



FEDERAL ELECTION COMMISSION
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AGENDA ITEM

For Meeting of: 1-14-10

MEMORANDUM

TO: The Commission

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Subject: Draft AO 2009-27 (American Future Fund Political Action)

We have been asked to circulate the attached drafts of the subject advisory opinion. Please place these drafts on the agenda for January 14, 2010.

Attachment

1 ADVISORY OPINION 2009-27

2 Jason Torchinsky, Esq.
3 Holtzman Vogel PLLC
45 North Hill Drive
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DRAFT A

4 Dear Mr. Torchinsky:

5 We are responding to your advisory opinion request on behalf of American Future
6 Fund Political Action (“American Future Fund”), concerning the possible preemption of
7 the State laws of fifteen States by the Federal Election Campaign Act of 1971, as
8 amended (“the Act”), and Commission regulations. The Commission concludes that
9 these State laws prohibiting or restricting American Future Fund’s use of automatic
10 dialing answering devices to solicit contributions and make independent expenditures are
11 not preempted by the Act and Commission regulations. The Commission further
12 concludes that State laws requiring disclaimers on calls made using automatic dialing
13 answering devices are preempted by the Act.

14 ***Background***

15 The facts presented in this advisory opinion are based on your letters received on
16 October 13, 21, and 29, 2009, and publicly available materials, including reports filed
17 with the Commission.¹

18 American Future Fund is a non-connected multicandidate committee registered
19 with the Commission. As a Federal political committee, American Future Fund may only
20 accept contributions that are subject to the Act’s limitations and prohibitions. 2 U.S.C.

¹ See FEC Form 1, Statement of Organization, *available at*
<http://query.nictusa.com/pdf/381/28039722381/28039722381.pdf#navpanes=0>.

1 441a(f). American Future Fund makes expenditures with funds that have been raised
2 subject to the Act's limitations and prohibitions. *Id.*

3 American Future Fund proposes to distribute pre-recorded telephone calls,
4 through the use of what is known as automatic dialing answering devices ("ADAD"), as
5 part of a nationwide program of political outreach. American Future Fund's telephone
6 calls will expressly advocate the election or defeat of one or more clearly identified
7 candidates for Federal office, and/or solicit contributions to American Future Fund.
8 American Future Fund's phone calls will be developed and distributed independent of
9 any Federal candidate, authorized committee, or party committee, and will not be
10 authorized by any Federal candidate.

11 American Future Fund's telephone calls will constitute a "telephone bank to the
12 general public" and "public communications," as those terms are defined in the Act and
13 Commission regulations. *See* 2 U.S.C. 431(22) and (24); 11 CFR 100.26 and 100.28. A
14 telephone bank is a type of public communication that must include the disclaimers
15 required by the Act. *Id.* American Future Fund's telephone calls will also constitute
16 "independent expenditures," as that term is defined in the Act and Commission
17 regulations. *See* 2 U.S.C. 431(17) and 11 CFR 100.16(a). American Future Fund's
18 telephone calls will comply with applicable disclaimer requirements. *See* 2 U.S.C.
19 441d(a)(3); *see also* 11 CFR 110.11(a)(1)-(3) (requiring disclaimers on public
20 communications generally made by political committees, public communications by any
21 person expressly advocating the election or defeat of a clearly identified Federal
22 candidate, and public communications by any person that solicit any contribution).

1 American Future Fund’s telephone banks will reach into fifteen States that
2 prohibit or otherwise restrict telephone bank calls. Two States ban ADAD calls outright.²
3 Ten States require prior consent obtained by live operators.³ One State, Iowa, prohibits
4 ADAD calls except for nonprofit fundraising. *See* Iowa Code 476.57. Two States that
5 require prior consent by operators also require certain disclaimers on ADAD calls.⁴ Two
6 other States only require certain disclaimers on ADAD calls.⁵

7 ***Questions Presented***

- 8 1. *Are certain State laws purporting to prohibit all pre-recorded*
9 *telephone calls by Federal political committees preempted by FECA?*
10
11 2. *Are certain State laws requiring Federal political committees to obtain*
12 *prior consent, specifically through the use of a live operator, prior to*
13 *delivery of a pre-recorded telephone call preempted by FECA?*
14
15 3. *Is Iowa State law purporting to prohibit Federal political committees*
16 *from engaging in fundraising via pre-recorded telephone calls*
17 *preempted by FECA?*
18
19 4. *Are certain State laws purporting to require Federal political*
20 *committees to include additional disclaimers on pre-recorded*
21 *telephone calls preempted by FECA?*
22

23 ***Legal Analysis and Conclusions***

24 The Act states that its provisions and the rules prescribed thereunder “supersede
25 and preempt any provision of State law with respect to election to Federal office.”

² These States are Arkansas and Wyoming. *See* Ark. Code § 5-63-204(a)(1) and Wyo. Stat. § 6-6-104(a).

³ These States are California, Indiana, Minnesota, Mississippi, Montana, New Jersey, North Carolina, North Dakota, South Carolina, and Tennessee. *See* Cal. Pub. Util. Code 2872 – 2874; Ind. Code 24-5-14-5, 24-5-14-7; Minn. Stat. 325E.27, 325E.29; Miss. Code 77-3-455; Mont. Code 45-8-216; N.J. Stat 48:17-28; N.C. Gen. Stat. 75-104(b)(2); N.D. Code 51-28-02 – 51-28-04; S.C. Code 16-17-446; Tenn. Code 47-18-1502.

⁴ These States are California and Mississippi. *See* Cal. Pub. Util. Code 2872; Miss. Code 77-3-455.

⁵ These States are New York and Pennsylvania. *See* N.Y. Gen. Bus. 399-p; 52 Pa. [Admin.] Code 63.60.

1 2 U.S.C. 453; *see also* 11 CFR 108.7(a). The legislative history indicates that Congress
2 intended “to make certain that the Federal law is construed to occupy the field with
3 respect to elections to Federal office and that the Federal law will be the sole authority
4 under which such elections will be regulated.” *H.R. Rep. No. 93-1239*, 93d Cong.,
5 2d Sess. 10 (1974).

