# STATE OF MINNESOTA

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AOR 1991-22
COMMENTS

N Bradley Litchfield
Associate General Counsel
Federal Election Commission
999 E Street N W
Washington, DC 20463

Re: **Request for Advisory Opinion Number 1991-22**

Dear Mr. Litchfield:

Enclosed by facsimile to you is the State of Minnesota Response to Douglas Kelley's supplemental comment to his Request for Advisory Opinion 1991-22 The original plus nine copies of this Comment are being sent to you by first class mail today.

Thank you again for providing us the opportunity to respond

Very truly yours,

Martha J Casserly

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Enclosure

UNITED STATES
FEDERAL ELECTION COMMISSION

Re: Advisory Opinion
Request of Douglas A. Kelley

Advisory Opinion
Request 1991-22

## RESPONSE OF THE STATE OF MINNESOTA

### I. THE FECA DOES NOT PREEMPT THE MINNESOTA ACT.

In his responsive comments, Mr Kelley completely ignores the well-established presumption against a finding that Congress has preempted state law. A finding of preemption is plainly disfavored in the absence of persuasive reasons -- either that the nature of the regulated matter permits no other conclusions or that Congress has "unmistakably so ordained." Alessi v. Raybestos-Manhatten, Inc., 450 U.S. 311, 317 (1981). Furthermore, the presumption against finding preemption is especially strong in areas traditionally regulated by the States. California v. ARC America Corp., 490 U.S. 93 (1989).

When appropriate preemption analysis is applied in the instant matter, it is plain that the Federal Election Campaign Act ("FECA") does not preempt the Minnesota Congressional Campaign Reform Act, Minn. Stat. §§ 10A.40-.51 (1990) ("Minnesota Act").

#### A. No Direct Conflict Exists Between The FECA And the Minnesota Act.

Mr. Kelley does not cite any direct conflict between the FECA and the Minnesota Act because, indeed, no such conflict exists. In fact, Mr. Kelley candidly admits that "at the present time Congress has chosen not to impose expenditure limitations or public financing on Congressional elections."

In his attempt to create a conflict, Mr. Kelley offers several arguments. First, he argues that the Minnesota Act "penalizes a candidate for exercising his federal rights." However, the FECA does not create federal rights. Rather, the FECA creates a statutory scheme for regulating, that is limiting, the conduct of federal campaigns and elections. Moreover, Mr. Kelley fails to explain exactly how a candidate is "penalized" for not agreeing to the voluntary limits. Quite the contrary, if a candidate chooses not to receive state funds, no limitations are imposed. It is well established that conditioning the receipt of governmental funds does not constitute a penalty or denial of any right or benefit since the recipient has no right to the public funds and can simply decline the subsidy to avoid the restrictions. Cf. Rust v. Sullivan, ___ U.S. ___, 111 S. Ct. 1759 (1991) (upholding governmental restrictions on recipients of Title X family planning funds).

If the FECA preemption were as broad as Mr. Kelley claims, the Commission would not have upheld various state funding programs in numerous advisory opinions. Mr. Kelley attempts to distinguish these opinions by claiming they involved either income tax check-off distribution or licensing fees. Arguing over the mechanism for collecting the state funds is a distinction without merit, for the source for all these state funding programs remains the state taxpayers. More significantly, this Commission has already upheld state funding programs similar to Minnesota's where there is no direct payment from any taxpayer or direct impact on a specific taxpayer's liability, but rather the funds derive from the general state fund. Advisory Opinions 1980-103 (North Carolina) and 1991-14 (Kentucky).

Congress could act to expressly prohibit a scheme such as the Minnesota Act establishes However, the fact is that Congress has not done so. Until Congress acts in a manner which directly conflicts with the Minnesota Act, no question of preemption arises under this prong of United States Supreme Court analysis. -

**B. Congress Has Not Occupied The Field.**

The State of Minnesota recognizes that, at first blush, the language of the FECA's

preemption provision, 2 U.S.C. § 453, appears to sweep broadly. However, when this provision is fairly analyzed in conjunction with constitutional principles and the FECA's legislative history, it becomes clear that Congress did not intend to occupy the field to the extent advocated by Mr. Kelley. See Securities Industries Ass'n v. Connolly, 883 F.2d 1114 (1st Cir.), cert. denied, ____ U.S. ____, 110 S. Ct. 2559 (1989) (discerning Congressional intent essential to preemption analysis).

