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FOLEY & LARDNER LLP
ATTORNEYS AT LAW

WASHINGTON HARBOUR
3000 K STREET, N.W., SUITE 500
WASHINGTON, D.C. 20007-5143
202.672.5300 TEL
202.672.5399 FAX
www.foley.com

WRITER'S DIRECT LINE
202.295.4081
cmitchell@foley.com EMAIL

CLIENT/MATTER NUMBER
999100-0101

VIA HAND DELIVERY

Mr. Lawrence Norton
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

AOR 2004-29

Re: Advisory Opinion Request – Rep. Todd Akin & Todd Akin for Congress
Expedited Request

Dear Mr. Norton:

This firm serves as counsel to Rep. Todd Akin & Todd Akin for Congress (collectively "Requester") which together submit this request for an Advisory Opinion from the Federal Election Commission ("the Commission" or "the FEC") pursuant to 2 U.S.C. §437f and 11 C.F.R. §112.1. Because the primary election is scheduled for August 3, 2004, Requesters respectfully request the Commission's expedited review of this Advisory Opinion Request pursuant to 11 C.F. R. §112.4(b).

Basis of Questions:

Rep. Todd Akin (R-MO) is a member of the United States House of Representatives, elected from the Second District of Missouri. Todd Akin for Congress is the principal authorized campaign committee of Congressman Akin in his capacity as a candidate for the House of Representatives.

On August 3, 2004, the state of Missouri will conduct its primary elections. Rep. Akin is a candidate for re-election whose name will appear on the Republican primary ballot in the 2d congressional district.

Also, on the August primary ballot in all congressional districts are two ballot questions to be voted on by the people of Missouri on the same date. The Missouri Secretary of State has certified two ballot measures for the August 3, 2004 primary election, as follows:

1. A proposed Amendment to the Missouri State Constitution to Expand Gambling in the State of Missouri, as more fully described in the attached Official Ballot Title ("Gambling Question", Exhibit A); and

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2. A proposed Amendment to the Missouri State Constitution to provide that to be valid and recognized in the state of Missouri, a marriage shall exist only between a man and a woman, as more fully described in the attached Official Ballot Title ("Defense of Marriage Amendment", Exhibit B).

There are committees established pursuant to Missouri law to support / oppose the respective ballot questions: The Coalition to Protect Marriage in Missouri, Missourians for Marriage, and the Show Me You Care Committee. Rep. Akin did not establish or finance and does not maintain or control any of the committees established by others to support the Defense of Marriage Amendment or to oppose the Gambling Amendment.

Because of the recent amendments to the Federal Election Campaign Act of 1971 as amended, 2 U.S.C. §431 *et seq* ("FECA" or "the Act") in the Bipartisan Campaign Reform Act of 2002, ("BCRA"), Requesters seek the Commission's Expedited Advisory Opinion on the following questions:

1. Is it permissible under the Act, specifically 2 U.S.C. §§439a, for Rep. Todd Akin to make direct contributions from campaign funds received by Todd Akin for Congress to one or more of the committees established to support the Defense of Marriage Amendment, or to a committee established for the purpose of opposing the Gambling Amendment?

2. Is it permissible under the Act, specifically 2 U.S.C. §441i(e) for Rep. Akin to solicit contributions for Todd Akin for Congress with the stated purpose in the solicitation that funds received may be used to support passage of the Defense of Marriage Amendment or to oppose the Gambling Amendment?

3. Is it permissible under the Act for Rep. Akin to appear in ads paid for by Missourians for Marriage, the Coalition to Protect Marriage in Missouri or any other registered committee in advertisements sponsored and paid for by Missourians for Marriage or the Coalition to Protect Marriage in Missouri? Does it make a difference if Todd Akin for Congress has contributed to the committee sponsoring the ads?

4. Is it permissible under the Act for Rep. Akin to personally appear in television and radio advertisements in support of the Defense of Marriage Amendment where such advertisements are both sponsored and paid for by Todd Akin for Congress, are independent of any other committee or candidate and which appear in media markets that include areas both within and outside of his congressional district? Must the script for such an advertisement include a reference to Rep. Akin's candidacy for reelection or is a reference to his position as a member of the United States House of Representatives sufficient?