6 The language of section 453 preempts “any State law with respect to election to
7 Federal office.” Nonetheless, “[i]f a federal law contains an express pre-emption clause,
8 it does not immediately end the inquiry because the question of the substance and scope
9 of Congress’ displacement of State law still remains.” *Altria Group, Inc. v. Good*, 129
10 S.Ct. 538, 543 (2008). As the Supreme Court has indicated, the analysis of whether a
11 Federal statute expressly preempts State law begins with “the assumption that the historic
12 police powers of the States [are] not to be superseded by the Federal Act unless that was
13 the clear and manifest purpose of Congress. . . . That assumption applies with particular
14 force when Congress has legislated in a field traditionally occupied by the States. . . .
15 Thus, when the text of a pre-emption clause is susceptible of more than one plausible
16 reading, courts ordinarily accept the reading that disfavors pre-emption.” (Internal
17 citations and quotations omitted.) *Id.* Because “the States are independent sovereigns in
18 our federal system,` we have long presumed that Congress does not cavalierly preempt
19 state law.” *Bates v. Dow Agrosiences LLC*, 544 U.S. 431 (2005) (quoting *Medtronic,*
20 *Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

21 Section 453 has also been interpreted narrowly by courts. “The narrow wording
22 of this provision suggests that Congress did not intend to preempt state regulation with
23 respect to non-election related activities.” *Stern v. Gen. Elec. Co.*, 924 F.2d 472, 475 (2d

1 Cir. 1991). In finding that the Act does not preempt state law on the issue of liability of a
2 candidate for debts of an unincorporated campaign committee, the Fifth Circuit stated
3 that a “‘strong presumption’ exists against preemption, and ‘courts have given section
4 453 a narrow preemptive effect in light of its legislative history.’” *Karl Rove & Co. v.*
5 *Thornburgh, et al.*, 39 F.3d 1273, 1280 (5th Cir. 1994) (internal citation omitted).
6 Courts have found that Section 453 may be susceptible of more than one plausible
7 reading. *See, e.g., Reeder v. Kansas Cty Bd. Of Police Comm’rs*, 733 F.2d 543, 545 (8th
8 Cir. 1984).

9 Courts have also suggested that 2 U.S.C. 453 could be interpreted to be limited to
10 regulations that address campaigns and candidates only. The Second Circuit stated that:
11 “The narrow wording of this provision suggests that Congress did not intend to preempt
12 state regulation with respect to non-election-related activities.” *Stern*, 924 F.2d at 475
13 (finding 2 U.S.C. 453 did not create express, field or conflict preemption of a state law
14 governing whether political contributions were corporate waste). In interpreting 2 U.S.C.
15 453, the Eighth Circuit noted “The statute can also be read to refer primarily to the
16 behavior of candidates...” *Reeder*, 733 F.2d at 545 (finding Congress “intended instead
17 to leave the States free, so far as any claim of preemption was concerned, to allow or
18 forbid political activities, including contributions, by their own employees.”). Thus,
19 while Section 453 preempts State laws with respect to election to Federal office, it does
20 not exempt those active in Federal elections from all state laws.

21 The Commission has issued a long line of Advisory Opinions interpreting 2
22 U.S.C. 453 since the inception of the statute in 1974 and the Commission’s regulation in
23 1977. In fact, in almost every year since 1975, the Commission has issued at least one, if

1 not many, Advisory Opinions regarding its interpretation of 2 U.S.C. 453.⁶ A unanimous
2 Supreme Court stated:

3 It has long been recognized that many of the responsibilities conferred on
4 federal agencies involve a broad grant of authority to reconcile conflicting
5 policies. Where this is true, the Court has cautioned that even in the area of
6 pre-emption, if the agency's choice to pre-empt 'represents a reasonable
7 accommodation of conflicting policies that were committed to the agency's
8 care by the statute, we should not disturb it unless it appears from the statute
9 or its legislative history that the accommodation is not one that Congress
10 would have sanctioned.'"

11
12 *City of New York v. FCC*, 486 U.S. 57 (1988) (quoting *U.S. v. Shimer*, 367 U.S.

13 Pursuant to 2 U.S.C. 437f(c)(2), an Advisory Opinion may only provide
14 protection against enforcement of the federal statutes within the Federal Election
15 Commission's jurisdiction. Therefore, regardless of the conclusions reached in this
16 Advisory Opinion regarding preemption, the Commission cannot provide the requestor
17 with any protection from any state law enforcement body.

18 *I. Are certain State laws purporting to prohibit all pre-recorded*
19 *telephone calls by Federal political committees preempted by FECA?*

20
21 No, the laws of Arkansas and Wyoming that prohibit pre-recorded telephone calls
22 are not preempted by FECA. The Arkansas statute states "It is unlawful for any person to
23 use a telephone for the purpose of offering any goods or services for sale, or for
24 conveying information regarding any goods or services for the purpose of soliciting the

⁶ See, e.g., Advisory Opinions 1975-124 (Brewster); 1976-08 (Brewster); 1978-54 (Democratic Party of Alabama); 1979-82 (Mottl); 1980-36 (Miller); 1981-27 (Archer); 1982-29 (United Telecom Political Action Committee); 1983-42 (Allied Building Inspectors, Local 211-I.U.O.E. PAC); 1984-01 (Zablocki); 1985-24 NFL; 1986-11 (Mueller); 1987-11 (Zorinsky); 1988-21 (Wieder); 1989-27 (Bryan); 1990-6 (Pacific Power and Light); 1991-5 (Tennessee Democratic Party); 1992-43 (Erwin); 1993-21 (Ohio Republican Party); 1994-2 (Berglin); 1995-41 (DCCC); 1996-08 (Jefferson County Democrats); 1997-14 (Mississippi Republican Party); 1998-7 (Pennsylvania Democratic Party); 1999-12 (Campaign for Working Families); 2000-23 (New York State Democratic Committee); 2001-12 (Democratic Party of Wisconsin); 2002-2 (Gaily), 2004-28 (Iowa Ethics Board); 2006-24 (Republican and Democratic Senatorial Committees); and 2009-21 (West Virginia Secretary of State).

