No. _____

In The
Supreme Court of the United States

THOMAS CHARLES HORNE, ATTORNEY GENERAL;
KATHLEEN A. WINN,

Petitioners,

V.

SHEILA SULLIVAN POLK, IN HER OFFICIAL CAPACITY
AS THE YAVAPAI COUNTY ATTORNEY,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

APPENDIX

DENNIS I. WILENCHIK
Counsel of Record
JOHN D. WILENCHIK
WILENCHIK & BARTNESS, P.C.
2810 N. Third St.
Phoenix, AZ 85004
(602) 606-2810
diw@wb-law.com
jackw@wb-law.com
admin@wb-law.com
Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

APPENDIX TABLE OF CONTENTS

FILED

JUN 25 2020
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THOMAS CHARLES HORNE, Attorney General Committee; KATHLEEN WINN, Plaintiffs-Appellants, vs. SHEILA SULLIVAN POLK, in her official capacity as the Yavapai County Attorney, Defendant-Appellee.	No. 19-15942 D.C. No. 3:18-cv-08010-SPL MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the District of Arizona
Steven Paul Logan, District Judge, Presiding
Seattle, Washington

Submitted May 4, 2020** Seattle, Washington

Before: KLEINFELD, W. FLETCHER, and RAWLINSON, Circuit Judges.

Thomas Horne and Kathleen Winn ("plaintiffs") sued Sheila Polk under 42U.S.C. § 1983, alleging that Polk violated their due process rights when, in her role as Yavapai County Attorney, she served as both advocate and adjudicator in an Arizona administrative action brought against them. Below, Polk moved to dismiss, arguing *inter alia* that she was entitled to judicial immunity and that plaintiffs' claim was time-barred. The district court ultimately held that *Heck v. Humphrey*, 512 U.S. 477 (1994), did not apply, and therefore accrual of plaintiffs' cause of action was not tolled pending the Arizona Supreme Court's decision that Polk had violated their due process rights. *See Horne v. Polk*, 394 P.3d 651 (Ariz. 2017). The district court also held that Polk was not entitled to judicial immunity.

Plaintiffs appealed, and Polk cross-appealed the judicial immunity determination. We have jurisdiction under 28 U.S.C. § 1291, and we review de novo a district court's dismissal based on the statute of limitations. *Mills v. City of Covina*, 921 F.3d 1161, 1165 (9th Cir. 2019). We affirm.

The applicable limitations period is two years. *See TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir.

1999); Ariz. Rev. Stat. § 12-542. "Under federal law, a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Klein v. City of Beverly Hills*, 865 F.3d 1276, 1278 (9th Cir. 2017) (internal quotation marks omitted).

Plaintiffs knew or had reason to know of their injury when Polk, who rendered the final decision in their administrative case, admitted in a brief to the Arizona Court of Appeals that she was also "involved with the prosecution of the case, by assisting with the preparation and strategy." That brief was filed in February 2015. Yet the plaintiffs did not bring their § 1983 claim until January 2018, after their administrative case had been resolved upon remand. Their claim was therefore not made within two years of its accrual.

Plaintiffs argue that because *Heck* has been applied in the context of § 1983 claims stemming from prison disciplinary proceedings, which are administrative in nature, it may therefore be applied to the § 1983 claim stemming from their administrative case. *See Edwards v. Balisok*, 520 U.S. 641, 646 (1997) (applying *Heck* in a prison disciplinary context); *see also Muhammad v. Close*, 540 U.S. 749, 754 (2004) (characterizing "prison disciplinary proceedings" as "administrative determinations"). Plaintiffs' argument is overbroad. *Heck* applies where there is an underlying criminal conviction or sentence. Its limited extension involves a species of administrative decisions that the Supreme Court has acknowledged is similar to criminal proceedings. *See Edwards*, 520 U.S. at 647 (analogizing the prison disciplinary petitioner in question to a criminal defendant). Plaintiffs'

administrative case, on the other hand, involved only a monetary penalty.

Because we hold that plaintiffs' § 1983 action is time-barred, we do not reach the question presented in Polk's cross-appeal of the district court's decision on judicial immunity.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-18-08010-PCT-SPL

Thomas Horne, et al.,
Plaintiffs,
vs.

Sheila Sullivan Polk,
Defendant.

ORDER

Plaintiffs' Thomas Horne and Kathleen Winn (the "Plaintiffs") filed suit against Yavapai County Attorney Sheila Polk (the "Defendant") alleging violations of their due process rights pursuant to 42 U.S.C. § 1983. (Doc. 1) The defendant moved to dismiss the Plaintiffs' claims (Doc. 12), which the Court denied on February 26, 2019. (Doc. 20) The Plaintiff filed a motion for reconsideration (the "Motion") on March 11, 2109. (Doc. 21) For the reasons set forth below, the Motion is granted.

Reconsideration is disfavored and "appropriate only rare circumstances." *WildEarth Guardians v. United States Dep't of Justice,* 283 F. Supp.3d 783, 795 n., 11 (D. Ariz. June 21, 2017); *see also Bergdale v. Countrywide Bank FSB,* No. CV-12-8057-PCT-SMM, 2014 WL 12643162, at *2 (D. Ariz. May 23, 2014) ("[Reconsideration] motions should not be used for the purpose of asking a court to

rethink what the court had already thought through-rightly or wrongly.") A motion for reconsideration will be granted only where the Court "(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Sch. Dist. No. 1J, Multnomah Cty., Or. V. ACandS, Inc.,* 5 F.3d 1255, 1263 (9th Cir. 1993).

The Defendant requests for the Court to reconsider its prior Order (Doc. 20) because the Court incorrectly applied the standard for determining when the Plaintiffs' due process claim accrued. (Doc. 21 at 5) The Defendant argues that the Court incorrectly applied the standard for a malicious prosecution claim instead of the standard for a due process claim, which accrues at the time due process is denied. (Doc. 21 at 5) The basis for the Motion is derived from the Court's statement that "[i]I is well settled that a claim pursuant to 42 U.S.C. § 1983 brought on the basis of malicious prosecution does not accrue until criminal proceedings terminate in favor of the accused." (Doc. 20 at 8) In support of this statement, the Court followed it with a parenthetical stating that "the *Heck* precedent applies to all plaintiffs' civil rights claims, and the statute of limitations begins when the Arizona Supreme Court declines to review an appeal." (Doc 20 at 8)

Federal law determines when a federal civil rights claim accrues. *Wallace v. Kato,* 549 U.S. 384 (2007) (stating "the accrual date of a § 1983 cause of

action is a question of federal law that is not resolved by reference to state law."); *Morales v. City of Los Angeles,* 214 F.3d 1151, 1154 (9th Cir. 2000). Under federal law, a claim accrues "when the plaintiff knows or has reason to know of the actual injury" that is the basis of the cause of action. *Wallace,* 549 U.S. at 384 (2007) (stating that accrual occurs when the plaintiff has a complete and present cause of action); *Lukovski v. City & County of San Francisco,* 535 F.3d 1044, 1051 (9th Cir, 2008); *Hoesterey v. City of Cathedral City,* 945 F.2d 317, 318 (9th Cir. 1991) (stating the general rule for the accrual of 42 U.S.C. § 1983 claims is "a cause of action generally accrues when a plaintiff knows or has reason to know of the injury which is the basis of his action."). In a § 1983 action for a substantive due process violation, the injury giving rise to the claim is complete when there is an abuse of power by and official acting under color of law that shocks the conscience. *Reiss v. Arizona Dep't of Child Safety,* 2018 WL 6067258, at 8 (D. Ariz. Nov. 20, 2018) (citing *City of Sacramento* The Defendant argues that the Plaintiffs' due process claim accrued in May 2014 when the Defendant issued her final administrative decision. (Doc. 21 at 4) Alternatively, the Defendant argues that the Plaintiffs' claim accrued in February 2015 when the Defendant stated that she was involved in both the prosecution and adjudication of the case against the Plaintiffs. (Doc. 21 at 4) In response to the Motion, the Plaintiffs' argued that the statute of limitations for their due process claims did not begin until the Plaintiffs' appeals of the Defendant's final

administrative decision were completed because the Plaintiffs could not have moved forward with the present litigation until those appeals were fully complete. (Doc. 27 at 4; Doc. 15 at 14-17) In support of this argument, the Plaintiffs cited the *Heck* precedent to argue that a statute of limitations cannot begin to run until it is possible to file a lawsuit. (Doc. 15 at 14)

In *Heck v. Humphrey,* the Supreme Court of the United States held that a § 1983 claim for damages is not cognizable when the basis for the § 1983 claim call into question the lawfulness of a conviction. *Heck v. Humphrey,* 512 U.S. 477, 483 (1994). The Supreme Court used malicious prosecution as an analogy and ultimately held that "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions who unlawfulness would render a conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal." *Heck,* 512, U.S. at 487. Furthermore, "[a] claim for damages bearing that relationship to a conviction or sentence that has been so invalidated is not recognizable under § 1983." *Id.* However, *Heck* applies only when there is an extant conviction. *Bradford, v. Scherschligt,* 803 F.3d 382, 386 (9th Cir. 2005) stating that *Heck* tolling does not apply when a plaintiff does not fact criminal charges); *Printup v. Dir., Ohio Dep't of Job and Family Servs.,* 654 F. App'x 781, 791 (6th Cir. 2016) (stating that *Heck* does

not apply to cases that do not involve criminal conviction).

It is undisputed that the Plaintiffs' claim arises out of the Defendant's involvement in their prosecution for violations of campaign finance laws. (Doc. 12 at 12) However, the prosecution was administrative in nature, and the exclusive remedy for a violation of A.R.S § 16-924 is civil penalties, *Pacion v. Thomas,* 236 P.3d 395, 396 (2010). Throughout their response to the motion to dismiss (Doc. 15), the Plaintiffs describe their claim as both one for "unconstitutional prosecution" and "for violation of due process." (Doc. 15 at 15) However, it is clear to the court that the Plaintiffs' are bringing their § 1983 claim on the basis of the Defendant's violation of their substantive due process rights. Therefore, the Court erred in applying the *Heck* precedent to determine when the Plaintiffs" § 1983 claim accrued.

The injury giving rise to a § 1983 claim is complete when there is an abuse of power by an official acting under color of law that shocks the conscience. *City of Sacramento,* 523 U.S. at 846. Therefore, the Plaintiffs' § 1983 substantive due process claim would have accrued upon the Plaintiffs' knowledge of the deprivation of their constitutional interest. *Reiss,* 2018 WL 6067258 at 8 (citing *City of Sacramento,* 523 U.S. at 834). The parties do not dispute that the applicable statute of limitations period for the Plaintiffs' § 1983 claim is two years. (Doc. 12 at 14; Doc. 15 at 15); *Normandeau v. City of Phoenix,* 516 F. Supp 2d 1054, 1065 (D. Ariz. 2005) (stating that in Arizona,

the statute of limitations for actions pursuant to 42 U.S.C. § 1983 is two years).

The Defendant argues that the Plaintiffs' had knowledge of their injury on February 27, 2015, when the Defendant filed her answer brief to the Plaintiffs' appeal of her final decision before the Arizona Court of Appeals. (Doc. 12 at 15; Doc. 21 at 4) The Plaintiffs concede this fact in their response to the Defendant's motion to dismiss. (Doc. 15 at 2; Doc. 1 at 2-3) Separately, both parties also argue that, due to the administrative nature of the proceedings against the Plaintiffs', the Plaintiffs' cause of action did not accrue until the agency made a final decision. The Defendant argues that the final decision she made in May 2014 started the clock for statute of limitations purposes. (Doc. 21 at 4) The Plaintiffs argue that the stature of limitations period began in July of 2017 when the Plaintiffs received a final judgment in their favor. (Doc. 15 at 15) Because the Court finds that *Heck* tolling does not apply in this case, the Court finds that the Plaintiffs became aware of the Defendant's abuse of power by February 2015, at the latest, which is more than two years prior to the Plaintiffs' bringing their § 1983 claim. Therefore, the Court must find that the Plaintiffs claim is time-barred because this action was initiated in January 2018, more than two years after the Plaintiffs' had knowledge that their due process rights had been violated by the Defendant.

Accordingly,

IT IS ORDERED that Defendant's Motion for Reconsideration (Doc. 21) is granted. IT IS FURTHER ORDERED that the Court's Order (Doc. 20) is vacated;

IT IS FURTHER ORDERED that the Clerk of Court shall terminate this action and enter judgment accordingly.

Dated this 16th day of April, 2019

/s/ Stephen P. Logan
Honorable Steven P. Logan
United State District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-18-08010-PCT-SPL

Thomas Horne, et al.,
Plaintiffs,
vs.

Sheila Sullivan Polk,
Defendant.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order filed April 17, 2019, judgment is entered in favor of defendant and against plaintiffs. Plaintiffs to take nothing, and the complaint and action are here by terminated.

Brian D. Karth
District Court Executive /Clerk of Court

April 17, 2019

By s/E. Aragon
Deputy Clerk

BRIAN M. McINTYRE
COCHISE COUNTY ATTORNEY
P.O. Drawer CA, Bisbee, Arizona 85603 Telephone Number: (520) 432-8700
Attorney@cochise.az.gov
BY: BRIAN M. MCINTYRE, #019200, County Attorney
Enforcement Officer appointed by the Attorney General

OFFICE OF THE YAVAPAI COUNTY ATTORNEY
CAMPAIGN FINANCE PROCEEDING

IN THE MATTER OF, TOM HORNE, individually; Tom Horne for Attorney General Committee (SOS Filer 2010 00003); KATHLEEN WINN, individually; Business Leaders for Arizona) (SOS Filer 2010 00375).	Case No.: CV2020-051932 **Final Administrative Decision (Accepting Recommendation of Administrative Law Judge Decision in Office of Administrative Hearings Case 14F-001-AAG Dated April 14, 2014 and Rejecting Order Requiring Compliance Dated October 17, 2013)**

FINAL DECISION AND ORDER

On April 14, 2014, Administrative Law Judge Tammy Eigenheer ("the ALI") issued her Administrative Law Judge Decision ("the Decision") in Arizona Office of Administrative Hearings Case 14F-001-AAG. The Decision recommends that the Yavapai County Attorney's Order Requiring Compliance, issued October 17, 2013, ("the Order") be vacated. Brian M. McIntyre, Cochise County Attorney and the appointed Enforcement Officer for the Attorney General's Office, has reviewed the Decision and the entire record in this matter. Pursuant to A.R.S. §41-1092.0S(B), the Decision's Findings of Facts and Conclusions of Law are accepted and modified as reflected below.

Findings of Fact:

Findings of Fact ("FOF") 1- 108 are accepted. For ease of reference, additional facts found from review are sequentially numbered:

109. At 2:59 on October 20, 2010 Winn emailed Murray referencing "two very strong personalities debating this moment". (FOF 27) The evidence does not reveal any actual communication between Winn and Home between the subsequent 3:00 p.m. e-mails about BLA's payment to LSG and the 3:11 p.m. e-mail from Winn to Murray containing a revised script and the statement "I think I prevailed no mention of Tom thanks for what you said. I believe this times out let me know." (FOF 28-30) Therefore, the record supports the conclusion that those "strong personalities" did not include Home.

110. The FBI's inaccurate and misleading

summary of the conversations with Mr. Tatham and subsequent inaccurate testimony regarding the same, calls into question the reliability of other hearsay statements offered. (FOF 50-55) The record, unfortunately, supports a conclusion that the investigation being conducted was not a search for the truth, but rather, only intended to shore up conclusions already drawn.

111. On October 27, 2010, Home forwarded an email from Ryan Duchanne, an individual not connected to the Home campaign, to Kathleen Winn after a failed attempt due to using an incorrect email address. It is apparent from the e-mail that Home did not know that at that point, an additional $100,000 in funding had already been secured by BLA. (FOF 38-44) This fact supports the conclusion that the Horne campaign and BLA were not in engaged in coordination. Further, it is clear from the record that the email did not result in any change in activity by BLA.

Conclusions of Law:

Conclusions of Law 1- 60 are accepted.

CONCLUSION

The final agency decision maker "should give deference to the ALJ's credibility findings, [he] may overrule these findings only if [he] finds evidence in the record for so doing." *Ritland* v. *Arizona State Board of Medical Examiners,* 213 Ariz. 187, ¶14 (App. 2006). "The agency must, however, afford an ALJ's credibility findings greater weight than other findings of fact more objectively discernible

from the record. An agency may only depart from those findings if substantial evidence supports such departure." *Id.* at ¶ 8. In the present matter, the AU found Winn and Home to be credible in their testimony. This reviewer can find no substantial evidence to overturn those findings. lndeed, if anything, the record reveals further support for those determinations.

Home and Winn certainly engaged in communication during a time frame which would cause any outside observer to cry foul. The record, however, does not establish by a preponderance of the evidence that this communication was illegal. Both sides to this dispute present equally plausible explanations as to what did or did not occur during that communication. The party bearing the burden, therefore, has failed to meet it. As a result, the Decision's recommendation to vacate the Order Requiring Compliance dated October 17, 2013 is ACCEPTED as modified.

Pursuant to A.RS. §41-1092.0S(F), this is the final administrative decision in this matter.

DATED this 5th day of July, 2017.

COCHISE COUNTY ATTORNEY

BY: /S/ BRIAN M. McINTYRE

Horne v. Polk, 242 Ariz. 226 (2017)

394 P.3d 651, 765 Ariz. Adv. Rep. 16

242 Ariz. 226
Supreme Court of Arizona.

Thomas HORNE, individually and Thomas Horne for Attorney General Committee (SOS Filer ID 2010 00003); Kathleen Winn, individually, and Business Leaders of Arizona (SOS Filer ID 2010 00375), Plaintiffs/Appellants,
v.
Sheila Sullivan POLK, Yavapai County Attorney, Defendant/Appellee.

No. CV-16-0052-PR
|
Filed May 25, 2017

Synopsis

Background: Attorney General, community outreach director of Attorney General's Office, and two campaign committees appealed Special Attorney General's decision finding that they violated campaign finance statutes by illegally coordinating campaign expenditures, exceeding contribution limits, and collecting illegal contributions. The Superior Court, Maricopa County, No. LC2014–000255, Crane McClennen, J., affirmed decision. Attorney General, director, and committees appealed. The Court of Appeals, Thompson, J., 2016 WL 706376, affirmed. Attorney General, director, and committees sought further review, which was granted.

[Holding:] The Supreme Court, Bolick, J., held that due process did not permit Special Attorney General to issue initial decision finding violations of campaign finance laws, to participate personally in prosecution of the case before ALJ, and then to make final agency decision that was subject to deferential judicial review.

Vacated.

Procedural Posture(s): On Appeal.

****653** Appeal from the Superior Court in Maricopa County, The Honorable Crane McClennen, Judge, No. LC2014–000255. **VACATED**

Memorandum Decision of the Court of Appeals, Division One, 1 CA–CV 14–0837, Filed Feb. 23, 2016. **VACATED**

Attorneys and Law Firms Dennis I. Wilenchik (argued), Wilenchik & Bartness, P.C., Phoenix, Attorneys for Thomas Horne and Tom Horne for Attorney General Committee; Timothy A. La Sota (argued), Timothy A. La Sota, PLC, Phoenix, Attorneys for Kathleen Winn and Business Leaders of Arizona

Sheila Sullivan Polk, Yavapai County Attorney, Benjamin D. Kreutzberg (argued), Deputy County Attorney, Prescott, Attorneys for Sheila Sullivan Polk

Dominic E. Draye, Solicitor General, Jennifer M. Perkins, Assistant Attorney General, Phoenix, Attorneys for Amicus Curiae Arizona Solicitor General

Paul V. Avelar, Timothy D. Keller, Keith E. Diggs, Institute for Justice, Tempe, Attorneys for Amicus Curiae Institute for Justice

JUSTICE BOLICK authored the opinion of the Court, in which CHIEF JUSTICE BALES, VICE CHIEF JUSTICE PELANDER, JUSTICE BRUTINEL, and JUDGES ECKERSTROM, HOWARD, and WRIGHT joined.*

Opinion

JUSTICE BOLICK, opinion of the Court:

***228** ¶ 1 In this case involving substantial consequences for alleged violations of campaign finance laws, we hold that due process does not permit the same individual to issue the initial decision finding violations and ordering remedies, participate personally in the prosecution of the case before an administrative law judge ("ALJ"), and then make the final agency decision that will receive only deferential judicial review.

I. BACKGROUND

¶ 2 On June 27, 2013, acting pursuant to A.R.S. § 16–924(A) (2011) *repealed by* 2016 Ariz. Sess. Laws, ch. 79, § 10 (2d Reg. Sess.), Arizona Secretary of State Ken Bennett determined that there was reasonable cause to believe that Attorney General Thomas Horne, Kathleen Winn, who served as Community Outreach Director of the Attorney General's Office, and two campaign committees (collectively "Appellants") had violated Arizona campaign finance laws, specifically A.R.S. §§ 16–

901(14), –905, –913, –915, –917, and –919. The Secretary accordingly notified Solicitor General Robert L. Ellman, who appointed Sheila Polk as Special Arizona Attorney General because the Attorney General and one of his staffers were subjects of the notice, and "an appearance of impropriety would arise if the Arizona Attorney General's Office investigated the alleged campaign finance violation."

