

(Supersedes No. 10-01-A)



FEDERAL ELECTION COMMISSION
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2010 JAN -8 P 3: 34

January 8, 2010

AGENDA ITEM
For Meeting of: 1-14-10

MEMORANDUM

SUBMITTED LATE

TO: The Commission

FROM: Thomasenia P. Duncan *pch/jpc*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Robert M. Knop *RMK/NFS*
Assistant General Counsel

Anthony T. Buckley *ATB/NFS*
Attorney

William A. Powers *WAP/NFS*
Attorney

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

We have been asked to circulate the attached draft of the subject advisory opinion. Please place this draft 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
Suite 100
Warrenton, VA 20186

DRAFT C

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: (1)
9 the State laws purporting to prohibit all pre-recorded telephone calls by Federal political
10 committees are preempted by FECA; (2) the State laws requiring Federal political
11 committees to obtain prior consent, specifically through the use of a live operator, prior to
12 delivery of a pre-recorded telephone call are preempted by FECA; (3) the Iowa State law
13 purporting to prohibit Federal political committees from engaging in fundraising via pre-
14 recorded telephone calls is preempted by FECA; and (4) the State laws purporting to
15 require Federal political committees to include additional disclaimers on pre-recorded
16 telephone calls are preempted by FECA.

17 ***Background***

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

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

1 American Future Fund is a non-connected multicandidate committee registered
2 with the Commission. As a Federal political committee, American Future Fund may only
3 accept contributions that are subject to the Act's limitations and prohibitions. 2 U.S.C.
4 441a(f). American Future Fund makes expenditures with funds that have been raised
5 subject to the Act's limitations and prohibitions. *Id.*

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

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

1 person expressly advocating the election or defeat of a clearly identified Federal
2 candidate, and public communications by any person that solicit any contribution).

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

9 ***Questions Presented***

- 10 1. *Are certain State laws purporting to prohibit all pre-recorded*
11 *telephone calls by Federal political committees preempted by FECA?*
12
13 2. *Are certain State laws requiring Federal political committees to obtain*
14 *prior consent, specifically through the use of a live operator, prior to*
15 *delivery of a pre-recorded telephone call preempted by FECA?*
16
17 3. *Is Iowa State law purporting to prohibit Federal political committees*
18 *from engaging in fundraising via pre-recorded telephone calls*
19 *preempted by FECA?*
20
21 4. *Are certain State laws purporting to require Federal political*
22 *committees to include additional disclaimers on pre-recorded*
23 *telephone calls preempted by FECA?*
24

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 ***Legal Analysis and Conclusions***

2 The Act states that its provisions and the rules prescribed thereunder “supersede
3 and preempt any provision of State law with respect to election to Federal office.”
4 2 U.S.C. 453; *see also* 11 CFR 108.7(a). The legislative history indicates that Congress
5 intended “to make certain that the Federal law is construed to occupy the field with
6 respect to elections to Federal office and that the Federal law will be the sole authority
7 under which such elections will be regulated.” *H.R. Rep. No. 93-1239*, 93d Cong.,
8 2d Sess. 10 (1974). According to the Conference Committee Report on the 1974
9 Amendments to the Act, “Federal law occupies the field with respect to criminal
10 sanctions relating to limitations on campaign expenditures, the sources of campaign funds
11 used in Federal races, the conduct of Federal campaigns, and similar offenses, but does
12 not affect the States’ rights” as to other areas such as voter fraud and ballot theft. *H.R.*
13 *Rep. No. 93-1438*, 93d Cong., 2d Sess. 69 (1974). The Conference Committee Report
14 also states that Federal law occupies the field with respect to reporting and disclosure of
15 political contributions to, and expenditures by, Federal candidates and political
16 committees, but does not affect State laws as to the manner of qualifying as a candidate,
17 or the dates and places of elections. *Id.* at 100-101.

18 In promulgating 11 CFR 108.7, the Commission stated specifically that Federal
19 law supersedes State law with respect to the organization and registration of political
20 committees supporting Federal candidates, disclosure of receipts and expenditures by
21 Federal candidates and political committees, and the limitations on contributions and
22 expenditures regarding Federal candidates and political committees. *Explanation and*
23 *Justification of the Disclosure Regulations*, House Document No. 95-44, at 51 (1977).

