

September 19, 2016

Adav Noti, Esq.  
Associate General Counsel for Policy  
Office of the General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463  
[anoti@fec.gov](mailto:anoti@fec.gov)

Re: Advisory Opinion Request –Martins for Congress

Dear Mr. Noti:

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 may still rely on the Federal Election Commission’s (“FEC” or the “Commission”) Advisory Opinion 2016-09, issued September 13, 2016, in light of changed circumstances regarding the court-ordered primary election that was to be held in New York's 3rd Congressional District on October 6, 2016. On September 14, 2016, the United States Court of Appeals for the Second Circuit vacated the district court’s order at the conclusion of oral argument, and issued its written summary opinion on September 16, 2016. The order on September 14, 2016 had the direct and immediate effect of cancelling the October 6, 2016 special primary election. 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**

For the Commission’s convenience, we restate the factual background prior to our previous request on August 23 for Advisory Opinion 2016-09. 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 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.<sup>1</sup>

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 that left Mr. Pidot with insufficient valid signatures to obtain ballot access. Mr. Pidot challenged the decision of the NYSBOE in New York State court. 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 the primary election and became the Republican nominee on June 28, 2016. He immediately began focusing his efforts on the general election by raising and spending campaign funds accordingly.

Having been denied the relief sought in state court, Mr. Pidot continued to assert his ballot access challenge in federal court. On August 17, 2016, the United States District Court for the Northern District of New York ordered the NYSBOE to hold a new special Republican primary election for New York's 3rd Congressional District on October 6, 2016. As a result, beginning on August 17, 2016 Mr. Martins then faced a second primary election within the calendar year. In Advisory Opinion 2016-09, issued on September 13, 2016, the Commission held that the second primary election would be considered a separate election for the purpose of raising campaign funds and therefore a separate contribution limit would apply to that election.

The day after the Commission's September 13, 2016 decision, the Court of Appeals for the Second Circuit unanimously overturned the lower court's order that a new primary be held on October 6, 2016. The Second Circuit issued its order orally at the conclusion of oral argument, and issued written summary opinion on September 16, 2016 (a copy is attached). Flowing from this court order, the results of the regularly scheduled primary will stand, and Martins will be the Republican nominee to face the Democratic nominee and other candidates in the November 8 General Election.

However, from the time of the lower court's decision on August 17, 2016, until the Second Circuit's decision on September 14, 2016, Martins was running in the court-ordered special Republican primary to be held on October 6 against Philip Pidot. Only after the court's order on September 14, 2016, could Martins begin campaigning as the Republican nominee for the general election. Martins and Pidot actively campaigned during the period of August 17, 2016 and September 14, 2016, with both candidates making expenditures supporting their candidacy and referencing the now cancelled October 6 election. Specifically, Martins sent mailers supporting his nomination scheduled to reach 3rd district voters as late as September 17, 2016. During the roughly four weeks in which Martins was effectively re-running for the Republican nomination, his campaign raised more than \$150,000 and spent in excess of \$250,000 in furtherance of his campaign for nomination in the court-ordered special primary.

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<sup>1</sup> 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.

## II. Questions Presented

1. *May Martins for Congress continue to consider the court-ordered October special primary as a separate election for contribution purposes, and therefore raise funds to retire debts incurred in furtherance of that election?*
2. *If the answer to Question 1 is “no,” may Martins for Congress allocate the portion of its expenditures capable of no other reasonable purpose than to defeat the October special primary opponent, and raise funds to retire debts incurred specifically for that spending?*
3. *If the answers to the first or second questions are negative, what is the appropriate treatment of funds raised and spent between August 17, 2016 and September 14, 2016?*

## III. Legal Discussion

Under the Act, 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). For the purposes of the Act and Commission 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). The present request involves a primary election, which is an election “held prior to a general election, as a direct result of which candidates are nominated, in accordance with applicable State law, for election to Federal office in a subsequent election.” 11 C.F.R. § 100.2(c)(1).

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

The Commission recently considered the impact of a scheduled election’s cancellation on contribution limits, and there has effectively held that the *expectation* of an election ultimately canceled by a court does not negate the fact of the planning and campaigning for that election and therefore the need for a separate contribution limit. Advisory Opinion 2016-03 (Holding for Congress). In that Advisory Opinion, the Commission further cited its previous holding that “a

separate contribution limit is available when a judicial decision places candidates in a ‘new electoral situation,’ thereby creating a separate election.” *Id.*; see also Advisory Opinions 2006-26 (Texans for Henry Bonilla) (approving separate contribution limit for newly scheduled special election after prior election was nullified by court order – although the enjoined and special elections were to be held on the same day); 1996-36 (Frost) (establishing new contribution limit for a special election after a federal court redrew the boundaries of congressional districts and ordered a new special election).