¶ 3 Following investigation, pursuant to A.R.S. § 16–924(A), Polk issued a twenty-five-page order finding that Appellants had violated Arizona campaign finance statutes by illegally coordinating campaign expenditures, exceeding contribution limits, and collecting illegal contributions. Polk directed Appellants to amend their campaign finance reports and ordered Horne and his campaign to refund contributions totaling approximately $397,000. The order stated that if the ****654 *229** Appellants failed to take the specified actions within twenty days, "this Office will issue an Order Assessing a Civil Penalty pursuant to A.R.S. § 16–924(B). The violation of the contribution limit carries a civil penalty of three times the amount of money of the violation. A.R.S. § 16–905(J)."

¶ 4 Appellants requested an administrative hearing pursuant to A.R.S. § 16–924(A). After a three-day evidentiary hearing, the ALJ issued a decision finding that Polk had failed to prove illegal coordination and recommending that Polk vacate her compliance order.

¶ 5 Pursuant to A.R.S. § 41–1092.08(B) (2000), Polk issued her final administrative decision, which rejected the ALJ recommendation and affirmed her prior compliance order. Polk accepted all of the ALJ's findings of fact and rejected in part the ALJ's conclusions of law.

¶ 6 Appellants appealed to the Maricopa County Superior Court, challenging Polk's decision and the constitutionality of Arizona's campaign contribution limits. Neither side requested an evidentiary hearing. The court affirmed Polk's decision, finding that substantial evidence supported it and rejecting challenges to the statutory scheme.

¶ 7 Appellants appealed to the court of appeals. Polk's answering brief acknowledged a fact previously unknown to Appellants: "Admittedly, the Yavapai County Attorney was involved with the prosecution of the case, by assisting with the preparation and strategy." Appellants argued that Polk's role as advocate and adjudicator violated their due process rights.

¶ 8 The court of appeals affirmed the superior court, concluding that "[b]ecause there was evidence in the record supporting Polk's finding that Horne and Winn coordinated ..., we find no abuse of discretion." *Horne v. Polk*, 1 CA–CV 14–0837, at *5 ¶ 12, 2016 WL 706376 (Ariz. App. Feb. 23, 2016). The court rejected Appellants' due process claim, relying on *Comeau v. Arizona State Board of Dental Examiners*, 196 Ariz. 102, 108 ¶ 26, 993 P.2d 1066, 1072 (App. 1999) ("An agency is permitted to combine some functions of investigation,

prosecution, and adjudication unless actual bias or partiality is shown."). *Horne*, 1 CA–CV 14–0837, at *5–6 ¶ 13. The court concluded, "In this case, appellants make no showing of actual bias. Accordingly, their due process rights were not violated." *Id.* at *6 ¶ 13.

¶ 9 We granted review of the due process issue, which is of statewide importance and likely to recur. We have jurisdiction under article 6, section 5(3) of the Arizona Constitution and A.R.S. § 12–120.24. Because we consider only the constitutionality of the procedure under which Appellants' statutory violations were determined, our review is de novo. *Gallardo v. State*, 236 Ariz. 84, 87 ¶ 8, 336 P.3d 717, 720 (2014).

II. DISCUSSION

A. Statutory Scheme

¶ 10 Arizona's Administrative Procedure Act ("APA"), title 41, chapter 6, is generally silent about how agency charges or complaints are initiated. In the context of campaign finance violations, § 16–924(A) prescribes that where there is "reasonable cause to believe that a person is violating any provision of this title" in connection with a statewide office, the "secretary of state shall notify the attorney general." The Attorney General, in turn, "may serve on the person an order requiring compliance with that provision. The order shall state with reasonable particularity the nature of the violation and shall require compliance within twenty days from the date of issuance of the order." *Id.*

¶ 11 Section 16–924(A) further provides that the alleged violator has twenty days to request a hearing pursuant to the APA, for which administrative adjudication procedures are set forth in A.R.S. § 41–1092 *et seq*. Once the ALJ issues a decision, "the head of the agency, executive director, board or commission may review the decision and accept, reject or modify it." A.R.S. § 41–1092.08(B). Where an agency has a board or commission whose members are appointed by the governor, it "may review the decision of the agency head ... and make the final administrative decision." A.R.S. § 41–1092.08(C).

¶ 12 Ordinarily, nothing in the APA would necessitate having an agency head make both ****655 *230** an initial and final legal determination. Here, the interplay between the campaign finance statute and the APA placed Polk in the position of issuing the initial order and then making the final determination. She also participated in the prosecution of the case before the ALJ. And under these circumstances, there was no board or commission to review Polk's final decision.[1]

¶ 13 An aggrieved party may appeal an adverse agency decision to the superior court, but the court's review is deferential. Section 12–910(E) provides that the court "shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion." The court affirms the agency's

factual findings if they are supported by substantial evidence, "even if the record also supports a different conclusion." *Gaveck v. Ariz. State Bd. of Podiatry Exam'rs*, 222 Ariz. 433, 436 ¶ 11, 215 P.3d 1114, 1117 (App. 2009).

B. Due Process

¶ 14 Combining prosecutorial and adjudicative functions in the same agency official gives rise to due process concerns. A single agency may investigate, prosecute, and adjudicate cases, and an agency head may generally supervise agency staff who are involved in those functions. *See, e.g.*, *Withrow v. Larkin*, 421 U.S. 35, 53, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975) ("administrative agency [can] investigate facts, institute proceedings, and then make the necessary adjudications"). However, where an agency head makes an initial determination of a legal violation, participates materially in prosecuting the case, and makes the final agency decision, the combination of functions in a single official violates an individual's Fourteenth Amendment due process right to a neutral adjudication in appearance and reality. That due process violation is magnified where the agency's final determination is subject only to deferential review.[2]

¶ 15 The general parameters for due process are set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). There, the United States Supreme Court held that the constitutional sufficiency of administrative procedures is determined by three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335, 96 S.Ct. 893.

¶ 16 In this context, where the government seeks repayment of substantial campaign contributions that the private parties contend were legal (and, indeed, constitutionally protected), due process requires a neutral decisionmaker. Although Appellants have not alleged actual bias, once an official determines that a legal violation has occurred, that official can be expected to develop a will to ****656 *231** win at subsequent levels of adjudication. At minimum, in the context of a regulatory agency adjudication, a process that involves the same official as both an advocate and the ultimate administrative decisionmaker creates an appearance of potential bias. *See, e.g.*, *Botsko v. Davenport Civil Rights Comm'n*, 774 N.W.2d 841, 849 (Iowa 2009) ("[T]he primary purpose of separating prosecutorial from adjudicative functions" in an administrative agency "is to screen the decisionmaker from those who have a 'will to win.' "). On the other hand, barring an agency head who makes an ultimate decision from having even

general supervisory authority over agency employees involved in the prosecution of a case would unduly hamper agency operations. Due process will be satisfied if the agency head who serves as the ultimate adjudicator does not also serve in an advocacy role in the agency proceedings.

¶ 17 The right to a neutral adjudicator has long been recognized as a component of a fair process. One cannot both participate in a case (for instance, as a prosecutor) and then decide the case. Blackstone observed that a judge must not rule in a cause in which he is a party, "because it is unreasonable that any man should determine his own quarrel." *Am. Gen. Ins. Co. v. Fed. Trade Comm'n*, 589 F.2d 462, 463 (9th Cir. 1979) (quoting Blackstone, *Commentaries on the Laws of England*, I, 91). In *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955), the United States Supreme Court recognized the due process principle that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Murchison* entailed a "one-man grand jury," in which a judge acting as a grand jury charged two witnesses with perjury and then convicted them, which the Court held violated due process. *Id.* at 133–34, 75 S.Ct. 623. Because the judge was "part of the accusatory process," he "cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *Id.* at 137, 75 S.Ct. 623. "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *Id.* at 136, 75 S.Ct. 623; *accord*

Marshall v. Jerrico, Inc., 446 U.S. 238, 243, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980) ("[J]ustice must satisfy the appearance of justice, and this stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." (internal citation and quotation marks omitted)). The process was impermissibly tainted by the judge performing both prosecution and adjudication functions.

¶ 18 The Court in *Withrow*, 421 U.S. at 46, 95 S.Ct. 1456, applied those principles to the administrative context. There, a state licensing board notified a physician that it would commence an investigative proceeding to consider possible violations of his medical license. *Id.* at 37–39, 95 S.Ct. 1456. The physician challenged the board's combined investigatory and adjudicatory functions as a due process violation. *Id.* at 39, 95 S.Ct. 1456. The Court noted that although "situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," the "contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden," given "the presumption of honesty and integrity." *Id.* at 47, 95 S.Ct. 1456.

¶ 19 The Court distinguished *Murchison* on the basis that there "the judge in effect became part of the prosecution and assumed an adversary position," and observed that *Murchison* did not

stand for the "broad rule that the members of an administrative agency may not investigate the facts, institute proceedings, and then make the necessary adjudications." *Id.* at 53, 95 S.Ct. 1456. The Court noted that an "initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes," thus the same agency may perform both functions. *Id.* at 58, 95 S.Ct. 1456. However, the Court cautioned, "[t]hat the combination of investigative and adjudicative functions does not, without more, constitute a due process violation, does not, of course, preclude a court from determining from the special facts and circumstances present in ****657 *232** the case before it that the risk of unfairness is intolerably high." *Id.*

¶ 20 Here, the combination of prosecutorial and adjudicative functions not just in a single agency but in the same official presents "special facts and circumstances" creating an intolerable risk of unfairness. The initial determination of a legal violation here was not akin to a judge finding probable cause to proceed to trial and then reaching a final decision after an adversarial process in which the judge was not an advocate. Rather, under the statutory scheme, the Secretary of State made the probable cause finding. Polk then commenced investigation and issued a lengthy decision finding a legal violation and ordering compliance, which would have been a final determination had Appellants not appealed. In the subsequent ALJ proceeding, Polk admittedly "was involved with the prosecution of the case, by assisting with the preparation and strategy." Thereafter, she issued a final administrative determination affirming her

prior order and rejecting most of the ALJ's conclusions of law. So we have here not only a single agency performing accusatory, advocacy, and adjudicatory functions, but the same individual performing all three functions. As *Withrow* characterized the circumstances in *Murchison*, "the judge in effect became part of the prosecution and assumed an adversary position." *Withrow*, 421 U.S. at 53, 95 S.Ct. 1456. Beyond even that, Polk was in the position to affirm the very determination and order that she initially issued. *See also id.* (describing denial of due process where judge could rely on his own "[personal] knowledge and impression ... that could not be tested by adequate cross examination" (internal quotation marks omitted)).

¶ 21 Other decisions further inform our analysis. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993), pertains to pension plans, but its reasoning applies here. The federal statutory scheme entailed an adjudication of withdrawal liability by pension trustees, who have a fiduciary duty to the integrity of the pension plans, but the Court concluded that sufficient safeguards were present to ensure due process. *Id.* at 619–20, 113 S.Ct. 2264. The initial liability determination was made by the trustees, who "act only in an enforcement capacity," *id.* at 619, 113 S.Ct. 2264, and whose decision was reviewed by a neutral arbitrator applying a preponderance of the evidence standard. *Id.* at 611, 113 S.Ct. 2264. "Where an initial determination is made by a party acting in an enforcement capacity," the Court ruled, "due process

may be satisfied by providing for a neutral adjudicator to conduct a *de novo* review of all factual and legal issues." *Id.* at 618, 113 S.Ct. 2264 (internal quotation marks omitted). By contrast, "[c]learly, if the initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised." *Withrow*, 421 U.S. at 58, 95 S.Ct. 1456.

¶ 22 Here the initial determination was subject to de novo review by the ALJ, but the ALJ's determination was not final. Rather, the initial decisionmaker returned to make the final decision. "Even appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator." *Concrete Pipe*, 508 U.S. at 618, 113 S.Ct. 2264. The superior court review available from the final agency decision here falls far short of that.

¶ 23 More recently, in *Williams v. Pennsylvania*, ––– U.S. ––––, 136 S.Ct. 1899, 1908–09, 195 L.Ed.2d 132 (2016), the Court found a defendant's due process rights were violated when a prosecutor who approved the decision to seek the death penalty later served as a supreme court justice in a habeas petition arising from the same crime. "Of particular relevance to the instant case, the Court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case." *Id.* at 1905. Where "a prosecutor who participates in a major adversary decision" or "a judge has served as an

advocate for the State in the very case the court is now asked to adjudicate," a serious question arises concerning whether the adjudicator, ****658 *233** despite best efforts, could untether from his or her previous position and render a fair judgment. *Id.* at 1906. Here, the fact that Polk "had a direct, personal role in the [Appellants'] prosecution," *id.*, likewise violates due process.

¶ 24 The reasoning of the *Williams* dissenters also supports our conclusion. Chief Justice Roberts distinguished the basis for the due process violation in *Murchison*, where "the judge (sitting as grand jury) accused the witnesses of contempt, and then (sitting as judge) presided over their trial on that charge." *Id.* at 1913 (Roberts, C.J., dissenting). In *Williams*, by contrast, it was "abundantly clear" that the justice "had *not* made up his mind about either the contested evidence or the legal issues under review," because he had not "previously made any decision with respect to that evidence in his role as prosecutor." *Id.* at 1914. Likewise, Justice Thomas observed in *Williams* that "[b]roadly speaking, *Murchison* 's rule constitutionalizes the early American statutes requiring disqualification when a single person acts as both counsel and judge in a single civil or criminal proceeding." *Id.* at 1920 (Thomas, J., dissenting). He emphasized that a due process violation occurs only where the "same person ... act[s] as counsel and adjudicator in *the same case*." *Id.* at 1919 (highlighting the separation between the original decision to approve the request to seek the death penalty and the current civil proceeding regarding timeliness of a stay action). In this case, Polk made her views on the evidence and

legal issues very clear in her initial twenty-five-page order, and she subsequently affirmed that very order in the same case after participating in the prosecution.

¶ 25 These cases instruct that the combination of accusatory, advocacy, and adjudicative roles in a single agency official violates due process. Other courts have followed that instruction. Synthesizing the cases as we have, the Iowa Supreme Court held in *Botsko* that the conduct of the civil rights commission's director in advocating on behalf of the complainant and then participating in the commission's closed adjudicatory proceeding violated due process. 774 N.W.2d at 849–50. Therein, the court articulated the applicable constitutional boundaries. Applying *Withrow*, it concluded that "there is no due process violation based *solely* upon the overlapping investigatory and adjudicatory roles of agency actors." *Id.* at 849. "A more serious problem, however, is posed where the same person within an agency performs both *prosecutorial* and *adjudicative* roles." *Id.*; *see also Am. Gen.*, 589 F.2d at 464–65 (the order "is infected with invalidity" because a commissioner participated as counsel in earlier proceedings, even though that participation may have been "superficial rather than substantial"); *Trans World Airlines, Inc. v. Civil Aeronautics Bd.*, 254 F.2d 90, 91 (D.C. Cir. 1958) ("The fundamental requirements of fairness ... require at least that one who participates in a case on behalf of any party, whether actively or merely formally by being on pleadings or briefs, take no part in the decision of that case."); *Nightlife Partners, Ltd. v. City of*

Beverly Hills, 108 Cal.App.4th 81, 133 Cal.Rptr.2d 234, 248 (2003) (observing that combination of investigatory and adjudicatory functions is "fraught" with problems, especially where "these dual functions were not held by different sections of a single office, but by a *single individual*").

¶ 26 Arizona jurisprudence is consistent with those authorities. In *Comeau*, a doctor retained by the board investigated the complaint, then made statements and asked questions before the administrative panel, but "was not on the panel and did not participate in the discussion that preceded the panel's findings and recommendations." 196 Ariz. at 108 ¶ 27, 993 P.2d at 1072. In *Rouse v. Scottsdale Unified School District No. 48*, 156 Ariz. 369, 371, 752 P.2d 22, 24 (App. 1987), the court stated that "[t]he precise question in this case is whether simply joining investigative/prosecutorial and adjudicative functions results in a partial decision maker. We hold that it does not." To the extent that these functions are combined in a single agency, we agree that the potential for bias is not intolerable; if they are performed by the same individual, they violate due process. *Cf. Taylor v. Ariz. Law Enf. Merit Syst. Council,* 152 Ariz. 200, 206, 731 P.2d 95, 101 (App. 1986) ("A conflict of interest would clearly arise if the same assistant attorney ****659 *234** general participated as an advocate before the council and simultaneously served as an advisor to the council in the same matter."). In *Rouse*, the termination decision at issue was initiated by the staff, not the board that rendered the final decision; and "the board, at the time of the hearing, had little more than 'mere

familiarity with the facts.' " 156 Ariz. at 373, 752 P.2d at 26. Under such circumstances, the defendant still had a neutral adjudicator.

¶ 27 We hold that due process does not allow the same person to serve as an accuser, advocate, and final decisionmaker in an agency adjudication. This holding should not unnecessarily impede the efficient and effective functioning of administrative agencies. As noted, in most instances, agencies are free under Arizona law to generate their own processes regarding initiation, investigation, and prosecution of charges or complaints. The agency head may supervise personnel involved in such functions; but if she makes the final agency decision, she must be isolated from advocacy functions and strategic prosecutorial decisionmaking and must supervise personnel involved in those functions in an arms-length fashion. *See, e.g.*, *Lyness v. Pa. State Bd. of Med.*, 529 Pa. 535, 605 A.2d 1204, 1209, 1211 (1992) ("if more than one function is reposed in a single administrative entity, walls of division [must] be constructed which eliminate the threat or appearance of bias"; specifically, "placing the prosecutorial functions in a group of individuals, or entity, distinct from the Board which renders the ultimate adjudication").

¶ 28 Although Appellants do not allege actual bias, the circumstances here deprived them of due process. Apparently unique in the context of Arizona administrative law, Arizona's campaign finance statute, when joined with the APA, place a single official in the position of making both an initial and

final determination of legal violation, with no opportunity for de novo review by the trial court. A quasi-judicial proceeding "must be attended, not only with every element of fairness but with the very appearance of complete fairness." *Amos Treat & Co. v. Sec. & Exch. Comm'n*, 306 F.2d 260, 266–67 (D.C. Cir. 1962) (holding that a similar combination of functions violated the "basic requirement of due process"). Specifically, we hold that when Polk also assumed an advocacy role during the ALJ proceedings, the due process guarantee prohibited her from then serving as the final adjudicator.

III. REMEDY

¶ 29 Appellants argue that because there was no "valid" decision by the agency head within thirty days after the ALJ decision, we should reinstate the ALJ decision as the "final administrative decision" pursuant to A.R.S. § 41–1092.08(D) ("if the head of the agency ... does not accept, reject or modify the administrative law judge's decision within thirty days," it becomes "the final administrative decision"). We disagree. The agency head took action within the deadline.

¶ 30 Rather, Appellants are entitled to a determination by a neutral decisionmaker. *See Williams*, 136 S.Ct. at 1910; *Botsko*, 774 N.W.2d at 853; *Nightlife Partners*, 133 Cal.Rptr.2d at 248–49. We therefore remand the matter to the current Attorney General's Office, which does not have a conflict, for a final administrative decision. We express no opinion on the merits of the case.

¶ 31 After filing their petition for review, Appellants submitted an amended request for attorney fees under A.R.S. § 12–348(A)(2), which allows an award of fees for a party that "prevails by an adjudication on the merits" in a "court proceeding to review a state agency decision." Because the case is remanded, any fee award would be premature as no party has yet "prevail[ed] by an adjudication on the merits." *Scottsdale Healthcare, Inc. v. Ariz. Health Care Cost Containment Syst. Admin.*, 206 Ariz. 1, 8 ¶ 29, 75 P.3d 91, 98 (2003) (alteration in original).

¶ 32 For the foregoing reasons, we vacate the decisions of the superior court and court of appeals, and remand the case to the Attorney General's Office for further proceedings consistent with this opinion.

All Citations
242 Ariz. 226, 394 P.3d 651, 765 Ariz. Adv. Rep. 16

FOOTNOTES

* Justices Ann A. Scott Timmer, Andrew W. Gould, and John R. Lopez IV have recused themselves from this case. Pursuant to article 6, section 3 of the Arizona Constitution, the Honorable Peter J. Eckerstrom, Chief Judge of the Arizona Court of Appeals, Division Two, the Honorable Joseph W. Howard, Judge of the Arizona Court of Appeals, Division Two, and the Honorable Timothy M. Wright, Judge of the Gila County Superior Court, were designated to sit in this matter.

[1] Polk notes that the federal APA contains an exception allowing an agency head, unlike other employees, to both participate in investigative or prosecuting functions and participate or advise in the agency review or decision. 5 U.S.C. § 554(d). Arizona's APA contains no such exception. Arizona's APA tacitly recognizes the potential for conflict arising from agency officials performing certain multiple roles in the administrative adjudication process. Section 41–1092.06(B) provides that in the context of informal settlement conferences, the agency must be represented by "a person with the authority to act on behalf of the agency," and the "parties participating in the settlement conference shall waive their right to object to the participation of the agency representative in the final administrative decision."

[2] As Appellants did not raise or argue a distinct state constitutional claim, we have no occasion to determine whether the due process provision in Arizona's Declaration of Rights, Ariz. Const. art. 2, § 4, provides greater protection in this context than the Fourteenth Amendment. *Cf.* *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432, 511 S.E.2d 48, 54 (1998) (holding that the state constitution provides greater procedural protections in administrative proceedings than federal due process).

