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OFFICE OF GENERAL
COUNSEL

By Electronic Mail and Fax

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

RE: Comments on Advisory Opinion Request AOR 2009-27

Dear Ms. Duncan,

These comments are filed on behalf of Shaun Dakin, CEO of Citizens for Civil Discourse and the National Political Do Not Contact Registry and Steve Carter, former Attorney General of Indiana and Former President of the National Association of Attorneys General in regard to AOR 2009-27 an advisory opinion request submitted on behalf of the America Future Fund Political Action (AFFPA), requesting the Commission's guidance "on the question of whether these additional state restrictions on pre-recorded telephone calls are preempted by FECA." AFFPA states that it would like answers to these questions:

Specifically:

- 1. Are state laws purporting to prohibit all pre-recorded telephone calls by federal political committees preempted by FECA?*
- 2. Are state laws requiring prior consent, specifically through the use of a live operator, prior to delivery of a pre-recorded telephone call preempted by the Federal Election Campaign Act, as amended?*
- 3. Are state laws purporting to prohibit federal political committees from engaging in fundraising via pre-recorded telephone calls preempted by FECA?*
- 4. Are state laws purporting to require federal political committees to include additional disclaimers on pre-recorded telephone calls preempted by FECA?*

Discussion

Steve Carter, Attorney in Indiana, is the only Attorney General to have brought suit over political robocalls. Shaun Dakin is the CEO of Citizens for Civil Discourse, a membership organization representing the American voter and over 100,000 members that advocates for additional regulation on political robocalls. Mr. Carter testified in the US House in December 2007 at hearings held by Rep. Lofgren (D-CA) in the House Administration Subcommittee on Elections. Mr. Dakin testified in the US Senate in February 2008 at hearings held by Sen. Feinstein (D-CA) in the United States Senate Committee on Rules and Administration.

We believe that an opinion of the kind being sought would have an extremely negative impact on voters and would diminish the ability of state enforcers and legislators to provide the relief their constituents desire: the protection of voter privacy from unwanted political pre-recorded telephone calls.

Specifically, Indiana has worked hard over the years, including at least 10 personal meetings Mr. Carter had with FCC commissioners from 2005 to 2008 to prevent preemption of state telephone privacy laws.

Now Political Action Committees, specifically America Future Fund Political Action (AFFPA), would like to shift to a playing field where they believe the FEC may be more inclined to knock down state enforcement.

We do not believe state regulations on pre-recorded telephone calls can be viewed as campaign finance regulations and thereby should not be regulated by FECA.

Instead, we believe that state laws (specifically Indiana law) address something else, the use of a specific technology, automated dialers, which invade the privacy of voters. It is important to note that these laws regulate pre-recorded calls across the board, and do not specifically regulate political calls. As a result, politicians are treated no better and no worse than all other entities, commercial or otherwise.

In Indiana Mr. Carter would not have been able to pursue the initial pre-recorded telephone call enforcement in the 2006 Hill - Sodrel race if such a preemption had been in place (See, *State of Indiana v. American Family Voices, Inc. et al*¹. Also see, **State of Indiana v. Economic Freedom Fund, et al.**)

As the statues cited in the request filed in this matter show, the Indiana language does not single out political calls for regulation, and do not create an exemption as the industry has been able to extract from Congress.

It is incorrect to believe that states are not able to regulate "instrumentalities" that become objects of use during a political or advocacy campaign. For example, state traffic laws affect campaigners going to and from events and gun safety laws are still applied to campaigners at gun rallies.

As a result, just because a regulation impacts those in the political context does not mean the state is trying to regulate the political discourse. Rather, issues like privacy, safe roads, and safety from violent harm are legitimate interests of their own that legislators at the state level must able to protect.

¹ http://indianalawblog.com/archives/2008/06/ind_courts_indi_30.html

We urge the Commission to advise AFFPA that FECA does not preempt additional state restrictions on pre-recorded telephone calls.

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ Shaun Dakin

**Shaun Dakin
Citizens For Civil Discourse**

/s/ Steve Carter

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