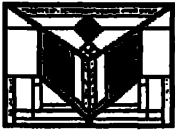


Comment on

AOR 2009-27

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To Robert Knop/FEC/US@FEC, Tony Buckley/FEC/US@FEC,
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COUNSEL

Subject Fw: Reply Comments in Advisory Opinion Request 2009-27

— Forwarded by Rosie Smith/FEC/US on 01/04/2010 10:57 AM —



"Michael Bayes"
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01/04/2010 10:56 AM

To <tduncan@fec.gov>

cc <rsmith@fec.gov>, <mdove@fec.gov>

Subject RE: Reply Comments in Advisory Opinion Request 2009-27

Ms. Duncan,

Please find attached comments filed on behalf of our client, American Future Fund Political Action, in the matter of Advisory Opinion Request 2009-27.

Thank you,

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Advisory Opinion Request, comments re Drafts A and B _01.04.pdf

January 4, 2010

Thomasenia P. Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

**Re: Advisory Opinion Request 2009-27
Comments on Drafts A and B**

VIA E-MAIL

Dear Ms. Duncan:

America Future Fund Political Action (AFFPA), by and through counsel, submits the following comments in response to Advisory Opinion 2009-27 Drafts A and B, as issued on December 18, 2009.

The adoption of either Draft A or Draft B would (i) represent a fundamental break with the Commission's past approach to preemption questions, (ii) abandon over 30 years of precedent, and (iii) cast doubt on the continuing validity of every Advisory Opinion issued from 1975 to August 28, 2009 on the subject of preemption. The Commission should resist abandoning its long-established historical approach for the short-term benefit of evading responding to a valid legal question in this particular case.

DRAFT B

Draft B is a transparent proposal to simply avoid answering the valid legal questions raised in the Advisory Opinion Request.

Draft B asserts that "advisory opinions previously [issued] on questions regarding the Act's preemption of state laws on various issues" were issued in the Commission's "discretion." Nothing in the legislative history of the Federal Election Campaign Act (FECA), the Commission's rules, regulations, court cases, nor any Advisory Opinion regarding preemption issued between 1975 and August 28, 2009, contains even a hint that issuing an advisory opinion is a matter of the Commission's "discretion." Draft B also states that "Because of the limited

effect an advisory opinion would have in response to this Request, the Commission in its discretion declines to address the preemption question presented.” With all due respect to the Commission, there is no legal basis for any assertion that such “discretion” exists. Under the Act and Commission regulations, if an Advisory Opinion Request “set[s] forth a specific transaction or activity that the requesting person plans to undertake or is presently undertaking and intends to undertake in the future,” 11 C.F.R. § 112.1(b), then “the Commission *shall* render a written advisory opinion relating to such transaction or activity to the person,” 2 U.S.C. § 437f(a)(1) (emphasis added). The term “shall” is mandatory in nature. We also note that the Commission’s Office of General Counsel determined this Request to be complete and in compliance with the law as of October 31, 2009, and Draft B itself concedes that a “live question” is presented: “this is certainly a live question under the Act’s preemption provision at section 453.”

Draft B claims that “the Request asks generally whether specific State statutes apply to Requestor’s proposed activities, or whether they are preempted by the Act.” This is true of every preemption advisory opinion ever requested.

Draft B further explains, “While this is certainly a live question under the Act’s preemption provision at section 453, the Requestor is not seeking an advisory opinion to protect itself from enforcement against a violation of any of the Act’s prohibitions or requirements relating to its proposed activities. Instead, Requestor is seeking an advisory opinion to protect itself from enforcement against a violation of various state laws. Any answer from the Commission regarding the application of the state laws that are the subject of this request would provide little protection for the Respondent from actions brought under those state laws. Such protection is more properly provided by the judiciary.” Again, this could be said of any Advisory Opinion Request ever submitted seeking guidance on a preemption question, and never to our knowledge has the existence of a pending state enforcement action been a prerequisite to the issuance of an advisory opinion. (The Commission should remember that its opinions are “advisory.”)