End of Document

Horne v. Polk, Not Reported in P.3d (2016)
2016 WL 706376

Court of Appeals of Arizona,
Division 1.

Thomas HORNE, individually and Thomas Horne, for Attorney General Committee (SOS Filer ID 2010 00003); Kathleen Winn, individually, and Business Leaders for Arizona (SOS Filer ID 2010 00375), Plaintiffs/Appellants,
v.
Sheila Sullivan POLK, Yavapai County Attorney, Defendant/Appellee.

No. 1 CA–CV 14–0837.
|
Feb. 23, 2016.

Appeal from the Superior Court in Maricopa County; No. LC2014–000255–001; The Honorable Crane McClennen, Judge.

Attorneys and Law Firms

Wilenchik & Bartness, P.C., By Dennis I. Wilenchik, Kimerer & Derrick P.C., By Michael D. Kimerer, Tiffany & Bosco, P.A., By Timothy A. LaSota, Phoenix, Counsel for Plaintiffs/Appellants.

Yavapai County Attorney, By Benjamin D. Kreutzberg, Prescott, Counsel for Defendant/ Appellee.

Judge JON W. THOMPSON delivered the decision of the Court, in which Presiding Judge RANDALL M. HOWE and Judge LAWRENCE F. WINTHROP joined.

MEMORANDUM DECISION

THOMPSON, Judge.

***1** ¶ 1 Appellants Tom Horne (Horne), Tom Horne for Attorney General Committee (THAGC), Kathleen Winn (Winn), and Business Leaders for Arizona (BLA) (collectively appellants) appeal from the trial court's order affirming the final decision and order issued in May 2014 by Appellee Special Arizona Attorney General and Yavapai County Attorney Sheila Polk (Polk) affirming her October 2013 order requiring compliance with campaign finance laws. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶ 2 Horne ran for the office of Arizona Attorney General in 2010. Winn was a volunteer who worked for the Horne campaign during the primary election. Horne won the Republican primary election in August 2010. Subsequently, in October 2010, Winn decided to cease volunteering for the Horne campaign and "reactivate" BLA, her independent expenditure committee. She then began soliciting contributions for BLA.[1] The sole purpose of BLA in

relation to the Horne campaign was to raise money to purchase a political commercial. BLA hired Brian Murray (Murray) and Lincoln Strategy Group to produce the commercial. The commercial started running on October 25; it was a negative ad directed against Felecia Rotellini (Rotellini), Horne's Democratic opponent.[2] Horne was elected to the office of Arizona Attorney General in 2010.

¶ 3 In 2013, the Arizona Secretary of State issued a letter to the Arizona Attorney General's Office stating that reasonable cause existed to believe that appellants violated state campaign finance laws during the 2010 general election. Solicitor General Robert Ellman appointed Polk as Special Arizona Attorney General to fulfill the role of Attorney General as set forth in Arizona Revised Statutes (A.R.S.) section 16–924 (2013).[3]

¶ 4 After investigation, Polk issued an order in October 2013 requiring compliance concluding that appellants violated campaign finance laws by coordinating their activities in order to advocate for the defeat of Rotellini. The order required Horne and THAGC to amend their 2010 post-general election report to include expenditures by BLA as in-kind contributions, required Winn and BLA to amend their 2010 post-general election report, and required Horne and THAGC to refund $397,378.00, the amount deemed in-kind contributions in excess of legal limits. Appellants filed a request for hearing pursuant to A.R.S. § 16–924(A). Polk set the matter for an administrative hearing, and an administrative law judge (ALJ) held a three-day hearing in February 2014.

¶ 5 In April 2014, the ALJ issued her decision concluding that Polk failed to prove by a preponderance of the evidence illegal coordination between appellants. The decision recommended that Polk vacate her order requiring compliance.

¶ 6 In May 2014, pursuant to A.R.S. § 41–1092.08(B) (2013)[4], Polk issued her final administrative decision rejecting the ALJ's recommendation and affirming her order requiring compliance. In her final decision, Polk accepted all of the ALJ's findings of fact, accepted in part the ALJ's conclusions of law, and rejected in part the ALJ's conclusions of law. She found that the evidence showed that Winn and Horne coordinated to develop BLA's commercial on October 20, 2010, and that subsequently, on October 27, Horne directed Winn to raise another $100,000 and expend it in accordance with advice Horne received from Ryan Ducharme (Ducharme), an individual who was working on a different campaign.

***2** ¶ 7 Appellants filed a notice of appeal for judicial review of administrative decision in May 2014. Neither party requested an evidentiary hearing. In October 2014, the trial court affirmed Polk's final administrative decision. Appellants timely appealed from the judgment, and the trial court stayed the case below pending appeal. We have jurisdiction pursuant to A.R.S. § 12–913 (2003).

DISCUSSION

A. Standard of Review

¶ 8 Section 12–910(E) (2003) provides that the

superior court, in reviewing a final administrative decision, "shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion." The superior court defers to the agency's factual findings and affirms them if they are supported by substantial evidence. *Gaveck v. Ariz. State Bd. of Podiatry Exam'rs,* 222 Ariz. 433, 436, ¶ 11, 215 P.3d 1114, 1117 (App.2009) (citation omitted). "If an agency's decision is supported by the record, substantial evidence exists to support the decision even if the record also supports a different conclusion." *Id.* (citations omitted). "On appeal, we review de novo the superior court's judgment, reaching the same underlying issue as the superior court: whether the administrative action was not supported by substantial evidence or was illegal, arbitrary and capricious, or involved an abuse of discretion." *Carlson v. Ariz. State Pers. Bd.,* 214 Ariz. 426, 430, ¶ 13, 153 P.3d 1055, 1059 (App.2007). *See also Eaton v. Ariz. Health Care Cost Containment Sys.,* 206 Ariz. 430, 432, ¶ 7, 79 P.3d 1044, 1046 (App.2003) ("The court will allow an administrative decision to stand if there is any credible evidence to support it, but, because we review the same record, we may substitute our opinion for that of the superior court .") (citation omitted). We review de novo any legal issues. *Comm. for Justice & Fairness (CJF) v. Ariz. Sec'y of State's Office,* 235 Ariz. 347, 351, ¶ 17, 332 P.3d 94, 98 (App.2014) (review denied April 21, 2015).

B. Polk's Final Decision Was Supported by the Evidence and Was Not Arbitrary or an Abuse of Discretion

¶ 9 Under Arizona's campaign finance laws, independent expenditures are not considered to be contributions to a candidate's campaign. A.R.S. 16–901(5)(b)(vi) (2010). A.R.S. 16–901(14) (2010) defines an "independent expenditure" as:

> [A]n expenditure by a person or political committee, other than a candidate's campaign committee, that expressly advocates the election or defeat of a clearly identified candidate, that is made without cooperation or consultation with any candidate or committee or agent of the candidate and that is not made in concert with or at the request or suggestion of a candidate, or any committee or agent of the candidate....

***3** Under A.R.S. § 16–917(C) (2010), an expenditure by a political committee or person that does not meet the definition of an independent expenditure is considered to be an in-kind contribution to the candidate and a corresponding expenditure by the candidate. Federal guidelines provide further guidance as to coordinated communications and independent expenditures. *See* 11 C.F.R. 109.21 (2010).

¶ 10 Appellants argue that Polk's final decision was unsupported by substantial evidence, was arbitrary, or was an abuse of discretion pursuant to A.R.S. §

12–910(E). We disagree. On October 20, 2010, Winn and Murray designed BLA's political commercial. The evidence showed that Murray emailed Winn a draft script of the commercial at 10:21 a.m. that day. The draft script provided:

> The Federal Government is suing Arizona. Arizona needs the right attorney general. An Attorney General who will be tough on illegal immigration. Liberal Felicia Rotellini isn't. She openly opposes SB 1070. It gets worse: taking money from labor unions and special interest groups who launched a boycott against Arizona. She sold Arizona out. Opposing SB 1070, boycotting Arizona, selling us out. If she wins Arizona loses.

Around lunchtime, Winn met with George Wilkinson (Wilkinson), BLA's treasurer, to discuss the commercial. At 2:19 p.m. on the 20th, Horne called Winn and spoke with her for about eight minutes. In the middle of this phone call, Murray emailed Winn an unedited voice-over file of the commercial. At 2:29 p.m., a few minutes after ending the phone call with Horne, Winn emailed Murray the following:

> We do not like that her name is mentioned 4 times and no mention for Horne. We are doing a re-write currently and will get back to you. Too negative and takes away from the message we wanted which [sic] we want to hire the next AG to protect and defned [sic] Arizona against the federal government. I will get back to you shortly Brian sorry for the confusion except I have several masters.[5]

At 2:30 p.m., Murray emailed Winn telling her he would halt production of the commercial. At 2:37 p.m., Winn emailed Murray saying that she would "have it worked out by 5:30," and that:

> [t]hey feel [the commercial] leaves people with [Rotellini's] name 4 X and with no mention of [Horne] it is like saying don't think about a pink elephant.. so you think about the pink elephant.

Also at 2:37, Winn called Horne again and they spoke for eleven minutes. At 2:50 p.m., two minutes after that phone call ended, Winn emailed Murray: "Okay it will be similar message just some changes." At 2:53 p.m. Murray responded:

> It is kind of the point, driving [Rotellini's] negatives. We don't want Tom's name associated with the negative messaging. From a timing standpoint in order to be on the air Monday we will have to produce and make all edits tomorrow....

At 2:59 p.m. Winn responded:

> The concern is you can get out her negatives without saying her name 4 times. I have two very strong personalities debating this moment she lacks name recognition we do now want to help her in that regard is the argument.[[6]

***4** At 3:11 p.m., Winn emailed Murray a revised script of the commercial, stating: "I think I prevailed

no mention of [Horne] thanks for what you said. I believe this times out let me know." At 3:13 p.m., Murray emailed Winn that the script was too long. At 3:14 p.m. Winn responded suggesting he remove a sentence. At 3:15 p .m., Winn received a phone call from attorney Harris that lasted three minutes. At 3:16 p.m., Murray emailed Winn that the script was still too long. At 3:21 p.m., Home called Winn again for about four minutes. At 3:25 p.m., Winn emailed Murray stating:

> Change to: Arizona needs the RIGHT attorney general taking money from labor unions and special interest groups

The final script of the commercial that aired provided:

> The Federal Government is suing Arizona. But, Arizona needs the right Attorney General. Liberal Felicia Rotellini isn't. She openly opposes SB 1070. It gets worse: Rotellini took money from labor unions and special interest groups who boycott Arizona. She sold Arizona out. Opposing SB 1070, boycotting Arizona, selling us out. If Rotellini wins, Arizona loses. Paid for by Business Leaders for Arizona. Major funding by the Republican State Leadership Committee (571) 480–4860.

¶ 11 The evidence supports Polk's conclusion that Horne and Winn coordinated on October 20, 2010. The content and timing of Winn's emails to and from Murray and the timing of her phone calls with Horne

support Polk's findings that Horne and Winn discussed the wording of the commercial on October 20 and that their discussion led to changes in the wording of the commercial.[7] Although the record may also support a different conclusion, we must defer to Polk's decision. *See Gaveck,* 222 Ariz. at 436, ¶ 11, 153 P.3d at 117; *Blake v. City of Phoenix,* 157 Ariz. 93, 96, 754 P.2d 1368, 1371 (App.1988). Polk was free to reject Winn and Horne's testimony as to the content of their discussions as "not credible."[8] Appellants argue that all of the evidence of coordination was circumstantial rather than direct evidence. However, even if the evidence here was circumstantial we assign no less weight to it. *See State v. Harvill,* 106 Ariz. 386, 391, 476 P.2d 841, 846 (1970) ("direct and circumstantial evidence are [of] intrinsically similar [probative value]; therefore, there is no logically sound reason for drawing a distinction as to the weight to be assigned each.").

¶ 12 Additionally, the evidence supports Polk's finding that Horne and Winn coordinated on October 27, 2010. On that day, Ryan Ducharme sent Horne an email stating:

> Recent polls show you losing ground amongst independents to Rotellini and her starting to pick up more Reps then you are picking up Dems. Bleeding needs to be stopped. Allegations and smears against you by DC group starting to peel away votes. They need to be addressed as desperate last minute attacks with no basis in truth.

Ducharme followed up with a second email to Horne stating:

> ***5** I would link attacks directly to Rotellini as someone behind in the polls trying to hide from her record (SB1070, ties to unions calling for AZ boycott, etc.) The truth, once known, will undermine Rotellini's credibility and call in to [sic] question her character—a very important quality for Inds. You are much stronger in rural AZ.

Home forwarded this email chain to Winn at 2:10 p.m. on the 27th stating: "I forwarded this to [C]asey.[9] Maybe with this we can. Try again for the hundred k." Winn forwarded Horne's email chain to Murray at 2:31 p.m., stating, "[t]his just came into me read below." [10] At 2:55 p.m., Murray forwarded the chain of emails to his firm's attorney, stating:

> I wanted to make you aware of an incident that occurred with one of our clients. [Winn] is running an [independent expenditure] committee called [BLA] which is in support of Tom Horne for AG. I was hired to do the TV component. I warned her on numerous occasions that she needed to cease contact with the candidate and any agents of the campaign. I then received the following email. I then called her and informed her again that she should not have any contact. She assured me that this was unsolicited and had not in several days. As our firm's attorney I wanted to make you aware of this situation should something arise at a later date.

From this evidence, Polk concluded that Horne was trying to get Winn to raise an additional $100,000 and expend it attacking Rotellini.[11] Polk further found that the October 27, 2010 email from Horne to Winn "casts grave doubt on the denials of both [Horne and Winn] that coordination occurred on October 20, 2010." Because there was evidence in the record supporting Polk's finding that Horne and Winn coordinated on October 27, 2015, we find no abuse of discretion.

C. Appellants' Due Process Rights Were Not Violated

¶ 13 Appellants argue that their due process rights were violated because Polk was both an advocate and judge in this case and necessarily biased. It is well established under Arizona law that an agency employee can investigate, prosecute, and adjudicate a case. In *Comeau v. Ariz. State Bd. of Dental Exam'rs,* 196 Ariz. 102, 108, ¶¶ 26–27, 993 P.2d 1066, 1072 (App.1999), where the appellant argued that his due process rights were violated because the Board of Dental Examiner's investigator functioned in several capacities in his professional discipline matter, we noted:

> An overlap of investigatory, prosecutorial, and adjudicatory functions in an agency employee does not necessarily violate due process. An agency is permitted to combine some functions of investigation, prosecution, and adjudication unless actual bias or partiality is shown. (citations omitted).

Similarly, in *Rouse v. Scottsdale Unified Sch. Dist.*, 156 Ariz. 369, 371, 374, 752 P.2d 22, 24, 27 (App.1987), we held that due process was not violated when a school board participated in a decision to terminate a teacher, and then reviewed and affirmed the termination, concluding:

> ***6** Due Process ... is not violated unless there is a showing of actual bias or partiality. A mere joining of investigative and adjudicative functions is not sufficient. [Appellant] has made no such showing of actual bias or partiality here.

In this case, appellants make no showing of actual bias. Accordingly, their due process rights were not violated.

D. Polk Did Not Err By Applying the Wrong Standard of Proof

¶ 14 Appellants next argue that Polk erred by applying the wrong standard of proof. They maintain that the standard of proof should have been clear and convincing evidence instead of a preponderance of the evidence. They base their argument on the future possibility that, if they do not come into compliance with Polk's order requiring compliance, Polk could then assess a civil penalty pursuant to A.R.S. § 16–924(B) and A.R.S. § 16–905(J) (civil penalty for violating contribution limits). However, the clear and convincing standard of proof does not apply in this case. Arizona Administrative Code R2–19–119(A) (2013) provides that the standard of proof in administrative hearings is a preponderance of the

evidence, unless otherwise provided by law. Although appellants cite cases holding that the recovery of punitive damages requires a clear and convincing standard of proof, *see e.g., Linthicum v. Nationwide Life Ins. Co.,* 150 Ariz. 326, 332, 723 P.2d 675, 681 (1986), the order requiring compliance was issued pursuant to A.R.S. § 16–924(A). That section does not provide for civil penalties, nor did Polk's order assess civil penalties. The remedy in Polk's order required a repayment of contributions that exceeded the relevant limits.[12] Accordingly, we find no error.

B. Arizona's Campaign Finance Contribution Limits Were Constitutional

¶ 15 Appellants argue that A.R.S. § 16–905, which limited individual political contributions in Arizona to $840 per election cycle, violated the United States and Arizona Constitutions because the limits were too low.[13] They argue that, with a limit of $840 per election cycle (primary and general elections) Arizona really had a "per election" limit of $420.

¶ 16 In *Randall v. Sorrell,* 548 U.S. 230, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006), the United States Supreme Court addressed the constitutionality of Vermont's campaign contribution limits. Vermont limited political contributions to candidates for state office by individuals, political committees and, and political parties ($400 for a candidate running for governor, lieutenant governor or other statewide office, $300 for state senator, and $200 for state representative, per two-year general election cycle with no index for inflation). *Id.* at 238–39. In

Randall, the Supreme Court found that Vermont's contribution limits failed to satisfy the First Amendment's requirement that contribution limits be "closely drawn." *Id.* at 238, 249, 253.

¶ 17 The plurality opinion set out a two-part, multi-factor test. First, a court should look for "danger signs" that the limits are too low, such as 1) limits are set per election cycle rather than divided between primary and general elections, 2) limits apply to contributions from political parties, 3) the limits are the lowest in the country, and 4) the limits are below those the Supreme Court has previously upheld. *Id.* at 249–53 & 268 (Thomas, J., concurring). Then, if danger signs exist, the court must determine whether the limits are closely drawn. *Id.* at 249, 253. To determine whether the limits are closely drawn, the court considers:

> ***7** 1. [Whether the] contributions limits will significantly restrict the amount of funding available for challengers to run competitive campaigns.
> 2. [Whether] political parties [must] abide by *exactly* the same low contribution limits that apply to other contributors.
> 3. [Whether an] Act excludes from its definition of "contribution" [volunteer services].
> 4. [Whether or not] contribution limits are ... adjusted for inflation.
> 5. Any special justification that might warrant a [low or restrictive] contribution.

Id. at 253–62. Arizona's contribution limits in 2010 were $840 per election cycle in comparison to Vermont's limit of $400 per two-year election cycle for candidates for governor and lieutenant governor. Section 16–905 provided for higher total contribution limits for candidates to accept contributions from political parties and organizations. Section 16–901(5)(iv)(b) further exempted a volunteer's unreimbursed payment for personal travel expenses from being considered contributions, and A.R.S. § 16–905(H) adjusted contribution limits for inflation. Given all of the factors, and lack of a showing that a candidate for attorney general in Arizona could not run a competitive campaign under the 2010 contribution limits, we find that the contribution limits did not violate the First Amendment.

F. Appellants Waived Their Argument that A.R.S. § 16–901(19) Was Unconstitutional

¶ 18 Finally, appellants argue that there was no statutory basis for Polk's enforcement action because A.R.S. § 16–901(19), which defines "political committee," is unconstitutional.[14] Because appellants failed to raise the argument concerning section 16–901(19) below, they have waived it. *See Rand v. Porsche Fin. Servs.,* 216 Ariz. 424, 434, ¶ 39, n. 8, 167 P.3d 111, 121, n. 8 (App.2007) (arguments not raised in the trial court are waived on appeal). We decline to accept appellants' suggestion that we consider this argument even though they failed to raise it because they make a constitutional argument. *See Hawkins v. Allstate Ins. Co.,* 152 Ariz. 490, 503, 733 P.2d 1073, 1086 (1987).

G. Attorneys' Fees and Costs

¶ 19 Appellants request attorneys' fees pursuant to A.R.S. § 12–348 and costs pursuant to A.R.S. § 12–341 and –342. We deny the request for fees and costs.

CONCLUSION

¶ 20 For the foregoing reasons, the decision of the trial court affirming Polk's final decision and order requiring compliance is affirmed.

