



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**MEMORANDUM**

**TO:** THE COMMISSION  
STAFF DIRECTOR  
GENERAL COUNSEL  
CHIEF COMMUNICATIONS OFFICER  
FEC PRESS OFFICE  
FEC PUBLIC DISCLOSURE

**FROM:** DEPUTY COMMISSION SECRETARY *D.H.*

**DATE:** January 8, 2010

**SUBJECT:** COMMENT ON DRAFT AO 2009-27  
American Future Fund Political Action

Transmitted herewith is a timely submitted comment from William J. McGinley, Esq., and Joseph E. Sandler, Esq., on behalf of the American Association of Political Consultants, regarding the above-captioned matter.

Proposed Advisory Opinion 2009-27 is on the agenda for Thursday, January 14, 2010.

**Attachment**

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January 8, 2010

**Via Facsimile**

Honorable Mary Dove, Secretary  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

**Re: Draft Advisory Opinion 2009-27  
Comments of American Association of Political Consultants**

**Dear Madame Secretary:**

These comments are submitted on behalf of the American Association of Political Consultants ("AAPC") on Draft Advisory Opinion 2009-27, relating to the issue of preemption, by the Federal Election Campaign Act of 1971 as amended ("FECA" or the "Act") of state laws prohibiting and/or regulating the use of automatic dialing answering devices in federal election campaigns.

For the reasons set out below, the AAPC urges the Commission to reject the conclusions of the Draft AO, in part, and to issue an advisory opinion holding that state laws effectively prohibiting the use of pre-recorded telephone calls in federal elections—including those state laws requiring that prior consent be obtained by a live operator-- are preempted by the Act.

The AAPC is the nation's preeminent nonpartisan organization of political professionals, representing more than 1,000 professionals, both Republican and Democrat, who provide services and advice to candidates for federal, state and local office, to political party committees and to other political committees and organizations. AAPC members provide strategic advice, polling, media production and placement, website design and development, fundraising services, direct mail, phones and other services to candidates, committees and organizations. AAPC is dedicated to promoting high professional standards and ethics.

#### **I. State Laws Requiring Prior Consent Are Effective Bans On Use of ADAD's**

The Commission should address the effect of the Act's preemption clause, 2 U.S.C. §453, on the laws of the twelve states in which state law either prohibits the use of ADAD's outright or requires the prior consent of the person being called. While only two states—Arkansas and Wyoming—ban the use of ADAD's for any use "in connection with" or "related to a political campaign", the laws of ten other states require the caller to obtain the consent of the person being called before any pre-recorded message can be played. Draft AO 2009-27 Version

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A at 6-7, 13-14. These ten states are California, Indiana, Minnesota, Mississippi, Montana, New Jersey, North Carolina, North Dakota, South Carolina and Tennessee. *Id.* at 13. These state laws require that a live operator announce the call; and/or that the person called have previously consented to receive pre-recorded calls; and/or that a live operator obtains the consent of the person called immediately before the prerecorded message is played. *Id.* at 14-16.

The Commission should understand, in the first instance that the effect of all of these state laws is exactly the same: as a practical matter, they impose an outright ban on the use, by a federal political committee of its own funds, to communicate to voters by means of an automatically dialed call in which a prerecorded message is played. It is impossible, as a practical matter, to obtain the consent of every person called prior to calling them. The costs of doing so would obviously be prohibitive.

It is equally impossible for a live operator to announce each prerecorded message or to obtain the consent of the person called before the message is played. An ADAD device can place in the range of approximately 250,000 calls per hour; by contrast a live operator can generally make no more than approximately 60-75 calls per hour. In comments submitted to the Commission, one vendor notes that to place 1 million calls one time would require use of 2,000 individuals for 25 hours, at a cost of \$2 million, 1,500 percent more than using an automated system. Comments by ccAdvertising in response to AOR 2009-27 at 5 (Dec. 8, 2009). In the industry today, it is common for the cost per call, to the political candidate or committee, for an autocal to range down to 6-7 cents, as opposed to \$2 or more for that same call to be placed using a live operator. For these reasons, all of these laws effectively serve as an outright ban.

## **II. The State Laws Banning Use of ADAD's in Federal Campaigns Effectively Outlaw Specific Types of Messages in Those Campaigns**

These state laws do not merely make it more expensive or inconvenient for federal candidates and political committees to deliver a given message. Rather, these laws effectively ban federal candidates and committees from communicating certain types of messages *at all*.

