

HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
Attorneys at Law

45 North Hill Drive • Suite 100 • Warrenton, VA 20186

August 23, 2016

Mr. Daniel A. Petalas
Acting General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

RE: Advisory Opinion request for Jack Martins for Congress

Dear Mr. Petalas:

The undersigned counsel submit this request for advisory opinion on behalf of Martins for Congress (the "Martins Campaign") pursuant to 52 U.S.C. § 30108(a) and 11 C.F.R. § 112.1. We respectfully request an advisory opinion confirming that the Martins Campaign is entitled to an additional contribution limit for the court-ordered primary election to be held in New York's 3rd Congressional District on October 6, 2016, in accordance with 52 U.S.C. § 30101(1)(a) and 11 C.F.R. § 110.1(j). Given the time-sensitive nature of this request, the Martins Campaign respectfully requests expedited review pursuant to 52 U.S.C. § 30108(a)(2) and 11 C.F.R. § 112.4(b).

I. FACTUAL BACKGROUND

Jack Martins is a candidate for the United States House of Representatives representing New York's 3rd Congressional District. On January 7, 2016, Mr. Martins filed a Statement of Candidacy with the Federal Election Commission ("FEC" or "the Commission") to run for election to represent the 3rd Congressional District of New York in 2016, and designated Martins for Congress as his principal campaign committee. Martins for Congress filed its Statement of Organization with the FEC on the same date. Mr. Martins became the Republican nominee for the general election after he was unopposed in the June 28, 2016, primary election.

On April 14, 2016, the New York State Board of Elections ("NYSBOE") determined that Mr. Martins was the only candidate to qualify for ballot access in the 3rd Congressional District of New York for the Republican primary election scheduled for June 28, 2016. Mr. Martins was the unopposed winner of June 28, 2016, Republican primary, and became the Republican nominee for the November 8, 2016, general election.

Another would-be Republican primary candidate, Philip Pidot, was left off the Republican primary ballot after the NYSBOE invalidated a certain number of petition signatures

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that left Mr. Pidot with insufficient valid signatures to obtain ballot access. Mr. Pidot challenged the decision of the NYSBOE. On June 24, the New York Supreme Court determined that Mr. Pidot submitted a sufficient number of valid signatures to appear on the ballot, but it further held that he was out of time and that ballot access was impossible four (4) days prior to the June 28 primary. Thus, Mr. Martins remained unopposed for on the primary election of June 28, 2016. Mr. Martins became the Republican nominee for the November 8, 2016, general election and began focusing his efforts on the general election by raising and spending campaign funds accordingly.

Mr. Pidot continues to assert his ballot access challenge in federal court. On August 17, 2016, fifty (50) days after the June 28 primary election was held, and 124 days after the nomination petitions were submitted to the NYSBOE, the United States District Court for the Northern District of New York ordered the NYSBOE to hold a new Republican primary election for New York's 3rd Congressional District on October 6, 2016.¹ As a result, Mr. Martins now faces a second primary election within the calendar year, and well after the June 28th primary took place. Following the June 28, 2016, primary election, Martins for Congress ceased collecting contributions for the primary and began to focus its efforts on the general election.

As the Republican nominee for the 3rd Congressional District seat, any funds remaining in the Martins for Congress account after the June 28 primary became available for use in connection with the general election, consistent with FEC regulations. Martins for Congress now faces a court-ordered, second primary election, less than one month prior to the originally-scheduled general election. Mr. Martins has already raised and spent general election funds. Martins for Congress, of course, has no funds specifically designated for this "new" or "second" primary election ordered by the Federal District Court and seeks Commission guidance prior to raising new primary funds.

Accordingly, we request confirmation that Martins for Congress may raise additional primary contributions subject to a new contribution limit because, under the Act and Commission regulations, the October 6, 2016, New York congressional primary election is a different election from the June 28, 2016, election.

II. QUESTION PRESENTED

May Martins for Congress raise contributions, subject to a separate contribution limit, in connection with the new October 6th Republican primary election ordered by the Federal District Court?

¹ Martins for Congress has intervened in the litigation in the U.S. District Court for the Northern District of New York. *See Pidot, et al. v. New York State Board of Elections, et al.*, No. 16-0859 (N.D.N.Y. Aug. 17, 2016) (text only order mandating Oct. 6, 2016 primary election) (attached hereto as Exhibit A). A hearing on Martins for Congress's Motion to Alter Judgment is currently scheduled on August 30, 2016. *See id.* (ECF 71). Martins for Congress will keep the Commission apprised of any new developments.

III. LEGAL DISCUSSION

Pursuant to the Federal Election Campaign Act of 1971, as amended ("FECA"), candidates and their authorized committees are entitled to separate individual contribution limits with respect to "any election for Federal office." 52 U.S.C. § 30116(a)(1)(A). Under FECA and FEC regulations, an "election" includes "a general, special, primary, or runoff election," *id.* at § 30101(1)(A), where an individual "whether opposed or unopposed, seek[s] nomination for election, or election, to federal office." 11 C.F.R. § 100.2(a).

As the Commission has recognized, "[b]ecause contribution limits 'apply separately with respect to each election,' participating in multiple distinct elections can render a candidate eligible for separate contribution limits." Advisory Opinion 2016-03 (Holding). "The plain language of the Act and Commission regulations . . . on their face place no limit on the number of 'elections' eligible for separate contribution limits." MUR 6438 (Art Robinson for Congress), Factual and Legal Analysis at 6-7 (Oct. 5, 2012).