All Citations
Not Reported in P.3d, 2016 WL 706376

FOOTNOTES

[1]	According to Winn's March 30, 2012 affidavit she originally created BLA in 2009 to oppose Andrew Thomas's candidacy for Attorney General.
[2]	BLA raised and expended more than $500,000 on its sole commercial. (I.102). BLA received $350,000 from the Republican State Leadership Committee (RSLC).
[3]	Section 16–924(A) provides, in relevant part: "The attorney general, county attorney or city or town attorney, as appropriate, may serve on [a person believed to have violated any provision of Title 16] an order requiring compliance with that provision. The order shall state with reasonable particularity the nature of the violation and shall require compliance within twenty days from the

	date of issuance of the order. The alleged violator has twenty days from the date of issuance of the order to request a hearing pursuant to title 41, chapter 6."
[4]	Section 41–1092.08(B) provides, in relevant part: "Within thirty days after the date the office sends a copy of the administrative law judge's decision to the head of the agency ... the head of the agency ... may review the decision and accept, reject or modify it.... If the head of the agency ... rejects or modifies the decision the agency head ... must file with the office ... and serve on all parties a copy of the administrative law judge's decision with the rejection or modification and a written justification setting forth the reasons for the rejection or modification."
[5]	Winn testified that "we" in the 2:29 p.m. email to Murray referred to herself and Wilkinson, not Horne, and that her "several masters" included Wilkinson and attorney Greg Harris (Harris), who represented one of BLA's donors. She denied discussing the commercial's script with Horne on the 20th and testified instead that she only spoke with Horne about a real estate transaction and her mother's surgery. Appellants provided no emails or real estate documents at trial which would corroborate that Winn was working on Horne's real estate transaction in October 2015.
[6]	Winn testified that the "two very strong personalities debating" in her 2:59 p.m. email were coworkers in her office at AmeriFirst. She denied that Horne was one of the "strong

	personalities" debating the commercial's script. In contrast, in her May 30, 2012 affidavit, Winn stated that she "produced the ad, and bought the air time without the assistance of anyone other than Mr. Murray."
[7]	Appellants argue that the changes to the commercial were not material, and thus, even if Winn and Horne discussed the commercial those discussions would not constitute actual coordination. Under 11 C.F.R. § 109.21(d)(2), a communication is deemed coordinated if the candidate "is materially involved in decisions regarding the content, intended audience, means or mode of the communication, specific media outlet used, the timing or frequency or size or prominence of a communication." Even if the changes to the commercial were not material, it does not follow that Horne could not have been materially involved in the revisions.
[8]	Citing a Maryland case, *State of Md. Comm'n on Human Relations v. Kaydon Ring & Seal, Inc.*, 149 Md.App. 666, 818 A.2d 259 (Md.Ct.Spec.App.2003), appellants argue that Polk's decision was not based on substantial evidence because she did not defer to the ALJ's credibility findings. But A.R.S. § 41–1092.08(B) expressly permits "the head of the agency ... [to] review the [ALJ's] decision and accept, reject or modify it."
[9]	Casey Phillips was a regional director for the RSLC.

[10]	Winn testified that she "didn't even really read [the email]," but just forwarded it to Murray without asking him to take any action. Horne testified that he paid no attention to the strategic advice in Ducharme's email and that part of the email was "utterly meaningless." He maintained that all he cared about in the email was the polling data.
[11]	Appellants argue that the October 27 email only concerned fundraising and that A.R.S. § 16–901(14) and the relevant federal guidelines apply only to "expenditures" (how money is spent such as the content of the commercial) and not contributions. Horne's October 27 email, however, did more than request Winn to raise an additional $100,000, it also contained strategic advice from Ducharme concerning attacking Rotellini.
[12]	Appellants also argue for heightened scrutiny because this case implicates their First Amendment rights. They maintain that Polk relied on "mere conjecture" in reaching her decision. However, as discussed in section B, *supra*, there was sufficient evidence from which Polk could find coordination by a preponderance of the evidence.
[13]	In 2013 the Arizona legislature raised contribution limits to $2500 from an individual. A.R.S. § 16–905 (2013).
[14]	Appellants offer an additional constitutional argument concerning whether the definition of

	"independent expenditure" was unconstitutionally overbroad. They cite our opinion in *Comm. for Justice & Fairness,* 235 Ariz. 347, 332 P.3d 94 (App.2014), where we found that section to be constitutional, and note that review was still pending at the time of briefing in this appeal. However, our supreme court denied review of *Committee for Justice & Fairness* in April 2015.

End of Document

Michael K. Jeanes, Clerk
*** Filed ***
10/31/2014 8:00 AM

SUPERIOR COURT OF ARIZONA,
MARICOPA COUNTY

LC2014-000255-001 DT 10/30/14

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton Deputy

TOM HORNE MICHAEL D. KIMERER

KATHLEEN WINN TIMOTHY LASOTA

SHEILA SULLIVAN POLK (001)

JACK H. FIELDS
OFFICE OF ADMINISTRATIVE
HEARINGS
REMAND DESK – LCA – CCC

MINUTE ENTRY

Appellants Tom Horne (individually) (Horne), Tom Horne for Attorney General Committee (TH4AGC), Kathleen Winn (individually) (Winn), and Business Leaders for Arizona (BLA) (collectively Appellants) ask this Court to review the Final Decision and Order issued on May 14, 2014, by Appellee Special Arizona Attorney General and Yavapai County Attorney Sheila Polk affirming her

October 17, 2013, Order Requiring Compliance. For the following reasons, this Court affirms the May 14, 2014, Final Decision and Order.

I. FACTUAL BACKGROUND.

On June 27, 2013, the Arizona Secretary of State issued a letter to the Office of the Arizona Attorney General (OAAG) stating reasonable cause existed to believe Appellants had violated campaign finance laws during the 2010 general election. On that same day, the OAAG, through Solicitor General Robert Ellman, appointed Yavapai County Attorney Sheila Polk (Polk) as a Special Arizona Attorney General to fulfill the role of the Arizona Attorney General as described in A.R.S. § 16–924. After investigating the matter, Polk issued an Order Requiring Compliance on October 17, 2013, outlining her findings that Appellants had coordinated their activities in violation of Title 16, Chapter 6, of the Arizona Revised Statutes. As a result of the coordination, BLA's expenditures were deemed to be in-kind contributions to the TH4AGC. That Order required Horne and the TH4AGC to amend their 2010 Post-General Election Report to include the expenditures by the BLA as in-kind contributions. Additionally, that Order required them to refund $397,378.00, which was the amount deemed in-kind contributions in excess of the appropriate limits. That Order also required Winn and the BLA to amend their 2010 Post-General Election Report to reflect the coordinated nature of the BLA's expenditures.

On October 31, 2013, Appellants filed their Notice of Appeal and Request for Hearing. Polk issued a Notice of Hearing setting the matter for a hearing before the Office of Administrative Hearings, an independent state agency. Administrative Law Judge Tammy Eigenheer held that hearing on February 10, 11, and 12, 2014. At that hearing, the following evidence was presented.

In 2010, Horne was running for Arizona Attorney General. During the primary election campaign, Winn had worked as a volunteer for the Horne campaign in the rural counties. (R.T. of Feb. 12, 2014, at 529.) On October 12, 2010, Winn began to work with BLA for the general election. (*Id.* at 622–23.) Winn worked with Brian Murphy (Murphy) of Lincoln Strategy Group to design and produce BLA's only political commercial. On Wednesday, October 20, 2010, at 10:21 a.m., Murphy sent an e-mail to Winn discussing the content of that commercial:

> I think the copy is pretty powerful. After reviewing the polling data I have and reviewing Tom's ad I think he does a better job of defending himself than we can, so I am suggesting through this ad that our message be used to drive her negatives. I believe this commercial will certainly accomplish that. Please let me know if we are okay to get in the studio and start producing the spot.

(Record on Review (syntax and punctuation mirrored) [R.O.R.] #98, at 000019.) At 10:40 a.m., Winn contacted George Wilkinson, BLA's treasurer, and made arrangements to meet over the noon hour. (R.T.

of Feb. 12, 2014, at 561.) At 2:19 p.m., Horne called Winn and spoke for 8 minutes until 2:27 p.m.. (R.O.R. #99, at 000022.) At 2:24 p.m., Murray e-mailed the unedited voice-over file for BLA's commercial. (R.O.R. #101, at 000043–44.) At 2:29, Winn responded as follows:

> We do not like that her name is mentioned 4 times and no mention for Horne. We are doing a re-write currently and will get back to you. Too negative and takes away from the message we wanted which we want to hire the next AG to protect and defend Arizona against the federal government. I will get back to you shortly Brian sorry for the confusion except I have several masters.

(R.O.R. #101, at 000043.) At 2:30 p.m., Murray responded that he needed to stop production then. (*Id.*) At 2:37 p.m., Winn responded:

> Yes I will have it worked out by 5:30. They feel this leaves people with her name 4X and with no mention of Tom It is like saying don't think about a pink elephant . . so you think about the pink elephant.

(R.O.R. #101, at 000043.) At 2:53 p.m., Murray responded:

> It is kind of the point, driving her negatives. We don't want Tom's name associated with the negative messaging. . . .

(R.O.R. #101, at 000043.) At 2:59 p.m., Winn

responded:

> The concern is you can get out her negatives without saying her name 4 times. I have two very strong personalities debating this moment she lacks name recognition we do not want to help her in that regard is the argument.

(R.O.R. #101, at 000043.)

At 3:01 p.m., Winn placed a telephone call to Horne, but the records show it lasted only 1 minute. (R.O.R. #99, at 23.) At 3:11 p.m., Winn e-mailed Murray the revised script with this comment: "I think I prevailed no mention of Tom thanks for what you said I believe this times out Let met know." (R.O.R. #98, at 000018–19.) Murray and Winn then exchanged e-mails on the length and the wording until 3:25 p.m. (*Id.* at 000018.) At 3:21 p.m., Horne called Winn, and they spoke for 4 minutes. (R.O.R. #99, at 23.)

On October 27, 2010, Ryan Ducharme (Ducharme) (a Republican who was working for a different campaign) sent Horne the following e-mail:

> Recent polls show you losing ground amongst independents to Rotellini and her starting to pick up more Reps than you are picking up Dems. Bleeding needs to be stopped. Allegations and smears against you by DC group starting to peel away votes. They need to be addressed as desperate last minute attacks with no basis in truth.

(R.O.R. #107, at 000121–22.) At 1:45 p.m., Ducharme

sent another e-mail to Horne and Kim Owens (who was involved in the Horne Campaign):

> I would link attacks directly to Rotellini as someone behind in the polls trying to hide from her record (SB1070, ties to unions calling for AZ boycott, etc.) The truth, once known, will undermine Rotellini's credibility and call in to question her character
> – a very important quality for Inds.
> You are much stronger in rural AZ.
> –Ryan

(R.O.R. #107, at 000121.) At 1:47 p.m., Horne forwarded both messages to Casey Phillips, a regional director for the Republican State Leadership Committee. (*Id.*) At 2:02 p.m., Horne attempted to forward the e-mail chain to Winn, with the following message:

> I forwarded this to casey. Maybe with this we can. Try again for the hundred k.

(R.O.R. #107, at 000121.) At 2:05 p.m., Horne received a notice that the attempt to forward the e-mail chain had failed, so at 2:10 p.m., Horne again attempted to send the e-mail chain to Winn, and this time she received it. (*Id.* at 000120.)

At 2:31 p.m., Winn forwarded the entire e-mail chain to Murray with the message, "this just came into me read below." (R.O.R. #107, at 000120.) At 2:55 p.m., Murray sent the e-mail chain to Steve Sparks, the firm's attorney, with this message:

> Steve,
> I wanted to make you aware of an incident that occurred with one of our clients. Kathleen is running an IE committee called Business Leaders of Arizona which supports Tom Horne for AG. I was hire[d] to do the TV component. I warned her on numerous occasions that she needed to cease contact with the candidate and any agents of the campaign. I then received the following email. I then called her and informed her again that she should not have any contact. She assured me that this was unsolicited and had not in several days.
> As our firm's attorney I wanted to make you aware of this situation should something arise at a later date.
> Thanks, B

(R.O.R. #107, at 000120.)

On April 14, 2014, the ALJ issued her Administrative Law Judge Decision containing 108 Findings of Fact and 60 Conclusions of Law. The ALJ concluded with a Recommended Order that Polk vacate her Order Requiring Compliance.

On May 14, 2014, Polk issued her Final Decision and Order. In that Final Decision and Order, Polk accepted all 108 of the ALJ's Findings of Fact, accepted 51 of the ALJ's Conclusions of Law, and rejected nine of the ALJ's Conclusions of Law. Polk found the evidence presented showed Horne and Winn discussed the wording of the commercial during their telephone conversations on Wednesday, October 20, 2010, and those discussions resulted in changes in the wording of that commercial. Polk

further found the evidence presented of the October 27, 2010, e-mail from Horne to Winn showed Horne was trying to get Winn to raise another $100,000 and spend it on the campaign. Polk rejected the ALJ's Recommended Order and affirmed her Order Requiring Compliance.

On May 29, 2014, Appellants filed their Notice of Appeal for Judicial Review of Administrative Decision. This Court has jurisdiction pursuant to A.R.S. § 12–124(A) and A.R.S. § 12– 905(A).

II. GENERAL STANDARDS FOR REVIEW.

The Arizona statutory authority and case law define the scope of administrative review:

> In reviewing an agency's decision pursuant to the Administrative Review Act, the superior court ***must*** affirm the agency action unless it is "not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion."

Carlson v. Arizona St. Pers. Bd., 214 Ariz. 426, 153 P.3d 1055, ¶ 13 (Ct. App. 2007) (emphasis added), *quoting* A.R.S. § 12–910(E).

> The court must defer to the agency's factual findings and affirm them if supported by substantial evidence. If an agency's decision is supported by the record, substantial evidence exists to support the decision even if the record also supports a different conclusion.

Gaveck v. Arizona St. Bd. of Podiatry Exam., 222 Ariz. 433, 215 P.3d 1114, ¶ 11 (Ct. App. 2009) (citations omitted).

> [I]n ruling on the sufficiency of the evidence in administrative proceedings, courts should show a certain degree of deference to the judgment of the agency based upon the accumulated experience and expertise of its members.

Croft v. Arizona St. Bd. of Dent. Exam., 157 Ariz. 203, 208, 755 P.2d 1191, 1196 (Ct. App. 1988).

> A trial court may not function as a "super agency" and substitute its own judgment for that of the agency where factual questions and agency expertise are involved.

DeGroot v. Arizona Racing Comm'n, 141 Ariz. 331, 336, 686 P.2d 1301, 1306 (Ct. App. 1984).

> [The reviewing court must] view the evidence in a light most favorable to upholding the Board's decision and "will affirm that decision if it is supported by any reasonable interpretation of the record."

Baca v. Arizona D.E.S., 191 Ariz. 43, 46, 951 P.2d 1235, 1238 (Ct. App. 1998) (cites omitted).

> A question of statutory interpretation involves a question of law, and [the reviewing court] is not bound by the trial court's or the agency's conclusions [about] questions of law.

Siegel v. Arizona St. Liq. Bd., 167 Ariz. 400, 401, 807 P.2d 1136, 1137 (Ct. App. 1991).

> On appeal, [the reviewing court] is free to draw its own conclusions in determining if the Board properly interpreted the law; however, the Board's interpretation of statutes and . . . regulations is entitled to great weight.

Baca, 191 Ariz. at 45–46, 951 P.2d at 1237–38.

> Judicial deference should be given to agencies charged with the responsibility of carrying out specific legislation, and ordinarily an agency's interpretation of a statute or regulation it implements is given great weight. However, the agency's interpretation is not infallible, and courts must remain the final authority on critical questions of statutory construction.

U.S. Parking Sys. v. City of Phoenix, 160 Ariz. 210, 211, 772 P.2d 33, 34 (Ct. App. 1989) (citations omitted).

III. ISSUE: WAS THERE SUBSTANTIAL EVIDENCE TO SUPPORT THE ACTION OF THE AGENCY, AND WAS THE ACTION OF THE AGENCY CONTRARY TO LAW, ARBITRARY AND CAPRICIOUS, OR AN ABUSE OF DISCRETION.

Appellants contend the evidence does not support Appellee's finding that Winn and BLA coordinated efforts with Horne (Appellants' Argument F), while Appellee contends the evidence does support that finding (Appellee's Argument A). In reviewing the actions of an agency, the Arizona Court of Appeals has said the following:

> The court may not intervene if there is "any" evidence to support the administrative decision, and should not weigh the evidence in making that determination. We will not substitute our judgment for that of the agency if it was persuaded by the probative force of the evidence before it. We will not substitute our judgment for that of the board, even where the question is faulty or debatable and one in which we would have reached a different conclusion had we been the original arbiter of the issues raised by the application.

Blake v. City of Phoenix, 157 Ariz. 93, 96, 754 P.2d 1368, 1371 (Ct. App. 1988); *accord, Stant v. City of Maricopa Employee Merit Board,* 234 Ariz. 196, 319 P.3d 1002, ¶ 18 (Ct. App. 2014). This Court concludes there was evidence in the record that supported Appellee's finding that Winn and BLA coordinated efforts with Horne. Thus, this Court "will not substitute [its] judgment for that of the agency."

Appellants make several challenges to the administrative review process as applied in this matter. Acknowledging that the actions of the Administrative Law Judge are only advisory, Horne contends: (1) The statute should not apply when the "agency" is a Special Arizona Attorney General or a County Attorney and thus the agency here should not have the right to "overrule" the ALJ's recommended decision (Appellants' Argument A); (2) to the extent the statute would allow the "agency" to "overrule" (decline to accept) the recommended

decision of the ALJ, the statute is unconstitutional as a denial of due process (Appellants' Argument B); and (3) it is not logical to allow the head of an agency, who never saw the live testimony of the witnesses, to make credibility determinations (Appellants' Argument E). Appellants have provided to this Court authorities and arguments in support of their position. Appellee contends the statute properly allows an agency to reject the ALJ's recommended decision and doing so does not deny due process, and the head of an agency may make credibility determinations when based on an assessment of conflicts in the testimony, rather than on the demeanor of a witness (Appellee's Argument B-2). Appellee has provided to this Court authorities and arguments in support of her position. This Court concludes the authorities and arguments provided by Appellee are well- taken, and this Court adopts those authorities and arguments in support of its decision.

Finally, Appellants make several challenges to the statutory framework: (1) The relevant statutes should not apply to Business Leaders of Arizona because the commercial did not contain such words as "vote for," "elect," "reject," "support," "endorse," "cast your ballot for," "vote against," "defeat," or "reject" (Appellants' Argument D); (2) the statute limiting political contributions violates the United States Constitution and the Arizona Constitution because the limits were too low (Appellants' Argument G); and (3) the standard of proof should be by clear and convincing evidence rather than by a preponderance of the evidence (Appellants' Argument C). Appellants have provided to this Court authorities and arguments in support of their position. Appellee contends: (1) The definition of

"expressly advocates" is constitutional as applied to this case (Appellee's Argument B-4); (2) the contribution limits in the statute are constitutional (Appellee's Argument B-3); (3) Proof by a preponderance of the evidence is a proper standard (Appellee's Argument B-1). Appellee has provided to this Court authorities and arguments in support of her position. This Court concludes the authorities and arguments provided by Appellee are well-taken, and this Court adopts those authorities and arguments in support of its decision.

IV. CONCLUSION.

Based on the foregoing, this Court concludes there was substantial evidence to support the action of the agency, and the action of the agency was not contrary to law, was not arbitrary or capricious, and was not an abuse of discretion. This Court further determines there is no just reason to delay entry of judgment and no further matters remain pending, and thus this judgment is entered pursuant to Rule 54(c).

If any party wishes to appeal this Court's Decision to the Arizona Court of Appeals, that party must do so pursuant to A.R.S. § 12–913 and Rule 9(a) of the Arizona Rules of Civil Appellate Procedure. *See Eaton v. AHCCCS,* 206 Ariz. 430, 79 P.3d 1044, ¶ 7 (Ct. App. 2003) ("The [Arizona Court of Appeals] will allow an administrative decision to stand if there is any credible evidence to support it, but, because we review the same record, we may substitute our opinion for that of the superior court." "And when consideration of the administrative decision involves the legal interpretation of a

statute, this court reviews *de novo* the decisions reached by the administrative officer and the superior court."); *accord, Pendergast v. Arizona St. Ret. Sys.,* 234 Ariz. 535, 323 P.3d 1186, ¶ 10 (Ct. App. 2014) ("On appeal, we review de novo the superior court's judgment, reaching the same underlying issue as the superior court: whether the administrative action was not supported by substantial evidence or was illegal, arbitrary and capricious, or involved an abuse of discretion."), *quoting Carlson v. Arizona St. Pers. Bd.,* 214 Ariz. 426, 153 P.3d 1055, ¶ 13 (Ct. App. 2007); *Pima Cty. Hum. Rts. Comm. v. Arizona D.H.S.,* 232 Ariz. 177, 303 P.3d 71, ¶ 7 (Ct. App. 2013) ("Because the superior court did not hold an evidentiary hearing or admit any new evidence, we review its judgment *de novo,* 'reaching the same underlying issue as the superior court.' "); *Blancarte v. Arizona D.O.T.,* 230 Ariz. 241, 282 P.3d 442, ¶ 7 (Ct. App. 2012) ("Applying a *de novo* review of the superior court's decision "); *Ritland v. Arizona St. Bd. Med. Exam.,* 213 Ariz. 187, 140 P.3d 970, ¶ 7 (Ct. App. 2006) ("In reviewing the Board's decision, we are not bound by the superior court's judgment because we review the same record.").

IT IS THEREFORE ORDERED affirming the Final Decision and Order issued May 14, 2014, by Appellee Special Arizona Attorney General and Yavapai County Attorney Sheila Polk.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN

JUDGE OF THE SUPERIOR COURT
103020141030•

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.

IN THE OFFICE OF THE ADMINISTRATIVE HEARINGS

No. 14F-001-AAG

IN THE MATTER OF:

TOM HORNE, individually; Tom Horne for Attorney General Committee (SOS Filer ID 2010 00003); KATHLEEN WINN, individually; Business Leaders for Arizona (SOS Filer ID 2010 00375),

ADMINISTRATIVE LAW JUDGE DECISION

HEARING: February 10, 2014, through February 12, 2014, with the record held open until March 24, 2014.

