Late Comment on AOR 2012-10

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Re: Advisory Opinion Request from Greenberg Quinlan Rosner Research, Inc.

Dear Attorney Herman:

The New Hampshire Department of Justice, Office of the Attorney General, responds to the request by Greenberg Quinlan Rosner Research, Inc. ("GQRR") for an advisory opinion as to whether New Hampshire Revised Statutes ("RSA") 664:16-a is preempted by the Federal Election Campaign Act of 1971 as amended ("FECA"). For the reasons set forth below, RSA 664:16-a is not preempted by FECA.

I. Introduction

The question presented to the Commission is whether Congress intended to preempt state law with respect to regulation of telephone surveys discussing federal campaigns. Since RSA 664:16-a addresses transactions outside FECA's preemptive regulatory scheme, it is within the field of traditional state regulation, and not within the preemptive domain of 2 U.S.C. §453.

Telephonic polling generates a significant number of complaints to the Office of the Attorney General. In response to concerns by New Hampshire citizens, in 1998, the New Hampshire legislature passed the statutory sections at issue, RSA 664:2, XVII and 664:16-a. These provisions simply require disclosure be made to New Hampshire citizens who receive a push-poll, as that term has been defined by the legislature.

To determine whether a particular poll requires a disclosure, the law provides a three-part test. Disclosure is required if the poll involves:

(a) Calling voters on behalf of, in support of, or in opposition to, any candidate for public office by telephone; and

(b) Asking questions related to opposing candidates for public office which state, imply, or convey information about the candidates character, status, or political stance or record; and
(c) Conducting such calling in a manner which is likely to be construed by the voter to be a survey or poll to gather statistical data for entities or organizations which are acting independent of any particular political party, candidate, or interest group.

If such a poll is conducted, the caller is required to "inform any person contacted that the telephone call is being made on behalf of, in support of, or in opposition to a particular candidate for public office, identify that candidate by name, and provide a telephone number from where the push-polling is conducted."

As is discussed in greater detail below, GQRR's request for an advisory opinion attempts to merge the concepts of express preemption and field preemption, which is a legal construct that GQRR does not justify by citation to any court decision that has recognized such a merger. Indeed, merging the two legal theories would result in a contradictory analysis. Congress could not have intended to expressly identify areas of preemption, while at the same time, so broadly regulate a field that no state can pass any laws within that field.

In its rules and opinions, the FEC has found that states retain broad jurisdiction to regulate elections. As such, field preemption cannot apply, leaving only the argument that New Hampshire's law is expressly preempted by federal law.

For the reasons set forth below, New Hampshire respectfully requests that the Commission reject GQRR's construction of federal law, and find that RSA 664:2, XVII and 664:16-a are not preempted by FECA.

II. Federal Preemption Doctrine

Any analysis of federal preemption works "on the assumption that the historic police powers of the States [a]re not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541-542 (2001). The Court will not "lightly presume" the exercise of Federal supremacy. *Schwartz v. State of Texas*, 344 U.S. 199, 202-203 (1952) (overturned; but not for cited proposition). "[W]hether a certain state action is pre-empted by federal law is one of congressional intent," *Gade v. National Solid Wastes Management*, 505 U.S. 88, 96 (1992) (citations omitted), and "[t]he purpose of Congress is the ultimate touchstone" in every preemption case. *See Medtronic Inc. v. Lohr* 518 U.S. 470, 485 (1996), quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). The Supreme Court has summarized the different categories of preemption, stating that: "[a]bsent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption...and conflict pre-emption." *Gade*, 505 U.S. at 98.

FECA contains an express preemption provision, and is therefore not properly analyzed under implied preemption doctrine. *See* 2 U.S.C. §453. The Supreme Court has noted, "an express definition of the pre-emptive reach of a statute...supports a reasonable inference...that Congress did not intend to pre-empt other matters." *Lorillard*, 533 U.S. at 541-542 (citing *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995)). In other words, express preemption is not "field occupation" where, for example, any state regulation pertaining to immigration is preempted despite the lack of a preemption provision in the statute. *See Hines v. Davidowitz*, 312 U.S. 52 (1941) (holding that federal law is exclusive in regulating immigration). Express preemption exists where the scope of preemption is determined by the construction of the preemption provision in the statute. *See Lorillard*, 533 U.S. 525 (interpreting the scope of preemption provisions in federal cigarette outdoor and point of sale advertising regulations).

On this point, GQRR's use of the term "express field preemption" misapprehends these categories of preemption. Where GQRR discusses *implied* field preemption doctrine, it misses the mark as *implied* preemption presupposes the absence of an express preemption provision. The term "occupy the field," moreover, is a term of art, and to the extent that House committee members used that term, it should not be interpreted as requiring the Commission to apply implied preemption doctrine. *See* H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974) (preemption provision "intended to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office..."). The Commission should instead be guided by the language of the Act itself, and the Commission's own interpretation of FECA. The merging of these two preemption doctrines is inappropriate since the analysis is different under express preemption where it "supports a reasonable inference...that Congress did not intend to pre-empt other matters." *Lorillard*, 533 U.S. at 541-542 (citing *Freightliner Corp.*, 514 U.S. at 288).

