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April 28, 2016

MEMORANDUM

TO: The Commission

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Subject: AO 2016-03 (Holding) Draft C

Attached is a proposed draft of the subject advisory opinion.

Attachment

1 ADVISORY OPINION 2016-03

2

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7

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12

13 Dear Messrs. Engle and Kappel:

14 We are responding to your advisory opinion request on behalf of George Holding for
15 Congress, Inc. (the “Holding Committee”), concerning whether, under the Federal Election
16 Campaign Act, 52 U.S.C. §§ 30101-46 (the “Act”), and Commission regulations, the Holding
17 Committee may raise additional contributions subject to a new contribution limit for the North
18 Carolina congressional primary election on June 7, 2016. The Commission concludes that the
19 Holding Committee may do so.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on March
22 16, 2016.

23 George Holding currently represents the 13th congressional district of North Carolina in
24 the U.S. House of Representatives. Advisory Opinion Request at AOR001. The Holding
25 Committee is his principal campaign committee.¹

26 Representative Holding was running unopposed for his party’s nomination for reelection
27 in the primary election scheduled for March 15, 2016. But on February 5, 2016, a three-judge
28 panel of the U.S. District Court for the Middle District of North Carolina found that two

¹ George E. Holding, FEC Form 2 at 1 (Feb. 20, 2015),
<http://docquery.fec.gov/pdf/344/15950807344/15950807344.pdf>.

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1 congressional districts constituted impermissible racial gerrymanders in violation of the Equal
2 Protection Clause of the U.S. Constitution. *Id.* (citing *Harris v. McCrory*, Case No. 1:13-cv-949,
3 2016 WL 482052, at *2 (M.D.N.C. Feb. 5, 2016)). The court ordered the North Carolina
4 legislature to enact a remedial plan by February 19, 2016. North Carolina filed emergency
5 motions to stay the court's order with both the three-judge panel and the U.S. Supreme Court; the
6 motions were denied on February 9 and February 19, 2016, respectively. *Id.* (citing *Harris v.*
7 *McCrory*, Case No. 1:13-cv-949, Defs.' Emergency Mot. to Stay Final J. & to Modify Inj.
8 Pending Sup. Ct. Rev. (M.D.N.C. Feb. 8, 2016), ECF No. 145; *McCrory v. Harris*, 136 S. Ct.
9 1001 (Mem), 84 USLW 3450 (U.S. Feb. 19, 2016)).

10 By the time of the court's decision, the primary election was "already well underway."
11 AOR002. As of February 7, 2016, county elections officials had mailed 8,621 absentee ballots
12 to voters, and more than 400 absentee ballots had already been returned. Moreover, according to
13 the Executive Director of the North Carolina State Board of Elections, given the proximity
14 between the date of the court's order and the March 15 primary election, "congressional
15 candidates will remain on ballots" issued to absentee and early voters, and presented to voters at
16 the polls on March 15. *Id.*

17 To comply with the district court's order to enact a remedial plan, the North Carolina
18 General Assembly held a special two-day session to redraw the district lines. The General
19 Assembly adopted two separate bills during the special session, both on February 19, 2016. The
20 first bill approved a remedial redistricting plan that redrew the two impermissibly gerrymandered
21 districts by redrawing several congressional districts across the state. For example, the district
22 Representative Holding had been running in and representing for two terms, the 13th, was
23 divided up among several surrounding districts, and a brand-new district 130 miles to the west

1 was designated as the 13th.² The “majority of the old 13th [c]ongressional district” was shifted
2 into the 2nd congressional district. AOR002.

3 The second bill revised the procedures for conducting the 2016 congressional primary
4 elections. AOR012-13 (attaching S.L. 2016-2, Special Session (N.C. 2016)). The bill
5 established June 7, 2016, as the new congressional primary election date and required any
6 candidates running in that election to file notices of candidacy between March 16 and March 25,
7 2016, while allowing any person who had previously filed a notice of candidacy for the 2016
8 congressional primary to obtain a refund of his or her filing fee.³ S.L. 2016-2 §§ 1(b)-(c), (f).
9 The bill stated that the winner of the June 7 election “shall be determined by a plurality,” and
10 prohibited the holding of second primaries during the 2016 election cycle.⁴ *Id.* at § 2(a).
11 Finally, the bill prohibited the State Board of Elections from certifying any ballots cast for the
12 U.S. House of Representatives in any district in the March 15 primary. *Id.* at § 4. The Governor
13 signed the legislation into law on February 23, 2016.