1 sale or purchase of the goods or services, or for soliciting information, gathering data, or
2 for any other purpose in connection with a political campaign when the use involves an
3 automated system for the selection and dialing of telephone numbers and the playing of
4 recorded messages when a message is completed to the called number.” Ark. Code § 5-
5 63-204(a)(1). The Wyoming statute states: “No person shall use an automated telephone
6 system or device for the selection and dialing of telephone numbers and playing of
7 recorded messages if a message is completed to the dialed number, for purposes of: (i)
8 Offering any goods or services for sale; (ii) Conveying information on goods or services
9 in soliciting sales or purchases; (iii) Soliciting information; (iv) Gathering data and
10 statistics; or (v) Promoting or any other use related to a political campaign.” Wyo. Stat.
11 § 6-6-104(a). Although both statutes mention political campaigns, they are both statutes
12 of general applicability and neither is limited to political ADADs.

13 The analysis of Section 453 starts with the presumption against preemption, and
14 the requirement that the historic police powers of the States will not be disturbed absent
15 the clear and manifest purpose of Congress. *See Altria Group v. Good*, 129 S.Ct. at 543.
16 The presumption against preemption is particularly strong where Congress legislates in a
17 field traditionally occupied by the States, and the Federal statute affects an area of the law
18 that falls within the States’ historic police powers. *Id.* “The State’s interest in protecting
19 the well-being, tranquility, and privacy of the home is certainly of the highest order in a
20 free and civilized society.” *Frisby v. Schultz*, 487 U.S. 474, 484 (1988). States have
21 traditionally exercised their police powers to protect citizens from unwanted invasion of
22 the privacy of their homes. *See Van Bergen v. Minnesota* 59 F.3d 1541, 1555 (8th Cir.
23 1995); *see also Fraternal Order of Police, N.D. State Lodge v. Stenehjem*, 431 F.3d 591,

1 597 (8th Cir. 2005).

2 Specifically, the Eighth Circuit has recognized the States' interest in protecting
3 citizens' privacy by upholding a State restriction on ADAD calls against a First
4 Amendment challenge. *Van Bergen v. Minnesota* 59 F.3d at 1555. That Court concluded
5 that privacy was a significant State interest "[b]ecause ADAD calls intrude upon the
6 privacy and tranquility of the home and the efficiency of the workplace, and because the
7 recipient has no opportunity to indicate the desire not to receive such calls." *Id.*

8 In their statutes, Arkansas and Wyoming have exercised their historic police
9 powers to protect the privacy of their citizens by prohibiting ADAD calls. As a proper
10 exercise of State police power, the presumption against preemption counsels against
11 applying section 453's preemption to these types of laws. Moreover, the Supreme Court
12 has held that unless a State statute specifically targets an area of Federal regulation, State
13 laws of general applicability will not be preempted. *See Altria Group, Inc. v. Good*, 192
14 S.Ct. at 547; *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 550, 121 S.Ct. 2404,
15 2419 (2001). Other courts have concluded that where there is a legitimate exercise of
16 State power and FECA does not address the activity, the State law should not be
17 preempted. *See Stern v. General Electric Co.*, 924 F.2d at 476. For example, in *Stern*,
18 the Second Circuit declined to preempt a State corporate waste law because FECA only
19 addressed the political activity of a corporation's separate segregated fund, and not
20 whether a fiduciary duty arose from the level of funding the corporation provided the
21 separate segregated fund. *Id.*

22 Although the Arkansas and Wyoming statutes both specifically mention the
23 activities of political campaigns, these statutes are laws of general applicability and

1 extend beyond political conduct. For example, the Arkansas statute reaches farther than
2 just political conduct by prohibiting ADAD calls by “any person” for “the purpose of
3 offering any goods or services . . . or for soliciting information.” Ark. Code 5-63-
4 204(a)(1). Similarly, Wyoming also prohibits ADAD calls for a wide range of activities
5 in addition to the promotion of political campaigns. Wyo. Sta. 6-6-104. These areas
6 include the sale of goods or services, conveying or soliciting information, or gathering
7 data and statistics. *Id.* The expansive categories of activity covered by both the Arkansas
8 and Wyoming statutes demonstrate that these laws are general in their application and do
9 not specifically target Federal political activity. As several commenters explained, to
10 find otherwise would lead to a result where political committees and candidates involved
11 in federal elections could be exempted from a variety of state laws unrelated to federal
12 elections.

13 Federal law does not limit independent expenditure spending. *See e.g., Buckley v.*
14 *Valeo*, 424 U.S. 1 (1976). FECA only defines independent expenditures, requires
15 disclaimers on each independent expenditure, and requires disclosure at various times,
16 depending upon the amount. 2 U.S.C. 431(17), 2 U.S.C. 441d(a), 2 U.S.C. 434(g).
17 FECA does not address the myriad ways expenditures and independent expenditures may
18 be otherwise affected by government regulation. If the Commission found that any state
19 law implicating any expenditure made by any federal political committee were preempted
20 by FECA, this would prevent states from regulating any activity typically reserved for the
21 states, such as contractual agreements (including rental agreements), payments to public
22 utilities, payments of salaries, payment of state taxes (including sales tax), and any

1 number of other inherently state powers including criminal activity, such as payment of
2 bribes.

3 Even expenditures that include a communicative element, such as independent
4 expenditures, may be regulated in some ways by state or local law. Regulations
5 restricting a variety of methods of communication have been upheld as reasonable time,
6 place, and manner restrictions, even when challenged as overly burdensome on political
7 speech. *See, e.g., Kovaks v. Cooper*, 336 U.S. 77, 88-89 (1949) (upholding a city
8 ordinance prohibiting the use of a sound truck emitting loud and raucous noises on public
9 streets); *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466
10 U.S. 789 (1984) (upholding city ordinance prohibiting posting of signs on public property
11 as applied to expressive activities of a group of supporters of a political candidate). *But*
12 *see City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994) (finding “[i]t is common ground that
13 governments may regulate the physical characteristics of signs” but holding
14 unconstitutional a city’s ban on all signs on one’s own residence, in part, because of the
15 “special respect for individual liberty in the home.”).⁷

16 The state regulations at issue here are reasonable time, place, and manner
17 restrictions as to the method of communication. An analogous federal statute that
18 prohibits automated calls has been upheld as a content-neutral, reasonable time, place,
19 and manner restriction. *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995), *cert. denied*, 515

⁷ The comment submitted by ccAdvertising contends that the state laws prohibiting prerecorded messages should be preempted because they “prohibit an entire category of speech.” Comment at 6. Preemption is a question of Congressional intent, which is within the Commission’s jurisdiction, as opposed to the question of a state law’s constitutionality. In any event, on grounds of abstention, the Seventh Circuit dismissed the case brought in federal court seeking declaratory and injunctive relief to prevent Indiana from enforcing the law against plaintiffs because Indiana had already filed a complaint in state court to enforce the law against Freeeats. *FreeEats.com, Inc. v. Indiana*, 502 F.3d 590, 600 (7th Cir. 2007). The Court found the state court could adequately address plaintiffs’ preemption and constitutional claims. *Id.* We find the fact that the Seventh Circuit has found this is a matter appropriately considered in state channels to be informative.