*First*, these laws make it impossible for a federal candidate, party committee or PAC to communicate with voters individually using the voice of the candidate herself, or of another elected official, a community leader or a celebrity. The candidate herself may wish to communicate to voters in her own voice. A campaign or party committee may want a well-known civic or community leader, advocate or activist, who has endorsed a candidate or identifies with the party, to communicate with voters to urge them to support the candidate and/or to get out to vote. Clearly it is not practical for any one individual to make thousands or tens of thousands of calls to voters in any reasonable period of time. The state laws banning use of ADAD's effectively preclude federal candidates and committees from using the voice of any recognizable individual in a federal campaign.

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*Second*, the state laws banning use of ADAD's in federal campaigns effectively ban federal campaigns and committees from communicating to voters information that must be imparted very quickly in order to be effective at all—specifically, for example:

- rebuttals of last-minute rumors or false or misleading information about *candidates* that may have been circulated by opponents or third party groups;
- rebuttals of last-minute rumors or false or misleading information about voting procedures and requirements that may have been circulated by opponents or third party groups—for example, a false rumor that voters cannot carry sample ballots to the polls, or wear buttons, or that they will be asked certain invasive questions, etc.; and
- updates of information about voting procedures and requirements—for example, changes of position by local election officials that modify what forms of identification voters need to bring to the polls, changes of polling locations or hours, and the like.

*Third*, at least in Arkansas and Wyoming, the two states that ban use of ADAD's altogether “in connection with a political campaign” (Ark. Code §5-63-204(a)) and in “[p]romoting or any other use related to a political campaign” (Wyoming Stat. §6-6-104(a)), the bans arguably do not cover the making of such automated calls by corporations, labor organizations and nonprofit organizations that promote, attack, support or oppose a federal candidate in the context of issue advocacy. These laws, then, effectively bar federal candidates from *responding to direct attacks* using the same medium employed to make those attacks—even if those federal candidates were willing to go to the trouble and expense of using a live operator to obtain prior consent from the recipients of the calls.

*Fourth*, while there is considerable debate in the survey profession about the relative accuracy of polling conducted through interactive automated calls and polling conducted using live operators, at least some professionals believe that the former can be more accurate in certain circumstances. One leading pollster, for example, “argues that using robocalls for polling actually increases the accuracy because the automated technology insures that every respondent hears exactly the same question, from exactly the same voice, asked with the exact same inflection every single time. J. Miller, *Regulating Robocalls*, 16 MICH. TELE. & TECH. L. REV. \_ (2009). In any event, polling conducted through automated calls is less expensive and some research has shown it is at least as accurate as polling conducted using live operators. For example, an April 2009 study by the American Association of Public Opinion Research found that the two types of polling were equally accurate in certain 2008 primary election polls.

The state laws prohibiting use of ADAD's thus serve as outright bans on the communication, by federal candidates and committees, of any of these types of *content* in federal campaigns.

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### **III. The State Laws Banning Use of ADAD's in Federal Campaigns Are Preempted by FECA**

#### **A. The State Laws Are Preempted Because They Ban A Specific Type of Communication to Voters and Purport to Regulate the Content of Communications to Voters**

As the Draft AO correctly notes, the question presented by this AOR is the scope of an express preemption clause, namely, section 453 of the Act, which states 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. The Commission is called upon in this case to "identify the domain expressly pre-empted by that language." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996). The "question of the substance and scope of Congress' displacement of state law still remains." *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008).

That question is squarely addressed by the Commission's rules, which provide that section 453 preempts state laws with respect to the "[l]imitation on contributions and expenditures regarding Federal candidates and political committees." 11 C.F.R. §108.7(b)(3). "Federal law supersedes State law with respect to...the limitations on contributions and expenditures regarding Federal candidates and political committees." FEC Advisory Opinion 2009-21 at 3.

To be sure, the term "limitation on...expenditures" is not all encompassing. The courts and the Commission, however, have made it clear that the term "limitation on...expenditures" does include state laws that ban a federal committee from expending its funds on particular types of communications with voters or that purport to regulate the content of those communications. In *Bunning v. Commonwealth of Kentucky*, 42 F.3d 1008 (6<sup>th</sup> Cir. 1994), the Court held that the Act preempted a state law that would ban a federal candidate from using funds from his authorized committee to conduct a poll outside his district, that the state claimed was being used to assess the candidate's potential for a future run for state office, without registering a political committee with the state. The Court noted that the poll was paid for by a federal political committee and that the expenditure for the poll was lawful under FECA. Thus, the state's "intrusion into the [federal candidate's] federally regulated activity constituted an attempt to impose on a federal political committee Kentucky's requirements on both on the disclosure of expenditures and the limits on expenditures made by such a committee. The [state election authority]'s claimed right to do so is preempted by §453...." 42 F.3d at 1012.