1 Section 108.7 also specifies that the Act does not supersede State laws relating to the
2 manner of qualifying as a candidate or political party organization, dates and places of
3 elections, voter registration, voting fraud, ballot theft, candidates' personal financial
4 disclosures, or funds used for the purchase or construction of State or local party office
5 building. 11 CFR 108.7(c). The Commission has previously stated that the legislative
6 history of 2 U.S.C. 453 shows, "the central aim of the clause is to provide a
7 comprehensive, uniform Federal scheme that is the sole source of regulation of campaign
8 financing . . . for election to Federal office." Advisory Opinion 1988-21 (Wieder).

9 In addition, 2 U.S.C. 453 and 11 CFR 108.7 do not limit the Act's preemption of
10 state laws to only those laws focusing exclusively on elections and political activity.
11 Thus, the Commission has concluded that certain other areas of law, if affecting Federal
12 elections, may be preempted by the Act. *See* Advisory Opinion 1981-27 (Archer)
13 (concluding that a city ordinance requiring the inclusion of an anti-littering warning was
14 preempted as applied to Federal campaign materials); Advisory Opinion 1999-12
15 (Campaign for Working Families) (concluding that a state provision requiring the
16 inclusion of certain disclaimers about the nature of charitable solicitations through the
17 mail was preempted as applied to a Federal political committee).⁶

⁶ The Commission has received a number of comments on this advisory opinion request. Comments from several State agencies argue that the Commission should conform its conclusion as to whether the FECA preempts State laws to the finding by some courts that the Telephone Consumer Protection Act ("TCPA") does not preempt state restrictions on ADAD usage. *See Van Bergen v. State of Minnesota*, 59 F.3d 1541, 1547-48 (8th Cir. 1995) (concluding that the TCPA does not expressly preempt State law); *Stenehjem v. Freeeats.com, Inc.*, 712 N.W.2d 828, 837 (N.D. 2006) ("There is no provision in the TCPA which explicitly states that the federal statute was intended to preempt state laws prohibiting certain classes of interstate calls.").

The preemption clause at issue in those cases, however, stated that the federal law *did not* explicitly preempt state law, except under limited circumstances. 47 U.S.C. § 227 ("Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that

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

3
4 Yes, the laws of Arkansas and Wyoming purporting to prohibit pre-recorded
5 telephone calls made by Federal political committees are preempted by FECA.

6 The Act and Commission regulations establish that limitations and restrictions on
7 Federal political committees' expenditures is an area to be regulated solely by Federal
8 law. The Act specifically addresses expenditures by Federal political committees. *See,*
9 *e.g.,* 2 U.S.C. 431(9).

10 Ark. Code § 5-63-204(a)(1) states "It is unlawful for any person to use a
11 telephone . . . for any other purpose in connection with a political campaign when the use
12 involves an [ADAD]." Although the term "political campaign" is not defined by the
13 Arkansas Code, that term appears to have been used broadly by the Arkansas legislature
14 when it prohibited the involvement of charitable organizations in "*any* political campaign
15 on behalf of or in opposition to *any* candidate for public office." Ark. Code 26-51-303
16 (emphasis added). The term "political campaign" appears to apply to both Federal and
17 State or local campaigns because it relates to any "public office," including Federal
18 office.

19 Wyo. Stat. § 6-6-104(a) states "No person shall use an [ADAD] . . . for purposes
20 of . . . [p]romoting or any other use related to a political campaign." Wyoming's law,
21 appears to include all political campaigns, including those conducted by a Federal

imposes more restrictive requirements or regulations on, . . ."); *see also Van Bergen v. State*, 59 F.3d at 1547 ("the statute includes a preemption provision expressly not preempting certain state laws"); *Stenehjem v. Freeeats.com, Inc.*, 712 N.W.2d at 837 ("Rather, the federal act includes a provision explicitly stating that such state laws are *not* preempted by the TCPA.") (Emphasis original.). The FECA does not similarly limit preemption of State law, and is intended to occupy the field as to the conduct of Federal campaigns. It is the FECA, and its express preemption provision, which is at issue in this advisory opinion.

1 political committee. Indeed, Wyoming has indicated in comments submitted by its
2 Attorney General that its law would apply to Federal political committees.