1 U.S. 1161 (1995) (finding a federal law banning automated, prerecorded calls to
2 residences is a content-neutral time, manner, and place restriction “that is narrowly
3 tailored to advance a [residential privacy] interest and leaves open ample alternative
4 channels of communication,” therefore “it does not violate the First Amendment.”).

5 As the Commission previously explained, the Commission does not regulate the
6 placement of political advertising and such state laws are not preempted by 2 U.S.C. 453.
7 In Advisory Opinion 1981-27 (Archer), the Commission stated that it “views state or
8 local regulations and statutes that apply to the placement and location of campaign
9 advertisements as outside the purview of 2 U.S.C. 453.” By analogy, if state laws
10 regarding the placement of campaign advertisements are not preempted, then state laws
11 regulating the manner of making campaign advertisements cannot be preempted by
12 FECA.

13 Recently, in Advisory Opinion 2009-21 (West Virginia Secretary of State), the
14 Commission examined a State law that regulates political committees, defined as “any
15 candidate committee, political action committee or political party committee,” with respect to
16 their payment for a limited number of specific election expenses, including, among others,
17 “conducting public opinion poll or polls.” W.Va. Code 3-8-1a (22), 3-8-9(a)(10). The West
18 Virginia statute defines such public opinion polls as “limited to the gathering, collection,
19 collation and evaluation of information reflecting public opinion, needs and preferences as to
20 any candidate, group of candidates, party, issue or issues,” and prohibits polls from being
21 “deceptively designed or intentionally conducted in a manner calculated to advocate the
22 election or defeat of any candidate or group of candidates or calculated to influence any
23 person or persons so polled to vote for or against any candidate, group of candidates,

1 proposition or other matter to be voted on by the public at any election.” *Id.* Chapter 3 of the
2 West Virginia Code, concerning elections, by its terms applies to “every general, primary and
3 special election in which candidates are nominated or elected or in which voters pass upon
4 any public question submitted to them. . . .” W.Va. Code 3-1-2. The statute further defines
5 “any election” or “all elections” to include elections for Federal offices as well as state,
6 county, and municipal offices. *Id.* The West Virginia statute exclusively focused on public
7 opinion polls regarding elections, including federal elections, and prohibited polls that
8 deceptively advocated the election or defeat of any candidate. The statute’s exclusive focus
9 on politics, candidates, and federal elections means that it was not a law of general
10 applicability. Significantly, the Commission has regulations regarding expenditures
11 made for polling. *See, e.g.*, 11 CFR 100.131-155, 106.2, 106.4, 113.2, 116.2, 116.11,
12 116.12. Therefore, although the Commission concluded that the West Virginia law was
13 preempted by the Act and Commission regulations, that conclusion does not foreclose the
14 Commission from finding the statutes at issue here are not preempted.

15 In sum, there is no indication that Congress intended 2 U.S.C. 453 to limit the
16 states’ police powers or anything other than state laws about elections to federal office.
17 The robocall statutes in Arkansas and Wyoming are inherent to the states’ police powers
18 to protect their citizens from unwanted disturbances in their home – the most private and
19 protected of all locations. Content-neutral statutes regulating the time, place, and manner
20 of a particular communication have been upheld. It is not the role of the *Federal Election*
21 Commission to substitute its judgment for that of state legislatures or courts.

1 Accordingly, with respect to American Future Fund’s proposed phone calls, the
2 Arkansas and Wyoming statutes prohibiting pre-recorded phone calls by political
3 committees are not preempted by the Act and Commission regulations.

4 2. *Are certain State laws requiring Federal political committee to obtain*
5 *prior consent, specifically through the use of a live operator, prior to*
6 *delivery of a pre-recorded telephone call preempted by FECA?*
7

8 The laws of California, Indiana, Minnesota, Mississippi, Montana, New Jersey,
9 North Carolina, North Dakota, South Carolina, and Tennessee require a Federal political
10 committee to obtain prior consent, specifically through the use of a live operator, before
11 delivery of a pre-recorded telephone call. These laws, when applied to Federal
12 committees, are not preempted by FECA.

13 The laws of California,⁸ Indiana, Minnesota, Mississippi,⁹ Montana, New Jersey,
14 North Dakota, and South Carolina each require the caller to obtain the consent, by
15 various manners including a live operator, for pre-recorded telephone calls. These laws
16 are not disclaimers, rather they ensure recipients of calls have an option to “opt-out” of
17 receiving the communication. These statutes are designed to strike a balance between the
18 competing First Amendment concerns of the maker of an automated call and the captive
19 audience’s privacy interest to be free from intrusion upon the home. *See e.g., Van*
20 *Bergen v. Minnesota* 59 F.3d 1541 (8th Cir. 1995).

21 Cal. Pub. Util. Code 2872 – 2874 permits an ADAD-placed call, unless
22 previously agreed to by the persons involved, to be completed “only after an unrecorded,
23 natural voice announcement has been made to the person called by the person calling.”

⁸ The California statute is also the subject of Question 4, below.

⁹ The Mississippi statute is also the subject of Question 4, below.