*1. The Time Period During the Court Ordered Special Election Period is a Separate Election*

The Commission should similarly conclude here that the federal court’s order cancelling the special primary election, issued nearly a month after a lower court order created that election, does not negate the month of planning and campaigning by the candidates for that contest. When a candidate raises and spends funds under an assumption of an election, the Commission should not then overturn its previous conclusion that those funds will count toward a contribution limit specific to that election. Moreover, the October 6 special primary was scheduled and then later cancelled wholly due to unanticipated judicial intervention, on which the candidates could not rely.

During the period from August 17, 2016 to September 14, 2016, Pidot and Martins campaigned as candidates for the October Republican special primary election and not for any other federal election, including the General Election.<sup>2</sup> Moreover, like his opponent Martins, Pidot’s campaign committee was actively raising and spending funds in support of his bid for the Republican nomination in the October special primary. Pidot was never a candidate in the November General Election, and his attempt at a candidacy for the Republican nomination in the regularly scheduled Republican primary had long since concluded. Therefore, if the Commission now determines that the potential October special primary is not an election with a separate contribution limit, Pidot has raised and spent funds in support of a federal candidacy outside of the Commission’s regulations.

*2. If The Time Period Was Not A Separate Election, Certain Costs Should Be Treated Separately*

If, contrary to its precedent in this and previous election cycles, the Commission believes that a court-ordered change to an election did not result in a separate contribution limit for the participating campaigns, we ask that the Commission consider expenditures reasonably allocable to defeating the unique opponent in that court-ordered primary are subject to a separate contribution limit.

We acknowledge that it is possible that certain campaign expenditures during a special primary election campaign could certainly have residual benefit to a candidate in the case that he

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<sup>2</sup> While Martins remained a candidate for the general election on two other political party lines, we are aware of no expenditures by his campaign committee during the period of August 17, 2016, to September 14, 2016, in direct support of those ballot lines for the general election.

is nominated and is a candidate in the General Election. Positive advertising, name identification efforts, and certain campaign infrastructure investments could be placed in this category. However, certain other spending would likely have little or no impact in a potential General Election. A campaign would have little reason to engage in contrast messaging, public opinion research, ad design, development and deployment that mentions or refers to a specific special primary opponent or opposition research on a particular candidate if that campaign were not facing him in an election. It is obvious that Martins for Congress would not have used any resources for expenditures in this category directly related to Pidot had the federal court not ordered that Martins face Pidot in an October 6, 2016 special primary election. If the Commission believes it must cancel the previously-granted contribution limit for this special primary election, Martins for Congress requests that in the alternative it designate only that latter category of spending as within a separate contribution limit.

*3. If The Commission Is Unable To Resolve Questions One Or Two In The Affirmative, It Should Provide Guidance As To How To Handle The Receipts And Expenditures During The Special Primary Time Period*

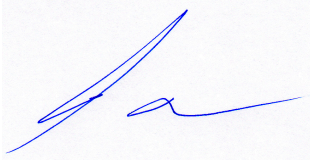
If the Commission is unable to resolve questions one or two as proposed, Martins for Congress respectfully requests direction on how it should file its reports for receipts and disbursements, and how it should designate, report, and refund and contributions that it may have received during the relevant time period when Senator Martins believed he was subject to three different contribution limits in light of Advisory Opinion 2016-09.

#### **IV. CONCLUSION**

Based on the foregoing, the undersigned respectfully request that the Commission confirm its previous Advisory Opinion 2016-09 that granted Martins for Congress a separate contribution limit for the October 6, 2016, primary election in New York's 3rd Congressional District for the time period from August 17, 2016 through September 14, 2016. In the alternative, we request that the Commission determine that any funds spent specifically in furtherance of efforts that can have no other reasonable purpose than to defeat the opposing candidate in the court-ordered October special primary are subject to a separate contribution limit. If the Commission is unable to resolve either of these questions, we respectfully request that the Commission provide the Committee with guidance.

We appreciate the Commission's consideration of this request, and, given the short time remaining before the General Election, we also appreciate having the benefit of the Commission's guidance as early as possible. While we understand that the Commission has a statutory 20 days to respond, the Martins Campaign looks forward to resolving these reporting questions prior to the close of books on September 30, 2016 if there is any way the Commission could further expedite the processing and response to this Advisory Opinion. If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,



Jason Torchinsky

Steve Roberts

Counsel to Martins for Congress

16-3028  
Martins v. Pidot et. al.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16<sup>th</sup> day of September, two thousand sixteen.

