FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 2, 1981

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1981-27

The Honorable Bill Archer
House of Representatives
Washington, D.C. 20515

Dear Congressman Archer:

This responds to your letter of May 21, 1981, and attachments, requesting an advisory opinion on your behalf concerning preemption by the Federal Election Campaign Act of 1971, as amended (the Act"), of a Houston, Texas ordinance requiring that a specific "warning" be affixed to all political advertising materials placed, posted or erected in Houston.

Enclosed with your letter was a copy of the recently enacted election ordinances which included both the specific "warning" of concern to you and anti-littering sections. The warning reads as follows:

> "Warning: Placement, posting or erection of this material within the City of Houston is regulated by Sections 3-2 and 3-3 of the City's Code of Ordinances and Chapter 46 of the City's Building Code; violation thereof is punishable by a fine of up to $200."

Sections 3-2 and 3-3 of the City's Code of Ordinances prohibit the painting of political advertising matter on curbs, sidewalks, bridges or public buildings, or the posting of such advertising matter on utility poles, trees, traffic signs and in any other public place in the City of Houston. Specifically, you ask if it will be necessary to affix this warning to all future political advertising materials used in Houston for Federal election purposes, or if the Act supersedes this local ordinance.

The Act and regulations prescribed thereunder "supersede and preempt any provision of state law with respect to election to Federal office." 2 U.S.C. 453. The House Report states in part that "[t]he provisions of the conference substitute make it clear that the Federal law occupies the field with respect to criminal sanctions relating to limitations on campaign expenditures, the

sources of campaign funds used in Federal races, the conduct of Federal campaigns, and similar offenses, but does not affect the States' rights to prohibit false registration, voting fraud, theft of ballots, and similar offenses under State law." [*]

Commission regulations embody this legislative intent by explaining that the Act and regulations thereunder supersede and preempt State law with respect to: the organization and registration of political committees supporting Federal candidates, the reporting and disclosure of political contributions and expenditures to and by candidates for Federal office and political committees supporting them, and limitations on contributions and expenditures regarding Federal candidates and political committees. 11 CFR 108.7(b).

2 U.S.C. 441d and 11 CFR 110.11 require notice of the identity of the persons who paid for or who authorized any communication expressly advocating the election or defeat of a clearly identified candidate. The ordinance's requirement that the "warning" be affixed to all political advertising materials in Houston, Texas exceeds the Act's disclosure requirements. Thus, because of the ordinance's excessive mandate in this regard, the issue is whether 2 U.S.C. 441d of the Act and 11 CFR 110.11 of Commission regulations supersede and preempt this Houston ordinance.

In Advisory Opinion 1978-24, copy enclosed, the Commission addressed the relationship of 2 U.S.C. 441d to a Washington State statute requiring party designation on all campaign advertising. The Commission considered 2 U.S.C. 453 and its legislative history in concluding that 2 U.S.C. 441d and relevant Commission regulations superseded and preempted the Washington law. The same conclusion for the same reasons was reached in Advisory Opinion 1980-36 (preemption of an Ohio statute relating to political communications by 2 U.S.C. 441d), copy enclosed. Thus, the Commission concludes that the Act supersedes and preempts the Houston ordinance as that ordinance relates to the physical placement of a "warning" on all political campaign materials placed, posted or erected in Houston, Texas, with respect to any election to Federal office. Therefore, it will not be necessary to affix the "warning" to any political advertising materials used in a Federal election campaign in Houston.

The Commission's approach in this particular opinion and other opinions concerning the application of 2 U.S.C. 453 accords with the Supreme Court's consideration of similar Federal preemption language in other Federal statutes. For example, in considering a preemption issue under the Employee Retirement Security Act of 1974 (ERISA), the Supreme Court reiterated its long-standing approach to such problems: "[O]ur analysis ... must be guided with respect to the separate spheres of governmental authority preserved in our federalist system." Alessi v. Raybestos-Manhattan, Inc., 49 U.S.L.W. 4503, 4507 (May 18, 1981). The Court continued with language that has recurred in many preemption decisions:

> [p]reemption of state law by Federal statute or regulation is not favored 'in the absence of persuasive reasons - either that the nature of the regulated subject matter permits no other conclusions, or that the Congress has unmistakably so ordained.' Alessi, Id. at 4507 citing Chicaco & N.W. Transp. Co. v Kalo Brick &

[*] House Report of the Committee on Conference on the Federal Election Campaign Act Amendments of 1974 (Report No. 93-1438, 93d Cong., 2d Sess., 69, 1974).

Tile Co., 101 S.Ct. 1124, 1130 (1981) which quotes Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963).

The Commission, in reaching its conclusion that the Act preempts the Houston ordinance, 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. This conclusion is based upon Commission regulations which state that: "the Federal law ... does not affect the States' rights to prohibit false registration, voting fraud, theft of ballots, and similar offenses under state law." 11 CFR 108.7(c)(4). The Commission views state or local regulations and statutes that apply to the placement and location of campaign advertisements as outside the purview of 2 U.S.C. 453, since they do not relate to identifying the sponsor of the advertising and thus are not integral to the disclosure purpose that undergirds 2 U.S.C. 441d. Therefore, although the "warning" need not be affixed to political advertising materials used in a Federal election campaign, political campaign advertising materials used in Houston are otherwise subject to the restrictions outlined in the City's Code of Ordinances.

This response constitutes an advisory opinion concerning the application of a general rule of law stated in the Act, or prescribed as a Commission regulation, to the specific factual situation set forth in your request. See 2 U.S.C. 437f.

Sincerely yours,

(signed)

John Warren McGarry
Chairman for the
Federal Election Commission

Enclosures (AO 1978-24, 1980-36)