1 California’s ADAD statute covers “[t]he use of such a device by any person, either
2 individually or acting as an officer, agent, or employee of a person or corporation
3 operating [ADAD].” Cal. Pub. Util. Code 2872(b). None of the exceptions to
4 California’s prohibition on ADAD calls appear to apply to Federal political committees.
5 The California Public Utilities Commission has indicated, both on its website and
6 through its comments in response to this advisory opinion request, that California’s law
7 would apply to Federal political committees.¹⁰

8 Likewise, Ind. Code 24-5-14-5, 24-5-14-7 states that a caller may not connect to a
9 telephone line using ADAD unless “the subscriber has requested, consented to, permitted,
10 or authorized receipt of the message; or . . . the message is immediately preceded by a
11 live operator who obtains the subscriber’s consent.” The Indiana statute “unambiguously
12 reaches all autodialer calls and not just consumer transaction calls with commercial
13 messages.” *State of Indiana v. American Family Voices, Inc.*, 898 N.E.2d 293, 297 (Ind.
14 2008). Comments on this advisory opinion request submitted by the Indiana Attorney
15 General state that its law applies to all ADAD calls and that it is currently enforcing the
16 law against two entities that made political calls using ADAD. *See State of Indiana v.*
17 *Economic Freedom Fund, et al.*, Brown Circuit Court, Cause No. 0-C01-0609-MI-0425
18 and *State of Indiana v. American Family Voices, et al.*, Harrison Circuit Court, Cause No.
19 31C01-0609-MI-78.

20 Minn. Stat. 325E.27, 325E.29 uses language similar to the Indiana statute and
21 prohibits ADAD calls unless the subscriber has voluntarily consented to receive such

¹⁰ See California Public Utilities Commission Comment on AOR 2009-27 at 2; California Public Utilities Commission: WHEN ARE ROBOCALLS LEGAL?, ftp://ftp.cpuc.ca.gov/cei/080129_robocalladad_faq.pdf.

1 calls or the call is preceded by a live operator who obtains consent. A “caller” is defined
2 as “a person, corporation, firm, partnership, association, or legal or commercial entity
3 who attempts to contact, or who contacts, a subscriber in this state by using a telephone
4 or a telephone line.” Minn. Stat. 325E.26(3). As indicated in this advisory opinion
5 request, Minnesota’s law has been applied to Federal political committees during the
6 2004 presidential election. In addition, Minnesota, through comments submitted by its
7 Attorney General, has indicated that the Minnesota law would apply to Federal political
8 committees.

9 Miss. Code 77-3-455 allows ADAD to be used only pursuant to a prior agreement
10 between the persons involved, or when the ADAD is operated by a person who obtains
11 the informed consent of the subscriber to hear the prerecorded message. Mississippi has
12 indicated, through comments submitted by its Public Service Commission, that its law is
13 general in nature and applicability. Given the general applicability of these requirements,
14 it appears that Mississippi’s law would apply to Federal political committees.

15 Mont. Code 45-8-216 prohibits the use of ADAD for a political campaign unless
16 the permission of the called party is obtained by a live operator before the recorded
17 message is delivered. The Montana law explicitly states that ADAD may not be used for
18 the purpose of “promoting a political campaign or any use related to a political
19 campaign.” This language indicates that the Montana law could be applied to a Federal
20 political committee.

21 N.J. Stat 48:17-28 states that a caller may not contact a subscriber to deliver a
22 recorded message “unless the recorded message is introduced by an operator who shall
23 obtain the subscriber’s consent before playing the recorded message, or unless a prior or

1 current relationship exists between the caller and the subscriber.” Without any applicable
2 exemptions or limitations, this language of the New Jersey statute could be applied to a
3 Federal political committee.

4 N.D. Code 51-28-02 – 51-28-04 also uses language similar to Indiana and
5 Minnesota’s statutes, requiring either prior consent or a live operator to obtain consent.

6 S.C. Code 16-17-446 prohibits an ADAD call unless it is in response to the
7 express request of the person called, or in response to a person with whom the caller has
8 or has had a previous business relationship. The language of the South Carolina statute
9 could be applied to a Federal political committee.

10 The laws of North Carolina and Tennessee also require prior approval for the use
11 of ADAD, although these laws restrict the use of ADAD in a more limited manner than
12 previously discussed statutes. N.C. Gen Stat 75-104 prohibits most ADAD calls, but
13 permits a “political party or political candidate” to make a call, no part of which is used
14 to make a solicitation. However, N.C. Gen Stat 75-104(b)(2) permits ADAD solicitations
15 by Federal political committees if a live operator obtains approval. North Carolina’s
16 Attorney General has completed a number of cases where violations of this statute were
17 at issue. *See* Telemarketing Cases, North Carolina Department of Justice, Attorney
18 General Roy Cooper, available at [http://www.ncdoj.com/Protect-Yourself/Stop-](http://www.ncdoj.com/Protect-Yourself/Stop-Telemarketers/Telemarketing-cases.aspx)
19 [Telemarketers/Telemarketing-cases.aspx](http://www.ncdoj.com/Protect-Yourself/Stop-Telemarketers/Telemarketing-cases.aspx) (last visited 12/8/09).

20 Tenn. Code 47-18-1502 states that “[i]t is unlawful for any person to use, to
21 employ, or direct another person to use, or to contract for the use of ADAD
22 equipment . . . for the purpose of conducting polls or soliciting information,” except when
23 prior consent is obtained.

1 As discussed in the answer to Question 1, the presumption against preemption is
2 particularly strong where Congress legislates in a field traditionally occupied by the
3 States, and the Federal statute affects an area of the law that falls within the States'
4 historic police powers. *See Altria Group v. Good*, 129 S.Ct. at 543. States have
5 traditionally exercised their police powers to protect citizens from unwanted invasion of
6 the privacy of their homes, and have categorized ADAD calls as one type of invasion of
7 privacy that States may regulate. *See Van Bergen v. Minnesota* 59 F.3d at 1555; *see also*
8 *Fraternal Order of Police, N.D. State Lodge v. Stenehjem*, 431 F.3d at 597.

9 The ten States that require prior consent before the use of ADAD calls each are
10 exercising their historic police power as a means of preventing the unwanted invasion of
11 the privacy of the States' citizens. The Act is silent as to the consent, if any, a Federal
12 political committee may be required to obtain before playing such a pre-recorded
13 message. Without a clear indication that Congress intended to preempt State laws
14 requiring prior consent to deliver ADAD messages, laws that stem directly from the
15 States' police power to protect citizens from invasion of privacy, the presumption against
16 preemption would apply. Accordingly, the California, Indiana, Minnesota, Mississippi,
17 Montana, New Jersey, North Carolina, North Dakota, South Carolina, and Tennessee
18 statutes are not preempted by the Act and Commission regulations. 2 U.S.C. 453;
19 11 CFR 108.7(b)(3).