PRESENT: DENNIS JACOBS,  
BARRINGTON D. PARKER,  
DEBRA A. LIVINGSTON,  
Circuit Judges.

-----X  
JACK MARTINS,  
Defendant-Intervenor-  
Appellant,

-v.-

16-3028

PHILIP PIDOT, NANCY HAWKINS, STEVEN  
AXELMAN,  
Plaintiffs-Appellees,

AND

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

1 KELLNER, ANDREW J. SPANO, GREGORY P.  
2 PETERSON, TODD D. VALENTINE, ROBERT  
3 A. BREHM, IN THEIR OFFICIAL  
4 CAPACITIES AS BOARD MEMBERS,  
5 COMMISSIONERS, AND EXECUTIVE  
6 DIRECTORS OF THE NEW YORK STATE BOARD  
7 OF ELECTIONS,

8 Defendants-Appellees

9  
10 AND

11  
12 TOM SUOZZI

13 Intervenor-Appellee\*

14  
15 - - - - -X

16  
17 **FOR APPELLANT JACK MARTINS:**

JASON TORCHINSKY, SHAWN  
TOOMEY, STEVE ROBERTS,  
Holtzman Vogel Joeseffiak  
Torchinsky PLLC, Warrenton,  
Virginia

PAUL DEROHANNESIAN,  
DANIELLE R. SMITH,  
DerOhannesian &  
DerOhannesian, Albany, New  
York

28  
29 **FOR APPELLEES PHILLIP PIDOT, NANCY HAWKINS, STEVEN AXELMAN:**

JERRY H. GOLDFEDER, DAVID  
V. SIMUNOVICH, Stroock,&  
Stroock & Lavan LLP, New  
York, New York

34  
35 **FOR APPELLEE BOARD OF ELECTIONS IN THE CITY OF NEW YORK:**

JANET L. ZALEON, *for*  
*Zachary W. Carter,*  
Corporation Counsel of the  
City of New York, New York,  
New York (Susan Greenberg,  
on the brief)

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\*The Clerk of Court is directed to amend the caption as set forth above.



1 FOR APPELLEES NEW YORK STATE BOARD OF ELECTIONS, PETER  
2 KOSINSKI, DOUGLAS KELLNER, ANDREW J. SPANO, GREGORY P.  
3 PETERSON, TODD D. VALENTINE, ROBERT A. BREHM, IN THEIR  
4 OFFICIAL CAPACITIES AS BOARD MEMBERS, COMMISSIONERS, AND  
5 EXECUTIVE DIRECTORS OF THE NEW YORK STATE BOARD OF  
6 ELECTIONS:

7 BRIAN QUAIL, WILLIAM  
8 MCCANN, JR, New York, New  
9 York

10  
11  
12 FOR APPELLEE TOM SUOZZI:

13 ABHA KHANNA, MARTIN E.  
14 GILMORE, Perkins Coie LLP,  
15 New York, New York  
16

17 Appeal from judgment of the United States District  
18 Court for the Northern District of New York (Scullin, J.).

19 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**  
20 **AND DECREED** that the injunction of the district court be  
21 **VACATED**, and that the case is remanded with direction to  
22 dismiss.

23 This appeal, heard on an expedited basis, is taken from  
24 an injunction that directs a special election for the  
25 Republican nomination to stand for Congress in the Third  
26 Congressional District of New York. Appellant Jack Martins  
27 stood unopposed in the Republican general primary on June 28  
28 while litigation was ongoing in the New York state courts as  
29 to whether a potential opponent for the Republican  
30 nomination, Phillip Pidot, had submitted sufficient  
31 signatures to get on the ballot. The signatures on Pidot's

1 petition were validated by the state court four days before  
2 the primary, by which point it was found to be impossible to  
3 make the arrangements for Pidot to appear on the ballot and  
4 to arrange compliance with the other requirements of state  
5 and federal law. After the original primary date, the  
6 United States District Court for the Northern District of  
7 New York (Scullin, J.) issued an injunction requiring that  
8 the primary election, with Pidot now on the ballot, be  
9 conducted on October 6.

10 Appellant Martins challenges the injunction on several  
11 grounds, including voter confusion, the burden holding an  
12 election would place on the local boards of election, and  
13 the brevity of the interval between the new primary and the  
14 general election.

15 We conclude that Martins has standing to appeal the  
16 district court's order; that the Rooker-Feldman doctrine  
17 does not apply because Pidot was a state court *winner*, and,  
18 in any event, did not invite review of the state court's  
19 legal judgment; that collateral estoppel is not a bar to  
20 this suit, in part because the district court found no  
21 privity between Pidot and the voter plaintiffs and in part  
22 because the issues involved in the federal action--i.e.  
23 UOCAVA and the First Amendment--were neither actually  
24 litigated nor necessarily decided in the state action; and

1 that Pidot has not precipitated delays sufficient to entail  
2 the application of the doctrine of laches. We assume  
3 arguendo that Pidot's suit is not barred by res judicata.

