocate expenditures attributable “to defeating the unique opponent” in the special election.<sup>10</sup> Mr. Martins has not provided the Commission with any information about the nature of the expenditures that he wishes to treat as allocable to the October primary. Accordingly, the Commission does not have a proper factual basis upon which to render an opinion. This “general question” does not qualify as an advisory opinion request.

Based on Commission precedent, it is highly unlikely that many (if any) of Mr. Martins’ expenditures can be “allocated” to the non-existent October primary. In Advisory Opinion 1986-17 (Green), for example, the Commission concluded that allocation was appropriate only in “those limited circumstances where it is necessary to make advance payments or deposits to vendors for services that will be rendered, or goods that will be provided, to your committee” in connection with that election. The Commission continued, “This limited, permissible use of such general election contributions does not include the expenditure of such contributions for activities that influence the primary election or nominating process or expenditure allocations for goods or services to be used in both the primary and general elections.” Accordingly, any expenditure that would have been made to influence both the cancelled October primary and the November general election cannot be properly allocated to the canceled October primary. That would be deeply prejudicial to Mr. Suozzi.

### **C. Conclusion**

It would be unfair and contrary to law to allow Mr. Martins to retain a separate contribution limit for the now-cancelled October primary.

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<sup>8</sup> 11 C.F.R. § 112.1(b). *See* 52 U.S.C. § 30108 (a)(1) (stating that a written advisory opinion request must detail “a specific transaction or activity”).

<sup>9</sup> *Id.* *See, e.g.*, FEC Adv. Op. 2003-12 (Flake) (“The Commission concludes that several of your questions are “general question[s] of interpretation,” within the meaning of 11 CFR 112.1(b), rather than questions regarding ‘a specific transaction or activity.’”); FEC Adv. Op. 2006-24 (Republican and Democratic Senatorial Committees) (“Commission regulations explain that requests posing a hypothetical situation, presenting a general question of interpretation, or regarding the activities of third parties, do not qualify as advisory opinion requests. 11 CFR 112.1(b). On this basis, the Commission expresses no opinion regarding this question.”); FEC Adv. Op. 1988-31 (Baldwin) (“Your inquiry does not appear to satisfy the requirements established by the Act and Commission regulations. First, [you] are not proposing specific ongoing or future activity to which the Act applies.”).

<sup>10</sup> FEC Adv. Op. 2016-13, Request by Martins for Congress (Martins for Congress II), at 4.

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All funds raised under the separate contribution limit should be refunded to the donors or redesignated to the general election in accordance with Commission regulations.

Thank you for your consideration.

Very truly yours,

A handwritten signature in black ink, consisting of several overlapping, slanted strokes that form a stylized, somewhat abstract representation of the name Marc E. Elias.

Marc E. Elias  
Graham M. Wilson  
Jonathan S. Berkon  
Katherine T. LaBeau

Counsel for the DCCC