First, as noted above, there exists in constitutional case law a strong presumption against a finding of preemption. In the election area, a field in which the states have historically shared authority with Congress, this presumption should operate with particular force. The United States Constitution explicitly provides:

> The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

U.S. Const. art. I, § 4 This language strongly suggests that the states may initially regulate the elections of senators and representatives as they choose. If Congress wishes, it may alter the state regulations except those designating the place of choosing senators. However, because state power to regulate congressional elections is reserved in the constitution, arguably Congress may not comprehensively regulate and thereby occupy the field of congressional elections. See, e.g., Roudebush v. Hartke, 405 U.S. 15, 24-25 (1972); Oregon v. Mitchell, 400 U.S. 112, 123 (1970) (acknowledging broad power of the states under article I, § 4). Even assuming that Congress may occupy the entire field, the constitutionally recognized authority of the states in the election area indicates a particularly strong presumption against a finding of preemption.

Second, as was discussed thoroughly in the State of Minnesota's original comment, the legislative history underlying 2 U.S.C. § 453 makes clear that Congress intended to occupy the election field only as to reporting, disclosure and other areas explicitly covered

by the FECA. In quoting from the relevant 1974 Conference Report, Mr. Kelley omits the following language which clearly supports the State of Minnesota's position:

> It is the intent of the committee to make certain that the Federal law is construed to occupy the field with respect to elections to federal office and that the Federal law will be the sole authority under which such elections will be regulated. Under the 1971 Act provision was made for filing federal reports with state officials and supervisory officers were required to cooperate with, and to encourage, state officials to accept federal reports in satisfaction of state reporting requirements. The provision requiring filing of federal reports with state officials is retained, but the provision relating to encouraging state officials to accept federal reports to satisfy state reporting requirements is deleted. Under this legislation, federal reporting requirements will be the only reporting requirements and copies of the federal reports must be filed with appropriate state officials. The committee also feels that there can be no question with respect to preemption of local laws since the Committee has provided that the Federal laws supersede and preempt any law enacted by a State, the Federal law will also supersede and preempt any law enacted by a political subdivision of the state.

H R. Rep. No. 1239, 93rd Cong., 2nd Session, 10-11, quoted in Kelley Response at 5 (emphasis added to indicate omitted portion of report). The other excerpts cited by Mr. Kelley either specifically refer to reporting and disclosure or pertain to the communal preemption provision in the 1974 amendments which were later repealed after Buckley v. Valeo, 424 U.S. 1 (1976)

Mr Kelley argues that the legislative debates surrounding the FECA amendments further support a finding of preemption. However, the quotations provided do not specifically address preemption of public financing and expenditure limits. In fact, the most revealing discussion of this issue on the floor of the House occurred in reference to an amendment, which was rejected, proposed by Representative Obey of Wisconsin. Representative Obey proposed adding an exception to the preemption provision, allowing States to set lower spending limits than Congress itself set for congressional elections. 1xx Cong. Rec. 7894 (Aug. 8, 1974), reprinted in Legislative History of Federal Campaign Act

Amendment of 1974, 866 (1977).[1] As one would expect, Representative Obey himself thought that "if this bill is passed the States will be preempted on absolutely everything except overall spending limits." However, his view of the preemption provision without his amendment is quite different.

> Let me point out to the gentleman right now there is very little preemption. This bill if it is passed with my amendment will greatly broaden the preemption which exists right now. I am in the same situation the gentleman is in with regard to my several unrealistic requirements of State law One section of the my [sic] State law contains filing requirements so complicated the gentleman would not believe them.

Id. at 870. Evidently, Representative Obey also perceived the preemption provision without his amendment as displacing State reporting and filing requirements, and nothing more He thought that specifying expenditure limits as an exception would in fact broaden other areas of preemption.

Representative Hayes, in opposing the amendment, advanced the view that Congress should occupy the field of federal elections:

> So, on the subject of preemption it seems to me that it is a little bit like pregnancy -- you either are or you are not; you cannot be part way. I just think that if we are going to preempt State laws -- and I think it is vital that we do so, so that we have some orderly kind of procedure -- that we have one set of standards for all the States all the way through for Federal elections.