4 Our review of the record indicates that the district  
5 court's resolution of Pidot's application for an injunction  
6 failed to address the applicable injunction standards.

7 A party seeking a preliminary injunction must  
8 ordinarily establish (1) irreparable harm, (2) a likelihood  
9 of success on the merits, and (3) that issuance of an  
10 injunction is in the public interest. See New York ex rel.  
11 Schneiderman v. Actavis PLC, 787 F.3d 638, 650 (2d Cir.  
12 2015). The district court's decision here to order a  
13 special primary is a form of permanent injunction. See Pope  
14 v. County of Albany, 687 F.3d 565, 569-70 (2d Cir. 2012).  
15 "The requirements for a permanent injunction are essentially  
16 the same as for a preliminary injunction, except that the  
17 moving party must demonstrate actual success on the merits."  
18 New York Civil Liberties Union v. New York City Transit  
19 Auth., 684 F.3d 286, 294 (2d Cir. 2011). We properly  
20 reverse an order of a permanent injunction where the  
21 district court decision rests on an error of law. Pope, 687  
22 F.3d at 570-71.

23 Our decision in Rivera-Powell v. New York City Board of  
24 Elections, 470 F.3d 458 (2d Cir. 2006), forecloses Pidot's

1 claim. After review, we conclude that Martins did not waive  
2 his Rivera-Powell argument in the district court, and that  
3 we can construe Pidot's First Amendment claim in this case  
4 as analogous to a due process claim, as was done in Rivera-  
5 Powell itself. Id. at 469. Under Rivera-Powell, "when a  
6 candidate raises a First Amendment challenge to his or her  
7 removal from the ballot based on the allegedly unauthorized  
8 *application* of an admittedly valid restriction," such as  
9 here, "the state has satisfied the First Amendment if it has  
10 provided due process." Id. at 469-70. Pidot does not  
11 allege that the state failed to afford him due process. We  
12 therefore vacate the injunction on that ground.

13 Further, Pidot failed to establish--and the district  
14 court failed to find--that the balance of equities tipped in  
15 his favor or that the injunction would be in the public  
16 interest. Accordingly, Pidot is not entitled to the  
17 injunctive relief which he seeks.

18 For the foregoing reasons, and finding no merit in  
19 Pidot's other arguments, we hereby **VACATE** the order of the  
20 district court and direct the court to enter judgment in  
21 favor of the defendants.

22 FOR THE COURT:  
23 CATHERINE O'HAGAN WOLFE, CLERK  
24

  
A circular seal of the United States Second Circuit Court of Appeals is overlaid on the signature. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS".

**United States Court of Appeals for the Second Circuit  
Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, NY 10007**

**ROBERT A. KATZMANN**  
CHIEF JUDGE

Date: September 16, 2016  
Docket #: 16-3028cv  
Short Title: Pidot v. New York State Board of Electi

**CATHERINE O'HAGAN WOLFE**  
CLERK OF COURT

DC Docket #: 16-cv-859  
DC Court: NDNY (SYRACUSE)  
DC Judge: Scullin  
DC Judge: Hummel

**BILL OF COSTS INSTRUCTIONS**

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- \* be filed within 14 days after the entry of judgment;
- \* be verified;
- \* be served on all adversaries;
- \* not include charges for postage, delivery, service, overtime and the filers edits;
- \* identify the number of copies which comprise the printer's unit;
- \* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- \* state only the number of necessary copies inserted in enclosed form;
- \* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- \* be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals for the Second Circuit  
Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, NY 10007**

**ROBERT A. KATZMANN**  
CHIEF JUDGE

Date: September 16, 2016  
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**CATHERINE O'HAGAN WOLFE**  
CLERK OF COURT

DC Docket #: 16-cv-859  
DC Court: NDNY (SYRACUSE)  
DC Judge: Scullin  
DC Judge: Hummel

**VERIFIED ITEMIZED BILL OF COSTS**

Counsel for

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respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

\_\_\_\_\_

and in favor of

\_\_\_\_\_

for insertion in the mandate.

Docketing Fee \_\_\_\_\_

Costs of printing appendix (necessary copies \_\_\_\_\_ ) \_\_\_\_\_

Costs of printing brief (necessary copies \_\_\_\_\_ ) \_\_\_\_\_

Costs of printing reply brief (necessary copies \_\_\_\_\_ ) \_\_\_\_\_

**(VERIFICATION HERE)**

\_\_\_\_\_  
Signature