APPEARANCES: The Yavapai County Attorney's Office was represented by Deputy County Attorney Jack H. Fields and Deputy County Attorney Benjamin D. Kreutzberg. Tom Horne and the Tom Horne for Attorney General Committee were represented by Michael D. Kimerer and M.E. "Buddy" Rake, Jr. Kathleen Winn and Business Leaders for Arizona were represented by Timothy A. La Sota and Larry L. Debus.

ADMINISTRATIVE LAW JUDGE: Tammy L. Eigenheer

OVERVIEW

This case involves an appeal of a determination by the Yavapai County Attorney's Office made pursuant to its authority under A.R.S § 16-924(A) that Tom Horne, the Tom Horne for Attorney General Committee, Kathleen Winn, and

Business Leaders for Arizona (BLA) (collectively, Appellants) violated the provisions of Title 16, Chapter 6 of the Arizona Revised Statutes by consulting and conferring on the contents of BLA's political advertisement that aired during the 2010 general election for Attorney General. The Administrative Law Judge concludes that the Yavapai County Attorney's Office failed to prove by a preponderance of the evidence that there was any illegal coordination between M. Horne, the Tom Horne for Attorney General Committee, Ms. Winn, and BLA.

FINDINGS OF FACT

Order Requiring Compliance

1. On June 27, 2013, the Arizona Secretary of State issued a letter to the Arizona Attorney General's Office stating that reasonable cause existed to believe that Appellants had violated campaign finance laws during the 2010 general election for Attorney General.

2. On June 27, 2103, the Arizona Attorney General's Office, through Solicitor General Robert Ellman, appointed Yavapai County Attorney Sheila Polk as a Special Arizona Attorney General to fulfill the Attorney General's role as described in A.R.S. § 16-924.

3. On October 17, 2013, the Yavapai County Attorney's Office issued an Order Requiring Compliance outlining its findings that Appellants had coordinated in violation of Title 16, Chapter 6 of the Arizona Revised Statutes. As a result of the coordination, BLA's expenditures were deemed in-kind contributions to the Tom Horne for Attorney General Committee.

4. Mr. Horne and the Tom Horne for Attorney General Committee were ordered to amend their 2010 Post-General Election Report to include the expenditures by BLA as in-kind contributions. They were also ordered to refund the amount of the deemed in-kind contributions in excess of the appropriate limits, which totaled $397,378.00, to the persons or organizations that made the contributions.
5. Ms. Winn and BLA were ordered to amend their 2010 Post-General Election Report to reflect the coordinated nature of BLA's expenditures.
6. On October 31, 2013, Appellants filed their Notice of Appeal and Request for Hearing.
7. A Notice of Hearing was issued by the Yavapai County Attorney's Office setting this matter for a hearing before the office of Administrative Hearings, an independent state agency.

Background

8. Ms. Winn formed BLA on December 23, 2009. According to Ms. Winn, the original purpose of BLA was to oppose Andrew Thomas in the Attorney General primary election.[1]*
9. According to Ms. Winn's March 30, 2012 affidavit, BLA was funded by approximately $2,500.00 that was given to a graphics art designer who absconded with the funds. After that initial expenditure, BLA was inactive and Ms. Winn continued to file the required forms with the Arizona Secretary of State that demonstrated no additional funds had been raised.[2]

---

*Footnotes are at end of document

10. Ms. Winn was volunteer for Mr. Horne's campaign from early 2010 until shortly after the primary election. Ms. Winn was the out-of-county coordinator for all 14 Arizona counties, with the exception of Maricopa County. Ms. Winn traveled extensively during the primary election to support Mr. Horne's election bid.[3]

11. According to the Amended 2010 Post-General Election Report filed by Ms. Winn, between October 20, 2010, and October 29, 2010, BLA raised $513,340.00 from individuals and businesses, including a $350,000.00 contribution from the Republican Sate Leadership Committee (RSLC).[4]

Yavapai County Attorney's Office's Investigation

12. The Yavapai County Attorney's Office has premised its case on the activities of M. Winn and Mr. Horne on October 20, 2010, and October 27, 2010, to show there was coordination between Ms. Winn and BLA with Mr. Horne and the Tom Horne for Attorney General Committee.

13. In reaching its conclusion, the Yavapai County Attorney's Office reviewed the joint investigation of the Federal Bureau of Investigation (FBI) and Maricopa County Attorney's Office. At hearing, the Yavapai County Attorney's Office's primary witness was FBI Special Agent Brian Grehoski, who with his partner, FBI Special Agent Mervin Mason,[5] conducted the investigation, interviewed witnesses, reviewed records, and wrote reports.

14. Agent Grehoski testified as to his investigation and review of phone and email records during the relevant time period, and more specifically on October 20, 2010, and October 27, 2010.

October 20, 2010 Timeline

15. The following timeline of events of October 20, 2010, details relevant phone calls and emails between Mr. Horne, Ms. Winn, Brian Murray, apolitical consultant with Lincoln Strategy Group (LSG), and others that the Yavapai County Attorney's Office relied on to assert that Mr. Horne and Ms. Winn coordinated as to the advertisement Mr. Murry was producing.[6]

16. At 9:47 a.m. Ms. Winn spoke to Greg Harris, an attorney who had put her in contact with one of his clients who had contributed $30,000.00 to BLA.[7]

17. 10:21 a.m., Mr. Murray emailed Ms. Winn with an initial script of the advertisement.

The email read as follows:

> I think the copy is pretty powerful. After reviewing the polling data I have and reviewing (Mr. Horne's) ad I think he does a better job of defending himself than we can, so I am suggesting through this ad that our messaging be used to drive [Democratic general election opponent Felicia Rotellini's] negatives: I believe this commercial will certainly accomplish that. Please let me know if we are okay to get in the studio and start producing the spot.
>
> . . . .
>
> VO: "Arizona needs an Attorney General who will be tough on illegal immigration.
> But liberal Felecia Rotellini isn't.
> She openly opposes SB 1070.
> It gets worse:

> When liberal special interests' groups launched a boycott against Arizona, Rotellini worked with them. She took thousands of their dollars for her campaign; Selling Arizona out.
> Felicia Rotellini: opposing SB 1070, boycotting Arizona, sell us out.
> Felicia Rotellini: If she wins, Arizona loses.
> Paid for by Business Leaders for Arizona"[8]

18. At 10:40 a.m. Ms. Winn called BLA's treasurer, George Wilkinson.[9]
19. At 2:19 p.m., Mr. Horne called Ms. Winn and the two spoke for eight minutes, until approximately 2:27 p.m.[10]
20. At 2:24 p.m. Mr. Murray sent an email to Ms. Winn with the unedited voice-over file of the BLA advertisement.[11]
21. At 2:29 p.m. approximately two minutes after finishing her conversation with Mr. Horne, Ms. Winn sent an email to Mr. Murray. The email read as follows:

> We do not like that [Ms. Rotellini's] name is mentioned 4 times and no mention for Horne. We are doing a re-write currently and will get back to you. Too negative and takes away from the message we wanted which we want to hire the next AG to protect and defend Arizona against the federal government. I will get back to you shortly Brian sorry for the confusion except I have several masters.[12]

22. At 2:30 p.m., Mr. Murray emailed Ms. Winn that he would stop production based on the concerns that Ms. Winn raised.[13]

23. At 2:37 p.m., Ms. Winn emailed Mr. Murray. The email read as follows:

> Yes! Will have it worked it outby 5:30. They feel this leaves people with [Ms. Rotellini's] name 4X and with no mention of Tom. It is like saying do not think about a pink elephant . .so, you think about the pink elephant.[14]

24. At 2:37 p.m. Ms. Winn called Mr. Horne from her office landline and the two spoke for 11 minutes until approximate 2:48 p.m.

25. At 2:50 p.m. Ms. Winn emailed Mr. Murray, "Okay it will be similar message just some changes.[16]

26. At 2:50 p.m., Mr. Murray emailed Ms. Winn that the message should be "driving [Ms. Rotllini's] negatives" and that Mr. Horne's name should not be "associated with the negative messaging."[17]

27. At 2:59 p.m., Ms. Winn sent another email to Mr. Murray. The email read as follows:

> The concern is you can get out [Ms. Rotellini's] negatives without paying [M. Rotellini's] name 4 times. I have two very strong personalities debating this moment [M. Rotellini] lacks name recognition we don't want to help her in that regard is the argument.[18]

28. At 3:00 p.m., Ms. Winn and Mr. Murray exchanged emails regarding payment details for the advertisement.[19]

29. At 3:01 p.m. Ms. Winn attempted to call Mr. Horne.[20]

30. At 3:11 p.m., Ms. Winn emailed Mr. Murray a revised script with the statement: "I think I prevailed no mention of Tom thanks for what you said. I believe this times out let me know."[21]

31. At 3:13 p.m., Mr. Murray emailed Ms. Winn that the script was still too long.[22]

32. At 3:14 p.m., Ms. Winn emailed Mr. Murray and suggested removing one line from the script.[23]

33. At 3:15 p.m. Ms. Winn received a telephone call from Mr. Harris that lasted approximately three minutes.[24]

34. At 3:16 p.m., Mr. Murray emailed Ms. Winn that the script was still too long.[25]

35. At 3:21 p.m. Mr. Horne called Ms. Winn and the two spoke for four minutes until approximately 3:25 p.m.[26]

36. At 3:25 p.m., Ms. Winn emailed Mr. Murray the following message:

> Change to : Arizona needs the RIGHT attorney general taking money from labor unions and special interest groups.[27]

37. On October 22, 2010, Mr. Murray ordered that the advertisement start airing on Monday October 25. 2010

October 27, 2010. Email

38. On October 27, 2010, Ryan Ducharme, who did telephone polling for John Huppenthal, sent Mr. Horne the following email:

> Recent polls show you losing ground amongst independents to Rotellini and her starting to pick up more Reps than you are picking up Dems. Bleedings needs to be stopped. Allegations and smears against you by the DC group starting to peel away votes. They need to be addressed as desperate last-minute attacks with no basis in truth.[29]

39. At 1:45 p.m. Mr. Ducharme resent that email to Mr. Horne and a member of the Tom Horne campaign with the additional message:

> I would link attacks directly to Rotellini as someone behind in the polls trying to hide from her record (SB 1070, ties to unions calling for AZ boycott, etc.) The truth, once known, will undermine Rotellini's credibility and call into question her character a very important quality for Inds. You are much stronger in rural AZ.[30]

40. Mr. Horne then forwarded the email with both messages from M. Ducharme to Casey Phillips. Regional director for the RSLC.[31]

41. At 2:02 p.m., Mr. Horne attempted to forward the email chain to Ms. Winn, with the message "I forwarded this to Casey. Maybe with this we can try again for the hundred K."[32]

42. At 2:05 p.m., Mr. Horne received a notice that the email chain could not be delivered.[33]
43. At 2:10 p.m., Mr. Horne resent the entire email chain to Ms. Winn.[34]
44. At 2:31 p.m., Ms. Winn forwarded the entire email chain to Mr. Murray with the message, "This just came into me read below."[35]
45. Mr. Murray then sent the email on to his attorney indicating his concern that Ms. Winn was in contact with Mr. Horne regarding the campaign.[36]

FBI Special Agent Brian Grehoski's Testimony

46. Agent Grehoski testified that during his investigation, he obtained and reviewed the telephone and email records of the relevant parties. Based on his review of those records, he was able to create the timeline of events described above.
47. Agent Grehoski stated that Verizon Wireless keeps its call detail records, or metadate for a period of one year. Because the FBI opened it s investigation on December 9, 2011, Verizon Wireless no longer had the metadate for the call made and received by Ms. Winn and Mr. Horne during October 2010.[37]
48. Agent Grehoski also indicated that based on a review of the Verizon Wireless policies regarding chargeable time, the lengths of the calls indicated on the records were calculated starting from the time the sender pressed "send" and ending when the call disconnected from the system and were rounded up to a full minute.[38]
49. Agent Grehoski testified that a review of Mr. Horne's emails revealed 129 emails relating to a

real estate deal and none of those emails made any mention of Ms. Winn.[39]

50. The question of Agent Grehoski's testimony with respect to conversations he and Agent Mason had with Greg Tatham, a commercial real estate broker, on May 31, 2012, became an issue at hearing.

51. At hearing, Agent Grehoski testified that he specifically recalled that he and Agent Mason had two substantive telephone conversations with Mr. Tatham on May 31, 2012.[40]

52. Agent Grehoski indicated the first telephone call was initiated by Agent Mason and that during That during that conversation, when asked if Mr. Horne had consulted with Ms. Winn regarding the sale of the property at y Avenue and McDowell, Mr. Tatham denied any knowledge.[41]

53. Agent Grehoski testified the call ended early because Mr. Tatham was not at his office and/or did not have the documents on hand. After the telephone call, Agent Grehoski testified that he and Agent Mason discussed the conversation and agreed that the next time they spoke, they would ask broader questions.[42]

54. Agent Grehoski stated that during the second substantive conversation, he and Agent Mason asked Mr. Tatham if he was aware of Mr. Horne conferring with anyone regarding the sale of property, and Mr. Tatham denied having knowledge. Mr. Tatham made a recording of this conversation.[43]

55. A review of Agent Mason and Mr. Tatham's telephone records show only one telephone call between them on May 31, 2012.[44] Therefore, the record supports a finding that the first substantive

telephone conversation to which Agent Grehoski testified did not occur.

Greg Tatham's Testimony

56. Mr. Tatham testified that he was the commercial real estate broker for Mr. Horne on the purchase side of a "1031 exchange" in October 2010 and that he was responsible for the removal of an underground storage tank at the 1515 North y Avenue property.[45]

57. Mr. Tatham stated that he was not the only person Mr. Horne consulted with on real estate matters. [46]

58. Mr. Tatham testified that at no time during the single conversation he had with Agents Grehoski and Mason on May 31, 2012, did they ask specifically about Ms. Winn's involvement with the real estate transaction in October 2010.[47]

Kathleen Winn's Testimony

59. Ms. Winn testified that she was out of the state in early October 2010, and that when she returned around October 8, 2010, or October 9, 2010, she contacted Brett Mecum, Executive Director of the Republican Party, to determine if any resources were available to support a Republican candidate. Mr. Mecum informed Ms. Winn that there were funds available from the RSLC, but that the funds would have to be given to an independent expenditure committee as the Republican Party could not accept funds directly.[48]

60. Ms. Winn then met with Mr. Horne on October 11, 2010 or October 12, 2010, to discuss her plans to

operate BLA as an independent expenditure committee supporting Mr. Horne's campaign for Attorney General.[49] During that meeting Mr. Horne informed Ms. Winn of the "rules" with respect to an independent expenditure committee.[50]

61. Later, Mr. Horne also advised Ms. Winn that she should consider contacting an attorney for further advice.[51] Following Mr. Horne's advice Ms. Winn contacted Lisa Houser, an attorney on October 13, 2010.[52]

62. On October 13, 2010, Ms. Winn also contacted Chuck Diaz, a potential donor to solicit a contribution to BLA.[53] Mr. Diaz expressed an interest in contributing and invited Ms. Winn to his home in Tucson to meet with him.[54]

63. On October 15, 2010, Ms. Winn went to Mr. Diaz's home and he gave Ms. Winn a check for $5,000.00 on that day.[55]

64. While in Tucson, Ms. Winn also met with Keith Bruner, a potential campaign contributor, and discussed BLA. Ms. Winn had already spoken to Mr. Bruner's attorney, Mr. Harris , on or about October 12, 2010, regarding BLA, and Mr. Harris referred Ms. Winn to contact Mr. Bruner.[56]

65. Ultimately, Mr. Bruner contributed $30,000.00 to BLA through two corporate entities. NCP Finance Limited and Texas Loan Corporation.[57]

66. In her conversations with Mr. Mecum, Ms. Winn asked him to recommend firms to assist her with BLA campaign. Ms. Winn was referred to at least two firms and she placed calls to those firms. LSG returned her call first, so went forward with that firm.[58]

67. Mr. Murray on behalf of LSG informed Ms. Winn that to be considered a viable campaign in the

eyes of the RSLC, BLA would have to raise at least $50,000.00 from other sources.[59]

68. In a conversation between Ms. Winn and with Christine Newman, Mr. Horne's sister, Ms. Newman asked about BLA and Ms. Winn explained that she had raised $35,000.00 and was working to get the additional funds to reach the $50,000.00 threshold that Mr. Murray indicated was necessary to be considered viable. Ms. Newman then volunteered to contribute the additional $15,000.00 at that time.[60]

69. After BLA had raised $50,000.00, Mr. Murray contacted the RSLC to determine if it was willing to contribute any funds to assist with Mr. Horne's campaign, Mr. Murray was able to secure a contribution of $350,000.00 from RSLC, even though he originally believed there may have been $450,000.00 available.

70. BLA then worked with Mr. Murray to produce and air a television advertisement expressly advocating the defeat of Felicia Rotellini.

71. In producing the advertisement, a number of emails were exchanged between Ms. Winn and Mr. Murray on October 20, 2010 as outlined in Findings of Fact Nos. 15 through 36.

72. On October 20, 2010, Ms. Winn met with George Wilkinson, BLA's treasurer, in Mesa.[61] Ms. Winn indicated she wanted to share the advertisement's script that Mr. Murray had emailed her with Mr. Wilkinson to get his opinion.

73. With respect to various phrases and/or terms used in the emails described above, Ms. Winn gave the following explanations:

a. The "we" and "several masters" used in the 2:29 p.m. email and the "they feel" used in the 2:37 p.m. email to Mr. Murray referred to BLA in general, Mr. Wilkinson in particular, and Mr. Harris and his client who had contributed a great deal of money to BLA.[62]

b. The "two strong personalities debating" mentioned in the 2:59 p.m. email referred to two coworkers in Ms. Winn's office that she had asked for their opinions.[63]

74. After the advertisement had been produced and while it was airing, Ms. Winn had another conversation with Ms. Newman, in which Ms. Newman asked about BLA and the campaign. Ms. Winn explained that BLA originally believed that it would receive $450,000.00 from the RSLC but ended up receiving only $350,000.00. Ms. Newman volunteered to contribute $100,000.00 to make up the difference. That contribution was wired to the BLA account on October 27,2010.[64]

75. As to the October 27, 2010 email from Mr. Ducharme that Mr. Horne had forwarded to her, Ms. Winn testified that she did not read the entire email when she received it. She saw it contained polling data and believed that Mr. Murray might be able to use the information to get additional funds from the RSLC as Mr. Horne had suggested, so she forwarded the email to Mr. Murray.[65]

76. Ms. Winn testified as to her extensive real estate background. Mr. Winn has 27 to 28 years of experience in real estate lending and real estate sales. She was a real estate broker and a mortgage

banker. At the time in question, Ms. Winn worked at AmeriFirst Financial as a senior loan officer.[66]

77. Ms. Winn explained that throughout the campaign, she assisted a number of people with real estate and lending issues.[64]

78. Ms. Winn testified that Mr. Horne was selling property at ih ave and McDowell in Phoenix and was doing a "1031" exchange," a mechanism by which a seller of a property can avoid tax consequences by rolling proceeds of the sale into the purchase of a new property. Ms. Winn was aware Mr. Horne had been attempting to sell the property for some time and had assisted in finding a potential purchaser, Mike Hogarty, months prior, but that sale fell through.[68]

79. Ms. Winn testified what she knew Mr. Horne was attempting to close the real estate transaction during October 2010.[69]

80. Ms. Winn stated that her mother had surgery on October 19, 2010; therefore, Ms. Winn was not available to talk to Mr. Horne on that day.[70]

81. Ms. Winn maintained that Mr. Horne informed her on October 20, 2010, that he had just been informed that the revenue from the sale of his property would not cover the funds necessary to close on the purchase of a new property. Ms. Winn state that Mr. Horne was using her as a sounding board to consider different options and she ultimately assisted him in applying for a loan to make up the difference.[71]

82. Ms. Winn testified that two of the conversations that she had with Mr. Horne on October 20, 2010, the 2:19 p.m. call of 8 minutes and the 2:37 p.m. call of 11 minutes, were regarding the regarding the real estate deal. Ms. Winn testified

she believe the first call was probably when Mr. Horne was describing his nee for a loan to close the real estate deal and the second call was when she filled out a loan application for him.[72]

83. Ms. Winn denied any coordination with Mr. Horne with respect to the BLA advertisement. Ms. Winn stated,

> I appreciate that both things were going on at the same time, except both things were going on at the same time, and they were separate matters. I didn't combine them. I didn't make fruit salad out of them. I dealt with Mr. Horne on his real estate matters, and I dealt with the – putting an ad together. And I did them separately and I didn't combine them. And I didn't involve either party in what was going on.
>
> And I dealt with Brian Murry to get the ad done, and got the ad done. We were on a tight deadline. I met my deadline. I did everything I was supposed to do to get that ad produced.
>
> I also helped my friend Tom Horne with his real estate transaction. It doesn't mean there was an inner – a commingling of these events.[73]

Ms. Winn's Affidavits

84. In her May 25, 2012, affidavit Ms. Winn stated that "Activity for the independent campaign did not begin until October 11th, and the first contribution was made on October 20th.[74]

85. Ms. Winn admitted during her testimony that the statement was false. BLA's activity began around October 12, 2010, and the first contribution was received on October 15, 2010.