Id. at 867. Yet even Representative Hayes thought that States could encourage voluntary expenditure limits in spite of the complete preemption he advocated:

> There is always the possibility that if a State has lower limits, that the candidates themselves can agree to abide by them. Certainly, if I were in a state that had lower limits, I would endeavor to get my opponent to abide by them. That can be a voluntary thing.

Id

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1. The proposed amendment and debate concerned the mandatory expenditure limits which were ultimately ruled unconstitutional in Buckley v. Valeo, supra.

Mr Kelley also argues that the FEC regulations demonstrate that the FECA preempts the Minnesota Act. However, federal administrative regulations that are inconsistent with congressional intent are entitled to no deference, Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94 (1973), and must be rejected. Almalgamated Transit Union v Skinner, 894 F.2d 1362 (D C. Cir. 1990) The FEC's regulations cannot reach more broadly than the FECA itself, and as the State of Minnesota has thoroughly demonstrated, the FECA itself does not preempt the Minnesota Act In addition, Mr. Kelley ignores the fact that Minnesota's limitations are voluntary, and the limitations are triggered, not by the state law, but by the candidate's own decision agreeing to limit his or her campaign spending.

Finally, Mr. Kelley argues that for the FEC not to find that the Minnesota Act is preempted "would require overturning years of precedent." However, Mr. Kelley does not offer one supporting citation for this proposition. In reality, all of the cases addressing the FECA's preemption provision have interpreted it narrowly. While the facts of these individuals cases may be different from the facts in the instant matter, those differences do not require a contrary result. The reasoning in those cases -- that the legislative history of section 453 requires a narrow view of that provision's preemptive effect -- applies equally here and requires that the Commission find the Minnesota Act not to be preempted.

## II. THE ISSUE OF THE MINNESOTA ACT'S SEVERABILITY IS BEYOND THIS COMMISSION'S JURISDICTION.

Mr. Kelley seems to concede that portions of the Minnesota Act are likely not preempted by FECA. As a result, he argues that the provisions of the Minnesota Act cannot be severed and he requests that the Commission conclude that the entire state law is invalid.

The determination of whether a portion of a state statute is severable involves an analysis of the relevant state statutory provisions and an examination of the state legislature's intent. Severability involves no question of federal law. Because the scope of

the Commission's advisory opinions is limited to the application of FECA and its regulations, 2 U.S.C. § 437f(a)(1), the Commission lacks jurisdiction to determine the severability of the Minnesota Act. It is the state courts which determine whether the non-preempted provisions of a state statute are severable from the preempted provisions. Exxon Corp. v. Hunt, 475 U.S 355, 376 (1986). The Commission need not even consider Mr. Kelley's specious separability argument

## III. PUBLIC POLICY FAVORS A FINDING THAT THE MINNESOTA ACT IS NOT PREEMPTED.

Finally, Mr Kelley argues that public policy weighs in favor of preemption. To the contrary, public considerations strongly support upholding the Minnesota Act.

In enacting its congressional campaign reform act, Minnesota sought to address the widely recognized serious national problem of the skyrocketing levels of campaign spending, increased dependence on special interests groups and large contributions and the unequal competition between candidates Minn. Stat. § 10A.40. The excessive cost of running a credible campaign causes congressional candidates to aggressively solicit contributions from special interest groups and out-of-state sources, which diverts the candidates from meeting the voters and addressing the pressing issues of the day. Id. Furthermore, the high levels of campaign spending creates the impression that wealthy individuals and special interest groups are able to buy and exercise undue influence, and thereby the integrity of the process and public confidence in the system are severely undermined Id.

The Minnesota Act addresses these serious concerns by establishing a mechanism for encouraging, but not requiring, expenditure limits Mr. Kelley mistakenly contends that the Minnesota Act increases an incumbent's advantage over a challenger because it takes more money for a challenger to overcome the advantages of incumbency. However, if a Minnesota challenger wants unlimited campaign expenditures, he or she may still have

them simply by declining state incentive funds The choice is the challenger's, not the state's.

## CONCLUSION

The State of Minnesota has worked to improve the election system by trying something new -- voluntary expenditure limits. Applying constitutional law and common sense, Minnesota should not be prohibited from attempting this improvement unless Congress has unequivocally preempted such action, either by creating a direct conflict or by occupying the field. Mr. Kelley has clearly failed to overcome the well-established presumption against a finding of preemption. Minnesota's statutory scheme should therefore be found constitutional.

Dated. September 16, 1991

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