20 3. *Is Iowa State law purporting to prohibit Federal political committees*
21 *from engaging in fundraising via pre-recorded telephone calls*
22 *preempted by FECA?*
23

24 No, the Iowa law purporting to prohibit Federal political committees from
25 engaging in fundraising via pre-recorded telephone calls is not preempted by FECA.

1 Iowa’s statute prohibits ADAD calls without the use of a live operator to disseminate
2 prerecorded messages to the numbers selected or dialed. Iowa Code 476.57. The statute
3 provides an exemption, among others, for non-profit organizations and individuals unless
4 the call is for “profit-making purposes or fund-raising, if the calls do not involve the
5 advertisement or offering for sale, lease, or rental of goods, services, or property.” Iowa
6 Code 476.57(2)(b)(1). The mere statement that fundraising is not exempted for nonprofit
7 organizations and individuals does not convert this blanket prohibition to a statute
8 specifically about solicitations by Federal political committees.

9 As discussed above, as a proper exercise of State police power, the presumption
10 against preemption counsels against applying section 453’s preemption to these types of
11 laws. The Iowa law furthers the state interest in protecting the privacy of residences,
12 which is an interest of the “highest order.” *Frisby v. Schultz*, 487 U.S. 474, 484 (1988).
13 The purpose of requiring a live operator is to provide the recipient with “the opportunity
14 to tell the operator, at any point in the conversation, that he does not want to hear from
15 the calling person or entity again” so that he may not “be obliged, against his will, to
16 respond over and over to the same unwanted caller.” *Van Bergen v. Minnesota* 59 F.3d
17 1541, 1555 (8th Cir. 1995). Moreover, State laws of general applicability will not be
18 preempted. *See Altria Group, Inc. v. Good*, 192 S.Ct. at 547; *see also Lorillard Tobacco*
19 *Co. v. Reilly*, 533 U.S. 525, 550, 121 S.Ct. 2404, 2419 (2001).

20 Some state laws regarding contributions have been considered preempted by
21 FECA where the law regulates federal contributions, such as statutes regulating the
22 timing of contributions. *See Teper v. Miller*, 82 F.3d at 995 and Advisory Opinion 1995-
23 48 (Day). Registration, reporting, and disclaimer provisions regarding the solicitation of

1 contributions have also been considered preempted. Advisory Opinion 1999-12
2 (Campaign for Working Families). However, not all laws that implicate contributions are
3 necessarily preempted. For instance, a state restriction on a federal contribution by a
4 police officer was not preempted. *Reeder*, 733 F.2d at 545-46.

5 Accordingly, due to the general applicability of this statute and the presumption
6 against preemption where states exercise their traditional police powers, the Commission
7 finds it is not preempted by FECA.

8 4. *Are certain State laws purporting to require Federal political*
9 *committees to include additional disclaimers on pre-recorded*
10 *telephone calls preempted by FECA?*
11

12 Yes, the laws of California, Mississippi, New York, and Pennsylvania purporting
13 to require Federal political committees to include additional disclaimers on pre-recorded
14 telephone calls are preempted by FECA.

15 California, Mississippi, New York, and Pennsylvania each require an additional
16 disclaimer on pre-recorded telephone calls, including those made by Federal political
17 committees. These statutes alter the disclaimer requirement set forth in the Act at 2
18 U.S.C. 441a(d). By requiring more explicit disclaimers, the state statutes, when applied
19 to federal committees, tread into an area regulated by FECA. In the interest of
20 maintaining consistency in federal elections, state disclaimer requirements are generally
21 preempted by 2 U.S.C. 453 and 441d(a).

22 Cal. Pub. Util. Code 2874(a)(1) requires that any ADAD call include an
23 announcement that states the nature of the call and the name, address, and telephone
24 number of the business or organization being represented, if any. California's Public
25 Utilities Commission has indicated in its comments that, like the state's requirement to

1 obtain prior approval to send ADAD messages, California’s disclaimer requirement
2 would apply to Federal political committees. *See also* California Public Utilities
3 Commission: When are Robocalls Legal?, [ftp://ftp.cpuc.ca.gov/cei/
4 080129_robocalladad_faq.pdf](ftp://ftp.cpuc.ca.gov/cei/080129_robocalladad_faq.pdf).

5 Miss. Code 77-3-455(2) is identical to California’s disclaimer requirement in that
6 it requires an ADAD call to state the nature of the call and the name, address, and
7 telephone number of the business or organization being represented. It appears that
8 Mississippi’s law would apply to Federal political committees.

9 The New York statute at issue requires ADAD-placed calls to state at the
10 beginning of the call the nature of the call and the name of the person on whose behalf
11 the message is being transmitted and at the end of the message the address and telephone
12 number of the person on whose behalf the message is transmitted. N.Y. Gen Bus. 399-p.
13 That statute defines a “person” as “any natural person, firm, organization, partnership,
14 association or corporation, or other entity, whether for-profit or not-for-profit.” *Id.* This
15 language indicates that the New York law could be applied to a Federal political
16 committee.

17 Pennsylvania requires an ADAD-placed call “to begin with, or be preceded by, a
18 statement announcing the name, address and call-back telephone number of the calling
19 party, the nature of the ensuing message, and the fact the message is a recording.” 52 Pa.
20 [Admin.] Code 63.60. The Pennsylvania law appears to apply to all ADAD calls placed
21 through public utilities in the state. 52 Pa. [Admin.] Code 63.60(b). As such, the
22 language of the statute indicates that the Pennsylvania law could be applied to a Federal
23 political committee.

1 The application of State disclosure requirements to Federal political committees
2 has been preempted where such State requirements would intrude upon the Act’s reach.
3 *See Bunning v. Commonwealth of Kentucky*, 42 F.3d at 1012. In *Bunning*, the Sixth
4 Circuit concluded that Kentucky’s attempt to impose its expenditure limits and disclosure
5 requirements on a poll by a Federal political committee was preempted because the poll
6 was “federally regulated activity.” *Id.* Like the polling expenditures in *Bunning*,
7 American Future Fund’s proposed telephone calls using ADAD will comply with the
8 Act, and as such, any State disclaimer requirement would intrude upon the disclaimer
9 requirements of the Act.