5. Is it permissible under the Act for Rep. Akin to personally appear in television and radio advertisements in opposition to the Gambling Question, where such advertisements are both sponsored and paid for by Todd Akin for Congress, and which appear in media markets that include areas both within and outside of his congressional district?

6. Is it permissible under the Act for Rep. Akin to make direct contributions from Todd Akin for Congress funds to candidates for state and local office in the State of Missouri as a further means of supporting these issues?

Factual Background

Rep. Akin is a staunch opponent of the Gambling Question and a strong proponent of the Defense of Marriage Amendment. During Rep. Akin's tenure as a member of the Missouri legislature and continuing since his election to the U.S. House of Representatives, he has been known within the State of Missouri as the leader of efforts to enact a constitutional amendment to recognize only marriage between a man and a woman as legally valid in the State of Missouri. Rep. Akin is further one of the primary sponsors of the H.J.Res. 56, known as the Federal Marriage Amendment and HR 3313, the Marriage Protection Act of 2003, either or both of which may be voted upon by the U.S. House of Representatives in September, 2004.

Rep. Akin's constituents and campaign supporters have called upon him to serve in a leadership capacity to help promote passage of the Defense of Marriage Amendment by the voters of Missouri at the August 3, 2004 primary election and Rep. Akin is willing to respond to those requests. Likewise, Rep. Akin has been a long time opponent of expanded casino gambling in the State of Missouri and is known as the primary anti-gambling leader in the State of Missouri. Rep. Akin seeks the Commission's guidance as to how he may be involved and how he may use his campaign funds and his position to promote passage of the Defense of Marriage Amendment and to oppose the Gambling Amendment in Missouri.

Rep. Akin submits that he is dedicated to these causes and he pledged during his campaigns for Congress his ongoing and visible involvement in these issues. Rep. Akin's constituents and primary political supporters expect him to fulfill his pledge of active leadership in the campaign efforts involving these two important issues which have significantly informed his public service career and are vital to his platform as a candidate and his official responsibilities as a member of the House of Representatives. Rep. Akin further advises the Commission that his official duties as a member of the House of Representatives involve leadership efforts on issues related to moral values, especially the defense of marriage at both the federal and state levels.

Legal Issues

For purposes of applying the Commission's guidance in Advisory Opinion 2003-12, it should be noted that Rep. Akin was not involved in establishing any of the committees now in existence to support the Defense of Marriage Amendment or to oppose the Gambling Amendment. The Missouri legislature placed the Defense of Marriage Amendment on the ballot and political opponents of Rep. Akin circulated the petitions to place the Gambling Amendment on the statewide primary ballot.

Contrasting Rep. Akin's intent and activities from those of Rep. Jeff Flake (R-AZ) in AO 2003-12, Rep. Akin does not seek to solicit or disburse contributions not subject to the Act's limitations and prohibitions. Rather, Rep. Akin wishes to solicit contributions to his campaign that could be used in the support of or opposition to the respective ballot issues. All funds solicited, received or spent by Todd Akin for Congress will be subject to the Act and duly reported to the FEC.

Likewise, Rep. Akin wishes to appear in advertisements paid for by his campaign committee, all of which contributions and expenditures are "funds subject to the limitations, prohibitions, and reporting requirements of th[e] Act" as provided in 2 U.S.C. §441i(e). However, instead of urging

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voters to support his reelection, the scripts would call for the voters to support the Defense of Marriage Act or to oppose the Gambling Amendment. Such disbursements will be in keeping with the Act's restrictions on the solicitation of funds not subject to the Act by federal officeholders.

Contributions made by Rep. Akin to candidates for state and local office with funds from Todd Akin for Congress are obviously in compliance with the provisions of 2 U.S.C. §441i(e) in that all such funds are subject to the limitations, prohibitions and reporting requirements of the Act. Rep. Akin submits that part of his official duties as well as maintaining his political viability require making contributions to state and local candidates in Missouri who support his views on these important issues and such disbursements would be in compliance with the provisions of the Act.

