JUN 19 2013

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Merrimack Superior Court
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NOTICE OF DECISION

Charles G. Douglas, III
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Concord NH 03301

Case Name: **Michael A. Delaney, Attorney General, State of New Hampshire v Bass Victory Committee**
Case Number: **217-2012-CV-00233**

Enclosed please find a copy of the court's order of June 17, 2013 relative to:

ORDER

June 18, 2013

William S. McGraw
Clerk of Court

(629)

C: Anne M. Edwards, ESQ; Benjamin T. King, ESQ; Stephen G. LaBonte, ESQ;

cc: client

The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Michael Delaney, Attorney General

v.

Bass Victory Committee

NO. 2012-CV-233

ORDER

The New Hampshire Attorney General ("AG") has filed an action in this Court against the Bass Victory Committee (the "Committee"), the authorized campaign committee of former United States Congressman Charles Bass, seeking statutory civil penalties against the Committee for engaging in so-called "push-polling" as defined in RSA 644:2, XVII, without complying with the disclosure requirements set out in RSA 664:16-a, I. The Committee moves to dismiss on the ground that the claim the AG made against it is preempted by The Federal Election Campaign Act ("FECA"), 2 U.S.C. 431, et seq. For the reasons stated in this Order, the Motion to Dismiss is GRANTED.

I

The history of this case is set out in New Hampshire Attorney General v. Bass Victory Committee, 2012 WL 2838425 at *1 (D.N.H. July 10, 2012). In September 2010, after receiving information regarding polling calls made to New Hampshire residents—which were described as containing negative content against United States congressional candidate Ann Kuster ("Kuster")—the AG began an investigation. Based on information obtained during the ensuing investigation, the AG concluded that the Committee had engaged in "push-polling" as defined in RSA 664:2, XVII. According to the AG, the

Committee violated RSA 664:16-a by asking questions that implied or conveyed negative information about Kuster. The questions were asked in such a manner that voters were likely to construe them as a survey to gather statistical data for a politically independent entity or organization. The survey did not disclose that the calls were made on behalf of the Committee. The AG filed suit in Merrimack County Superior Court against the Committee seeking statutory civil penalties for violations. The Committee removed the case to federal court, asserting that the court had federal question jurisdiction because FECA completely preempts RSA 664:16-a to the extent it purports to apply to telephone calls paid for by federal candidates or their authorized campaign committees. The AG moved to remand.

The United States District Court noted a distinction between complete preemption and field preemption, and remanded the claim to state court. Specifically, the court described complete preemption as "a short-hand for the doctrine that in certain matters Congress so strongly intended an exclusive federal cause of action that what a plaintiff calls a state law claim is to be recharacterized as a federal claim," and field preemption as "a defense to a state law cause of action." Bass Victory Committee, 2012 WL 2838425 at *2 (citing Fayard v. Northeast Vehicle Servs., LLC, 533 F.3d 42, 45–46 (1st Cir. 2008)). The court noted that, while field preemption is a defense to a state law cause of action, it cannot, by itself be a basis for removal to federal court. Id. The court also explained that the United States Supreme Court had applied the complete preemption doctrine in only three contexts: usury claims against national banks, benefit claims under ERISA, and no strike clauses of labor contracts. Id.

The United States District Court explained that the First Circuit applies a two-

pronged test to determine whether a federal statute completely preempts state law. Bass Victory Committee, 2012 WL 2838425 at *2 (citing Fayard, 533 F.3d at 46). A federal statute only completely preempts state law when there is: "exclusive federal regulation of the subject matter of the asserted state claim"; and "a federal cause of action for wrongs of the same type." Id. Because there is no counterpart federal cause of action under FECA for push-polling—as prohibited by RSA 664:16-a—the court held that complete preemption did not exist. Id. at *4. In so holding, the court noted, "[a]bsent a federal cause of action that would replace the AG state claim, there is no complete preemption." Id. The court concluded that the action was not removable, but it did not decide whether the Committee could rely on field preemption as a defense to the state law claim in this instance. Id. The court explained, "nothing prevents the Bass Committee from asserting a preemption defense in state court. I have faith that the state court will fulfill its constitutional duty to enforce federal law." Id. The Committee now moves to dismiss the AG's action on the grounds that federal law preempts the State's claim.