10 The Commission has long recognized that the Act preempts State and local laws
11 requiring disclaimers that must appear on advertisements or solicitations, treating such
12 disclaimers as related to the issues of disclosure and “the conduct of Federal campaigns.”
13 *See* Advisory Opinion 1978-24 (Sonneland); Advisory Opinion 1981-27 (Archer);
14 Advisory Opinion 1986-11 (Mueller); Advisory Opinion 1986-27 (Alaska Labor); and
15 Advisory Opinion 1999-12 (Committee for Working Families).

16 Accordingly, with respect to America Future Fund’s proposed phone calls, the
17 statutes of California, Mississippi, New York, and Pennsylvania, to the extent they
18 require additional disclaimers, are preempted by the Act and Commission regulations. 2
19 U.S.C. 453; 11 CFR 108.7(b)(3).

20 This response constitutes an advisory opinion concerning the application of the
21 Act and Commission regulations to the specific transaction or activity set forth in your
22 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
23 of the facts or assumptions presented and such facts or assumptions are material to a

1 conclusion presented in this advisory opinion, then the requester may not rely on that
2 conclusion as support for its proposed activity. Any person involved in any specific
3 transaction or activity which is indistinguishable in all its material aspects from the
4 transaction or activity with respect to which this advisory opinion is rendered may rely on
5 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
6 conclusions in this advisory opinion may be affected by subsequent developments in the
7 law including, but not limited to, statutes, regulations, advisory opinions and case law.
8 The cited advisory opinions are available on the Commission's website at
9 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Steven T. Walther
Chairman

1 ADVISORY OPINION 2009-27

2 Jason Torchinsky, Esq.
3 Holtzman Vogel PLLC
45 North Hill Drive
Suite 100
Warrenton, VA 20186

DRAFT B

4 Dear Mr. Torchinsky:

5 We are responding to your advisory opinion request on behalf of American Future
6 Fund Political Action (“American Future Fund”), concerning the possible preemption of
7 the laws of fifteen states by the Federal Election Campaign Act of 1971, as amended
8 (“the Act”), and Commission regulations. The Commission concludes American Future
9 Fund would be unable to rely on any opinion the Commission may render concerning this
10 request for the proposed transactions and activities. Accordingly, the Commission
11 declines to issue an opinion.

12 ***Background***

13 The facts presented in this advisory opinion are based on your letters received on
14 October 13, 21, and 29, 2009, and reports filed with the Commission.¹

15 American Future Fund is a non-connected multicandidate committee registered
16 with the Commission. As a federal political committee, American Future Fund may only
17 accept contributions that are subject to the Act’s limitations and prohibitions. 2 U.S.C.
18 441a(f). American Future Fund makes expenditures with funds that have been raised
19 subject to the Act’s limitations and prohibitions. *Id.*

20 American Future Fund proposes to distribute pre-recorded telephone calls,
21 through the use of what is known as automatic dialing answering devices (“ADAD”), as

¹ See FEC Form 1, Statement of Organization, available at
<http://query.nictusa.com/pdf/381/28039722381/28039722381.pdf#navpanes=0>.

1 part of a nationwide program of political outreach. American Future Fund’s telephone
2 calls will expressly advocate the election or defeat of one or more clearly identified
3 candidates for federal office, and/or solicit contributions to American Future Fund.
4 American Future Fund’s phone calls will be developed and distributed independent of
5 any Federal candidate, authorized committee, or party committee, and will not be
6 authorized by any Federal candidate.

7 American Future Fund’s telephone calls will constitute a “telephone bank to the
8 general public” and “public communications,” as those terms are defined in the Act and
9 Commission regulations. *See* 2 U.S.C. 431(22) and (24); 11 CFR 100.26 and 100.28. A
10 telephone bank is a type of public communication that must include the disclaimers
11 required by the Act. *Id.* American Future Fund’s telephone calls will also constitute
12 “independent expenditures,” as that term is defined in the Act and Commission
13 regulations. *See* 2 U.S.C. 431(17) and 11 CFR 100.16(a). American Future Fund’s
14 telephone calls will comply with applicable disclaimer requirements. *See* 2 U.S.C.
15 441d(a)(3); *see also* 11 CFR 110.11(a)(1)-(3) (requiring disclaimers on public
16 communications generally made by political committees, public communications by any
17 person expressly advocating the election or defeat of a clearly identified Federal
18 candidate, and public communications by any person that solicit any contribution).

19 American Future Fund’s telephone banks will reach into fifteen states that
20 prohibit or otherwise restrict telephone bank calls. Two states ban ADAD calls outright.²

² These states are Arkansas and Wyoming. *See* Ark. Code § 5-63-204(a)(1) and Wyo. Stat. § 6-6-104(a).

1 Ten states require prior consent obtained by live operators.³ One state, Iowa, prohibits
2 ADAD calls except for nonprofit fundraising. *See* Iowa Code 476.57. Two states that
3 require prior consent by operators also require certain disclaimers on ADAD calls.⁴ Two
4 other states only require certain disclaimers on ADAD calls.⁵

5 ***Questions Presented***

- 6 1. *Are certain state laws purporting to prohibit all pre-recorded*
7 *telephone calls by Federal political committees preempted by FECA?*
8
9 2. *Are certain state laws requiring Federal political committees to obtain*
10 *prior consent, specifically through the use of a live operator, prior to*
11 *delivery of a pre-recorded telephone call preempted by FECA?*
12
13 3. *Is Iowa state law purporting to prohibit Federal political committees*
14 *from engaging in fundraising via pre-recorded telephone calls*
15 *preempted by FECA?*
16
17 4. *Are certain state laws purporting to require Federal political*
18 *committees to include additional disclaimers on pre-recorded*
19 *telephone calls preempted by FECA?*
20

21 ***Legal Analysis and Conclusions***

22 The Act provides, in relevant part, that:

23 Not later than 60 days after the Commission receives from a
24 person a complete written request concerning the application of this Act,
25 chapter 95 or chapter 96 of title 26, or a rule or regulation prescribed by
26 the Commission, with respect to a specific transaction or activity by the
27 person, the Commission shall render a written advisory opinion relating to
28 such transaction or activity to the person.
29

³ These states are California, Indiana, Minnesota, Mississippi, Montana, New Jersey, North Carolina, North Dakota, South Carolina, and Tennessee. *See* Cal. Pub. Util. Code 2872 – 2874; Ind. Code 24-5-14-5, 24-5-14-7; Minn. Stat. 325E.27, 325E.29; Miss. Code 77-3-455; Mont. Code 45-8-216; N.J. Stat 48:17-28; N.C. Gen. Stat. 75-104(b)(2); N.D. Code 51-28-02 – 51-28-04; S.C. Code 16-17-446; Tenn. Code 47-18-1502.