14 Because the court acted too late for the state to reprint ballots, congressional candidates’
15 names remained on ballots given to voters on the March 15, 2016, primary day. AOR002.
16 Following the General Assembly’s adoption of the bill, the State Board of Elections encouraged
17 voters to “mark their preferences in all primary contests,” including for congressional candidates

² See “Redistricting in North Carolina,” https://ballotpedia.org/Redistricting_in_North_Carolina, last visited April 26, 2016.

³ The filing period for the primary to be held on March 15, 2016, ran from December 1, 2015 to December 21, 2015. N.C. Sess. Laws 2015-258 § 2(b).

⁴ Generally, state law requires a primary candidate to receive a “substantial plurality” of votes cast to be declared the winner, with a second primary available if no candidate receives a substantial plurality or in the event of a tie. N.C. Gen. Stat. 163-111 §§ (a), (b), (d).

1 appearing on the March ballot. AOR003. The Board urged citizens to “[v]ote the whole ballot
2 and let us worry about what will count.” *Id.*

3 On March 15, 2016, Representative Holding filed with the Commission an amended
4 statement of organization and a new statement of candidacy, changing the office that he is
5 seeking from North Carolina’s 13th congressional district to its 2nd congressional district.⁵
6 Prior to the court’s order and the state legislation, Representative Holding was running
7 unopposed for his party’s nomination in the 13th congressional district of North Carolina. Now,
8 he is running for his party’s nomination in North Carolina’s new 2nd congressional district on
9 June 7, 2016, against that district’s incumbent. AOR004. According to the requestor, as of
10 February 19, 2016, the Holding campaign had raised \$873,431.65 and spent \$708,100.68,
11 leaving it with \$165,330.97 cash on hand.

12 ***Question Presented***

13 *May the Holding Committee raise additional contributions subject to a new contribution*
14 *limit for the June 7, 2016, North Carolina congressional primary election?*

15 ***Legal Analysis and Conclusion***

16 Yes, the Holding Committee may raise additional primary contributions subject to a new
17 contribution limit because, under the Act and Commission regulations, the June 7, 2016, North
18 Carolina congressional primary election is a different election from the March 15, 2016, election.

19 Under the Act, candidates and their authorized committees are entitled to separate
20 individual contribution limits with respect to “any election for Federal office.” 52 U.S.C.
21 § 30116(a)(1)(A). For the purposes of the Act and Commission regulations, an “election”

⁵ George Holding for Congress Inc., FEC Form 1 at 2 (Mar. 15, 2016),
<http://docquery.fec.gov/pdf/277/201603159009754277/201603159009754277.pdf#navpanes=0>; George E. Holding,
FEC Form 2 at 1 (Mar. 15, 2016),
<http://docquery.fec.gov/pdf/475/201603159009751475/201603159009751475.pdf>.

1 includes “a general, special, primary, or runoff election,” *id.* at § 30101(1)(A), where an
2 individual, “whether opposed or unopposed, seek[s] nomination for election, or election, to
3 Federal office.” 11 C.F.R. § 100.2(a). The present request involves a primary election, which is
4 an election “held prior to a general election, as a direct result of which candidates are nominated,
5 in accordance with applicable State law, for election to Federal office in a subsequent election.”
6 11 C.F.R. § 100.2(c)(1).

7 Because contribution limits “apply separately with respect to each election,” 11 C.F.R.
8 § 110.1(j)(1), participating in multiple distinct elections can render a candidate eligible for
9 separate contribution limits. Although “[g]enerally, each [nominated] candidate will participate
10 in two elections: the primary . . . and the general election,” Explanation and Justification for
11 1977 Amendments to Federal Election Campaign Act of 1971, H.R. Doc. No. 95-44, at 40-41
12 (1st Sess. 1977); *see also* Advisory Opinion 1994-29 (Levy) at 2 (permitting committee one
13 contribution limit while competing in multiple primaries for same federal office), the
14 Commission has previously noted that “the plain language of the Act and Commission
15 regulations . . . on their face place no limit on the number of ‘elections’ eligible for separate
16 contribution limits.” Factual and Legal Analysis at 6-7, MUR 6438 (Art Robinson for Congress)
17 (Oct. 5, 2012) (finding no reason to believe that candidate violated Act and Commission
18 regulations by utilizing separate contribution limit for state-administered party primary and
19 internet-based independent party primary).