3 According to Requestor, the pre-recorded phone calls will expressly advocate the
4 election or defeat of clearly identified federal candidates and/or solicit contributions to
5 American Future Fund. The payments by American Future Fund for pre-recorded
6 telephone calls that expressly advocate the election or defeat of a clearly identified
7 Federal candidate constitute independent expenditures under the Act. 2 U.S.C. 431(17).
8 Both the Arkansas and Wyoming statutes prohibit Federal political committees, such as
9 American Future Fund, from using ADAD technology to make expenditures - one of the
10 areas explicitly regulated by the Act and Commission regulations. Under the Act's
11 preemption clause, and the Commission's implementing regulations, only Federal law
12 can limit the ability of a Federal political committee to make expenditures. 2 U.S.C.
13 453(a) ("The provisions of this Act, and of rules prescribed under this Act, supersede and
14 preempt any provision of State law with respect to election to Federal office."); 11 C.F.R.
15 108.7(b)(3) ("Federal law supersedes State law concerning the... [I]imitation on
16 contributions and expenditures regarding Federal candidates and political committees.").

17 To the extent that the laws of Arkansas and Wyoming purport to prohibit such
18 pre-recorded telephone calls by Federal political committees that expressly advocate the
19 election or defeat of a clearly identified federal candidate, they are preempted. Moreover,
20 the application of the laws of Arkansas and Wyoming to pre-recorded telephone calls that
21 contain express advocacy and that also solicit contributions to America Future Fund

1 (which, presumably, will include all solicitations) are preempted as they are, in effect,
2 expenditure limits.⁷

3 This conclusion is consistent with past Commission Advisory Opinions. For
4 example, in Advisory Opinion 2009-21 (West Virginia Secretary of State), the
5 Commission examined a State law that banned Federal candidates and committees from
6 paying for certain polling expenses. The Commission concluded that because the statute
7 limited expenditures regarding Federal elections (rather than regulating “those areas
8 defined as interests of the State”), the West Virginia law was preempted by the Act and
9 Commission regulations.

10 Moreover, with respect to American Future Fund’s proposed phone calls, the
11 Arkansas and Wyoming statutes do not address any of the Federal election-related areas
12 that Congress intended to leave exclusively to the jurisdiction of the States (*e.g.*, voter
13 fraud, ballot theft, ballot qualification, or dates and places of elections). *See H.R. Rep.*
14 *No. 93-1438* at 69, 100-101 and 11 CFR 108.7(b)(3). Accordingly, with respect to
15 American Future Fund’s proposed phone calls that expressly advocate the election or
16 defeat of a clearly identified federal candidate, the Arkansas and Wyoming statutes
17 prohibiting pre-recorded phone calls by political committees are preempted by the Act
18 and Commission regulations. 2 U.S.C. 453; 11 CFR 108.7(b)(3).

19 2. *Are certain State laws requiring a Federal political committee to*
20 *obtain prior consent, specifically through the use of a live operator,*
21 *prior to delivery of a pre-recorded telephone call preempted by FECA?*
22

23 The laws of California, Indiana, Minnesota, Mississippi, Montana, New Jersey,

⁷ *See FEC v. EMILY’s List v. FEC*, No. 08-5422, 2009 WL 2972412 (D.C. Cir. Sept. 18, 2009) (striking a Commission regulation styled as a contribution limit that in effect functioned as a spending limit). *See also Buckley v. Valeo*, 424 U.S. 1 (1976).

1 North Carolina, North Dakota, South Carolina, and Tennessee require a Federal political
2 committee to obtain prior consent, specifically through the use of a live operator, before
3 delivery of a pre-recorded telephone call. These laws, when applied to independent
4 expenditures by Federal committees, are preempted by FECA because they are
5 expenditure limitations. As the Supreme Court has explained, “a restriction on the
6 amount of money a person or group can spend on political communication during a
7 campaign necessarily reduces the quantity of expression by restricting the number of
8 issues discussed, the depth of their exploration, and the size of the audience reached.”⁸

9 Under the Act’s preemption clause, and the Commission’s implementing
10 regulations, only Federal law can limit the ability of a Federal political committee to
11 make expenditures of the sort at issue here. 2 U.S.C. 453(a) (“The provisions of this Act,
12 and of rules prescribed under this Act, supersede and preempt any provision of State law
13 with respect to election to Federal office.”); 11 C.F.R. 108.7(b)(3) (“Federal law
14 supersedes State law concerning the... [l]imitation on contributions and expenditures
15 regarding Federal candidates and political committees.”). Moreover, the Commission has
16 long recognized that the Act preempts State and local laws requiring political committees
17 to include certain content in their communications.⁹

⁸ *Buckley*, 424 U.S. at 19. See also *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (reiterating that non-profit advocacy groups are generally entitled to raise and spend unlimited money on elections).