In Advisory Opinion 2009-21, the Commission similarly ruled that the Act preempted, as to federal candidates and committees, a West Virginia statute that forbid candidates for any office from conducting a poll which included any question calculated to advocate the election or defeat of a candidate. The Commission found, that, "With respect to Federal elections, the West Virginia statute at issue here on its face limits expenditures by Federal political committees

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(including candidate committees)—one of the areas regulated by the Act and Commission regulations.” AO 2009-21 at 3. The Commission explained that:

The Act and Commission regulations establish that limitations and restrictions on Federal candidate expenditures is an area to be regulated solely by Federal law.... Under the Act's pre-emption clause, only Federal law could limit the ability of a Federal candidate to make expenditures for polling.

*Id.* at 4.

The Commission has also found that the Act preempts state laws that purport to regulate the content of communications to voters by federal candidates and committees, by requiring that certain information be communicated or forbidding certain information from being communicated. The Commission's rulings have treated such content restrictions as impinging on the Act's exclusive regulation of disclosure requirements. As Draft AOR 2009-27 notes, the "Commission has long recognized that the Act preempts State and local laws requiring disclaimers that must appear on advertisements or solicitations, treating such disclaimers as related to the issues of disclosure and the conduct of federal campaigns." Draft AOR 2009-27 at 21. The Commission's rulings, however, have treated the concept of disclosure broadly and have *not* been limited to state disclaimer requirements, but have extended to any state law purporting to mandate or bar specific content in communications to voters by federal candidates.

For example, in AO 1978-24, the Commission held that Washington State could not enforce, against federal candidates, a state statute requiring that party designation be included in all campaign advertising. The Commission noted that the only requirements imposed by federal law as to what needed to be included in campaign advertising are those prescribed by the Act, and thus the Act "would supersede and preempt the cited Washington statute requiring designation of party affiliation on all campaign advertising." Similarly, in AO 1981-27, the Commission ruled that a city could not enforce, against federal candidates, a local ordinance requiring that all campaign materials include a warning that the materials could only be posted in accordance with the city's Building Code. Again, in AO 1986-11, the Commission ruled that an Ohio state statute barring use, in any campaign materials, of any title of an office not currently held by the candidate, could not be applied to federal candidates.

Contrary to the suggestion made in Draft AO 2009-27, the state laws effectively banning use of ADAD's by federal candidates and committees are not statutes that merely regulate the "manner of making campaign advertisements." Draft AO 2009-27 at 11. These state laws ban federal candidates and committees from undertaking a specific type of communication with voters, and effectively regulate the *content* of communications by federal candidates with voters. Specifically, as noted, these laws effectively ban federal candidates and committees from making telephone calls to voters that use the voice of the candidate or other identifiable individuals, that correct misinformation circulated to voters immediately before an election or that employ a particular polling technique. In this regard, the state laws banning use of ADAD's, to the extent

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they are applied to federal candidates and campaigns, are no different than the state statute purporting to regulate the content of polls, found preempted in AO 2009-21, or the state statutes purporting to mandate or forbid specific content in communications to voters, found preempted in AO 1978-21, AO 1981-27 and AO 1986-11, among others. For those reasons, the state statutes banning use of ADAD's by federal candidates and campaigns are preempted by the Act.

#### **B. Regulation of Autocalls Is Not an Exercise of Historic Police Power of the States**

In finding the state laws banning not to be preempted by the Act, the Draft AO relies heavily on two propositions. The first is that a presumption against preemption applies because these laws represent an exercise of the historic police powers of the states. That is simply not the case.

To be sure, it is well-established that "the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Altria Group*, 129 S. Ct. at 543 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). "That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States." *Id.* In this case, the Draft AO characterizes the state ADAD bans as a "traditional[] exercise[]" of "police powers to protect citizens from unwanted invasion of the privacy of their homes." Draft AOR at 7.