II

The Supremacy Clause of the United States Constitution provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. There is no doubt that under this provision of the Constitution, Congress has the power to preempt state law. Crosby v. Nat'l Foreign Trade Counsel, 530 U.S. 363, 372 (2000). Congress' preemptive intent can be "explicitly stated in the statute's language or implicitly contained in its structure and

purpose." Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516, (1992) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)). "Congress may withdraw specified powers from the states by enacting a statute containing an express preemption provision." Arizona v. United States, 132 S. Ct. 2492, 2500–501 (2012) (citing Chamber of Commerce of United States of America v. Whiting, 131 S. Ct. 1968, 1974–975 (2011)). Further, as the Supreme Court noted in Arizona:

> State law must also give way to federal law in at least two other circumstances. First, the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. The intent to displace state law altogether can be inferred from a framework of regulation "so pervasive . . . that Congress left no room for the States to supplement it" or where there is a "federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."
>
> Second, state laws are preempted when they conflict with federal law. This includes cases where "compliance with both federal and state regulations is a physical impossibility," and those instances where the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

132 S. Ct. at 2501 (citations omitted). In order to determine whether FECA preempts RSA 664:16-a, it is necessary evaluate both laws, determine their respective scope, and assess "the extent to which they are in tension." Teper v. Miller, 82 F.3d 989, 993 (11th Cir. 1996).

In support of its argument, the Committee primarily relies on the language of the FECA, which contains an express preemption provision that states, "the provisions of this Act, and the rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. § 453 (a). The Committee also relies on legislative history. Specifically, the Committee asserts that the report of the

House of Representatives committee that drafted the express preemption provision stated, "[i]t is the intent of the Committee to make certain that 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." Dewald, 2012 WL 3206021 *13 (citing H.R. Rep. No. 93-1239, at 10–11 (1974), reprinted in 1974 U.S.C.C.A.N. 5587) (emphasis added).

The Committee also relies on a FEC advisory opinion issued in response to an inquiry as to whether RSA 664:16-a was applicable to polling in campaigns for federal office. The FEC specifically ruled:

> [T]he New Hampshire statute requiring disclaimers on certain telephone calls, New Hampshire Revised Statutes section 664:16-a, [I,] is preempted by the Act and Commission regulations with respect to the proposed telephone surveys made on behalf of Federal candidates, their authorized committees, or other Federal political committees that refer only to candidates for Federal office.

Op. F.E.C. 2012-10 (Apr. 27, 2012).[1]

The Committee cites four additional FEC Advisory Opinions—a Washington case, Op. F.E.C. 1978-24 (May 12, 1978); a Texas case, Op. F.E.C. 1981-27 (July 2, 1981); a New York case, Op. F.E.C. 1995-41 (Dec. 7, 1995); and a West Virginia case, Op. F.E.C. 2009-21 (Aug. 28, 2009). These four cases involve attempted regulation of polling in political campaigns for federal offices, and, in each, the FEC has held that state statutes governing polling conduct, if applied to federal candidates, would impede those candidates' ability to pay polling expenses that are covered by the Act and Commission regulations. For example, in holding that a New York law requiring campaigns to furnish

[1] WL 1529235 *2.

detailed polling information preceding the release of all results conflicted with federal law, the FEC stated:

> [T]he 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. New York State may not impose any obligation for reporting Federal contributions, disbursements and expenditures since those obligations fall only within the purview of the Act and Commission regulations.