⁹ See, e.g., Advisory Opinion 1978-24 (Sonneland), where the Commission concluded that given “stated Congressional intent that the Act preempt State law as to required disclosures in conducting political campaigns for Federal office,” the provisions of 2 U.S.C. 435(b) and 441d would supersede and preempt the cited State statute requiring designation of party affiliation on all campaign advertising. Similarly, in Advisory Opinion 1981-27 (Archer), the Commission concluded that a city ordinance that required the inclusion of an anti-littering “warning” in all political campaign materials placed, posted or erected within the city’s limits would exceed the Act’s disclosure requirements at 2 U.S.C. 441d and 11 CFR 110.10. The Commission observed, however, that state statutes that apply to the placement and location of campaign advertisements are outside the purview of the preemption provision of 2 U.S.C. 453. In Advisory Opinion

1 The laws of California,¹⁰ Indiana, Minnesota, Mississippi,¹¹ Montana, New
2 Jersey, North Dakota, and South Carolina each require the caller to obtain the consent, by
3 various manners including a live operator, for pre-recorded telephone calls, including
4 those calls made by Federal political committees.

5 Cal. Pub. Util. Code 2872 – 2874 permits an ADAD-placed call, unless
6 previously agreed to by the persons involved, to be completed “only after an unrecorded,
7 natural voice announcement has been made to the person called by the person calling.”
8 None of the exceptions to California’s prohibition on ADAD calls appear to explicitly
9 apply to Federal political committees. Moreover, the California Public Utilities
10 Commission has indicated, both on its website and through its comments in response to
11 this advisory opinion request, that California’s law would apply to Federal political
12 committees. *See* California Public Utilities Commission: When are Robocalls Legal?,
13 ftp://ftp.cpuc.ca.gov/cei/080129_robocalladad_faq.pdf.

14 Likewise, Ind. Code 24-5-14-5, 24-5-14-7 states that a caller may not connect to a
15 telephone line using ADAD unless “the subscriber has requested, consented to, permitted,
16 or authorized receipt of the message; or . . . the message is immediately preceded by a
17 live operator who obtains the subscriber’s consent.” Comments on this advisory opinion
18 request submitted by the Indiana Attorney General state that its law applies to all ADAD
19 calls and that it is currently enforcing the law against two entities that made political calls

1986-11 (Mueller), the Commission determined that a State law requiring that a candidate’s campaign logo include either the word “elect” or “for” was preempted, applying the reasoning in Advisory Opinions 1978-24 (Sonneland) and 1981-27 (Archer).

¹⁰ The California statute is also the subject of Question 4, below.

¹¹ The Mississippi statute is also the subject of Question 4, below.

1 using ADAD. *See State of Indiana v. Economic Freedom Fund, et al.*, Brown Circuit
2 Court, Cause No. 0-C01-0609-MI-0425 and *State of Indiana v. American Family Voices,*
3 *et al.*, Harrison Circuit Court, Cause No. 31C01-0609-MI-78.

4 Minn. Stat. 325E.27, 325E.29 uses language similar to the Indiana statute and
5 prohibits ADAD calls unless the subscriber has voluntarily consented to receive such
6 calls or the call is preceded by a live operator who obtains consent. As indicated in this
7 advisory opinion request, Minnesota's law has been applied to Federal political
8 committees during the 2004 presidential election. In addition, Minnesota, through
9 comments submitted by its Attorney General, has indicated that the Minnesota law would
10 apply to Federal political committees.

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

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

23 N.J. Stat 48:17-28 states that a caller may not contact a subscriber to deliver a

1 recorded message “unless the recorded message is introduced by an operator who shall
2 obtain the subscriber’s consent before playing the recorded message, or unless a prior or
3 current relationship exists between the caller and the subscriber.” Without any applicable
4 exemptions or limitations, this language of the New Jersey statute could be applied to a
5 Federal political committee.

6 N.D. Code 51-28-02 – 51-28-04 also uses language similar to Indiana and
7 Minnesota’s statutes, requiring either prior consent or a live operator to obtain consent.
8 North Dakota’s comments, submitted by its Attorney General, indicate that its statute
9 would apply to Federal political committees.