Under express preemption analysis, a considered analysis of the scope of FECA and its interpretive regulations is necessary to discern congressional intent.

III. FECA Statute & Regulations

FECA regulates federal campaigns regarding the organization of federal political committees, the reporting of campaign contributions and expenditures by federal candidates and political committees, the regulation of campaign contributions and expenditures, and the regulation of electioneering communications. *See* 2 U.S.C. §453. A plain reading of FECA indicates that telephone surveys were never part of the federal election regulatory scheme.

2 U.S.C. §453 states: "...the provisions of this Act, and of rules prescribed under this act, supersede and preempt any provision of State law with respect to election to Federal office." The Commission's regulations, however, define the preemptive reach of FECA. Notably, the Commission's regulations provide that:

> Federal law supersedes State law concerning the (1) Organization and registration of political committees supporting Federal candidates; (2) Disclosure of receipts and expenditures by Federal candidates and political committees; and (3) Limitation on contributions and expenditures regarding Federal candidates and political committees.

11 CFR 108.7(b). These regulations also expressly provide that certain areas that may also pertain to federal elections remain within the legitimate scope of state power, stating that:

> The Act does not supersede State laws which provide for the (1) Manner of qualifying as a candidate or political party organization; (2) Dates and places of elections;(3) Voter registration; (4) Prohibition of false registration, voting fraud, theft of ballots, and similar offenses; (5) Candidate's personal financial disclosure; or (6) Application of State law to the funds used for the purchase or construction of a State or local party office building to the extent described in 11 CFR 300.35.

11 CFR 108.7(c).

The Commission has rejected the proposition that telephone surveys are a part of FECA's regulatory scheme, stating that "[t]he plain language of this section does not impose disclaimer requirements upon polls, survey research, or anything of the sort." *In re Democratic Congressional Campaign Committee*, MUR 5835 (Statement of Reasons of Vice Chairman Petersen, and Commissioners Hunter and McGahn) 4, 16 (FEC July 1, 2009). Instead, the Commission explained that the reach of the section applies to "general public political advertising." *Id.* That the Commission could have, in theory, decided different does not, as GQRR suggests, compel the conclusion that state regulation of disclaimers in politically related telephone surveys is preempted. Rather, this decision merely confirms what is plain from reading the statute; that telephone surveys are outside of FECA's regulatory scheme.

IV. Federal Law on FECA Preemption

The Federal Courts have not interpreted FECA's preemption provision broadly. Rather, they have found that, in light of the provision's ambiguous language and its accompanying legislative history, FECA's preemption is *narrow*. As the Court set out in *Krikorian v. Ohio Elections Commission*, 2010 WL 4117556, 10 (S.D. Ohio 2010):

> While at first blush, § 453 appears to have an exceedingly broad scope, courts have not interpreted in that manner. Rather, courts have recognized that § 453 is ambiguous and have 'given [§] 453 a narrow preemptive effect in light of its legislative history.'" *Karl*

> *Rove & Co. v. Thornburgh,* 39 F.3d 1273, 1280 (5th Cir.1994) (quoting *Stern v. General Elec. Co.,* 924 F.2d 472, 475 n. 3 (2d Cir.1991)); *see also Weber,* 995 F.2d at 875. Indeed, courts recognize in this area "a 'strong presumption'... against preemption." *Karl Rove & Co.,* 39 F.3d at 1280 (quoting *Weber,* 995 F.2d at875).

The *Krikorian* court also emphasized the FEC's express statutory authority to determine the appropriate scope of FECA's ability to preempt state regulation of elections, stating that:

> Section 453 incorporates by reference "rules prescribed under" FECA. With the 1974 amendments to FECA, Congress created the Federal Election Commission ("FEC") and "vest[ed] in it primary and substantial responsibility for administering and enforcing the Act," delegating to the agency "extensive rulemaking and adjudicative powers." *Buckley v. Valeo,* 424 U.S. 1, 109, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). The FEC has issued a regulation interpreting the scope of § 453 in accordance with the statute's plain language and it's legislative history. *See* 11 C.F.R. § 108.7. That regulation identifies specific areas which are and are not superceded...

Id. at 11. Under this framework, courts will often uphold state regulations, despite the fact that they may touch upon federal candidates, committees and campaigns. *See Karl Rove & Co. v Thornburgh,* 39 F.3d 1273 (5th Cir. 1994) (held that FECA does not preempt state law on issue of liability of candidate for debts of unincorporated campaign committee); *Stern v. General Electric Co.*, 924 F.2d 472 (2nd Cir. 1991) (held that allegations of waste by corporation's directors in funding political support committee were not preempted by FECA); *Janvey v. Democratic Senatorial Campaign Committee*, 793 F.Supp.2d 825 (N.D. Tex. 2011) (neither FECA nor BCRA soft money amendments to FECA impliedly pre-empted Texas Uniform Fraudulent Transfer Act claims); *United States v. Trie*, 21 F.Supp.2d 7 (D. D.C. 1998) (criminal provisions of FECA did not preempt conspiracy, mail and wire fraud, and false statements provisions of criminal code).