20 The Commission has previously concluded that a separate contribution limit is available
21 when a judicial decision places candidates in a “new electoral situation,” thereby creating a
22 separate election. For example, in Advisory Opinion 1996-36 (Frost), the Commission
23 determined that five members of Congress from Texas were entitled to a separate contribution

1 limit for a special election after a federal district court redrew the boundaries of thirteen
2 congressional districts and ordered a new special election, thereby placing each candidate “in a
3 new electoral situation” and creating a new “election contest.” *Id.* at 3; *see also* Advisory
4 Opinion 2006-26 (Texans for Henry Bonilla) (approving separate contribution limit for newly
5 scheduled special election after prior election was nullified by court order); Advisory Opinion
6 1996-37 (Brady) (same). The Commission has also determined, however, that a candidate’s
7 decision to run in a different congressional district in the same primary election after a court-
8 ordered redistricting does not entitle the candidate to a new contribution limit. Advisory Opinion
9 1982-22 (Bartlett).

10 Therefore, the relevant question here is whether the court order requiring North Carolina
11 to enact a remedial plan, and the state legislation establishing a primary election on June 7, 2016,
12 created a new election under the Act and Commission regulations. *See* 52 U.S.C. § 30101(1)(A);
13 11 C.F.R. § 110.1(j). For the reasons given below, the Commission concludes that they did.

14 As indicated in the request, voting in the March 15 congressional primary election was
15 already well under way by the time the three-judge panel issued its order: 8,621 absentee ballots
16 had been mailed to voters, and more than 400 absentee ballots had already been returned as of
17 February 7, 2016. Moreover, the names of congressional candidates remained on the ballot for
18 the March 15 election even after the court’s order, including ballots presented to voters at the
19 polls on election day. Indeed, the Board of Elections encouraged voters to “[v]ote the whole
20 ballot and let us worry about what will count.” AOR003. Thus, the March 15 primary elections
21 were held as planned, with congressional candidates on the ballot, even if the State Board of
22 Elections could not subsequently certify the votes cast for congressional candidates.

1 Moreover, state law treated the March 15 and June 7 elections differently. For example,
2 congressional candidates who had qualified for the March 15 ballot by filing a notice of
3 candidacy for that election could not run in the June 7 primary unless they filed another notice of
4 candidacy for the June election within the new filing period of March 16 and March 25, 2016.
5 AOR005; S.L. 2016-2 § 1(c). The law also changed the percentage of votes that a candidate
6 must receive to win the primary from substantial plurality to plurality, and eliminated the
7 possibility of a second primary. S.L. 2016-2 § 2(a).

8 Finally, the factual situation presented here, like the one considered in Advisory Opinion
9 1996-36 (Frost), presents highly unusual electoral circumstances stemming from judicial actions
10 affecting congressional elections. The court issued its order and the new state laws took effect
11 just a few weeks away from the March 15 election. As a direct result of the court order and
12 change in state law, congressional candidates were required to file new candidacies in
13 congressional districts with new boundaries and prepare, plan, and campaign for a new election
14 more than three months away and held under new rules. Because the court order and state
15 legislation created a new electoral situation, under these unusual circumstances, the Commission
16 concludes that North Carolina's June 7, 2016, primary election for the U.S. House of
17 Representatives constitutes a separate election from North Carolina's March 15, 2016, primary
18 election for the U.S. House of Representatives under 11 C.F.R. § 110.1(j), and provides for a
19 separate contribution limit.⁶

⁶ The Commission notes that not every court order will entitle candidates to a new contribution limit. In Advisory Opinion 1982-22 (Bartlett), for example, the Commission determined that pre-election, court-ordered redistricting did not entitle a candidate to a new contribution limit. The circumstances presented in that request differ materially from the one considered here, however, because the court-ordered redistricting in Advisory Opinion 1982-22 (Bartlett) occurred several months before the election and did not result in a change in the election date, electoral procedures, or candidate eligibility requirements.