Preemption requests all adhere to a very simple formula: State law either requires a political committee to do X, or prohibits Y. Federal law does not contain the same requirement or prohibition. Is the state law preempted – and therefore rendered ineffective – by FECA? The Commission has *always* treated such requests as concerning “the application of this Act,” as that phrase is used in 2 U.S.C. § 437f(a)(1). To now claim that such requests really only concern the application of state law would be entirely inconsistent with over 30 years of Commission precedent. Moreover, the very obvious implication of doing so would be to assert that the Commission should never have issued at least 35 Advisory Opinions on preemption questions. If the Commission should never have issued these Opinions in the first place, are they still valid? May they still be relied upon? What is the purpose of 11 C.F.R. § 108.7(b) and (c), and how are these sections to be construed in light of the provision compelling the issuance of advisory opinions, if the preemption questions are “more properly” answered by the judiciary?

The Commission would do a great disservice to the public if it were to suddenly announce that it has the “discretion” to not respond to Advisory Opinion Requests it would prefer not to answer. After approaching preemption questions a certain way for over 30 years, including just four months ago in Advisory Opinion 2009-21 when the Commission issued its

last (unanimous) preemption advisory opinion, it is impossible to view Draft B as a principled application of the law. Rather, Draft B proposes throwing out the baby with the bath water to avoid providing a response to a distinct legal question that should be answered based on the law and facts – and not with an eye on the “parade of horrors” offered by a handful of commentators.

If the Commission can suddenly discover the “discretion” to not answer preemption questions, might such “discretion” be found elsewhere? The Advisory Opinion process was not designed to function like the Supreme Court’s *writ of certiorari* process. The FEC does not get to choose what cases go on its docket – rather, it must attempt to provide a substantive response when a “live question” is presented.

DRAFT A

General Considerations

Draft A, which at least provides a substantive response, is written as if the Commission were writing on a clean slate with regard to preemption. Draft A does not once refer to the language in the Commission’s regulations on preemption, instead relegating the preemption regulations to a single “see also” citation (*see* Draft A, page 4, line 1). These regulations were adopted in 1980,¹ and based on roughly 29 years of precedent, the Requestor was under the impression that they were relevant. After all, they specify which types of state laws are preempted and which types are not. As we have explained in previous submissions, the state laws regarding robocalls at issue in this matter do not fall within any of the non-preempted categories set forth at 11 C.F.R. § 108.7(c), but they do serve as direct limitations on political committee expenditures (*see* 11 C.F.R. § 108.7(b)(3)). We believe the Commission should squarely address its own regulations, and explain to the regulated community why those regulations do or do not control the matter before it.

Draft A also marks the very first instance in which either the phrase “historic police powers” or “police powers” had ever been mentioned in a preemption opinion. At least 35 advisory opinions on the subject of preemption have been issued without a single one mentioning the “historic police powers” presumption, even though that concept has existed in the Supreme Court’s preemption analysis since at least 1947 (*Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This is hardly the first time that a preemption question before the Commission has involved the state’s “police powers.”²

We do not argue that the “historic police powers” concept has no bearing on the questions presented, only that this concept cannot be the Commission’s sole analytical consideration. The Commission should adhere to the analysis it has used for decades, which

¹ See 45 Fed. Reg. 15,117 (March 7, 1980).

² We note that the term is ill-defined and potentially boundless. As one court explained, “[p]olice power is the exercise of the sovereign right of a government to promote order, safety, health, morals, and the general welfare of society, within constitutional limits.” *Marshall v. Kansas City*, 355 S.W.2d 877 (Mo. 1962) citing 16 C.J.S., Constitutional Law, § 174.

includes a review of the statutory language, a detailed regulation, unusually informative legislative history, and case law. As part of this analysis, the Commission should conclude that Congress' intent in enacting FECA was "clear and manifest," and that it intended to preempt state laws that interfered with FECA, *even if* those laws can be classified as exercises of "historic police power." We agree that this Request requires the "historic police powers" issue to be addressed, and we encourage the Commission to integrate the concept as a factor into the analysis it has used for over 30 years.

As is the case with Draft B, the adoption of Draft A would establish a fundamentally different – and entirely new – view of preemption. The continuing validity of the Advisory Opinions issued between 1975 and August 28, 2009, would be doubtful because they were the product of a method of analysis abandoned in this matter.

"Slippery Slopes"

Draft A incorporates a ridiculous "slippery slope" argument drawn from comments submitted by the California Public Utilities Commission and Indiana's Attorney General." Draft A asserts (at page 9, line 18 through page 10, line 2):

FECA does not address the myriad ways expenditures and independent expenditures may be otherwise affected by government regulation. If the Commission found that any state law implicating any expenditure made by any federal political committee were preempted by FECA, this would prevent states from regulating any activity typically reserved for the states, such as contractual agreements (including rental agreements), payments to public utilities, payments of salaries, payment of state taxes (including sales tax), and any number of other inherently state powers including criminal activity, such as payment of bribes.