86. Ms. Winn also stated in her March 30, 2012 affidavit that "[I]t was my independent campaign, my ideas, and my money I raised by my own efforts that created the ad."[75] In her May 30, 2012, affidavit, Ms. Winn similarly stated that "I raised every dollar for this campaign myself, produced the advertisement, and bought the air time without the assistance of anyone other than Mr. Murray."

87. However, Sharon Collins informed the FBI during a February 17, 2012 inter view that she referred Mr. Diaz to Ms. Winn.[77] During a February 21, 2012 interview with the FBI, Ms. Collins reiterated that she put Mr. Diaz in contact with Ms. Winn to help support Mr. Horne's campaign.[78]

88. Ms. Winn's emails to Mr. Murray on October 20, 2010, indicated she was consulting with someone else as to the content and script of the advertisement.

Mr. Horne's Testimony

89. Mr. Horne testified that Ms. Winn was an extremely effective and productive volunteer during the primary campaign and that as a result, they became good personal friends.[79]

90. Mr. Horne stated that during the campaign, he and other volunteers became aware that Ms. Winn had been in the real estate business and that many people went to her with real estate business and that many people went to her with real estate questions or concerns based on her expertise.[80]

91. Mr. Horne indicated that on or about October 11, 2010, Ms. Winn approached him to let him know that she was leaving to start an independent expenditure campaign.[81]

92. Mr. Horne had a meeting with Ms. Winn to go over the elections laws to ensure that she was aware of what was and was not allowed under the statutes. Mr. Horne provided Ms. Winn with a copy of the statutes and highlighted relevant portions. Mr. Horne also referred Ms. Winn to an attorney to obtain further advice.[82]

93. In addition to the campaign, Mr. Horne also had a real estate transaction pending at the same time.

94. Mr. Horne testified that he had first attempted to sell the property at 1515 N. yt Ave in 2005, but several transactions since then had failed mostly because the buyers could not obtain financing.

95. On October 19, 2010, Mr. Horne received notification that at the time of closing on the new property in Sun City West, he would be required to pay no less than $100,000.00 and no more than $217,000.00.[83]

96. Mr. Tatham was working on securing financing, but Mr. Horne knew these matters could often fall through and he felt insecure. Therefore, Mr. Horne contacted Ms. Winn for advice.

97. Mr. Horne testified that Ms. Winn was not listed on any real estate documents because she was not a broker or lender in the transaction, but merely assisting him as a courtesy to a friend. This is corroborated by a review of the real estate documents.[84]

98. Mr. Horne testified that he knew Ms. Winn was unavailable October 19, 2010, because her mother was having serious surgery. Therefore, the first time he could talk to Ms. Winn about the real estate transaction was on October 20, 2010.

99. Mr. Horne stated that, while he could not remember the specific contents of their conversations, he felt that the 3-minute call would have been him asking about Ms. Winn's mother, the 8-minute call would have been when he explained the problem with the property, and the 11-minute call would have been when Ms. Winn took the information for his loan application.[85]

100. Mr. Horne categorically denied discussing the advertisement with Ms. Winn on October 20, 2010, during any of their conversations.[86]

101. Mr. Horne was aware that Ms. Winn did not receive as much money as expected based on October 27, 2010 article and various rumors from people in the Republican Party.[87]

102. Mr. Horne acknowledged that he received the emails from Mr. Ducharme regarding the polling numbers. Mr. Horne testified that because Mr. Horne was worried about the polling date, he forwarded the email chain to Ms. Winn in the hope that she could use the information to raise more money.[88]

103. Mr. Horne represented that he did not act on Mr. Ducharme's strategic advice because he did not consider Mr. Ducharme to be an expert and Mr. Horne did not pay any attention to Mr. Ducharme's suggestions.[89]

Other witnesses and evidence

104. Mr. Wilkinson testified that he met with Ms. Winn in Mesa and reviewed the script at that time. Mr. Wilkinson stated that he believed the advertisement was too negative and focused too much on Ms. Rotellini.

105. Mr. Murray testified that Mr. Horne did not have enough money behind his advertisement, so his approach was to take what Mr. Horne had "already done and build upon it."[90]

106. Mr. Murray stated that he created the original script for the advertisement based on the messaging of Mr. Horne.[91] Mr. Murray indicated that with the exception of some minor changes, he wrote the final advertisement.[92]

107. The original script read:

> Arizona needs an Attorney General who will be tough on illegal immigration.
> But liberal Felecia Rotellini isn't.
> She openly apposes SB 1070.
> It gets worse:
> When liberal special interests groups launched a boycott against Arizona, Rotellini worked with them.
> She took thousands of their dollars for her campaign;
> Selling Arizona out.
> Felicia Rotellini: opposing SB 1070, boycotting Arizona, selling us out.
> Felicia Rotellini: If she wins, Arizona loses.
> Paid for by Business Leaders of Arizona.[93]

108. The final script of the advertisement that aired read:

> The Federal Government is suing Arizona but, Arizona needs the right Attorney General
> Liberal Felicia Rotellini isn't.
> She openly opposes SB 1070.
> It gets worse: Rotellini took money from labor unions and special interest groups who boycott Arizona.
> She sold Arizona out.
> Opposing SB 1070, boycotting Arizona, selling us out.
> If Rotellini wins, Arizona loses.
> Paid for by Business Leaders for Arizona. Major funding by the Republican State Leadership Committee (571) 480-4860.[94]

CONCLUSIONS OF LAW

Standard of Proof

1. Appellants argued that the standard of proof in this matter should be clear and convincing evidence based on the possibility that if the Order Requiring Compliance were upheld and Appellants failed to comply with the Order Requiring Compliance within 20 days, the Yavapai County Attorney's Office could seek to impose treble damages under A.R.S §16—92)8) and A.R.S. 16-905 (J). Appellants argued that "[w]here the consequences of establishing a conclusion can be a punitive remedy, then that conclusion must be established by clear and convincing evidence."[95]

2. The Order Requiring Compliance was issued to Appellants pursuant to A.R. S. § 16-924(A). There is no provision with A.R.S § 16-924 (A) that provides for a civil penalty or any other form of punitive remedy.

3. It is undisputed that before imposing a civil penalty for treble damages, the Yavapai County Attorney's Office would have to issue a separate Order Assessing a Civil Penalty, from which Appellants would have appeal rights. Appellants argue any determination on an Order Assessing a Civil Penalty would be a simple ministerial question of whether Appellants had complied with the Order Requiring Compliance within 20 days, and therefore, that the heightened burden of proof should apply to the underlying determination. The cases cited by Appellants in support of such a determination are not on point and are not persuasive

4. The Administrative Law Judge concludes that burden of proof in this matter is an the Yavapai County Attorney's Office to establish by a preponderance of the evidence that Appellants violated the provisions of Title 16, Chapter 6 of the Arizona Revised Statutes and the Order Requiring Compliance issued pursuant to A.R.S. § 16-924(A)[96] was proper.[97]

Use of Telephone and Email Records

5. It is noted that throughout the proceedings, Appellants referred to the unreliability of the telephone and email records based on the lack of metadata. While Appellants mentioned an expert witness that they had standing by to testify as to

the necessity of metadate to properly evaluate electronic records, Appellants did not call the expert witness during the hearing.

6. Without expert testimony or other evidence addressing the reliability of the electronic records, the electronic records will be considered on their face.

Applicable Law

7. A.R.S § 16901(14) defines an "independent expenditure" as

> an expenditure by a person or political committee, other than a candidate's campaign committee, that expressly advocates the election or defeat of a clearly identified candidate, that is made without cooperation or consultation with any candidate or committee or agent of the candidate and that is not made in concert with or at the request or suggestion of a candidate, or any committee or agent of the candidate. Independent expenditure includes an expenditure that is subject to the requirements of section 16-917, which requires a copy of campaign literature or advertisement to be sent to a candidate named or otherwise referred to in the literature or advertisement.
>
> An expenditure is not an independent expenditure if any of the following applies:
>
> . . . .
>
> (b) There is any arrangement, coordination or direction with respect to the expenditure between the candidate or the candidate's

> agent and the person making the expenditure, including any officer, director, employee or agent of that person.
>
> . . . .
>
> (d) The expenditure is based on information about the candidate's plans, projects or needs, or those of his campaign committee, provided to the expending person by the candidate or by the candidate's agent or any officer, member or employee of the candidate's campaign committee with a view toward having the expenditure made.

8. Independent expenditures are not considered contributions to a candidate's campaign.[98] In contrast "[a]n expenditure by a political committee, corporation, limited liability company, labor organization or person that does not meet the definition of an independent expenditure is an in-kind contribution to the candidate and a corresponding expenditure by the candidate unless otherwise exempted."[99]

9. Arizona has established contribution limits that vary depending on the type of election and the type of donor.[100] Arizona candidates cannot accept contributions from corporations or limited liability companies.[101] All political committees in Arizona must file periodic reports identifying all contributions received. [102]

10. Because Arizona statutes do not provide a great deal of specificity with how to interpret coordination activities, authorities often look to the federal guidelines for instruction.[103] Federal law provides for a three-prong coordination test to determine whether a communication is coordinated.

The three prongs-payment, content, and conduct-must be met for a communication to be deemed corrdinated.[104] The only prong issue in this matter is the conduct prong.

11. 11 C.F.R. § 109.21(d) provides:

> (d) *Conduct standards.* Any one of the following types of conduct satisfies the conduct standard of this section whether or not there is agreement or formal collaboration, as defined in paragraph (e) of this section:
>
> . . . .
>
> (2) *Material involvement.* This paragraph, (d)(2), is not satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source. A candidate, authorized committee, or political party committee is materially involved in decisions regarding:
>
> (i) The content of the communication;
>
> (ii) The intended audience for the communication;
>
> (iii) The means or mode of the communications;
>
> (iv) The specific media outlet used for the communication;
>
> (v) The timing or frequency of the communication; or
>
> (vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.

> (3) *Substantial discussion.* This paragraph, (d)(3), is not satisfied if the material to the creation, production, or distribution of thecommunication was obtained from a publicly available source. The communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication or the employees or agents of the person paying for communication, and the candidate who is clearly identified in the communication, or the candidate's authorized committee, or a political party committee. A discussion is substantial within the meaning of this paragraph if information about the candidate's political party committee's campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to a person paying for the communication and that information is material to the creation, production, or distribution of the communication.

12. As to subsection (2) above Appellants argued the Yavapai County Attorney's Office must prove that Mr. Horne's input, assuming there was any, was material to the actual advertisement that aired.
13. However, the plain language of the regulation provides that the conduct prong is met if "a candidate. . . is *materially involved*" in the decisions being made. Being "materially involved" in the decisions does not mean that the candidate must prevail on every decision. Furthermore, subsection

(d) above specifically provides that the conduct may satisfy the standard "whether or not there is agreement."

14. Also as to subsection (2) above, Appellants argued that to satisfy the material involvement standard, the Yavapai County Attorney's Office would have to establish that the information material to the advertisement was not publicly available.

15. In contrast, the language quoted above provides that the material involvement standard is not satisfied if the information material to the advertisement "*was obtained* from a publicly available source." If the information material to the advertisement was the opinion and input would be available from a publicly available source.

16. As to subsection (3) above, a "substantial discussion" requires that information about a candidate's plans, projects, activities, or needs must be material to the communication. Appellants again argued that the Yavapai County Attorney's Office must prove that Mr. Horne's input, assuming there was any, was material to the communication itself.

17. However, the plain language of the regulation provides that the conduct prong is met if "information about the candidate's . . .plans, projects, activities, or needs is conveyed. . . and that information is material" to the communication. Thus, if a candidate were to convey to an independent expenditure committee that he or she was in need of a negative advertisement against an opponent in a specific region and that the candidate was planning to release an advertisement highlighting the candidate's positive record in that same region on a certain day, that information could

be considered material to the communication even if the candidate had no input on the specific contents of the final communication.

Credibility of Agent Brian Grehoski

18. While the telephone records of Agent Mason and Mr. Tatham support a finding that the substantive telephone conversation on May 31, 2012, to which Agent Grehoski testified did not occur, such a finding does not mean Agent Grehoski's testimony is not credible with respect to other materials aspects of this matter.

19. Much of Agent Grehoski's testimony involved a review of his analysis on the email and telephone records in this matter to establish the timeline based on the documentation.

20. The Administrative Law Judge is capable of independently reviewing those documents to evaluate the accuracy of that timeline and the weight to be given to the events that occurred.

Credibility of Kathleen Winn

21. The Yavapai County Attorney's Office highlighted those statements in Ms. Winn's affidavits that contradicted her statement. Secretary of State filings, and other records in this matter.

22. Ms. Winn argued that the incorrect date in her affidavit were an error that she did not notice until later. Ms. Winn asserted that her statement is that she conducted the BLA activities on her own without the assistance of anyone other than Mr.

Murry were meant to address the specific allegations that she coordinated with Mr. Horne.

23. While there may be some inconsistencies in the dates of activities, those are not enough to determine Ms. Winn is not credible. And while Ms. Winn's explanation as to the limited nature of coordination described in her affidavits may mean those affidavits were less than fully accurate, it does not render Ms. Winn's testimony in this matter as not credible.

Yavapai County Attorney's Office Inferences

October 20, 2010

24. The Yavapai County Attorney's Office acknowledged that it had not knowledge or evidence to the content of the telephone conversations between Ms. Winn and Mr. Horne. Instead, from the circumstances surrounding the phone calls and the emails, the Yavapai County Attorney's Office drew five inferences from October 20, 2010 course of events to support a finding of coordination.

First Inference: "We" and Winn's "several masters"

25. Mr. Horne called Ms. Winn at 2:19 p.m. and they spoke for eight minutes until approximately 2:27 p.m. During their conversation, Mr. Murray emailed Ms. Winn the unedited voice-over file of the BLA advertisement. Just two minutes after finishing her conversation with Mr. Horne, Ms. Winn emailed Mr. Murray. In that email Mr. Winn expressed her concern with the number of times Ms. Rotellini's name was used without any mention of Mr. Horne. In so stating, Ms. Winn used the word

"we" four times and ended with "I have several masters."

26. Mr. Winn testified that the "we" used in the email was in reference to BLA in general, Mr. Wilkinson in particular, and Mr. Harris and his client who had contributed a great deal of money to BLA. Ms. Winn stated she met with Mr. Wilkinson to go over the script earlier in the day and that he thought the advertisement was too negative and focused too much on Ms. Rotellini and not enough on Mr. Horne. In so stating, Ms. Winn used the word "we" four times and ended with "I have several masters."

26. Ms. Winn testified that the "we" used in that email was in reference to BLA in general, Mr. Wilkinson in particular, and Mr. Harris and his client who had contributed a great deal of money to BLA. Ms. Winn stated she met with Mr. Wilkinson to go over the script earlier in the day and that the thought the advertisement was too negative and focused too much on Ms. Rotellini and not enough on Mr. Horne.

27. Based on telephone records, the meeting between Ms. Winn and Mr. Wilkinson in Mesa ended prior to 2:00 p.m. on October 20, 2010, and Ms. Winn had no further telephone contact with him the rest of the day. Also, Ms. Winn last spoke to Mr. Harris at 9:47 a.m. on October 20, 2010, before she had the script or voice-over file.

28. The Yavapai County Attorney's Office asserted that it was not possible Ms. Winn was doing a re-write of the script with either Mr. Wilkinson or Mr. Harris at 2:29 p.m. that afternoon when she emailed Mr. Murray. The Yavapai County Attorney's Office maintained that the evidence

established by preponderance of the evidence that Mr. Horne was part of the "we" and one of her "several masters."

29 Appellants argued that because the email was sound file, Ms. Winn would be unable to listen to it while she was on the phone with Mr. Horne, so her comments must have been a reflection of her earlier conversation with Mr. Wilkinson. This argument ignores the possibility that Ms. Winn opened the file and played over the phone to Mr. Horne and that he then gave his thoughts on the advertisement.

30. The Administrative Law Judge concludes that while the Yavapai County Attorney's Office inference is plausible, it is just as equally plausible that Ms. Winn was referencing her earlier conversation with Mr. Wilkinson when she said "We do not like" and We are doing a re-write." The statement made that it "takes away from the message we wanted which we want to hire the next AG" could also be a reference to BLA's position in general. It is also reasonable that Ms. Winn felt she had a certain duty to the contributors, including both Mr. Harris and his client, and considered them among her "several masters."

Second Inference: "they feel" and "similar message"

31. At 2:37 p.m., Ms. Winn emailed Mr. Murray that she would have the script worked out by 5:30 p.m. and included in her email the statement that "[t]hey feel this leaves people with [Rotellini's] name 4X." At the same time of the email, Ms. Winn called Mr. Horne from her office phone line and they spoke for 11 minutes until approximately 2:48 p.m. Two minutes later, at 2:50 p.m. Ms. Winn emailed

Murray, "Okay it will be similar message just some changes."

32. It was pointed out that Ms. Winn did not speak to Mr. Wilkinson or Mr. Harris between her 2:37 p.m. email promising to have it worked out by 5:30 p.m. and her 2:50 p.m. email consenting to a "similar message" with "some changes." However, during that time, Ms. Winn had a long conversation with Mr. Horne and had little to discuss the BLA advertisement with anyone else.

33. The Yavapai County Attorney's Office maintained that these activities established by a preponderance of the evidence that Mr. Horne was part of the "they" and agreed to the similar message with some charges.

34. Appellants argued that this inference simply calls into question Ms. Winn's ability to make decisions on her own to approve the message and to make some changes without direction from to others, specifically Mr. Horne.

35. The Administrative Law Judge concludes that while the Yavapai County Attorney's Office inference is plausible, it is equally plausible that Ms. Winn approved the similar message with some changes after considering the earlier input of Mr. Wilkinson.

Third Inference: "two strong personalities debating"

36. After Mr. Murry emailed Ms. Winn explaining that part of the message was to focus on Ms. Rotellini's negative without associating Mr. Horne's name with the negative messaging, Ms. Winn replied via email at 2:59 p.m. and stated that "I have two very strong personalities debating."

37. The Yavapai County Attorney's Office asserted that the record established by a preponderance of the evidence that one of the two strong personalities debating was Mr. Horne.

38. Ms. Winn testified that she had asked some of her co-workers their opinion about the advertisement and that they were concerned that the advertisement mentioned Ms. Rotellini's name four times when Ms. Rotellini lacked name recognition. Ms. Winn indicated these co-workers were the "two strong personalities debating."

39. The Yavapai County Attorney's Office argued that Ms. Winn's explanation strained credibility. Ms. Winn's explanation was further diminished by the fact that her affidavits did not mention discussing or debating the advertisement's contents with anyone other than Mr. Murray and specifically stated that she created the advertisement without anyone's assistance other than Mr. Murray's

Fourth Inference: "I think I prevailed"

40. The Administrative Law Judge concludes that while the Yavapai County Attorney's Office inference is plausible, it is equally plausible that Ms. Winn was referring to co-workers when she referenced the "two strong personalities debating."

41. At 3:01 p.m. Ms. Winn attempted to call Mr. Horne but the call did not appear in Mr. Horne's phone records, indicating he did not answer the call. At 3:11 p.m., Ms.

Winn emailed Mr. Murray a revised script of the BLA advertisement with the statement that "I think I prevailed"

42. The Yavapai County Attorney's office stated that it was logical to infer that Ms. Winn's opinion must have "prevailed" over someone else's opinion.

And thus, the Yavapai County Attorney's Office maintained that a preponderance of the evidence established that it was Mr. Horne over who she prevailed, given that he was one of the strong personalities debating" just moments before.

43. Appellants argued that Ms. Winn "prevailed" against Mr. Wilkinson, Mr. Harris and the co-workers.

44. Ms. Winn had not been in contact with Mr. Wilkinson or Mr. Harris since the prior email that "two strong personalities were debating, "so it is unlikely she was referring to either of them as there was no ongoing debate in which she could prevail. The Administrative Law Judge concludes that while the Yavapai County Attorney's Office inference is plausible, it is equally plausible that Ms. Winn was referring to the co-workers that she stated were debating with her when she stated that she believed she had "prevailed."

Fifth Inference: further changes

45. At 3:13 p.m. Mr. Murray emailed Ms. Winn that the script was still too long. At 3:14 p.m., Ms. Winn replied with the removal of one line. At 3:15 p.m., Ms. Winn received a call from Mr. Harris that lasted approximately three minutes. At 3:16 p.m., Ms. Winn received a call from Mr. Horne that lasted four minutes, until approximately 3:25 p.m. as the conversation ended, Ms. Winn emailed Mr. Murray at 3:25 p.m. with a final suggested change.

46. Because Ms. Winn had a conversation with Mr. Horne in the moments preceding her email to Mr. Murray, the Yavapai County Attorney's Office concluded that Mr. Horne and Ms. Winn were discussing the advertisement's script.

47. Appellants argued that because the script was never forwarded to Mr. Horne, it was extremely improbable that Mr. Horne could have participated in the detailed editing that was occurring at this point. Such an argument presupposes that Ms. Winn did not read that script to and/or play the sound file for Mr. Horne over the phone.

48. The Yavapai County Attorney's Office alleged that the weight of the evidence showed that Mr. Horne contributed to the changes in the script. However, the Administrative Law Judge concludes that it is equally plausible that Ms. Winn approved the final edits without any input from anyone else.

