GILBRIDE, TUSA, LAST & SPELLANE LLC

ATTORNEYS AT LAW
THE GRAYBAR BUILDING
420 LEXINGTON AVENUE
NEW YORK NEW YORK 10170--0105
(212) 692-9666
TELECOPIER (212) 661-6328

FRANK J GILBRIDE II
CHARLES S TUSA
BENNETT N LAST
THOMAS P SPELLANE
JOHN P TESEO *
ERIC H SELTZER
DAVID CRYSTAL II
JAMES P DONNELLY JR.
FREDERICK P ROLES **
SARAH J ORIS *
KENNETH M GAMMILL JR
GLEN J MOORE *
THOMAS W LITTMAN **

* ADMITTED IN NEW JERSEY AND VIRGINIA
** ADMITTED IN NEW JERSEY

COUNSEL
RAYMOND R FLETCHER, JR.
ROBERT N. LITTMAN

31 BROOKSIDE DRIVE
P.O. BOX 659
GREENWICH, CONNECTICUT 06836
(203) 622-0300
TELECOPIER (203) 622-0302

FACSIMILE

August 30, 2000

Comment on AOR 2000-23

202 208 3333
and
202 219 3923

Federal Election Commission
Office of General Counsel
999 E Street, N.W.
Washington, D.C. 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
AUG 31 11 44 AM '00

Re: Request for Advisory Opinion from
New York State Democratic Committee
AOR Number 2000-23

Dear Sir or Madam:

I am counsel to Regina Seltzer. Mrs. Seltzer is a candidate in a primary election against Michael Forbes seeking the Democratic Party's nomination for New York's First Congressional District.

I have been informed that the New York State Democratic Committee ("NYSDC") has submitted a request seeking the Federal Election Commission's opinion that the Federal Election Act ("FEA") preempts Section 2-126 of the New York Election Law. I write to bring to your attention certain salient facts that may have been omitted from NYSDC's submission, a submission that NYSDC has not shared with me.

Section 2-126 of the New York State Election Law precludes a political party from spending its members' money in aid of the candidacy of a person in a contested primary election. The statute protects the membership's contributions from being misapplied by ensuring that the officers of the political party only spend the members' funds upon candidates that a majority of the members have selected. The statute also precludes the officers of a political party from using the memberships' contributions to steamroll the candidate selected by the officers past the membership. In this regard, the statute serves the salutary purpose of ensuring that the officers of the political party

faithfully discharge their fiduciary duty to the membership of the party and that those persons seeking the party's nomination are treated equally by the political party.

In direct contravention of Section 2-126, NYSDC ran radio and television advertisements laudatory of Mr. Forbes. In early July, 2000, Mrs. Seltzer brought a lawsuit pursuant to Section 2-126 seeking to enjoin NYSDC from running the advertisements. NYSDC removed the proceeding to the United States District Court for the Eastern District of New York claiming that the FEA preempted Section 2-126. The Court in a nine-page decision, a copy of which is attached, scrutinized the question raised by NYSDC and determined that the FEA did not preempt Section 2-126. Essential to the Court's reasoning is that Section 2-126, which restrains a political party from expending members' funds in a contested primary election, is outside the legislative sphere of the FEA. The governance of a political party and, in particular, the manner in which it decides how or how not to spend its members' contributions, is not within the scope of the FEA. Accordingly, the Court correctly found that the FEA did not preempt Section 2-126.

I trust that after you review the enclosed decision, you will agree with the Court's analysis.

Very truly yours,

Eric H. Seltzer

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

REGINA SELTZER,

Petitioner,

-against-

NEW YORK STATE DEMOCRATIC COMMITTEE, JUDITH HOPE, State Chair, and DAVID ALPERT, Treasurer,

Respondents.