Moreover, GQRR's reliance on *Bunning v. Commonwealth of Kentucky*, 42 F.3d 1008 (6th Cir. 1994), is misplaced. *Bunning* concerned the application of a Kentucky statute that sought to regulate campaign expenditures by candidates who were taking part in Kentucky's public campaign financing program. 42 F.3d at 1009. One element of the program included a prohibition of expenditures made pursuant to "exploratory" activities. *Id.* The Chairman of the Kentucky Democratic Party filed a complaint alleging that Congressman Bunning's poll that tested the waters for a gubernatorial campaign violated the "exploratory" spending prohibition. *Id.* at 1010. The Court, *citing to the specific preemption areas outlined in FEC regulations*, found that "the expenditure for the poll was made by a federal political committee, duly

registered with the FEC, and there is no claim that an expenditure for a poll...is in any way unlawful under FECA." *Id.* at 1012. The Court's analysis in *Bunning* dealt exclusively with expenditures. While the expenditure at issue involved a poll, the poll itself was not the subject of preemption. The Court found only that the regulation of expenditures was *explicitly* regulated by the FEC, and *explicitly* preempted under FEC regulations.

V. FEC Advisory Opinions on FECA Preemption

The Commission's Advisory Opinions reflect the limited scope of FECA's preemption. In fact, the advisory opinions cited by GQRR in its request do not provide support for the proposition that disclaimer requirements in polls are preempted by FECA. Instead, they provide support for the proposition that federal law preempts state regulation where a state attempts to regulate federal campaign spending, contributions, political advertising and reporting to government bodies.

For example, Advisory Opinion 1995-41, cited by GQRR for the proposition that FECA regulates disclaimer provisions, actually discusses the preemptive effect of FECA on financial disclosure laws. Advisory Opinion 1995-41 states only that "the Act would preempt New York State law with respect to the reporting of contributions, disbursements and expenditures, including expenditures for polling activity in Federal election campaigns." AO 1995-41 at 2. *See also* Advisory Opinion 1995-41 ("Federal preemption of certain *reporting* obligations of New York State *Campaign Finance* laws") (emphasis added).

Similarly, GQRR relies on Advisory Opinion 1981-27 for the same proposition. While this Advisory Opinion does address disclaimers, it does so only with respect to disclaimers made in political advertising, not polls. In fact, in that same advisory opinion, the Commission made it clear that field preemption was not applicable by holding that:

> [t]he Commission...wishes to make clear that neither the Act nor Commission regulations preempt the substance of the anti-littering ordinances referred to in the warning notice.... The Commission views state or local regulations and statutes that apply to the placement and location of campaign advertisement as outside the purview of 2 U.S.C. 453...political campaign advertising materials used in Houston are otherwise subject to the restrictions outlined in the City Code of Ordinances.

The other Advisory Opinions cited by GQRR are similarly off-point as they all deal with reporting, expenditures, contributions or political advertising. *See* Advisory Opinion 1978-24 (preemption of state law with respect to requirement that party affiliation be placed on *campaign advertising*) (emphasis added); Advisory Opinion 2009-21 (preemption of state law restricting *expenditures* for polling expenses) (emphasis added).

The Commission has repeatedly held that state regulations that do not address reporting, expenditures, contributions or political advertising are valid exercises of state power. *See e.g.* AO 1980-47(statute, which would prohibit payment by a candidate or his committee for "walk around services" on an election day, would not be preempted by FECA). AO 2001-19 (no preemption of ordinance requiring federal committee to acquire bingo license for fundraising purposes); AO 1986-29 ("[t]his provision, however, will not preempt the application of state law with regard to your committee's providing certain information to listed state and local candidates that they may need for state reporting purposes."); AO 1979-82 (no preemption of state rules regarding transfer of excess election funds to son's campaign for state office); AO 1978-37 ("[t]he Commission emphasizes that State regulation of funds received by a campaign for State office from a campaign for Federal office may not be avoided..."); AO 1976-8 ("[i]t is the opinion of the Commission that 2 U.S.C. §453 does not preempt provisions of State law pertaining to the number of signatures necessary...in order to place a new party on the state primary ballot, even though that party 'limits itself to only Federal positions.'")

Given the narrow scope ascribed to FECA's preemption by the Federal Courts and the Commission's regulations, New Hampshire's statutory disclosure is not preempted by FECA. New Hampshire retains legitimate authority over the regulation of elections taking place in the State. GQRR's suggestion that the requirement that a disclaimer be placed in a telephone survey somehow "limit[s] the ability of a Federal candidate to pay for a poll" is an argument not grounded in the provisions of FECA, its regulations, or federal case law interpreting the reach of FECA's preemption.

VI. Conclusion

FECA's preemptive scope is defined and limited to the areas that FECA explicitly regulates. The FEC's regulations *do not include* telephone surveys as part of its regulatory scheme or its preemption authority under §453. This is consistent with the Supreme Court's admonition that the police powers of the state should not be superseded unless there is *clear* congressional intent to do so. The Commission should not, therefore, find that RSA §664:16-a is preempted by 2 U.S.C. §453.

Sincerely,

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