First, as the Commission states at the end of every Advisory Opinion it issues, "The Commission emphasizes that, if there is a change in any of the facts or assumptions presented and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity." *See, e.g.*, Draft A, pages 21-22. The Advisory Opinion Request before the Commission has nothing to do with contractual agreements, utilities payments, salaries, taxes, or criminal activity.

Second, state laws that merely "affect" or "implicate" the activities of a Federal political committee are not at issue. Requestor in no way whatsoever asserts that all state laws "affecting" or "implicating" its spending are preempted. Rather, the state laws at issue are prohibitions and/or restrictions (or requirements, in the case of the additional disclaimers) on communicative activity that may be lawfully funded by a political committee pursuant to FECA. The question before the Commission is whether these state law prohibitions, restrictions, and requirements are preempted. Laws regarding contracts, taxes, salaries, and utilities payments very simply are not at issue, nor do they any place restrictions or prohibitions on the making of political committee expenditures. The Commission should not be distracted by this completely irrelevant red herring, nor should it rely on a "slippery slope" argument that is manufactured by mischaracterizing both the facts and the law.

State Laws of General Applicability

Draft A asserts (at page 8) that “the Supreme Court has held that unless a State statute specifically targets an area of Federal regulation, State laws of general applicability will not be preempted.” This assertion is re-stated in abbreviated form at page 18 (“Moreover, State laws of general applicability will not be preempted.”) Two Supreme Court cases – *Altria Group, Inc. v. Good* and *Lorillard Tobacco Co. v. Reilly* – are cited for this proposition. Neither case includes any such language – certainly not at the page citations included in Draft A.

Assuming – strictly for the sake of argument – that the above-cited language is an accurate restatement of the law, Draft A misapplies that restatement. Arkansas’ robocall prohibition applies to calls made “for any purpose in connection with a political campaign.” Wyoming’s prohibition applies to calls made for “promoting or any other use related to a political campaign.” How are these *not* state statutes that specifically target an area of Federal regulation? Must a state statute now actually refer to a “*Federal* political campaign” to be treated by the Commission as a statute that specifically targets an area of Federal regulation? The West Virginia statute at issue in Advisory Opinion 2009-21 applied to “political committees,” which were defined to include “any candidate committee, political action committee or political party committee.” This formulation appears to be very similar in terms of specificity to the term “political campaign.”

We question the conclusion that the state robocalls prohibitions are laws of “general applicability.” The Arkansas and Wyoming prohibitions apply to commercial calls, survey calls, and “political campaign” calls. Every other type of call is exempted. The fact that the statutes are not limited exclusively to “political campaign” calls does not automatically make them “laws of general applicability.” Draft A, however, appears to conclude otherwise. In its characterization of Advisory Opinion 2009-21, at page 12, Draft A explains: “The West Virginia statute *exclusively* focused on public opinion polls regarding elections, including federal elections, and prohibited polls that deceptively advocated the election or defeat of any candidate. The statute’s *exclusive* focus on politics, candidates, and federal elections means that it was not a law of general applicability” (emphasis added). This formulation ignores the existence of the substantial gray area between laws that are “*exclusively*” electoral in nature and “laws of general applicability,” and seems to assume that all laws must necessarily fall into one category or the other.

Nevertheless, the fact that both the Arkansas and Wyoming statutes very plainly “target Federal political activity” makes the “general applicability” question irrelevant under Draft A’s questionable formulation of the law (“*unless* a State statute specifically targets an area of Federal regulation, State laws of general applicability will not be preempted”). The laws at issue *do* specifically target an area of Federal regulation.

The Proposed “Exclusivity” Test

The Commission should consider how Draft A’s “exclusivity” test might work in practice. For example, in Advisory Opinion 1999-12 (Campaign For Working Families), the Commission considered Pennsylvania statutes that did not focus exclusively on “politics,

candidates, and federal elections.” Rather, the Pennsylvania laws at issue “impose[d] extensive registration and information disclosure requirements on charitable organizations, professional fundraisers and professional solicitors” and had been construed to apply to all entities “who in any manner emplo[y] a charitable appeal as the basis of any solicitation or an appeal which has a tendency to suggest there is a charitable purpose to any solicitation.” The Commission concluded that Pennsylvania’s registration and reporting requirements were preempted insofar as they applied to the Requestor, to the extent the Requestor was engaged in activity subject to the Commission’s reporting requirements.