Op. F.E.C. 1995-41 (Dec. 7, 1995).[2] Similarly, in the West Virginia case, the FEC reasoned that a similar statute, if applied to federal candidates, would impede candidates' ability to make payment of polling expenses that are covered by the Act and Commission regulations. Op. F.E.C. 2009-21 (Aug. 28, 2009).[3]

The parties differ on the weight to be given to the FEC Advisory Opinions. The AG argues that the Advisory Opinions are not owed deference under Chevron[4] and its progeny because the issues in this case are squarely within the Court's jurisdiction and are not within any particular expertise or special administrative competence of the FEC. See e.g., Ass'n Int'l Auto. Mfrs., Inc. v. Comm'r, Mass. Dep't of Envt'l Prot., 208 F.3d 1, 5 (1st Cir. 2000) (finding issue of statutory interpretation and preemption were for courts to decide). However, federal courts have taken a sliding-scale approach to determine the degree of deference to afford to an agency opinion; these factors include thoroughness of consideration, validity of reasoning, and consistency with other opinions. Doe v. Leavitt 552 F.3d 75, 81 (1st Cir. 2009) (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). Although the FEC Advisory Opinions are not binding, when considering these

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[2] 1995 WL 735872 at *2.
[3] 2009 WL 2850352 at *3.
[4] Under Chevron USA, Inc. v. NRDC, 467 U.S. 837, 844 (1984), a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

factors, it becomes clear that they are owed respect. The consistent interpretation of federal law and regulations by those familiar with its enforcement is persuasive. Chevron, 467 U.S. at 844. Here, the FEC is most familiar with the enforcement of FECA, and its reasoning is both persuasive and remarkably consistent.

The AG relies on several cases: Janvey v. Democratic Senatorial Campaign Comm., Inc., 712 F.3d 185, 200 (5th Cir. 2013) (holding FECA does not preempt state law regulating fraudulent transfers); Karl Rove & Co. v. Thornburgh, 39 F.3d 1273, 1280-81 (5th Cir. 1994) (holding FECA does not preempt state law regulating liability of candidate for debts of campaign committee); Stern v. Gen. Electric Co., 924 F.2d 472, 476 (2d Cir.1991) (holding FECA does not preempt state law governing fiduciary duty to shareholders); U.S. v. Trie, 21 F.Supp.2d 7, 19 (D. D.C. 1998) (holding FECA does not preempt several criminal code provisions); Holtzman v. Oliensis, 695 N.E.2d 1104, 1108 (N.Y. 1998) (holding FECA does not preempt New York City's conflict of interest rules); State v. Jude, 554 N.W.2d 750, 753 (Minn. Ct. App. 1996) (holding FECA does not preempt state law governing false campaign advertising). Obj. Mot. Dismiss 7-8.[5] Janvey best illustrates the AG's argument. In Janvey, the Fifth Circuit analyzed FECA's preemptive impact on the Texas Uniform Fraudulent Transfer Act ("TUFTA"), as applied to a claim involving a supposed-fraudulent transfer involving a campaign fund. 712 F.3d at 200. The court noted that "TUFTA is a general state law that happens to apply to federal political committees in the instant case." Id.

[5] The AG also cites Krikorian v. Ohio Elections Comm'n, 2010 WL 4117556 (S.D. Ohio 2010). The AG represents that the Krikorian court held that FECA does not preempt a state statute prohibiting unfair campaign activities and false statements. This was not the holding in Krikorian. The court in Krikorian specifically abstained from determining the preemption issue. 2010 WL 4117556 at *12.

Janvey, along with other cases that the AG relies on, is not applicable to the facts of the case before this Court because they involve state law liabilities which happen to affect a federal campaign committee or candidate for federal office.

Push-polling is a campaign expenditure because the campaign must expend funds in order to conduct the activity. See 2 U.S.C. § 431(9)(A)(I) (defining "expenditure" as "payment . . . of money . . . for the purpose of influencing any election for Federal office"). Because FECA regulates the required disclosures associated with campaign expenditures, and because RSA 664:16-a mandates disclosure associated with a specific type of campaign expenditure, federal law preempts the state statute. As the FEC noted:

> Here, the New Hampshire statute, if applied to Federal candidates who wish to pay for the telephone surveys described in the request, would impose an additional disclaimer requirement on those expenditures. Under the Act's preemption clause, only Federal law may require disclosure regarding expenditures by Federal candidates.

Op. F.E.C. 2012-10 (Apr. 27, 2012).[6]

Under these circumstances, the Court must GRANT the Committee's Motion to Dismiss.

SO ORDERED.

6/17/13
DATE

Richard B. McNamara
Richard B. McNamara,
Presiding Justice

[6] 2012 WL 1529235 at *3.