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

14 The laws of North Carolina and Tennessee also require prior approval for the use
15 of ADAD, although these laws restrict the use of ADAD in a more limited manner than
16 previously discussed statutes. N.C. Gen Stat 75-104 prohibits most ADAD calls, but
17 permits a “political party or political candidate” to make a call, no part of which is used
18 to make a solicitation. However, N.C. Gen Stat 75-104(b)(2) permits ADAD solicitations
19 by Federal political committees if a live operator obtains approval. The North Carolina
20 Attorney General’s comments on this advisory opinion request assert that this provision
21 would be easily complied with by American Future Fund and cites to the language of the
22 North Carolina statute that permits some use of ADAD calls by Federal political
23 committees. Nonetheless, the language of the statute prohibits solicitations by Federal

1 political committees such as American Future Fund using ADAD without the use of a
2 live operator.

3 Tenn. Code 47-18-1502 states that “[i]t is unlawful for any person to use, to
4 employ, or direct another person to use, or to contract for the use of ADAD
5 equipment . . . for the purpose of conducting polls or soliciting information,” except when
6 prior consent is obtained. Thus, the language of the Tennessee statute applies to Federal
7 political committees for these narrow purposes.

8 The ten State statutes at issue constitute a limitation on American Future Fund’s
9 independent expenditures. Although not a complete ban like the laws discussed above,
10 the use of a live operator is substantially more expensive than ADAD,¹² and there is no
11 comparable alternative in terms of “impact and effectiveness.” The practical effect is an
12 expenditure limitation.¹³ As the Supreme Court explained, “[b]eing free to engage in
13 unlimited political expression subject to a ceiling on expenditures is like being free to
14 drive an automobile as far and as often as one desires on a single tank of gasoline.”¹⁴ In

¹² This issue was noted by a commenter , who also provided a compelling real-life example: If a live operator were used just to introduce a call, it would require 2,000 employees for 25 hours to place one million calls just one time. The cost of the operators alone would exceed \$2 million, which is 1500% more than using an automated system. AO 2009-27 (American Future Fund), Comments of ccAdvertising (Dec. 8, 2009) at 5.

¹³ See *FEC v. Wisconsin Right to Life (“WRTL”)*, 551 U.S. 449, 447, n.9 (2007) (In striking down BCRA’s prohibition on the use of corporate general treasury funds to finance “electioneering communications” during pre-federal-election periods when applied to its issue-advocacy advertisements, the majority noted that, “the response that a speaker should just take out a newspaper ad, or use a website, rather than complain it cannot speak through a broadcast communication... is too glib. Even assuming for the sake of argument that the possibility of using a different medium of communication had relevance in determining that permissibility of a limitation on speech, newspaper ads and websites are not reasonable alternatives to broadcast speech in terms of *impact and effectiveness*.” (emphasis added)).

¹⁴ *Buckley*, 424 U.S. at 19, n.18 (1976). Similarly, the Court rejected the argument that BCRA’s challenged electioneering communication provision did not amount to a limitation on a corporation’s free speech rights because of the availability of the so-called “PAC alternative.” *WRTL*, 551 U.S. at 447, n.9 (2007) (“the

1 other words, the prohibition on the use of ADAD under these laws amounts to a
2 categorical prohibition – an expenditure limitation – not merely a time, place and manner
3 restriction.¹⁵ Thus, the ten State statutes operate as expenditure limits, and as discussed
4 above, the regulation of expenditures is preempted by FECA.

5 Moreover, none of the ten State statutes at issue specify the precise words that
6 must be used to obtain the consent of the person called, and these State requirements to
7 obtain consent compel Federal political committees to include certain content in their
8 campaign communications. Further, the California, Indiana, Minnesota, Mississippi,
9 Montana, New Jersey, North Carolina, North Dakota, South Carolina, and Tennessee
10 statutes do not address any of the Federal election-related areas that Congress intended to
11 leave exclusively to the jurisdiction of the States (*e.g.*, voter fraud, ballot theft, ballot
12 qualification, or dates and places of elections). *See H.R. Rep. No. 93-1438* at 69, 100-101
13 and 11 CFR 108.7(b)(3). Accordingly, like the statutes considered in Advisory Opinions
14 1978-24 (Sonneland), 1981-27 (Archer) and 1986-11 (Mueller), the California, Indiana,
15 Minnesota, Mississippi, Montana, New Jersey, North Carolina, North Dakota, South
16 Carolina, and Tennessee statutes are preempted by the Act and Commission regulations.
17 2 U.S.C. 453; 11 CFR 108.7(b)(3).