⁴ These states are California and Mississippi. *See* Cal. Pub. Util. Code 2872; Miss. Code 77-3-455.

⁵ These states are New York and Pennsylvania. *See* N.Y. Gen. Bus. 399-p; 52 Pa. [Admin.] Code 63.60.

1 2 U.S.C. §437f(a)(1). The legal effect of the Commission’s advisory opinions is that
2 “any person who relies upon any provision or finding of any advisory opinion . . . shall
3 not, as a result of any such act, be subject to any sanction provided by this Act or by
4 chapter 95 or chapter 96 of title 26 [of the United States Code].” 2 U.S.C. §437f(c)(2).

5 The Commission determines that the request presented here concerns the
6 application of various state statutes to the proposed activities more than the application of
7 the Act to those activities. The request does not raise any specific questions about which,
8 if any, of the Act’s funding restrictions for political committees apply to the Requestor’s
9 pre-recorded telephone calls, or which, if any, of the Act’s disclaimer or reporting
10 requirements apply. Rather, the Request asks generally whether specific State statutes
11 apply to Requestor’s proposed activities, or whether they are preempted by the Act.

12 While this is certainly a live question under the Act’s preemption provision at
13 section 453, the Requestor is not seeking an advisory opinion to protect itself from
14 enforcement against a violation of any of the Act’s prohibitions or requirements relating
15 to its proposed activities. Instead, Requestor is seeking an advisory opinion to protect
16 itself from enforcement against a violation of various state laws. Any answer from the
17 Commission regarding the application of the state laws that are the subject of this request
18 would provide little protection for the Respondent from actions brought under those state
19 laws. Such protection is more properly provided by the judiciary. *See, e.g., Bunning v.*
20 *Commonwealth of Kentucky*, 42 F.3d 1008 (6th Cir. 1994) (holding that a State reporting
21 requirement, as applied to an expenditure for a poll conducted by a Federal political
22 committee, was preempted by the Act); *Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273
23 (5th Cir. 1994) (holding that state contract law, as applied to a Federal candidate and his

1 committee, was not preempted by the Act); *Stern v. General Electric Co.*, 924 F.2d 472
2 (2d. Cir. 1992) (holding that state corporate law, as applied to funding of a corporation's
3 federal political committee, was not preempted by the Act); *Reeder v. Kansas City Board*
4 *of Police Commissioners*, 733 F.2d 543 (8th Cir. 1984) (holding that state law prohibiting
5 police officers or department employees from making any political contributions was not
6 preempted by the Act with respect to Federal contributions).⁶ *See also Teper v. Miller*,
7 82 F.3d 989 (11th Cir. 1996) (holding that state law prohibiting contributions to state
8 legislators during the legislative session was preempted by the Act with respect to federal
9 contributions to state legislators running for federal office); *Weber v. Heaney*, 793 F.
10 Supp. 1438 (D. Minn. 1992); *aff'd*, 995 F.2d 872 (8th Cir. 1993) (holding that state law
11 providing public funding program for federal campaigns using State funds was
12 preempted by the Act).⁷

13 The Commission recognizes that it has, in its discretion, issued advisory opinions
14 previously on questions regarding the Act's preemption of state laws on various issues.
15 Most recently, the Commission concluded, in a request submitted by the West Virginia
16 Secretary of State, that the Act preempts a West Virginia statute regulating payment for

⁶ In these cases, the parties did not request advisory opinions from the Commission.

⁷ The Commission provided advisory opinions to plaintiffs in both *Teper* and *Weber* on the preemption issues. (In *Teper*, the Commission initially did not provide an advisory opinion, and did so only after the district court had already decided the issue.) The district court in *Weber* and Judge Kravitch of the Eighth Circuit in *Teper* both found the Commission's advisory opinions to be persuasive, rather than dispositive, and only after conducting their own statutory and legislative history analyses. Judge Carnes concurred with the decision in *Teper*, but stated in his opinion that "Judge Kravitch's opinion about the deference that might be due the Commission's regulations and advisory opinions if there were any ambiguity in [the Act's] preemption language is, in my view, unnecessary to proper decision of this appeal, because there is no ambiguity in the statutory language." 82 F.3d at 999. *See also Weber*, 995 F.2d at 872 ("We affirm, holding the express FECA and regulatory preemptions are not ambiguous and the plain language of the preemptions cover the entire [state law in question]."). In both cases, it was ultimately the courts, rather than the Commission's advisory opinions, that decided the preemption issues.

1 polling expenses by candidates and political committees. Advisory Opinion 2009-21. In
2 that opinion, however, it was the state itself that requested the Commission's opinion as
3 to whether its own laws applied to the activity at issue, and it was within the State's
4 power to decide whether and how to proceed with the enforcement of its own laws based
5 on that opinion. Thus, the Commission's advisory opinion in that matter had greater
6 saliency than it would in this matter, where the Requestor would not have it within its
7 own power to create exemptions to the state statutes at issue based on any opinion the
8 Commission may render. Because of the limited effect an advisory opinion would have
9 in response to this Request, the Commission in its discretion declines to address the
10 preemption question presented.⁸

11 The foregoing constitutes a response to your advisory opinion request concerning
12 the application of the Act and Commission regulations to the specific transaction or
13 activity set forth in your request. *See* 2 U.S.C. 437f. Please note that the analysis or
14 conclusions in this response may be affected by subsequent developments in the law
15 including, but not limited to, statutes, regulations, advisory opinions and case law. The
16 cited advisory opinions are available on the Commission's website at
17 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Steven T. Walther
Chairman

⁸ As explained above, although 2 U.S.C. 437f directs the Commission to issue advisory opinions, this provision applies to a "request concerning the application of *this Act*," rather than to the application of various State statutes, such as the ones at issue here.