IN THE SUPREME COURT OF STATE OF ARIZONA

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), Petitioners/Appellants, vs. SHEILA SULLIVAN POLK, Yavapai County Attorney, Respondents/Appellees.	Supreme Court No. ______________ Court of Appeals No.1 CA-CV 14-0837 Maricopa County Superior Court No. LC2014-000255-001

PETITION FOR REVIEW

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TABLE OF CONTENTS

I. ISSUES DECIDED BY THE COURT OF APPEALS……………………….1

II. THE FACTS MATERIAL TO CONSIDERATION OF THE ISSUES PRESENTED……………………………………………………………….2

III. THE REASONS THE PETITION SHOULD BE GRANTED……………..5

IV. FIRST AMENDMENT VIOLATION—A RIGHT THAT CAN BE NEGATED BY A SINGLE PROSECUTOR WITHOUT ANY MEANINGFUL OPPORTUNITY TO CHALLENGE THE PROSECUTOR'S ACCUSATION IS NO RIGHT AT ALL……………...13

V. DEMEANOR BASED CREDIBILITY……………………………………....15

VI. CONCLUSION…………………………………………………………......15

CERTIFICATE OF COMPLIANCE…………………………………………16

CERTIFICATE OF SERVICE………………………………………………..17

APPENDIX 1 - Memorandum Court of Appeals Decision

APPENDIX 2 - Excerpts from Court of Appeals Brief

TABLE OF CASES AND AUTHORITIES

Cases

Comeau v. Ariz. State Bd. Of Dental Exam'rs,
196 Ariz. 102, 108 ¶¶ 26-27, 993 P.2d 1066, 1072 (App. 1999)…………..…1, 2

Rouse v. Scottsdale Unified Sch. Dis.,
156 Ariz. 369, 371, 374, 752 P.2d 22, 24, 27 (App. 1987)……………………1, 2

Taylor v. Arizona Law Enforcement Merit System Council,
Ariz. 200, 731 P.2 95 (App. 1987)……………………………………..….5

Hamilton v. City of Mesa,
185 Ariz. 420 916 P.2d 1136 (1995)……………………………………………5

Botsko v. Da Venport Civil Rights Comm'n,
774 N.W. 2d 841, 851 (Iowa 2009)……………………………………………6, 7

Nightlife Partners, Ltd. v. City of Beverly Hills,
108 Cal.App. 4th 8, 133 Cal.Rptr.2d 234 (App. 2003)…………………………7

Howitt v. Superior Court,
3 Cal. App. 4th 1575, 5 Cal. Rptr. 2d 196 (App. 1992)………………………..7

Annie Carr's Pub, Inc., v New York State Liquor Authority,
194 A.D.2d 784, 599 N.Y.S.2d 617 (App. 1993)………………………………..8

Osuagwu v Gila,
938 F.Supp.2d 1142 (D. N.M. 2012)…………………………………………...8

Wolff v. McDonnell,
418 U.S. 539, 572 n 20, 94 S Ct. 2963, 41 L.Ed2d 935 (1974)…………………..8

Withrow v. Larkin,
421 US 35 (1975)…………………………………………………………………9

Schmidt v. Independent School District,
349 N.W.2d 563 (Minn. App. 1984)……………………………………………..9

Appeal of Trotzer,
143 N.H. 64, 719 P2d 584 (1998)……………………………………….…9

Taylor v. Arizona Law Enforcement Merit System Council,
452 Ariz. 200, 731 P.2 95 (App. 1987)…………………………….…..9, 10

Oates v. United States Postal Service New York,
444 F.Supp. 100 (S.D.N.Y. 1978)……………………….…………….…..10

Withrow v. Larken,
421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975)…………………………10

Lyness v. Commonwealth,
529 Pa. 535, 605 A.2d 1204 (Pa. S. Ct. 1992)……………………………..10

Wong Yang Sung v. McGrath,
339 U.S. 33, 70 S. Ct. 445, 94 L. Ed. 616 (1950)……………………………….11

Camero v. United States,
375 F.2d 777 (Ct. Cl. 1967)……………………………………..…………11

Davenport Pastures, LP v. Morris County Bd.,
238 P3rd 731 (Kan. 2010)………………………………………………….11