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

22 Yes, the Iowa law purporting to prohibit Federal political committees from

dissent overstates its case when it asserts that the ‘PAC alternative’ gives corporations a constitutionally sufficient outlet to speak.”). *Accord EMILY’s List*, 2009 WL 2972412 (D.C. Cir. Sept. 18, 2009).

¹⁵ *See Buckley*, 424 U.S. at 18 (distinguishing contribution and expenditure limits from time, place, and manner restrictions, because contribution and expenditure limits “impose direct quantity restrictions on political communication and association”).

1 engaging in fundraising via pre-recorded telephone calls is preempted by FECA if the
2 pre-recorded telephone calls expressly advocate the election or defeat of a clearly
3 identified federal candidate.

4 Iowa's statute prohibits ADAD calls for fund-raising, with exceptions not
5 applicable here. *See* Iowa Code 476.25. According to Requestor, the pre-recorded phone
6 calls will solicit contributions and/or expressly advocate the election or defeat of a clearly
7 identified federal candidate. Under FECA, an "independent expenditure" is defined as
8 "an expenditure by a person expressly advocating the election or defeat of a clearly
9 identified candidate" and that is not coordinated. 2 U.S.C. 431(17). Thus, to the extent
10 that the calls contain express advocacy, the Iowa statute would restrict independent
11 expenditures by Federal political committees,¹⁶ and therefore is preempted under
12 2 U.S.C. 543(a) and 11 CFR 108.7(b)(3).

13 4. *Are certain State laws purporting to require Federal political*
14 *committees to include additional disclaimers on pre-recorded*
15 *telephone calls preempted by FECA?*
16

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

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

¹⁶ The First Amendment prohibits any limits on how much money an independent political committee can spend on independent expenditures. *See WRTL*, 551 U.S. 449.

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. Mississippi has
8 indicated, through comments submitted by its Public Service Commission, that its law is
9 general in nature and applicability. It appears therefore that Mississippi’s law would
10 apply to Federal political committees.

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

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

1 language of the statute indicates that the Pennsylvania law could be applied to a Federal
2 political committee.

3 California, Mississippi, New York, and Pennsylvania each require an additional
4 disclaimer on pre-recorded telephone calls, including those made by Federal political
5 committees. This area is regulated by the Act and Commission regulations. 2 U.S.C.
6 453; 11 CFR 108.7(b)(3).¹⁷ Accordingly, the Commission has long recognized that the
7 Act preempts State and local laws requiring disclaimers that must appear on
8 advertisements or solicitations, treating such disclaimers as related to the issues of
9 disclosure and “the conduct of Federal campaigns.” *See* Advisory Opinion 1978-24
10 (Sonneland); Advisory Opinion 1981-27 (Archer); Advisory Opinion 1986-11 (Mueller).

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

15 This response constitutes an advisory opinion concerning the application of the
16 Act and Commission regulations to the specific transaction or activity set forth in your
17 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
18 of the facts or assumptions presented and such facts or assumptions are material to a
19 conclusion presented in this advisory opinion, then the requester may not rely on that
20 conclusion as support for its proposed activity. Any person involved in any specific
21 transaction or activity which is indistinguishable in all its material aspects from the

¹⁷ The California, Mississippi, New York, and Pennsylvania statutes do not address any of the Federal election-related areas that Congress intended to leave exclusively to the jurisdiction of the States (*e.g.*, voter fraud, ballot theft, ballot qualification, or dates and places of elections). *See H.R. Rep. No. 93-1438* at 69, 100-101 and 11 CFR 108.7(b)(3).

1 transaction or activity with respect to which this advisory opinion is rendered may rely on
2 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
3 conclusions in this advisory opinion may be affected by subsequent developments in the
4 law including, but not limited to, statutes, regulations, advisory opinions and case law.
5 The cited advisory opinions are available on the Commission's website at
6 <http://saos.nictusa.com/saos/searchao>.

7
8
9
10
11
12

On behalf of the Commission,

Matthew S. Petersen
Chairman