October 27, 2010

49. The Yavapai County Attorney's Office asserted that the October 27, 2010 email was more than mere polling numbers and involved strategic advice that constituted coordination.

50. Appellants argued that because the email was in reference to fundraising and nothing in the state or federal statutes or regulations prohibits coordination of contributions, this email cannot be considered a violation.

51. The first sentence of the first email referenced recent polls showing Mr. Horne was "losing ground" with independents. Following that, Mr. Ducharme gave advice as to how to deal with that issue. The second email Mr. Ducharme expended on that advice.

52. Appellants argued the campaign was over and that there was nothing more to be done when the email was sent. Appellants also dismissed the strategic advice that was included in the email because Mr. Ducharme was not a strategist with the

campaign and his opinion was not important to Mr. Horne.

53. According to the Yavapai County Attorney's Office, Mr. Horne must have believed when he forwarded the email to Ms. Winn that there was something more that could be done in the campaign, or he would not have forwarded the email or suggested to Ms. Winn that she use the information to get the additional $100,000.00 from the RSLC.

54. However, if the only relevant information that Ms. Winn needed was the polling numbers, Mr. Horne could have forwarded just the first email from Mr. Ducharme instead of the second email that included the original message and the additional strategic advice.

55. In contrast, based on their interpretation of the statutes and regulations, Appellants argued that the information could not be considered "substantial" or as having had a "material" effect on the expenditures of BLA because the advertisement had already been produced and was running on October 27, 2010.

56. The analysis of the applicable law above does not necessarily require that Mr. Horne attempted to have a material effect on the contents of the advertisement, but only he provided information as to his campaign needs that material to the distribution of the communication.

57. It is unclear from the record if Mr. Horne's email was material to the distribution of the communication after October 27, 2010. Ms. Winn had already received the additional $100,000.00 from Ms. Newman and used those funds to buy more airtime for the advertisement. Nothing in the record shows that the October 27, 2010 email

changed the way those funds were spent. No new ads were produced, and it does not appear that the distribution markets changed based on the email.

58. The evidence established the Mr. Horne had a real estate transaction pending at the same time of these activities. Both Ms. Winn and Mr. Horne asserted that their communications with each other on October 20, 2010, related only to the health of Ms. Winn's mother and Mr. Horne's real estate transaction. Both Ms. Winn and Mr. Horne flatly denied any coordination with respect to the advertisement.

Conclusion

59. Ultimately, the Yavapai County Attorney's Office failed to establish by a preponderance of the evidence that the telephone calls between Mr. Horne and Ms. Winn on October 20, 2010, constituted improper coordination of expenditure in violation of Title 16, Chapter 6 of the Arizona Revised Statutes. While there are inferences that can be made, there are also reasonable explanations that the communications related to Mr. Horne's real estate transaction that was pending at the same time.

60. The Yavapai County Attorney's Office also failed to establish by a preponderance of the evidence that the October 27, 2010 email from Mr. Horne to Ms. Winn constituted improper coordination in violation of Title 16, Chapter 6 of the Arizona Revised Statutes. No evidence was presented to show that the email had a material effect on BLA's expenditure.

RECOMMENDED ORDER

Based on the above, the October 17, 2013 Order Requiring Compliance is vacated.

Done this day, April 14, 2014.

/s/Tammy L. Eigenheer
Administrative Law Judge

Transmitted electronically to:
Benjamin Kreutzberg, Deputy Attorney
Yavapai County Attorney's Office

Footnotes:

[1]YCA Exhibit 3 at, r1
[2]YCA Exhibit 3 at I,I
[3]YCA Exhibit 3 at, r5
[4]YCA Exhibit 5. The Report also includes an $80.00 contribution from Ms. Winn on November 8, 2010
[5]Agent Mason was not called as a witness by either party.
[6]It is noted that throughout the proceedings, Appellants referenced the unreliability of the telephone and email records based on the lack of metadate. This argument will be addressed in the Conclusions of Law, *infra*
[7]YCA Exhibit 7 at 22.
[8]YCA Exhibit 6 at 19 All quoted emails appear as sent. Any errors were in the original.
[9]YCA Exhibit 7 at 22 and YCA Exhibit 31.
[10]YCA Exhibit 7 at 22 and YCA Exhibit 10 at 46.
[11]YCA Exhibit 8 at 41-42.
[12]YCA Exhibit 8 at 41

[13]*Id*
[14]YCA Exhibit 9 at 43
[15]YCA Exhibit 10 at 46
[16]YCA Exhibit 8 at 41.
[17]YCA Exhibit 9 at 43
[18] *Id*
[19]YCA Exhibit 8 at 40-41.
[20]YCA Exhibit 7 at 23.
[21]YCA Exhibit 6 at 18-19
[22]YCA Exhibit 6 at 18
[23]*Id*
[24]YCA Exhibit 7 at 23
[25]YCA Exhibit 6 at 18
[26]YCA Exhibit 7 at 23 and YCA Exhibit 10 at 46.
[27]YCA Exhibit 6 at 18
[28]Horne-Winn Exhibit 23
[29]YCA Exhibit 15 at 121-122
[30]YCA Exhibit 15 at 121
[31] *Id*
[32]YCA Exhibit 15 at 120-121
[33]YCA Exhibit 15 at 120
[34]*Id*
[35]Id
[36]Id
[37]Court Reporter's Transcript (Transcript) at 59:2-9
[38]Transcript at 63:11-64:3
[39]Transcript at 138:11-25
[40]Transcript at 136:1-19
[41]Transcript at 137:24-138:4
[42]Transcript at 138:5-7
[43]Transcript at 138:7-10
[44]YCA /exhibit 39 and Horne-Winn Exhibit 27.
[45]Transcript at 455:12-18
[46]Transcript at 463:18-23
[47]Transcript at 461:4-6

[48]Transcript at 530:1-531:19
[49]Transcript at 531:22-23; 612:6-21
[50]Transcript at 531:23-532:3; 614:19-23
[51]Transcript at 532:4-9; 616:3-5
[52]YCA Exhibit 32 at 549; Transcript at 616:6-617:1
[53]YCA Exhibit 32 at 549; Transcript at 621:19-622:3
[54]Transcript at 622:1-3
[55]Transcript at 624:5-14
[56]Transcript at 625:19-626:23; see also YCA Exhibit 32 at 549
[57]YCA Exhibit 5 at 13; Transcript at 537:6-12.
[58]Transcript at 538:20-539:6
[59]Transcript at 540:5-9.
[60]Transcript at 540:13-18
[61] Mr. Wilkinson's phone records show he was in Scottsdale at 10:40 p.m. and was in Chandler at 1:58 p.m. Mr. Wilkinson made or received calls from Mesa at 12:19 p.m., 12:21 p.m., and 12:58 YCA Exhibit 31. Ms. Winn's phone records show she was in Phoenix at 12:35 p.m. and was in Tempe at 3:41 p.m. Ms. Winn first made a call from Mesa at 12:47 p.m. and last received a call while in Mesa at 3:37 p.m. YCA Exhibit 7. Therefore, Mr. Wilkinson and Ms. Winn could have met in Mesa at some point shortly after 12:35 p.m. and shortly before 1:58 p.m.
[62]Transcript at 565: 10-566:7
[63]Transcript at 590:20-591:3
[64]Transcript at 552: 9-24
[65]Transcript at 653: 15-20
[66]Transcript at 526: 21-24, 528: 11-21
[67]Transcript at 572: 21-574;4
[68]Transcript at 569: 2-570:4
[69]Transcript at 569: 15-18
[70]Transcript at 583: 15-20
[71]Transcript at 576: 5-9

[72]Transcript at 584: 5-8
[73]Transcript at 670: 9-25
[74]YCA Exhibit 4 at 1[2].
[75]YCA Exhibit 3 at 1[6].
[76]YCA Exhibit 11 at 1[4].
[77]YCA Exhibit 29 at 395 and 404.
[78]Horne-Winn Exhibit 16 at 1
[79]Transcript at 685:20-23
[80]Transcript at 696: 16-24.
[81]Transcript at 687: 11-16
[82]Transcript at 688: 1-20
[83]YCA Exhibit 33 at 620.
[84]Horne-Winn Exhibit 6, Transcript at 138:11-25
[85]Transcript at 699: 1-15
[86]Transcript at 700: 3-4
[87]Transcript at 702: 17-25, Horne-Winn Exhibit 10
[88]Transcript at 703: 11-704: 16
[89]Transcript at 705: 24-706:2.
[90]Transcript at 401: 18-19
[91]Transcript at 375:16-376:8
[92]Transcript at 392:23-25
[93]YCA Exhibit 6 at 19
[94]YCA Exhibit 23
[95]Horne Rebuttal p. 9.
[96]A.R.S. § 16-924(A) provision relevant part:

> The attorney general, county attorney or city or town attorney, as appropriate may serve on the person an order requiring compliance with that provision. The order shall state with reasonable particularity the nature of the violation and shall require compliance within twenty days from the date of issuance of the order. The alleged violator has twenty days from the date of issuance of the order. The alleged violator

has twenty days from the date of issuance of the order to request a hearing pursuant to title 41, chapter 6.

[97]*See* A.A.C R2-19-119
[98]A.R.S § 16-901(5)(b)(vi)
[99]A.R.S. § 16-917(C)
[100]A.R.S. § 16-905
[101]A.R.S § 16-919(A)
[102]A.R.S § 16-913, A.R.S. § 16-915
[103]See Transcript at 215:3-8
[104]YCA Exhibit 14 at 111

SHEILA SULLIVAN POLK, SBN 007514
YAVAPAI COUNTY ATTORNEY

Jack H. Fields, SBN 012470
Benjamin D. Kruetzberg, SBN 027984
Deputy County Attorneys
255 East Gurley Street
Prescott, Arizona 86301
(928) 771-3344
YCAO@yavapai.us

OFFICE OF THE YAVAPAI COUNTY ATTORNEY CAMPAIGN FINANCE PROCEEDING

IN THE MATTER OF TOM HORNE, individually; Tom Horne for Attorney General Committee (SOS Filer ID 2010 00003); KATHLEEN WINN, individually; Business Leaders for Arizona (SOS Filer ID 2010 00375),	**Order Requiring Compliance**

On June 27, 2013, the Arizona Secretary of State issued a letter to the Arizona Attorney General's Office stating that reasonable cause exists to believe that Kathleen Winn ("Winn"), Business Leaders for Arizona ("BLA"), Tom Horne ("Horne"), and Tome Horne for Attorney General ("the Horne

Campaign") violated campaign finance laws under A.R.S. § 16-924(A). Also, on June 27, 2013, the Arizona Attorney General's Office, through Solicitor General Robert Ellman, appointed Yavapai County Attorney Shiela Polk as a Special Arizona Attorney General to fulfill the Attorney General's role as described in A.R.S 16-924. This Order Requiring Compliance ("Order") is issued to that authority.

Tom Horne ran for and was elected to the office of Arizona Attorney General in 2010. BLA, through its chair Kathleen Winn, was formed as an independent expenditure committee. However, as explained in this order, BLA and Winn coordinated their activities with Horne and the Horne Campaign to advocate the defeat of Horne's opponent in the 2010 general election, Felicia Rotellini. The coordination resulted in violations of Arizona Campaign finance law, A.R.S. § 16-901 et seq.

I. Arizona Campaign Finance Law

A.R.S. § 16-901(14) defines the term "independent expenditure":

> 14. Independent expenditure" means an experience by a person or political committee, other than a candidate's complain committee, that expressly advocates the election or defeat of a clearly identified candidate, that is made without cooperation or consultation with any candidate or committee or agent of the candidate and that is not made in concert with or at the request or suggestion of a candidate, or any committee or agent of the

candidate. Independent expenditure includes an expenditure that is subject to the requirements of § 16-917, which requires a copy of campaign literature or advertisement to be sent to a candidate named or otherwise referred to in the literature or advertisement. An expenditure is not an independent expenditure if any of the following applies:

(a) Any officer, member, employee or agent of the political committee making the expenditure is also an officer, member, employee or agent of the committee whose election or whose opponent's defeat is being advocated by the expenditure is also an officer, member, employee or agent of the committee of the candidate whose election or whose opponent's defeat is being advocated by the expenditure or an agent of the candidate whose election or whose opponent's defeat is being advocated by the expenditure.

(b) There is any arrangement, coordination, or direction with respect to the expenditure between the candidate of the candidate's agent and the persona making the expenditure, including any officer, director,

(c) In the same election the person making the expenditure, including any officer, director, employee, or agent of that person, is or

(i) Authorized to raise or expend monies on behalf of the candidate or the candidate's authorized committees.

> (ii) Receiving [a]n form of compensation or reimbursement from the candidate, the candidate's committees, or the candidate's agent.
>
> (d) The expenditure is based on information about the candidate's plans, projects or needs, or those of his campaign committee, provided to the expending person by the candidate or by the candidate's campaign committee with a view toward having the expenditure made.

Independent expenditures do not count as contributions a candidate's coma. A.R.S. § 16-901(5)(b)(vi). However, "[a]n expenditure by a political committee, corporation, limited liability company, labor organization of a person that does not meet the definition of an independent expenditure is an in-kind contribution to the candidate and corresponding expenditure by the candidate unless otherwise exempted" A.R.S. § 16-917 (C) (emphasis added).

Candidates and Candidate Committees are subject to contribution limits which vary depending on the nature of the election and the type of donor. A.R.S. §16-905l see Exhibit 1, 2009-2010 Contribution Limits Table. Candidate and their campaigns cannot accept contributions from corporations or limited liability companies, A.R.S § 16-919(A). All political committees, both candidate committees and independent committees, must periodically file reports list all contributions received. A.R.S. §§ 16-913, 16-915.

In sum, if there is any "arrangement, coordination or direction" between a persona or

political committee making an expenditure that expressly advocates the election or defeat of a clearly identified candidate and that candidate or the candidate's campaign, those expenditures are deemed in-kind contributions to the candidate and expenditures of the candidate. Several consequences may follow as a result of the deeming: (1) The deemed in-kind contributions may exceed the candidate's contribution limits; (2) The deemed in-kind contributions may violate the law that prohibits the candidate from accepting any contributions from corporate contributors; (3) If the deemed in-kind contributions are not reported by the candidate committee, the reports filed by the candidate committee and the expending "independent" committee would inaccurately state the nature and origins of the contributions.

II. The 2010 Attorney General Election

A. Background

Kathleen Winn formed BLA on December 23, 2009. Exhibit 2 BLA Statement of Organization. According to Winn, her original intent was to oppose Andrew Thomas in the Attorney General primary election. Exhibit 3, Kathleen Winn Affidavit dated March 30, 2012 at ¶ 1. According to Winn, BLA was mildly active during the first two months of 2010, and then remained "dormant" until activated again in October of 2010, Exhibit 3, Kathleen Winn Affidavit dated March 30, 2012 at ¶ 1.

According to her affidavit, Winn was involved with the Horne campaign from early in 2010 until a few weeks after the primary election. Exhibit 3,

Kathleen Winn Affidavit dated March 30, 2012 at ¶ 2. Her duties included coordinating the Horne campaign in all counties other than Maricopa County. Exhibit 3, Kathleen Winn Affidavit dated March 30, 2012 at ¶ 5. Winn states that she withdrew from the Horne campaign on October 17, 2010, and that the first contribution to BLA was made on October 20, 2010. Exhibit 4, Kathleen Winn Affidavit dated May 25, 2012 at ¶ 2.

According to BLA's Post-Election report filed by Winn with the Secretary of State, beginning approximately two weeks before the 2010 general election, BLA received five hundred thirteen thousand four hundred twenty dollars ($513,420.00) in contributions from seven individuals three entities. Exhibit 5, BLA Amended 2010 Post-General Election Report. BLA used the contributions to pay Lincoln Strategy Group ("LSG") for the production and airing of a television advertisement to expressly advocate the defeat of Felicia Rotellini, Horne's opponent in the 2010 Attorney General Election. Exhibit 3, Kathleen Winn Affidavit dated March 30, 2012 at ¶ 6 and Exhibit 5, BLA Amended 22010 Post-General Election Report. Winn's principal contact at LSG was Brian Murray ("Murray"). Winn's affidavit asserts that that the anti-Rotellini and advertisement was her idea alone, that the advertisement was produced by her alone, that she took no instruction from Horne or his campaign staff or advisors, and that there was absolutely no coordination between Horne/Horne's campaign, and Winn/BLA. Exhibit 3, Kathleen Winn Affidavit dated March 30, 2012 at ¶ 6.

B. Events of October 20, 2010

On October 20, 2010, Murray and Winn engaged in several key e-mail exchanges regarding the content and progress of the anti-Rotellini advertisement that BLA had commissioned from LSG. Interspersed with the e-mail exchanges between Murray and Winn are telephone calls between Winn and Horne. The Murray/Winn e-mails and the Winn/Horne phone calls, and the relationships between them, are critical because they document the development and refinement of the core political message of BLA's anti-Rotellini advertisement. That advertisement was BLA's entire contribution to the 2010 election's political landscape.

At 10:21, Murray sent Winn an e-mail suggesting that the advertisement "be used to drive [Rotellini] negatives." Exhibit 6, E-mail Chain A. Between 10:21 a.m. and the next e-mail at 1:42 p.m., the phone records show five calls between Horne and Winn and five calls between Winn and Murray. Exhibit 7, Winn Phone Records.

At 1:42 p.m., Winn e-mailed Murray and asked if sound was available for the anti-Rotellini advertisement. Exhibit 6, E-mail Chain A. At 1:46 p.m., Murray responded to Winn stating that the commercial's sound would not be available for few hours. Exhibit 6, E-mail Chain A.

At 2:19 p.m., Horne called Winn and they spoke for 8 minutes,[1] until 2:27 p.m. Exhibit 7, Winn Phone Records. While Horne and Winn were

[1] The telephone records round call lengths to the nearest minute.

speaking, at 2:24 p.m. Murray e-mailed Winn with the unedited voice-over file for the anti-Rotellini advertisement. Exhibit 8, E-mail Chain B. At 2:29 p.m., shortly after she had finished talking to Horne, Winn e-mailed Murray as follows:

> We do not like that her name is mentioned 4 times and no mention for Horne. We are doing a re-write currently and will get back to you. Too negative and to protect and defend [sic] Arizona against the federal government. I will get back to you shortly Brian sorry for the confusion except I have several masters.

Exhibit 8, E-mail Chain B. It would have taken Winn approximately 1-2 minutes to create this e-mail, meaning takes away from the message few wanted which we want to hire the next AG that she must have started it either while she was taking to Horne or immediately thereafter. In addition, Winn spoke to no one else on her cell phone between the receipt of the 2:24 p.m. e-mail from Murray and her 2:29 p.m. response. Exhibit 7, Winn Phone Records.

At 2:30 p.m. Murray responded stating that he would stop production on the anti-Rotellini advertisement. Exhibit 8, E-mail Chain B. Winn replied to Murray at 2:37 p.m.:

> Yes, I will have it worked out by 5:30. They feel this leaves people with her name 4X and with no mention of Tom [sic] It is like saying don't think about a pink elephant.. so [sic] you think about the pink elephant.

Exhibit 9, E-mail Chain C. Also, at 2:37 p.m. Winn initiated a telephone call to Horne, and they spoke for eleven minutes until approximately 2:48 p.m. Exhibit 10, Horne Phone Records.

At 2:50 p.m., just after she finished talking to Horne, Winn e-mailed Murray: "Okay it will be similar message just some changes." Exhibit 8, E-mail Chain B. At 2:53 p.m. Murray responded to Winn's e-mail that mentioned the "pink elephant" with the following e-mail:

> It is kind of the point, driving her negatives. We don't want Tom's name associated with the negative messaging. From a timing standpoint to be on the air Monday we will have to produce and make all edits tomorrow so I can traffic it on Friday.

Exhibit 9, E-mail Chain C.

At 2:59 p.m., Winn responded to Murray:

> The concern is you can get out her negatives without saying her name 4 times. I have two very strong personalities debating this moment she lacks name recognition we don't want to help her in that regard is the argument.

Exhibit 9, E-mail Chain C.

At 3:00 p.m., Winn and Murray exchanged two e-mails regarding BLA's payment to LSG for the anti-Rotellini advertisement. Exhibit 8, E-mail Chain B.

At 3:01 p.m. Winn called Horne and the call lasted for approximately one minute. Exhibit 7, Winn Phone Records. At 3:11 p.m. Winn sent Murray an e-mail with a revised script of the anti-Rotellini advertisement, and the statement: "I think I prevailed no mention of Tom thanks for what you said. I believe this times out let me know." Exhibit 6, E-mail Chain A. At 3:13 p.m., Murray told Winn that the script was too long. Exhibit 6, E-mail Chain A.

At 3:14 p.m., Winn suggested removing one line, but at 3:16 p.m. Murray told her that the commercial was still too long. Exhibit 6, E-mail Chain A. At 3:21 p.m., Horne called Winn, and they spoke for four minutes. Exhibit 7, Winn Phone Records. As they were finishing that conversation, at 3:25 p.m., Winn e-mailed Murray:

> Change to Arizona needs the RIGHT attorney general taking money from labor unions and special interest groups.

Exhibit 6, E-mail Chain A.