Hamilton v. City of Mesa,
185 Ariz. 420 916 P.2d 1136 (1995)……………………………………….12

Newton Township Board of Supervisors v. Greater Media Radio Co.,
138 Pa. Commonwealth. 157 587 A.2d 841 (1991)……………………………12

Horn v. Hilltown Township,
461 Pa. 745 337 A.2d 858 (1975)…………………………………………..12

Nova Services, Inc. v. Village of Saukville,
211 Wis.2d 691 585 N.W.2d 283 (1997)…………………………………..12

Matter of Robson,
575 P.2d 771 (1978)……………………………………………...………13

Colorado Republican Federal Campaign Committee v. Federal Election Com'n, 518 U.S. 604, 116 S.Ct. 2309 (1996)……………………………..…..13

Bose Corporation v. Consumers Union of US, Inc., 466 U.S. 485, 104 S. Ct. 1949 (1984)……………………………………..……14

Yetman v. English, 168 Ariz. 71, 811 P.2d 323 (1991)……………………………………….….14

Com'n on Human Relations v. Kaydon Ring & Steel, Inc., 149 Md. App. 666, 818 A.2d 259 (2003)…………………………………………15

Newman v. Newman, 219 Ariz. 260, 271, 196 P.3d 963 (App. 2008)…………………………………15

Statutes
A.R.S. § 15-539…………………………………………………………………2

A.R.S. § 41-1092.08……………………………………………………...….13

Rules
Arizona Rules of Civil Appellate Procedure (ARCAP) Rule 21…………………15

I. <u>Issues Decided By The Court Of Appeals</u>

Of a number of issues decided by the Court of Appeals (Appendix 1), we believe erroneously, we emphasize this: can a County Attorney, who was personally "involved with the prosecution of the case, by assisting with the preparation and strategy," personally overrule a decision of an Administrative Law Judge against her, so that by her own decision she wins the case that she had lost before the Administrative Law Judge?

Until this decision, the cases have been <u>unanimous</u> throughout the country that an Agency may advocate for conviction and make the final ruling, but that an <u>individual</u> within the agency cannot play all of those roles. There <u>must</u> be a division between the individual person acting as an advocate, and the person acting as a judge. Ours is the <u>first</u> decision in the <u>country</u> that holds the same individual can properly perform these conflicting roles.

The Court of Appeals at page 11, cites *Comeau v. Ariz. State Bd. Of Dental Exam'rs*, 196 Ariz. 102, 108 ¶¶ 26-27, 993 P.2d 1066, 1072 (App. 1999) and *Rouse v. Scottsdale Unified Sch. Dis.*, 156 Ariz. 369, 371, 374, 752 P.2d 22, 24, 27 (App. 1987). The passage quoted by the Court of Appeals in both cases refers to the Agency as a whole, not to the same individual playing all those roles.

In, *Comeau, supra*, the Court stated:

> <u>Dr. Pozil was not on the panel and did not participate in the discussion that preceded the panel's findings and recommendations.</u> 196 Ariz. at 108.

(emphasis added).

Similarly, in *Rouse, supra*, the Court stated:

> …Likewise, here the school board was responsible for the initial terminations, pursuant to A.R.S. § 15-539. However the decision to terminate Mr. Rouse was instituted not by the board but by the staff at Coronado High School.

156 Ariz. at 323 (emphasis added).

The position we are advocating is a step back from that implied in the above quotation. We concede that an individual can initiate the charges, and then act as a judge, but the same individual cannot participate in the advocacy of the adversary hearing, and act as a judge.

There are 20 cases from other jurisdictions that consider this question squarely, and that hold that the same individual cannot participate in advocacy and then act as judge. Neither side has been able to find any cases that considered this specific question, to the contrary.

II. The Facts Material To Consideration Of The Issues Presented

Defendants were charged with coordinating an election campaign for Attorney General with an independent campaign. The charge was brought by Yavapai County Attorney Sheila Polk. At page 35 of the Answering Brief, the Court Attorney conceded that:

> "Admittedly, the Yavapai County Attorney was involved with the prosecution of the case, by assisting with the preparation and strategy."

The Independent Administrative Law Judge found in favor of Defendants. County Attorney Polk overruled the Administrative Law Judge, so that she would win the case that she had lost, as someone participating in advocacy, before the Administrative Law Judge.