MEMORANDUM AND ORDER
00-CV-4077 (JS) (ARL)

Appearances:

For Petitioner: Regina Seltzer, Esq., pro se
30 South Brewster Lane
Bellport, New York 11713

For Respondents: John J. Leo, Esq.
229 Main Street
Huntington, New York 11743

SEYBERT, District Judge:

Pending before the Court is Petitioner Regina Seltzer's ("Petitioner") motion to remand this action to the New York Supreme Court, Suffolk County on the ground that no federal jurisdiction is present. Respondents New York State Democratic Committee, Judith Hope, and David Alpert ("Respondents") oppose. Petitioner, who is a candidate for the Democratic nomination for United States Representative in New York's First Congressional

District, urges the Court to rule quickly on the motion because the Democratic primary election is scheduled for September 12, 2000. For the reasons discussed below, the motion to remand is GRANTED.

Petitioner commenced this action by Order to Show Cause in the Supreme Court, Suffolk County, on July 10, 2000. Petitioner sought an order enjoining the Respondents from unlawfully expending party funds in violation of New York Election Law § 2-126 on behalf of Petitioner's putative primary opponent, Michael Forbes. Petitioner alleged that the Respondents had admitted that they had paid for radio advertisements on Forbes' behalf, that she had informed Respondants that she also was a candidate for the same office, that she had informed Respondents that such conduct violated § 2-126, but that Respondents continued to run the ads and expend party funds in violation of the statute.

Respondents removed this action to federal couft on July 19, 2000, pursuant to 28 U.S.C. § 1441. Respondents alleged in their Notice of Removal that this Court has original jurisdiction over this matter under the Federal Election Campaign Act, 2 U.S.C. §§ 431 et seq. ("FECA"). Petitioner promptly moved to remand on the ground that this action was improperly removed

and that this Court has no jurisdiction, because the action arises solely under New York law and because FECA contains no provision parallel to that found in the New York law under which Petitioner has brought this action.

New York Election Law § 2-126 governs and restricts expenditures of political party funds prior to contested primary elections. The section states that

> No contributions of money, or the equivalent thereof, made, directly or indirectly, to any party, or to any party committee or to any person representing or acting on behalf of a party or party committee, or any moneys in the treasury of any party, or party committee, shall be expended in aid of the designation or nomination of any person to be voted for at a primary election either as a candidate for nomination for public office, or for any party position.

N.Y. Election Law § 2-126 (McKinney's 1998). In short, this section of the Election Law prohibits a New York political party, or party committee, from playing favorites. Political parties, or party committees, are forbidden to spend or contribute money to a candidate who is facing a challenge in the party's primary election. See Baran v. Giambra, 265 A.D.2d 796, 705 N.Y.S.2d 740, 741 (4th Dep't 1999) (discussing purpose of § 2-126).

In the present case, this section of New York law at first glance appears to run head-on into Section 453 of the Federal Election Campaign Act. This section of federal law

provides that "[t]he 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." 2 U.S.C. § 453 (West 1997).

Here, Petitioner is running for a seat in the United States House of Representatives. There is no doubt that the office being sought by Petitioner is a "Federal office" as defined in FECA. "The term 'Federal office' means the office of . . . Senator or Representative in . . . the Congress." 2 U.S.C. § 431(3). Therefore, the question presented is whether § 2-126 of the New York Election Law has been preempted by FECA.

"A fundamental principle of the Constitution is that Congress has the power to preempt state law." Crosby v. National Foreign Trade Council, — U.S. —, 120 S. Ct. 2288, 2293 (2000) (citing Const. Art. VI, cl. 2). Federal law preempts state law when preemption is "the clear and manifest purpose of Congress." CSX Transportation, Inc. v. Easterwood, 507 U.S. 658, 664 (1993) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Where, as here, there exists an express preemption clause such as that found in § 453, "the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best

evidence of Congress' preemptive intent." Id.; see also Weber v. Heaney, 995 F.2d 872, 875 (8th Cir. 1993) (noting that congressional intent is the "touchstone" of the analysis into whether FECA preempts a particular state law).

Turning to the plain language of the federal statute, the Court determines that Congress could not have been more clear. Congress explicitly provided that the "provisions" and "rules prescribed under" the Federal Election Campaign Act "supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. § 453. Thus, to the extent that FECA's provisions and rules occupy the same sphere as state law, FECA preempts and supersedes the state law.