Rep. Akin advises further that his desired activities involving the ballot issues are important to his campaign and to help expand his base of supporters (11 C.F.R. §113.2). In addition, his appearances in person and through media advertisements would be in his official capacity as a member of Congress and he would be identified as such in each appearance. Rep. Akin submits that because he has staked out a leadership role on these issues as a member of the House of Representatives on legislation pending before the Congress, the disbursement of his campaign funds should be deemed to constitute an ordinary and necessary expense incurred in connection with his duties as a member of the House of Representatives. 2 U.S.C. §439a(a) and 11 C.F.R. §113.2(a)(1).

Rep. Akin's willingness to appear in ads paid for by the committees supporting or opposing the respective ballot issues would not be in the nature of soliciting contributions but rather articulating his positions on the issues and exhorting citizens who share his views to vote accordingly on August 3 regarding the issues. Some of the advertisements may appear in his congressional district and others would not.

In applying the Commission's reasoning in Advisory Opinion 2004-1, Rep. Akin is deemed to be 'materially involved' in the communications paid for by the ballot committee by virtue of any public appearance in the advertisement, citing Advisory Opinion 2003-25.1. However, the communication would not meet the content standards of 11 C. F. R. §109.21(c) if broadcast outside of Rep. Akin's district because the content of the advertisements would not be broadcast to the 'relevant electorate' (for electioneering communications under 11 C.F.R. §100.29(a)(3) and would contain no reference to a political party.

The more difficult question is whether under the Commission's recently promulgated regulations under the regulations and BCRA's provisions regarding 'coordinated public communications' at 11 C.F.R. §109.21 preclude Rep. Akin from appearing in advertisements broadcast within his congressional district if paid for by one or more the committees established to support and oppose the respective ballot questions. Rep. Akin seeks the Commission's guidance on that subject.



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Please contact the undersigned at (202) 295-4081 if there are any questions or if the Commission needs additional information.

Thank you for your prompt consideration.

Sincerely,

A handwritten signature in black ink that reads "Cleta Mitchell". The signature is written in a cursive, flowing style.

Cleta Mitchell, Esq.
Counsel to Rep. Todd Akin & Todd
Akin for Congress

Attachments

cc: The Honorable Todd Akin



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2004 Ballot Measures

The following ballot measures have been certified for the *August 3, 2004* primary election.

Official Ballot Title
Constitutional Amendment 1

[Full Text]

(Proposed by Initiative Petition)

Shall the Missouri Constitution be amended to authorize floating gambling facilities on or adjacent to the White River in Rockaway Beach, Missouri, to be licensed and regulated consistent with all other floating facilities in the State of Missouri, with fifty percent of the state revenues generated in the current year to be used for uniform salary supplement grants to all high quality teachers employed in priority schools, and the remaining state revenues generated in the current year to be distributed to all priority school districts on a per pupil basis for capital improvements to education facilities?

This constitutional amendment will generate annual direct gaming revenue ranging from \$39.9 to \$49.0 million for the state and \$10.2 to \$12.4 million for the local government, subject to local voter approval and licensing by the State Gaming Commission. The amount of indirect revenue or expense, if any, is unknown.

ATTACHMENT A

Official Ballot Title
Constitutional Amendment 2

[Full Text]

ATTACHMENT B

Proposed by the 92nd General Assembly (Second Regular Session) SJR 29

Shall the Missouri Constitution be amended so that to be valid and recognized in this state, a marriage shall exist only between a man and a woman?

The estimated fiscal impact of this proposed measure to state and local governments is \$0.

The following ballot measures have been certified for the *November 2, 2004* general election.

To date, no ballot measures have been approved for the November 2, 2004 general election.

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Office of the Secretary of State, Missouri - Matt Blunt
State Capitol, Room 208 and State Information Center, 600 W. Main
Jefferson City, MO 65101 • (573) 751-4936 • SOSmain@sos.mo.gov
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