If the facts set forth in the Court of Appeals decision were a fair representation of the facts in the record, the Independent Administrative Law Judge would not have found in favor of the Defendants. Because our focus is on the procedural due process issue, we do not refute those facts here. However, in case the Court has any interest in guilt or innocence, we attach as Appendix 2 relevant pages from the Appellate Briefs, showing that the facts in the record are very different from those represented in the Court of Appeal's decision.

We do mention one point. There was no evidence of any kind as to what was stated in telephone conversations between Horne and Polk. Polk reached her decision solely on the basis of the time of those calls, without any evidence of what was actually said. All the testimony in the record was that Horne was seeking Winn's help in financing a real estate transaction, inasmuch as she had been in that business for 29 years. At page six of the Court of Appeals Decision, the Court states:

> 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.

This is misleading. There *was* documentary evidence that Horne first learned he needed additional financing to close his real estate transaction the day before the phone conversations in question in this case. That was County Attorney exhibit 33 at 620, cited by the ALJ in her finding number 95. (The document is dated October 19, a day Horne could not call Winn because her Mother was having surgery. The next day, October 20, was the first day he could call her about this financing, and is the same day as the phone calls at issue in this case.)

It certainly strains credibility to argue, as the County Attorney implies, that Horne and Winn fabricated their discussions about financing on October 20, a date chosen by the County Attorney as the day when conversations about the ad allegedly took place, and it is just a *coincidence* that the *documents* show that Horne first learned about his need for financing on October 19, prompting these calls.

For purposes of the principal issue presented in this Petition for Review, the crucial facts are these: County Attorney Sheila Polk, by the admission at page 35 of the Answering Brief, "was involved with the prosecution of the case, by assisting with preparation and strategy." The Administrative Law Judge ruled in favor of Defendants, and against the County Attorney. County Attorney Polk then, personally, overruled the Administrative Law Judge, and ruled in her own favor, so that, in a case in which she participated in the advocacy, she would win the case

rather than lose it.

III. The Reasons The Petition Should Be Granted

Important issues of law were incorrectly decided by the Court of Appeals, contrary to unanimous decisions going the other way on the specific point presented, and involving an important question of law for the state of Arizona.

The decision also contradicts the holdings or implications of prior Arizona Court of Appeals cases, including the two mentioned above, and the following additional cases discussed below:

Taylor v. Arizona Law Enforcement Merit System Council, Ariz. 200, 731 P.2 95 (App. 1987) and *Hamilton v. City of Mesa*, 185 Ariz. 420 916 P.2d 1136 (1995).

This is not an ordinary case. It goes to the very heart of the assumptions of our legal system. Imagine if we read in the paper about the following happening in a foreign country: a defendant is accused by a prosecutor of a violation of law. The case goes to trial before a neutral judge. The judge takes testimony, judges the demeanor based credibility of the witnesses, and makes factual findings, and a final ruling in favor of the defendant. The prosecutor is angered about losing, wants to win the case, and overrules the judge. The legal system is constructed in such a way that it is the prosecutor's factual and final determinations, not the judge's, that must prevail. Defendant is hit personally with a huge monetary

judgment, even though the only neutral party to take testimony and observe the demeanor of the witnesses was the judge that was overruled by the prosecutor.

We would want to say to the decision makers of that country that a fundamental human right we have codified in our Constitution is that no person should be deprived of life, (or as in this case) liberty, or property, without due process of law. We would say that a crucial component of due process of law is an independent judiciary, and that determinations of factual disputes, including demeanor based credibility judgments, must be made by a neutral judge, not by the prosecutor.

We would say that a civilized legal system must be based on the principle enunciated by John Locke, who heavily influenced the American Founders, that no man can be a judge in his own case. We would say that this especially applies to prosecutors, whose natural desire to win cases makes it impossible to trust them as objective final determiners of facts. We would say that until now, making prosecutors' decisions final has been true only in authoritarian countries, not in countries that respect the rule of law.

These considerations, fundamental to the very concept of the rule of law, call for this Court to consider review of the Court of Appeals decision in this case.