The regulation of interstate ADAD telephone calls, however, is clearly not an exercise of "historic police powers" by the states. In fact, the making of calls using ADAD's is specifically regulated by the federal Telephone Consumer Protection Act of 1991, 47 U.S.C. §227 ("TCPA"). The only reason the states have any authority at all to regulate the use of ADAD's as to interstate calls made to individuals in their states is that TCPA contains an express "savings clause" that *expressly disclaims* the preemption of state laws imposing more stringent intrastate requirements on use of ADAD's. 47 U.S.C. §227(e)(1).

The Draft AO relies on cases upholding the constitutionality of state ADAD or telemarketing laws, based on the "historic police power" rationale. See Draft AO 2009-27 at 7-8. That reliance is misplaced. The issue here is not whether the state has a compelling or significant interest in regulating ADAD's, but whether the broadly worded express federal preemption clause should be ignored or constricted because of the presumption against preemption in a "field traditionally occupied by the States." The answer is no. Congress has made clear its intent to preempt state laws that purport to govern the content of communications with voters by federal candidates and campaigns. There is no long tradition or history of state regulation in the area of interstate ADAD's. Congressional intent should be respected by finding preemption in this case.

Further, the assumption that the particular states enacting bans on use of ADAD's are merely protecting their *own* citizens is becoming increasingly untrue. More and more people are

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using cellular telephones and mobile devices as their principal phones. Federal law requires that any organization obtain permission from a cellular telephone subscriber in order to send text messages or autocalled calls to the cellular number. But even if that permission is obtained, a federal campaign or committee may still be violating the law, for example, in Arkansas or Wyoming, because it may not be possible for the campaign or committee to know where that subscriber is residing when he or she is using that cellular telephone. Thus, a federal campaign or committee who obtains permission from a cellular customer who gives her address as Texas may in fact reach that subscriber in Arkansas—thereby unwittingly violating that state's law. The increasing portability of telephone numbers thus further undermines the argument that the states imposing bans are merely protecting the privacy of their own citizens.

**C. It Is Irrelevant That the State Laws Banning ADAD's Are Laws of General Applicability**

The second principal basis on which the Draft AO declines to find preemption is that the state laws banning ADAD's are not specifically targeted at federal elections, or even elections, but rather are "state laws of general applicability." Draft AO 2009-27 at 8. "[T]hese laws are general in their application and do not specifically target Federal political activity." *Id.* at 9.

The preemptive scope of section 453, however, is clearly not limited to state laws "specifically targeting Federal political activity." To the contrary, as the Commission explained in AO 1999-12, finding preemption of a general state law requiring registration of nonprofit groups engaged in fundraising:

The Commission notes that the State law at issue is not a campaign finance statute, and that the State has argued that it is regulating the solicitation of funds for charitable purposes and not the organization and registration of political committees. *The Act's preemptive powers, however, are not limited only to its effect on State or local campaign finance statutes and have been applied to other statutes having an impact on Federal election activity.*

*Id.* at 7 n. 9 (emphasis added). The Commission specifically noted, for example, that in *Friends of Phil Gramm v. Americans for Phil Gramm* in '84, 587 F. Supp. 769 (E.D. Va. 1984), the Court had found preemption of a state law prohibiting the unauthorized use of a person's name in advertising even though the state "law was one of general application not limited to a political context." *Id.*

As the Commission noted in AO 1999-12, the Commission has consistently found state laws of "general applicability" to be preempted when those laws (i) apply to federal candidates and committees and (ii) impose requirements or restrictions within the preemptive scope of section 453. See, e.g., AO 1993-25; AO 1992-43; AO 1989-12; AO 1982-29. That is the case with respect to the state laws banning use of ADAD's, to the extent those laws are applicable to federal candidates and committees.

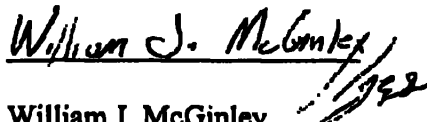


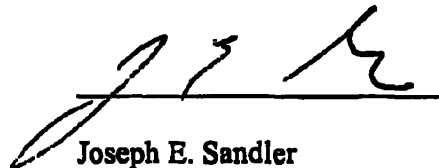
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**CONCLUSION**

For the reasons set forth above, the Commission should issue an Advisory Opinion finding that the Act preempts the twelve state laws effectively banning the use of prerecorded automatically dialed telephone calls, to the extent those laws would apply to federal candidates and committees.

Respectfully submitted,

  
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