This interpretation of § 453 is consistent with the sparse case law, which reflects that FECA is given "a narrow preemptive effect in light of its legislative history." Stern v. General Electric Corp., 924 F.2d 472, 475 & n.3 (holding that FECA did not preempt state regulation of corporate political spending). In other words, when Congress specifically expresses and defines its intent to preempt, as it has done in § 453, such specificity "implies that matters beyond that reach are not preempted." Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992). Therefore, with Congress having defined the scope of

FECA preemption, the Court's only remaining task is "to 'identify the domain expressly pre-empted by [this section].'" Weber, 995 F.2d at 875 (quoting Cipollone, 505 U.S. at 517) (brackets in original).

In determining the terrain occupied by FECA, the Court turns to the Commission's own position on preemption as set forth in the Code of Federal Regulations. The applicable regulation states that federal law specifically supersedes state law regarding "(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 C.F.R. § 108.7.[1] The situation presented here - the alleged expenditure of money by the Respondents in favor of a candidate in a primary race - is not encompassed within these three areas. Accordingly, there is ample room in the field of election law for the co-existence of both New York Election Law § 2-126 and FECA, and FECA does not preempt the state statute.

[1]The C.F.R. also sets forth five areas where the FECA does not supersede State laws, none of which are applicable here. See 11 C.F.R. § 108.7(c).

Also telling is the fact that when Respondents removed this action, they cited to several provisions of FECA which they allege confer jurisdiction in this Court. See Notice of Removal, ¶ 3. However, none of the cited provisions do what Respondents claim. In addition to citing § 453, which as discussed above does not confer jurisdiction on this Court, Respondents cite to 2 U.S.C. § 437c, which deals only with the creation and administration of the Federal Election Commission. Respondents cite to § 437d, which deals only with the powers and authority of the Commission. Respondents cite to § 437f, dealing with the Commission's issuance of advisory opinions and other various procedures. Respondents cite to § 437g, which sets forth the method by which any person who believes that FECA has been violated may file and pursue a complaint with the Commission. Respondents also cite to § 437h, which deals only with judicial review of the constitutionality of FECA. Respondents cite to § 438, which deals with the duties of the Commission. Respondents also cite to §§ 441a(a)(1) and 441a(a)(2), which -- while getting a little closer to the pertinent issue -- deal only with contributions to candidates and political committees. Thus, no part of the statute cited by Respondents confers jurisdiction in this Court, despite the language of the Notice of Removal.

Finally, and perhaps most importantly, removal was improper because this Court has no jurisdiction to entertain an action under FECA. Pursuant to § 437d(e), and subject only to one exception, the Federal Election Commission - and only the Federal Election Commission - has power to initiate civil actions under FECA. The exclusive civil remedy for enforcing FECA is an action brought by the Commission. 2 U.S.C. § 437d(e). The only exception to the Commission's exclusive power to bring suit to enforce the provisions of FECA is found in § 438g(a)(8), which provides that any person aggrieved by an order of the Commission may file a petition in the United States District Court for the District of Columbia. 2 U.S.C. § 438g(a)(8).

Thus, even if Petitioner originally had brought a FECA action in federal court in this district, the action would have been subject to dismissal for lack of subject matter jurisdiction. This jurisdictional defect is no less significant simply because the action was removed to this Court by Respondents. Either way, the action cannot proceed in this forum.

Therefore, for the reasons discussed, the Court holds that Section 2-126 of the New York Election Law is not preempted by the Federal Election Campaign Act, and that FECA does not

purport to govern the type of alleged primary election expenditures challenged here. The Court further holds that it has no jurisdiction over this action, and that this matter was improperly removed from state court. The motion to remand is therefore GRANTED.

The Clerk of the Court is directed to remand this case to New York State Supreme Court, Suffolk County, where it originated under index number 16954-2000, and thereafter to close this case.

SO ORDERED.

Joanna Seybert

Joanna Seybert, U.S.D.J.

Dated: Uniondale, New York
August 18, 2000