In *Botsko v. Da Venport Civil Rights Comm'n*, 774 N.W. 2d 841, 851 (Iowa 2009), the Iowa Supreme Court set aside as unconstitutional a ruling participated in

by an agency director who also participated in advocacy:

> That advocacy is of a sufficient nature to preclude her later participation in the adjudicatory process in the case under the due process clauses of the state and federal constitutions. *Nightlife*, 133 Cal. Rptr. 2d at 248. The combination of advocacy and adjudicative functions has the appearance of fundamental unfairness in the administrative process. *Id*. at 242-43. Further, because of the risk of injecting bias in the adjudicatory process, *Botsko* is not required to show actual prejudice, *Id*. at 854.

The Court discussed the impossibility of judging objectively once one has a "will to win," and quoted from an administrative law treatise:

> "It is difficult for anyone who has worked long and hard to prove a proposition … to make the kind of dramatic change in psychological perspective necessary to assess that proposition objectively . . . ." (*Id*. at 849.)

In *Howitt v. Superior Court*, 3 Cal. App. 4th 1575, 5 Cal. Rptr. 2d 196 (App. 1992) the Court noted, "A different issue is presented, however, where advocacy and decision making roles are combined." "The role is inconsistent with true objectivity, a constitutionally necessary characteristic of an adjudicator." *Id.* at 1584. (emphasis added)

Similarly, in *Nightlife Partners, Ltd. v. City of Beverly Hills*, 108 Cal. App. 4th 81, 133 Cal.Rptr.2d 234, 244 (App. 2003) the Court stated "the due process rule of overlapping functions in administrative disciplinary hearings applies to prevent the participant from being in the position of reviewing his or her own decision or adjudging a person whom he or she has either charged or investigated.

In *Annie Carr's Pub, Inc., v New York State Liquor Authority*, the Court stated:

> However, since Commissioner Tillman, who was counsel for the respondent at the time this proceeding was commenced and later voted with the majority in rejecting the Administrative Law Judge's findings, acted in the dual capacity of both prosecutor and adjudicator in the matter, the impartiality of the determination is suspect and, as such the determination must be annulled [citations].

Annie, 194 A.D.2d 784, 786, 599 N.Y.S.2d 617 (App. 1993) (emphasis added).

In *Osuagwu v. Gila*, 938 F. Supp. 2d 1142 (D. N.M. 2012) the hospital suspended a doctor's privileges and the court reversed. The chief medical officer of the hospital, because of his involvement on the relevant committees, served as the doctor's accuser, an expert witness against him, his prosecutor, and judge at the final hearing. The court held that this violated the doctor's constitutional "due process" rights, quoting from a 10th circuit opinion as follows:

> (T)he Due Process Clause of the Fifth Amendment guarantees a hearing concerning the deprivation of… a recognized property or liberty interest before a fair and impartial tribunal. This guarantee applies to administrative adjudications as well as those in the courts. [Citation omitted.]

Id. at 1163 (emphasis added).

The court also relied on a United States Supreme Court case:

> *Wolff v. McDonnell*, 418 U.S. 539, 572 n. 20, 94 S. Ct. 2963, 41 L.Ed.2d 935 (1974), *Id.* at 592. 94 S.Ct. 2963 (Marshall J., concurring) ("Due process is satisfied as long as no member of the disciplinary board has become involved in the investigation or presentation of the particular case or has any other form of personal

involvement in the case”). *Id.* (emphasis added).

In our case, this condition is not satisfied.

The *Osuagwu* court also distinguished *Withrow v. Larkin*, 421 U.S. 35 (1975), the case chiefly relied upon by the County Attorney on this issue in our case, in that in *Withrow* the issue was initiating and sitting in judgment, not advocating and sitting in judgment.

In *Schmidt v. Independent School Dist.*, 349 N.W.2d 563, 568 (Minn. App. 1984) the court ruled that where the same person performed “prosecutorial, judicial, and fact finding roles” there was a violation of “due process.” The court went on to review a number of other cases reaching the same conclusion.

In *Appeal of Trotzer*, 143 N.H. 64, 719 P2d 584 (1998) assistant attorney general George prosecuted the case and assistant attorney general Jones advised the board. The Court upheld the decision in part because:

> Attorney Jones and Attorney George were employed in different bureaus of the attorney general’s office, with different supervisors and wholly distinct functioning. *Id*. at 68.

The implication of the decision is that, had the person prosecuting the case and the person making the decision been the same person, it would have been a violation.