As the Commission stated in Advisory Opinion 1999-12, “Preemption with respect to the solicitation of funds for the Federal account is compelled by the need for one set of requirements for Federal campaign finance activities, rather than subjecting Federal political committees such as multicandidate committees, to a multiplicity of requirements depending upon the number of States in which they solicit contributions.”

Pennsylvania’s statute obviously applied beyond “politics, candidates, and federal elections,” and was certainly as broad in application as a statute applying to commercial sellers, survey takers, and political campaigners. And Pennsylvania’s “state interest” in regulating charitable solicitations – for the purpose of protecting its citizens from fraud and abuse – is just as great as a state’s interest in protecting its citizens’ residential privacy. Yet the analysis used in Draft A would seem to suggest a different result in Advisory Opinion 1999-12.

As a related aside, the conclusions reached in Draft A with respect to Question #3 are at odds with the conclusion reached in Advisory Opinion 1999-12 that states may not subject Federal political committee fundraising to a separate legal regime via charities regulations. And, as quoted above, the Commission has already determined that “Preemption with respect to the solicitation of funds for the Federal account is compelled by the need for one set of requirements for Federal campaign finance activities, rather than subjecting Federal political committees such as multicandidate committees, to a multiplicity of requirements depending upon the number of States in which they solicit contributions.”

Formal Categories vs. The Law’s Effect

Advisory Opinion 1999-12 was correctly decided in large part because it did not insist on formally categorizing the law at issue. Rather, that Opinion focused on the *effect* the state law at issue had on Federal political activities. As the Eleventh Circuit stated in *Teper v. Miller*, 82 F.3d 989, 995 (11th Cir. 1996), “it is the *effect* of the state law that matters in determining preemption, not its intent or purpose. Under the Supremacy Clause, state law that *in effect* substantially impedes or frustrates federal regulation, or trespasses on a field occupied by federal law, must yield, no matter how admirable or unrelated the purpose of that law” (emphasis added).

Telephone Consumer Protection Act

Draft A asserts that “[a]n analogous federal statute that prohibits automated calls has been upheld as a content-neutral, reasonable time, place, and manner restriction.” The reference

is to a provision the Telephone Consumer Protection Act (TCPA), and it is *not* analogous to the Arkansas and Wyoming prohibitions. The Court in *Moser v. FCC* specifically noted that the TCPA permitted the FCC to exempt non-commercial calls by regulation, and that the FCC had done so.³ Draft A purposefully omits this extremely important detail and attempts to sweep under the rug these important distinctions. While the court in *Moser* claimed not to utilize a commercial speech analysis, its consideration was limited to automated *telemarketing* calls made for commercial purposes. While we do not believe that the constitutionality of a ban on commercial robocalls is particularly relevant to the question of preemption under FECA, we do believe the Commission should exercise care to accurately characterize the TCPA.

Younger Abstention?

Footnote 7 of Draft A states, “We find the fact that the Seventh Circuit has found this a matter appropriately considered in state channels to be informative.” We find it difficult to understand how a routine application of the *Younger* abstention doctrine by a federal court is “informative” to an administrative agency asked to render an advisory opinion. As *FreeEats.com v. Indiana*, 502 F.3d 590 (7th Cir. 2007) explained, “*Younger* generally requires federal courts to abstain from taking jurisdiction over federal constitutional claims that involve or call into question ongoing state proceedings” (emphasis added). We have nothing like that here, are unaware of the Commission asserting some form of *Younger* abstention in the past, and do not believe that the Commission has the legal (constitutional, statutory or otherwise) authority to make such an assertion.⁴

We appreciate the opportunity to submit these reply comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Jason Torchinsky", with a horizontal line extending to the right.

Jason Torchinsky
Michael Bayes

³ See 47 C.F.R. 64.1200 (2009).

⁴ This request does not involve constitutional claims about the authority of state law – but rather poses a specific statutory interpretation question of whether the explicit pre-emption language of the FECA applies to the state laws at issue.