Previously, the Commission has determined that a separate contribution limit is available when a judicial decision "places candidates in a 'new election situation,' thereby creating a separate election." Advisory Opinion 2016-03 (Holding) at 4 (approving a separate primary contribution limit when a primary election was delayed pursuant to court-ordered state legislation after the absentee primary voting had already occurred); *see also* Advisory Opinion 1996-36 (Frost) (approving a separate contribution limit after a federal district court redrew the boundaries of congressional districts and ordered a new special election); Advisory Opinion 2006-26 (Texans for Henry Bonilla) (approving a separate contribution limit for a newly scheduled special election after the prior election was nullified by court order); Advisory Opinion 1996-37 (Brady) (same). The operative question in each of the previous decisions has been whether a court order created a new election under FECA.

The factual background in Advisory Opinion 2016-03 (Holding) is similar to those now faced in New York's 3rd Congressional District. Earlier this year, North Carolina scheduled its primary election for March 15, 2016, pursuant to state law. On February 5, 2016, the U.S. District Court for the Middle District of North Carolina found that two congressional districts constituted impermissible racial gerrymanders in violation of the Equal Protection Clause of the U.S. Constitution. Advisory Opinion 2016-03 at 1-2 (citing *Harris v. McCrory*, Case No. 1:13-cv949, 2016 WL 482052, at *2 (M.D.N.C. Feb. 5, 2016)). The court ordered the state legislature to adopt a remedial districting plan by February 19, 2016, just twenty-five (25) days prior to the primary election. Due to the proximity of the election, the North Carolina State Board of Elections recognized that administering an election based on new boundaries in twenty-five (25) days was logistically impossible and would lead to voter confusion. As a result, the Board of Elections pushed the date of the primary election to June 7, 2016.

In Advisory Opinion 2016-03 (Holding), voting had already begun in the first primary at the time that the Middle District of North Carolina ordered a new election. In the present case, voting had already been completed and the winners certified for the June 28, 2016, election. As a result, the "highly unusual electoral circumstances stemming from judicial actions" place Martins for Congress in a materially indistinguishable "new election situation" for which a

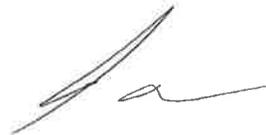
separate primary contribution limit should be available. AO 2016-03 (Holding) at 5. The new election situation is not only evidenced by the fully completed June 28, 2016, primary, but also by the fact that Martins for Congress and his opponent will be required to file a second pre-election FEC report and will be subject to a second 48-hour reporting window.

The Commission has granted a second primary limit on at least four (4) separate occasions. In the only instance where the Commission denied a separate primary limit, the facts were substantially different from the facts at hand. In Advisory Opinion 1982-22, the Commission did not grant a separate primary limit when Congressman Steve Bartlett voluntarily declared as a candidate in a new congressional district several months prior to the primary election after court-ordered redistricting. However, the Commission noted in Holding that Bartlett did not apply because the court-order in Bartlett occurred several months before the election and *did not result in a change in the election date*, electoral procedures, or candidate eligibility requirements. AO 2016-03 (Holding), fn. 6 (emphasis added). In the present case, the court order occurred after the first primary election and resulted in a change in the election date.

IV. CONCLUSION

Based on the foregoing, the undersigned respectfully request that the Commission grant Martins for Congress a separate contribution limit for the October 6, 2016, primary election in New York's 3rd Congressional District. We appreciate the Commission's consideration of this request, and, given the short time remaining before the second primary date of October 6th, we also appreciate having the benefit of the Commission's guidance as early as possible. If you have any questions, please do not hesitate to contact the undersigned.

Respectfully Submitted



Jason Torchinsky
(JTorchinsky@hvjt.law)
Steven Donaldson
(SDonaldson@hvjt.law)
Holtzman Vogel Josefiak Torchinsky, PLLC
45 North Hill Drive
Suite 100
Warrenton, VA 20186
Phone: 540-341-8808
Fax: 540-341-8809

EXHIBIT A

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

JUDGMENT IN A CIVIL CASE

**PHILIP PIDOT, NANCY HAWKINS
and STEVEN AXELMAN,**

Plaintiffs,

v.

**CASE NUMBER: 1:16-CV-859
(FJS/CFH)**

**NEW YORK STATE BOARD OF ELECTIONS,
SUFFOLK COUNTY BOARD OF ELECTIONS,
NASSAU COUNTY BOARD OF ELECTIONS,
BOARD OF ELECTIONS IN THE CITY OF NEW
YORK, PETER KOSINSKI, DOUGLAS KELLNER,
ANDREW J. SPANO, GREGORY P. PETERSON,
TODD D. VALENTINE and ROBERT A. BREHM,**

Defendants,

v.

JACK MARTINS,

Intervener Defendant.

Decision by Court. This action came to a hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Plaintiffs' # [19] motion is GRANTED. The Court ORDERS that Defendants shall hold a Republican primary election for New York's Third Congressional District with a ballot that names both Jack Martins and Philip Pidot as candidates on October 6, 2016. The Court further ORDERS that the State Defendants shall seek a "hardship exemption" pursuant to 52 U.S.C. § 20302(g)(2)(B)(ii) from UOCAVA's 45-day requirement with regard to the November 2016 general election. The Court further ORDERS that Defendant Martins' # 49 cross-motion for judgment on the pleadings is DENIED as moot. Judgment is entered in favor of Plaintiffs.

All of the above pursuant to the oral order of the Honorable Judge Frederick J. Scullin, Jr., rendered on the 17th day of August, 2016.

DATED: August 17, 2016


Clerk of Court


Nicole Eallonardo
Deputy Clerk