In Arizona, one of the principal functions of the Solicitor General’s office is to provide lawyers who advise decision-making boards, but are not part of the

divisions prosecuting the cases. *Taylor v. Arizona Law Enforcement Merit System Council*, 452 Ariz. 200, 731 P.2 95 (App. 1987) the Arizona Court of Appeals held that this division of roles is a due process requirement:

> A conflict of interest would clearly arise if the same assistant attorney general participated as an advocate before the council and simultaneously served as an advisor to the council in the same matter.

Id. at 206.

In *Oates v. United States Postal Service New York*, 444 F.Supp. 100 (S.D.N.Y. 1978) the court held there was no "violation of due process":

> <u>[i]n the absence of any substantial involvement by him</u> [a decision maker] <u>in the investigation or prosecutorial functions</u> relating to plaintiff's case. See *Withrow v. Larken*, 421 U.S. 35 … (emphasis added).

In *Lyness v. Commonwealth*, 529 Pa. 535, 605 A.2d 1204 (Pa. S. Ct. 1992) the Pennsylvania Supreme Court reversed discipline. The combining of prosecutorial and judicial functions was the precise reason for the reversal. The court agreed that prosecutorial and judicial functions could be combined in a single agency, <u>but only</u> if a wall of division divided those two functions. The court stated:

> What our Constitution requires, however, is that if more than one function is reposed in a single administrative entity, walls of division be constructed which eliminate the threat or appearance of bias. *Id*. at 1209.

The court directed that the agency could proceed in future cases: "… by

placing the prosecutorial functions in a group of individuals or entity distinct from the Board which renders the ultimate adjudication." *Id*. at 1211.

In *Wong Yang Sung v. McGrath*, 339 U.S. 33, 70 S. Ct. 445, 94 L. Ed. 616 (1950) the U. S. Supreme Court reversed because of violations of procedural safeguards. Among other things, the Court stated that presiding officers at hearings must be people: "…whose independence and tenure are so guarded to … guarantee the impartiality of the administrative process." *Id*. at 52.

In *Camero v. United States,* 375 F.2d 777 (Ct. Cl. 1967) the court reversed because the attorney who represented the government before the relevant committee engaged in *ex parte* communications with the commanding general. This was a "due process" violation. *Id*. at 781.

In our case, the County Attorney, who participated in the prosecution by participating in preparation and strategizing, could engage in *ex parte* communications with herself, as the person performing the adjudicatory function, whenever she wanted. Our case equally involves a violation of constitutional "due process" rights.

In *Davenport Pastures, LP v. Morris County Bd*., 238 P.3d 731 (Kan. 2010), the Kansas Supreme Court reversed as a denial of due process a decision in which the prosecuting attorney served as an advocate, and then helped the commission draft the decision. The court stated:

> In our view, Kassebaum was improperly asked to be, if not "A Man for All Seasons," then a man for too many seasons. 238 P.3d at 741.

In *Hamilton v. City of Mesa*, 185 Ariz. 420 916 P.2d 1136 (1995), the Arizona Court of Appeals stated:

> "A conflict would arise if Skaggs participated as advocate on behalf of the City of Mesa against Appellant and simultaneously served as advisor to the City Manager." 185 Ariz. at 427 (emphasis added).

In that case it held that he had not done so.

In both *Newton Township Board of Supervisors v. Greater Media Radio Co*., 138 Pa. Commonwealth. 157, 587 A.2d 841 (1991) and *Horn v. Hilltown Township*, 461 Pa. 745 337 A.2d 858 (1975), the court reversed as a violation of due process where the board acted as its own advocate and made the decision. *Horn, supra,* is a Pennsylvania Supreme Court case.

In *Nova Services, Inc. v. Village of Saukville*, 211 Wis.2d 691, 585 N.W.2d 283 (1997) the Court reversed the decision, stating:

> When an attorney represents a party in earlier proceedings, due process requires that the attorney not act as a decision-maker in the same case. [Citation.] *Id*. at 697.

In *Matter of Robson*, 575 P.2d 771 (1978) the Alaska Supreme Court reversed discipline of an attorney. The Executive Director was aligned with the prosecution, and her presence during deliberations for the decision was improper. The court agreed that a board may make a preliminary decision to investigate, and

then decide the case. However:

> Making such preliminary investigations to determine whether charges should be filed <u>is quite different from participating in the prosecution state of grievance proceedings</u>.