C. Analysis of the October 20, 2010 Events.

On October 20, 2010, Winn and Murray worked for several hours by phone and e-mail to finalize the "voice-over" script of the BLA advertisement that would support Horne and oppose Rotellini. The main discussion between Winn and Murray concerned the political message Winn/BLA wished to convey in the anti-Rotellini advertisements. The records show that in the course of this work whenever a decision was made to modify or approve the "voice-over" script, Winn was almost

always either on the phone with Horne, or spoke with Horne prior to conveying final instruction to Murray. The ***content*** of the e-mails between Winn and Murray, coupled with the ***timing*** of those e-mails and the phone calls between Winn and Horne provide convincing proof that Horne and Winn coordinated on the development of the political message to be conveyed by the BLA anti-Rotellini advertisement.

1. Content and timing of key phone calls and e-mails

At 2:19 p.m., Winn began an 8-minute phone conversation with Horne. Exhibit 7, Winn Phone Records. At 2:24 p.m., while Winn was on the phone to Horne, Murray e-mailed the unedited version of the voice-over script for the advertisement to Winn. Exhibit 9, E-mail Chain C.

At 2:29 p.m., shortly after ending her conversation with Horne, Winn e-mailed Murray with a critique of the script, stating that "**We** do not like that her name is mentioned 4 times and not mention for Horne." Exhibit 8, E-mail Chain B (emphasis added). Indeed, Winn used the plural pronoun "we" three additional time in that e-mail. – "**We** are doing a rewrite…", "Too negative and takes away from the message **we** wanted which **we** want. . .", Exhibit 8, E-mail Chain B. Winn clearly knew the difference between "we" and "I" as she finished the e-mail with the sentence: "I will get back to you shortly Brian sorry for the confusion except **I have several masters.** Exhibit 8, E-mail Chain B (emphasis added)

This e-mail is telling as it contradicts Winn's assertion in her affidavits that she "raised every dollar for this campaign [herself], produced the ad, and bought the airtime without the assistance of anyone other that Mr. Murray." Exhibit 11, Winn Affidavit dated May 30, 2012 at ¶ 6. Winn was on the phone with Horne when she received the draft script. She then told Murray that "we" have a problem with the script. Given the content of the 2:29 p.m. e-mail, the fact that the e-mail was sent within a minute or two of the end of the phone conversation between Winn and Horne and that nothing shows that Winn spoke with any other person during the time between the end of her call with Horne and the 2:29 p.m. e-mail, it is reasonable to conclude that "we" meant Winn and Horne. In other words, Winn was telling Murray that **Winn and Horne** had a problem with the script.

Winn also made a point to declare to Murray she had "several masters," again refuting her assertion that she was acting independently. Because she was finalizing advertisements advocating the defeat of Horne's opponent and was in communication at that time with no persons who could have contributed to the advertisement's contents other than Horne and Murray, the reasonable conclusion is that at least one of Winn's "masters" was Horne.

The focus of the e-mails then shifted to a debate about how the anti-Rotellini advertisement should be changed. In a 2:37 p.m. e-mail to Murray, Winn explained the objection "they" have a script: "I will have it worked out by 5:30. **They** feel this leaves people with their **4 X** and with no intention of Tom. It is like saying don't think about a pink elephant.

so, you think about the pink elephant." Exhibit 9, E-mail Chain C. Again, the use of the plural pronoun "they" indicates that Winn was not working alone on the script changes, contrary to her sworn assertion.

At the same time, she sent the e-mail, 2:37 p.m., Winn called Horne. Exhibit 7, Winn Phone Records and Exhibit 9, E-mail Chain C. This phone call with Horne lasted 11 minutes, and ended a t approximately 2:48 p.m. Very shortly after Winn's phone call with Horne ended, at 2:50 p.m., Winn e-mailed Murray to tell him that the revised script would have "a similar message" but incorporate some changes. Exhibit 8, E-mail Chain B. Clearly, between 2:37 p.m. and 2:50 p.m., while Winn and Horne spoke, changes to the script were being debated.

Winn confirmed that changes were being debated in here 2:59 p.m. e-mail to Murray where Winn states, "I have **two very strong personalities debating this moment** she lacks name recognition we don't want to help her in the regard is the argument." Exhibit 9, E-mail Chain C (emphasis added). Again, the statement that "two very strong personalities" were discussing the content of the anti-Rotellini advertisement refutes Winn's sworn assertions that she acted alone in developing it. The records show that while Winn and Murray were working on the advertisement, Winn was in contact with no person who could have contributed to the advertisement's content other than Horne. Indeed, Winn called Horne at 3:01 p.m., shortly after the 2:59 e-mail was sent. It is reasonable to conclude that Winn and Horne were debating the content of the anti-Rotellini advertisement.

At 3:11 p.m., Winn e-mailed Murray with modified script. Exhibit 6, E-mail Chain A. Winn made a point of telling Murray that she "prevailed" – again confirming Winn was engaged in a debate with someone else about the content of the script, logically one of her "several masters," and that she prevailed in the debate. This is also contrary to Winn's sworn assertions that she acted alone **and** dispels the notion that Winn was in any way the only person in control of the advertisement production process. And again, the only person Winn had contact with either by -e-mail or her cell phone during this time who could have contributed to the advertisement was Horne. Exhibit 7, Winn Phone records. The reasonable conclusion is that the debate about the content of the anti-Rotellini advertisement that LSG was preparing for BLA was between Winn and Horne.

It further appears that Horne participated in the final editing of the script to make short enough to air. At 3:13 p.m., Murray e-mailed Winn telling her the script was too long. Exhibit 6, E-mail Chain A. At 3:14 p.m., Winn suggested removing one line, but at 3:16 p.m. Murray told her that the script was still too long. Exhibit 6, E-mail Chain A. This e-mail appears to have prompted a call from Winn to Horne at 3:21 p.m. lasting for four minutes. Exhibit 7, Winn Phone Records. Near the end of that conversation, 3:25 p.m., Winn e-mailed Murray:

> Change to Arizona needs the **RIGHT** attorney general taking money from labor unions and special interest groups

Exhibit 6, E-mail Chain A.

2. Conclusions and inferences from the events of October 20, 2010

Two related conclusions flow clearly from the above chain of events: (1) Winn and Horne coordinated their efforts to produce the political message of the anti-Rotellini advertisement, and (2) Winn's sworn statements that she alone was responsible for the idea, design and production of the anti-Rotellini advertisement are false.

Under A.R.S. § 16-901(14), an independent expenditure must be made "without cooperation or consultation with any candidate or committee or agent of the candidate," and must also not be made "in concert with or at the request or suggestion of a candidate, or any committee or agent of the candidate," Further, an expenditure is not independent if "[t]here is any arrangement, coordination or direction with respect to the expenditure between the candidate or the candidate's agent and the person making the expenditure. . . "or if "[t]he expenditure is made on information about the candidate's plans, projects, or needs, or those of his campaign committee, provided to the expending person by the candidate's campaign committee with a view toward having the expenditure made." *Id.*

From 2:19 p.m. to 3:30 p.m. in October, the voice-over script for the anti-Rotellini advertisement was vetted and approved. The content of that script dictated BLA's entire political message during the 2010 election cycle.

As noted above, during her e-mail exchanges with Murray, Winn admitted that she had "several masters," that "we" have problems, and that "they"

do not like the script. Winn almost always consulted with Horne prior to instructing Murray. When a decision was finally made, Winn stated she "prevailed." The notion that she "prevailed" means that she had to persuade someone to her point of view, which in turn means someone else was making final decisions regarding the script.

The only other person Winn spoke with during that time who could have contributed to the advertisement with Horne. No other conclusion can be drawn other than that Horne himself was the final authority approving the political content of the anti-Rotellini advertisement purchased by BLA. Winn's primary contribution was to convey Horne's decisions to Murray. The records reflect that Winn and Horne coordinated their efforts on the anti-Rotellini advertisement because Horne was in fact in control of the content of BLA's anti-Rotellini advertisement. Thus, BLA's expenditures on the anti-Rotellini advertisement were not independent expenditures under A.R.S § 16-901(14) and are deemed an inkind contribution to Horne's campaign under A.R.S § 16-917 (C).[2]

---

[2] The conduct also satisfies the "conduct prong" of the Federal Elections Commission's (FEC's) guidelines to the extent that they might apply to Arizona campaign finance law. That test classifies expenditures as coordinated I) if the communications are made at the request or suggestion of the candidate, 2) if the candidate is materially involved in decisions regarding the content, audience, means of communication or other specific characteristics of the communication, 3) if the communication is made after one or more substantial discussions between the expender and the candidate, 4) if the expender and the candidate use a common vendor, or 5) if a person who has previously been an employee or independent contractor of the candidate's

The same facts lead to the conclusion that Winn's sworn assertions what she alone was responsible for the idea, design and production of the anti-Rotellini advertisement are patently false.[3] Winn's e-mails with Murray clearly state that Winn was looking to others to make decisions when finalizing the core political message of the anti-Rotellini advertisement, In fact, the October 20, 2010 emails make it clear that the origin of the political message to be conveyed by the anti-Rotellini advertisement was not Winn but was in fact Horne. Winn did not just consult with Horne regarding the development and production of the advertisement; she followed his direction for virtually it whole content.

Most of Winn's instructions to Murray occurred wither while she was on the phone with Horne or shortly after talking to him. Indeed, Winn admitted to Murray that she had "several masters," that "two strong personalities were debating," and that when a decision was made that he "prevailed." The e-mails show that Winn not only acted in coordination with Horne, she was not even in charge

---

campaign committee or party committee within 120 days of the expenditure. *See* Exhibit 14, Coordinated Communications, and Independent Expenditures. The FEC test also includes the "payment prong" and the "content prong," which are unambiguously satisfied in this situation. Accordingly, the expenditures would be considered coordinated under the FEC standard as well under the plain language of the Arizona statutes.

[3] Winn has also stated that she "raised every dollar for [the] campaign herself." Exhibit 11, Winn Affidavit dated May 30, 2012 at ¶ 4. However, Brian Murray raised the $350,000 from RSLC. Exhibit 12, Brian Murray Interview dated April 2, 2012 at 16-18 and Exhibit 13, E-mail Chain D.

of the production decisions for BLA's anti-Rotellini advertisement; Horne was.

D. Events of October 27, 2010

The coordination on October 27, 2010 is well documented through a single e-mail chain. *See* Exhibit 15, E-mail Chain E. At 1:36 p.m.,[4] political pollster Ryan Ducharme ("Ducharme") e-mailed Horne the following message:

> Recent polls show you losing ground amongst independents to Rotellini and her starting to pick up more Reps than you are picking up Dems. Bleeding needs to be stopped. Allegations and smears against you by the DC group starting to peel away votes. They need to be addressed as desperate last-minute attacks with no basis in truth.

Exhibit 15, E-mail Chain E, Ducharme then sent another e-mail to Horne and Kim Owens, a Horne campaigner:

> I would link attacks directly to Rotellini as someone behind in the polls trying to hide from her record (SB1070, ties to unions calling for AZ boycott, etc.) The truth, once known, will undermine Rotellini's credibility and call in to question her character – a very important quality for Inds.

---

[4] The initial e-mail carries a time stamp of "20:36:09," which appears to be the time in Greenwich Mean Time (GMT). All times are converted to Mountain Standard Time (MST) for consistency.

> You are much stronger in rural AZ
> -Ryan

Exhibit 15, E-mail Chain E.

After he received those two e-mails, Horne forwarded the entire chain to Casey Phillips, a Republican State Leadership Committee ("RSLC") regional director. Exhibit 15, E-mail Chain E. Then, at 2:02 p.m., Horne attempted to forward the entire chain to Winn, with the following message: "I forwarded this to casey. [sic] Maybe with this we can. Try again for the hundred k.[5]" Exhibit 15, E-mail Chain E. However, at 2:05 p.m. Horne received a notice that the attempt to forward the email to Winn had failed. Exhibit 15, Email Chain E. At 2:10, Horne successfully re-forwarded the entire email chain to Winn. Exhibit 15, Email Chain E.

At 2:31 p.m., Winn forwarded the chain to Murray, with the note: "This just came into me read below." Exhibit 15, Email Chain E. At 2:55 p.m., Murray sent the e-mail chain to his attorney:

> Steve,
>
> I wanted to make you aware of an incident that occurred with one of our clients. Kathleen is running an IE committee call Business Leaders for Arizona which is in

[5] The "hundred k" likely refers to an attempt to request additional money from RSLC. That group had originally indicated or suggested that it would provide BLA with $450,000, but later revised its contribution to $350,000. See Exhibit 12, Brian Murray Interview dated April 2, 2012 at 17-18 and Exhibit 16, Email Chain F.

> support of Tom Horne for AG. I was hire [sic] to do the TV component. I warned her on numerous occasions that she needed to cease contact with the candidate and any agents of the campaign. I then received the following email. I then called her and informed her again that she should not have any contact. She assured me that this was unsolicited and had not in several days.
> As our firm's attorney I wanted to make you aware of this situation should something arise later.
>
> Thanks,
> B

Exhibit 15, Email Chain E. Later on, October 27, 2010, Winn spoke three times to Horne, with each call either immediately preceding or immediately following a discussion between Winn and Murray. Exhibit 7, Winn Phone Records.

E. Analysis of October 27, 2010 events

On October 27, 2010, Horne received information polling data from a Republican pollster telling him that he was losing support because of pro-Rotellini advertisements being financed by an out of state independent committee. The pollster recommended to Horne that he need to address the pro-Rotellini advertisements to "stop the bleeding," and suggested to strategy to do so to Horne. Horne forwarded the polling information and strategic advice to Winn with a suggestion that Winn and BLA seek an additional one hundred thousand

($100,000), presumably from RSLC. Winn forwarded that information to Murray, who was Winn's financial contact with RSLC. Murray correctly recognized that the email was a violation of Arizona campaign finance law and warned his attorney about the email.

The October 27, 2010, email from Horne to Winn to Murray was a communication from a candidate to supposedly independent political committee. In that communication, Horne shared information about the need of his campaign to rebut pro-Rotellini advertisements. He also asked the supposedly independent political committee to fulfill that need by doing what he could not himself do: raise $100,000 from a single unrelated donor and spend it on anti-Rotellini advertisements targeting Rotellini's ties to unions and her record on Arizona immigration policy.

When Horne sent strategic information to a supposedly independent campaign, he intentionally and blatantly broke the barrier that was supposed to exit between his campaign and BLA. The breach is so clear that Horne must have recognized it to be improper. Even though the subsequent money raised by BLA was not from RSLC, it is clear that BLA's expenditures were based on the needs of the Horne campaign.

It is also notable that Winn made false statements in her sworn affidavits concerning these events as well. In her second affidavit, Winn states, "I did not take Mr. Horne's email as anything more than a suggestion, a suggestion I rejected and did not act upon." Exhibit 11, Kathleen Winn Affidavit dated May 30, 2012 at ¶ 4. This is a false statement.

The email string sent by Winn to Murray contained information regarding Horne's slipping poll numbers and thus his need to counterattack, a statement of strategy describing the content of such a counterattack, and a request from Horne that Winn raise another $100,000 for the counterattack. By forwarding this information to Murray, the man who had raised $350,000 for BLA from RSLC just a week previously, Winn was obviously asking Murray to try to raise another $100,000 from RSLC so BLA could carry out Horne's request. "Not acting" by Winn would have been **not** forwarding the email to Murray. Clearly Winn did try to carry out Horne's request, and her sworn statement that she did not act on is request is false.

F. Findings and Conclusions

As explained throughout Section II, Winn coordinated with Horne and his campaign. Horne was substantially involved with the creation of the BLA television commercial, which expressly advocated Rotellini's defeat. Accordingly, it was made "in concert with" him. A.R.S § 16-901(14). There was also "arrangement, coordination or direction with respect to the expenditure between the candidate of the candidate's agent and the person making the expenditure. . . . " A.R.S § 16-901(14)(b) The expenditure on the commercial was "made on information about the candidate's plans, projects or needs, or those of his campaign committee: and that the information was "provided to the expended person by the candidate" or his campaign personnel A.R.S. § 16-901 (d)

As a result of that coordination , all of BLA's expenditures must be deemed in-kind contributions to the Horne Campaign. A.R.S. § 16-917(C). That coordination resulted in Horne's violations campaign finance laws.

Any contributions to BLA which exceed the contribution limits for the Horne campaign are unlawful. A.R.S. § 16-905. In 2010, the contribution limit for both individuals and political committees was $840.00. A.R.S §§ 16-905(B), 16-905(C), 16-905(H), 16-941(B); *see* Exhibit 1, 2009-2010 Contribution Limits Table. Table 1, below summarizes the amount by which each individual contribution and the RSLC contribution exceeded the relevant limits.

Table 1: Contributions in Excess of Contribution Limits

Contributing Person or Entity	Date if BLA Contribution	Amount Contributed To BLA	Amount Contributed To Horne	Amount over Contribution Limit
Charles Diaz	10/20/2010	$5,000	$808	$4,968
Richard Newman[6]	10/21/2010 & 10/28/2010	$15,000 & $100,000	$808 & $332	$0
Ronald Lebowit	10/22/2010	$840	$750	$750

[6] Richard Newman is married to Horne's sister. Accordingly, his contributions are "family contributions" under A.R.S. § 16-901(10) and thus count as "personal monies" under A.R.S. § 16-901(18)(d).

z				
Fife Symington	10/27/2010	$500	$849	$500
Steven Ellman	10/28/2010	$5,000	$840	$5,000
Mark Goldman	10/28/2010	$5,000	$840	$5,000
RSLC	10/22/2010	$350,000	$0	$349,160

Sources: Exhibit 5, BLA Amended 2010 Post-General Election Report; Exhibit 17, BLA Contributions: Exhibit 18, Horne Exploratory Committee Amended 2010 January 31st Report: Exhibit 19, tom Horne for Attorney General Amended 2010 June 30th Report: Exhibit 20, Tom Horne for Attorney General Amended 2010 Pre-Primary Election Report; Exhibit 21, Tom Horne for Attorney General Amended 2010 Post-Primary Election Report; and Exhibit 22, Tom Horne for Attorney General Amended 2010 Post-General Election Report.

In addition, BLA received three contributions: NCP Finance Limited and Texas Loan Corporation each gave $15,000 and E.D. Marshall, Inc gave $2,000. Exhibit 5, BLA Amended 2010 Post-General Election Report and Exhibit 17, BLA Contributions. Those contributions are also deemed to be contributions from corporations. A.R.S § 16-919(A). Therefore, as to Horne, the corporate contributions were entirely unlawful.

Finally, both BLA and the Horne Campaign Filed inaccurate Post-General Election Reports because they did not correctly reflect that BLA's

expenditures were in-kind contributions and corresponding expenditures by the Horne Campaign.

III. Order

This Order is issued pursuant to A.R.S § 16-924(A). Horne, Winn, the Horne Campaign, and BLA Have twenty day from the date of issuance to come into compliance. *Id*

Horne and the Horne Campaign are ordered to amend their 2010 Post-General election report to include the expenditures made by BLA. These expenditures are deemed in-kind contributions and corresponding expenditures by A.R.S § 16-917(C). Winn and BLA are similarly ordered to amend their 2010 Post-General Election Report to reflect the coordinated nature of BLA's expenditures.

Horne and the Horne Campaign are ordered to refund the amount of the deemed in-kind contributions in excess of the appropriate limits to the person or organization that made the contribution. Table 1, above, details the specific amounts that exceed those limits. In addition, Horne and the Horne Campaign are ordered to fully refund the in-kind contributions from corporations, because they are unlawful in their entirety.

If Horne, Winn, the Horne Campaign, and/or BLA fail to take the ordered corrective action within twenty days, this Office will issue an Order Assessing a Civil Penalty pursuant to A.R.S § 16-924(B). The violation of the contribution limits carries a civil penalty of three times the amount of money of the violation. A.R.S § 16-905(J).

NOTICE

You may request a hearing to contest this order pursuant to A.R.S. § 16-924 by submitting a written request for a hearing by 5:00 p.m. no later than twenty days from the date of this Order to:

Sheila Sullivan Polk
Yavapai County Attorney
255 East Gurley Street
Prescott, Arizona 86301

You may request an informal settlement conference pursuant to A.R.S. § 41-1092.06. Individuals with disabilities may request accommodation during an informal settlement conference by contacting Maggie Robertson, (928) 771-3344. Requests should be made as early as possible to allow time to arrange the accommodation.

RESPECTFULLY SUBMITTED this 17th day of October, 2013

By: Sheila S Polk

SHEILA SULLIVAN POLK
YAVAPAI COUNTY ATTORNEY

COPIES of the foregoing MAILED this 17th day of October, 2012 to:

Ken Bennett
Arizona Secretary of State
1700 W. Washington Street, 7th Flr
Phoenix, AZ 85007

Michael Kimerer, Esq.
Kimerer & Derrick, Esq.
221 East Indianola Avenue
Phoenix, AZ 85012
Counsel for Tom Horne and Horne for Attorney General

Timothy A. LaSota, Esq.
Tiffany and Bosco, P.A.
Camelback Esplanade II, Third Floor
2525 East Camelback Road
Phoenix, Arizona 85016
Counsel for *Kathleen Winn and BLA*

By: /s/ Maggie Robertson