



Comment on AOR #
2009-27

Office of the Attorney General

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November 20, 2009

VIA ELECTRONIC MAIL AND U.S. MAIL

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Re: Comments in response to AOR 2009-27

Dear Ms. Duncan:

Pursuant to 2 U.S.C. § 437f(d) and 11 C.F.R. § 112.3, the State of Wyoming, through its Attorney General's Office, submits the following comments in response to Advisory Opinion Request ("AOR") 2009-27 submitted by America Future Fund Political Action ("AFFPA").

In AOR 2009-27, AFFPA requests the Federal Election Commission ("FEC") to find that WYO. STAT. ANN. § 6-6-104(a) is preempted by the Federal Election Campaign Act ("FECA") and its associated rules and regulations. The FEC should reject AFFPA's contentions and find that WYO. STAT. ANN. § 6-6-104(a) is not so preempted.

The Wyoming statute regulating pre-recorded telephone calls is located in the Wyoming Criminal Code, WYO. STAT. ANN. §§ 6-1-101 *et seq.*, and provides in its entirety:

(a) No person shall use an automated telephone system or device for the selection and dialing of telephone numbers and playing of recorded messages if a message is completed to the dialed number, for purposes of:

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- (i) Offering any goods or services for sale;
- (ii) Conveying information on goods or services in soliciting sales or purchases;
- (iii) Soliciting information;
- (iv) Gathering data and statistics; or
- (v) Promoting or any other use related to a political campaign.

(b) This section shall not prohibit the use of an automated telephone system or device described under subsection (a) of this section for purposes of informing purchasers of the receipt, availability or delivery of goods or services, any delay or other pertinent information on the status of any purchased goods or services or responding to any inquiry initiated by any person, or the use of an automated telephone dialing system as authorized by W.S. 40-12-303¹.

(c) Any person violating subsection (a) of this section is guilty of a misdemeanor punishable by imprisonment for not more than six (6) months, a fine of not more than seven hundred fifty dollars (\$750.00), or both.

WYO. STAT. ANN. § 6-6-104 (Emphasis added).

AFFPA contends that subsection (a)(v) of § 6-6-104 is preempted by FECA because the statute's prohibition on all pre-recorded telephone calls related to a political campaign is "clearly a '[l]imitation on . . . expenditures regarding Federal candidates and political committees'" in violation of 2 U.S.C. § 453(a) and 11 C.F.R. § 108.7(b)(3). AFFPA's contention is without merit.

¹ WYO. STAT. ANN. § 40-12-303 is part of the Wyoming Consumer Protection Act and prohibits automated telephonic sales calls with certain exceptions. The statute is not in any way applicable to political elections and so is irrelevant to the issue raised in the AOR.

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FECA provides that "the provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. § 453(a). Federal rule 11 C.F.R. § 108.7 provides, in pertinent part:

(b) Federal law supersedes State law concerning the —

....

(3) Limitations on contributions and expenditures regarding
Federal candidates and political committees.

11 C.F.R. § 108.7(b)(3).

"There is a strong presumption against preemption." *State v. Jude*, 554 N.W.2d 750, 752 (Minn. Ct. App. 1996) (citing *Weber v. Heaney*, 995 F.2d 872, 875 (8th Cir. 1993)); see also *Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1280 (5th Cir. 1994). Section 453 of FECA has been "given a narrow preemptive effect in light of its legislative history." *Rove*, 39 F.3d at 1273 (footnote omitted); *Jude*, 554 N.W.2d at 752 ("The explicit preemption in FECA has been narrowly construed in determining what area of state law has been preempted.") (citing *Weber*, 995 F.2d at 875 and *Reeder v. Kansas City Bd. of Police Comm'rs*, 733 F.2d 543, 545 (8th Cir. 1984). "Congress did not intend, in enacting § 453, to preempt a broad field of state law." *Pollard v. Bd. of Police Comm'rs*, 665 S.W.2d 333, 338 (Mo. 1984).

AFFPA bases its claim of preemption on subsection (b)(3) of 11 C.F.R. § 108.7: "Because the Arkansas and Wyoming statutes *limit expenditures by political committees* that are otherwise lawful under the Act and Commission regulations, the Arkansas and Wyoming statutes are preempted by FECA and FEC regulations, in so far as those state statutes apply to federal political committees." AFFPA Request for Advisory Opinion at page 7. AFFPA's claim cannot survive even the most cursory examination.

11 C.F.R. § 108.7(b)(3) preempts state laws that place "[l]imitations on contributions and expenditures regarding Federal candidates and political committees." WYO. STAT. ANN. § 6-6-104 does not place any restrictions whatsoever on a federal candidate or a federal political committee's contributions or expenditures. The statute simply bans automated telephone calls. The statute prohibits a certain specific *nonfinancial* campaign practice. The statute does not

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prohibit federal candidates or political committees from placing live telephone calls whether through its own members, volunteers or paid professional solicitors.

In *State v. Jude*, 554 N.W.2d 750 (Minn. App. Ct. 1996), a candidate for a federal congressional seat was charged under a Minnesota law for disseminating false campaign material in a television ad. *Id.* at 751-52. The trial court concluded that the state law was preempted by FECA. *Id.* at 752. The appeals court disagreed:

There is a strong presumption against preemption. *Weber v. Heaney*, 995 F.2d 872, 875 (8th Cir. 1993). The explicit preemption in FECA has been narrowly construed in determining what area of state law has been preempted. *Id.*; see also *Reeder v. Kansas City Bd. of Police Comm'rs*, 7733 F.2d 543, 545 (8th Cir. 1984) (FECA preemption statute is not so clear as to preclude consideration of legislative history as to scope of preemption).

The statute under which Jude was charged does not regulate the expenditures of, or campaign contributions to, candidates for federal office, or any other office. See Minn. Stat. § 211B.06. It merely prohibits certain nonfinancial campaign practices by all candidates in Minnesota, specifically the use of false campaign materials or advertising.

Id. at 752.

Similarly, WYO. STAT. ANN. § 6-6-104 "merely prohibits certain nonfinancial campaign practices by all candidates in" Wyoming. The prohibition on automated telephone calls is a reasonable time, place and manner restriction on advertising. *Jude*, 554 N.W.2d at 753; see also U.S. CONST. art. 1, §4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[.]"). The FEC has itself said that it "views state or local regulations and statutes that apply to the placement and location of campaign advertisements as outside the purview of 2 U.S.C. 453[.]" Advisory Opinion 1981-27.

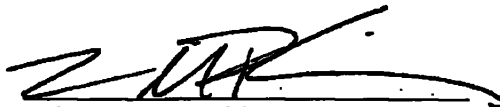
Neither FECA nor its rules or regulations purport to regulate automated telephone calls. The FCC, however, does regulate such calls extensively in the Telephone Consumer Protection Act (TCPA). AFFPA makes no claim, and could not make such a claim in front of the FEC, that Wyoming's statute banning automated telephone calls is preempted or otherwise invalid under

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the TCPA. Furthermore, Wyoming, like all states that adopted similar legislation, has a substantial interest in regulating automated telephone calls. *Van Bergen v. State*, 59 F.3d 1541, 1554 ("Residential privacy is a significant government interest.") (Case upholding Minnesota's ban on automated calling that is also being challenged by AFFPA in this case against a challenge under the TCPA).

WYO. STAT. ANN. § 6-6-104 is not preempted by FECA or its regulations, and the State of Wyoming respectfully requests the Commission to so find.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Robinson', written over a horizontal line.

Michael M. Robinson
Senior Assistant Attorney General

MMR:sg