Having found a violation of due process, the Court decided to disregard the findings of the disciplinary board, in which the Executive Director had participated, and proceed on the findings of the hearing committee, the next lower level, where there had been no such violation. Similarly, in our case, if the agency head does not overrule the findings of the Administrative Law Judge within 30 days, the decision of the Administrative Law Judge becomes final. A.R.S. § 41-1092.08. The proper remedy in this case therefore should be that the decision of the Administrative Law Judge is final.

IV. <u>First Amendment Violation—A Right That Can Be Negated By A Single Prosecutor Without Any Meaningful Opportunity To Challenge The Prosecutor's Accusation Is No Right At All</u>

This case is crucial because it involves the First Amendment right of free expression by those involved in the Independent Expenditure Committee. *Colorado Republican Federal Campaign Comm. v. Fed. Election Comm'n,* 518 U.S. 604, 116 S.Ct. 2309 (U.S. 1996). In this case, First Amendment rights are meaningless, because they are in the hands of the County Attorney without any objective decision on the merits by a judge.

In *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 104 S. Ct.

1949 (U.S. 1984), the United States Supreme Court stated: "On the other hand, respondent correctly reminds us that in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression." 466 U.S. at 499, 104 S.Ct. at 1958.

In *Yetman v. English*, 168 Ariz. 71, 811 P.2d 323 (1991) this Court applied the rule of "enhanced appellate review" in cases implicating the First Amendment, both *Bose* and *Yetman*, and this issue altogether, were simply ignored by the Court of Appeals in this case.

Despite the clear mandates of the *Bose* and *Yetman* courts, Plaintiffs Horne and Winn have never been afforded a meaningful opportunity to go to court. What has happened here, with a civil prosecutor ignoring the ruling of the neutral Administrative Law Judge, and then the Maricopa County Superior Court and Arizona Court of Appeals ruling that they must defer to the determination of the prosecutor, is the polar opposite of the "enhanced appellate review" that First Amendment cases such as this require.

V. Demeanor Based Credibility

This Court may also wish to consider whether, even though an Agency Head or County Attorney can overrule an Administrative Law Judge, she should defer on

issues of demeanor-based credibility, because the Administrative Law Judge is there to see the witnesses. This is the holding in a well-reasoned decision in *State Comm'n on Human Relations v. Kaydon Ring & Steel, Inc*., 149 Md. App. 666, 818 A.2d 259 (2003). That decision is consistent with this Court's philosophy in *Newman v. Newman* 219 Ariz. 260, 271, 196 P.3d 963 (App. 2008).

VI. Conclusion

It is therefore requested that the decision of the Court of Appeals be vacated and that the decision of the Administrative Law Judge be reinstated. Attorneys' fees are requested pursuant to Rule 21, ARCAP.

RESPECTFULLY SUBMITTED this 3rd day of March, 2016.

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APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX 1 - Memorandum Court of Appeals Decision

APPENDIX 2 - Excerpts from Court of Appeals Brief

APPENDIX 1

Memorandum Court of Appeals Decision

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

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
FILED 2-23-2016

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

AFFIRMED

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MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Lawrence F. Winthrop joined.

T H O M P S O N, Judge:

¶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

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[1] According to Winn's March 30, 2012 affidavit she originally created BLA in 2009 to oppose Andrew Thomas's candidacy for Attorney General.

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.

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[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."

¶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.

¶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

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[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."

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. . . .

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]

[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.

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]

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

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[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."

the script was still too long. At 3:21 p.m., Horne 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

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[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.

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:

> 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.

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[8] Citing a Maryland case, *State of Md. Comm'n on Human Relations v. Kaydon Ring & Seal, Inc.*, 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."

Horne 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

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[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.

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:

> 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.

E. 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 (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

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[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).

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:

> 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

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[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.

affirming Polk's final decision and order requiring compliance is affirmed.

APPENDIX 2

Excerpts from Court of Appeals Brief

In reviewing the following Statement of Facts, it should be noted that the County Attorney had no direct testimony or documentary evidence that the parties coordinated efforts between the campaign and the independent committee. The County Attorney attempted to make the case by five "inferences", from the timing of telephone records showing calls (with no evidence of the substance of those calls), and emails (with no direct evidence in any email that there was coordination) all of which were fully and carefully explained to the neutral. All of the evidence underlying these inferences equally supported contrary inferences argued by Appellants. The Statement of Facts will show that all of the direct testimony supported the contrary inferences, and that there was no direct testimony supporting the inferences arbitrarily adopted by the County Attorney so that she could win her case.

