

# Comment on ADR 2013-02

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## VIA ELECTRONIC AND CERTIFIED MAIL

Shawn Woodhead Werth  
Secretary and Clerk  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

**Re: Comment on Advisory Opinion Request by Daniel Winslow**

Dear Secretary Werth:

Daniel Winslow, a candidate for U.S. Senate, recently submitted an Advisory Opinion Request concerning his campaign's receipt of contributions from married same-sex couples. We submit this Comment to offer our perspective on this matter, having recently submitted an *amicus brief* about the Defense of Marriage Act ("DOMA") and federal campaign finance law in the U.S. Supreme Court case *U.S. v. Windsor*.

Mr. Winslow posits that his campaign cannot attribute contributions to certain same-sex spouses unless they fit within a safe harbor for "spouse" contributions at 11 C.F.R. § 110.1(i). He specifically invites the Commission to choose to "follow its long-standing practice of relying on state law" and thereby interpret the word "spouse," as found in Section 110.1(i), to include same-sex spouses.

We agree that Mr. Winslow's campaign may lawfully attribute contributions to same-sex spouses. But we believe the Commission cannot reach this result by taking the path Mr. Winslow advocates. Indeed, Mr. Winslow's assertion that "spouse" is "not defined in FECA or the Commission's regulations" is incorrect because DOMA mandates that "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, ... the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."<sup>1</sup> This DOMA provision, though not within the four corners of FECA itself, was placed by Congress in the U.S. Code's "Rules of Construction," which apply to *all* federal laws.

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<sup>1</sup> 1 U.S.C. § 7.

Consequently, we do not believe the Commission currently has the discretion to accept Mr. Winslow's invitation to ignore DOMA and instead "follow its long-standing practice of relying on state law" while interpreting "spouse." In fact, DOMA precludes the Commission from interpreting Section 110.1(i) to apply to contributions by same-sex spouses.

Nevertheless, we emphasize that the Commission may still permit the Winslow campaign to attribute contributions to same-sex spouses.

FECA imposes amount limitations and reporting obligations on a candidate's receipt of a contribution, but does not stipulate when a contribution is properly attributed to a particular person. See 2 U.S.C. §§ 434, 441a. The Commission has, of its own accord, filled this gap by issuing rules that instruct candidates about attribution for particular types of contributors.<sup>2</sup>

Section 110.1(i) in one such rule. It offers an affirmative statement that simply "provide[s] helpful guidance"<sup>3</sup> to contributors and recipients: "The limitations on contributions ... shall apply separately to contributions made by each spouse even if only one spouse has income." DOMA does prevent same-sex couples from equally enjoying the protections of this safe harbor, but failure to qualify for a safe harbor is not a legal violation.

And because Section 110.1(i) has no statutory analogue, nothing prevents the Commission from applying the safe harbor's underlying rationale to circumstances that might not fit within its precise text. The Commission is free to declare that an incoming contribution may be attributed to a same-sex spouse, even if it does not originate from a "spouse" pursuant to Section 110.1(i). The Commission could, for instance, declare through an Advisory Opinion that contribution limitations apply separately to two individuals who share a residence and bank account.<sup>4</sup> Such a resolution may well not be possible with other issues found at the confluence of DOMA and FECA,<sup>5</sup> but the Commission is able to respond here to this Request by allowing the Winslow campaign to attribute contributions to same-sex spouses.

Respectfully Submitted,



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Joseph M. Birkenstock  
Bryson B. Morgan  
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<sup>2</sup> 11 C.F.R. § 110.1(e), (i), (g), (k).

<sup>3</sup> Fed. Election Comm'n, Contribution and Expenditure Limitations and Prohibitions, 52 Fed. Reg. 760, 765 (Jan. 9, 1987) ("Although the Commission considered whether to delete this provision, it decided not to because it provides helpful guidance and because deletion might create the misleading impression that both spouses would no longer enjoy separate contribution limits.").

<sup>4</sup> See 11 C.F.R. § 113.1(g)(7)(iv).

<sup>5</sup> See Brief Amici Curiae of Former Federal Election Commission Officials Supporting Respondent Edith Schlain Windsor on the Merits, U.S. v. Windsor (2013), available at <http://www.capdile.com/windsor-brief-doma-affects-campaign-finance-laws>.