A. First "Inference"

On October 20, 2010, Appellant Winn was exchanging emails with consultant Brian Murray regarding an ad to be run for an Independent Campaign. Winn was Chair of the Independent Campaign. On the same day, phone records show that she had phone conversations with Appellant Horne. The "inference" drawn by the County Attorney is that the phone calls *must* have been about the same subject, in which case there was coordination between Horne and Winn, a Campaign Finance violation. The contrary inference presented by Appellants'

actual evidence, however, and accepted by the Administrative Law Judge, was that Horne and Winn were discussing a completely unrelated personal financial transaction the previous day, involving real property Horne was then selling, and not the ad.

On October 19th, Horne found out for the first time that he would need a large loan to close a real estate sale he then had pending. This was supported by documentary evidence. (County Attorney Exhibit 133 at 620). Winn had been in the business of real estate financing for 27 years. Horne was discussing with her the need for back up financing. They did not talk about the ad. (Transcript, pp. 583, 699, 700.)

In determining which inference is reasonable, one must look to the direct testimony. The "first inference", beginning at Page 4 of Appellee's Order (Appendix A), refers to an 8 minute phone call between Horne and Winn between 2:19 and 2:27 PM, and an email that Winn sent to Murray at 2:29 PM referring to "we" and to Winn's "several masters". The County Attorney's "inference" is that the words "we" and "several masters" included Horne; Appellants' position is that they did not.

To resolve this, one must turn to the direct testimony. What then does the direct testimony show? Some of it is quoted in the Administrative Law Judge's Order, as follows:

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. 7th Avenue 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 $217,500.00.[1]

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.

...

98. Mr. Horne testified that he knew Ms. Winn was unavailable on October 19, 2010, [when he received notice of the financing need], because her mother was having serious surgery. Therefore, the first time he could talk to Ms. Winn about the real estate transaction was 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.[2]

100. Mr. Horne categorically denied discussing the advertisement with Ms. Winn on October 20, 2010, during any of their conversations.[3]"

Specifically with respect to the 8 minute conversation which is the subject of Defendants "first inference", the Administrative Law Judge quoted testimony as

[1] YCA Exhibit 33 at 620.
[2] Transcript at 699: 1-15.
[3] Transcript at 700: 3-4.

follows:

> 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.[4]
>
> 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 stated 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.[5]
>
> 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 real estate deal. Ms. Winn testified she believed the first call was probably when Mr. Horne was describing his need for a loan to close the real estate deal and the second call was when she filled out a loan application for him.[6]
>
> 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, 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 Murray 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.'"[7]

[4] Transcript at 583: 15-20.
[5] Transcript at 576: 5-19.
[6] Transcript at 584: 5-8.
[7] Transcript at 670: 9-25.

Similarly, Horne testified as follows:

> 'It seems likely that the eight-minute call would have been when I would have explained what my problem was, and the 11 minute call would have been when she was taking the information for her form for the financing, which she says is within the length that you would normally expect to take down that financing information.'

Q: 'And you specifically remember those conversations occurring, because that's what you were really concerned about then?'

A: 'That's correct.' (Day 3 pages 697, 698).

With respect to terms used in the emails and focused on by the County Attorney, Ms. Winn gave the following explanations, as summarized by the Administrative Law Judge:

> 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.[8]
>
> 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.[9]

George Wilkinson, Treasurer of the Independent Campaign, gave testimony that fully supported this testimony by Kathleen Winn. Wilkinson testified that on that date, he drove from Scottsdale (where his office is) to Mesa (where Kathleen Winn's office was). He testified that they went over the script of the proposed ad

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[8] Transcript at 565: 10-566:7.
[9] Transcript at 590: 20-591:3.

by Brian Murray, and Kathleen Winn took notes of their discussion. (Day 2, Page 475.) The cell phone records confirmed this meeting, in that the cell tower that was identified on the bill (showing Wilkinson's location) started in Scottsdale and moved to Mesa. The investigators had all of Horne's emails, and they show that Horne was never sent a copy of the proposed script. Wilkinson, by contrast, testified that Winn showed him the script personally and they went over it in Mesa. Wilkinson testified on five separate occasions that he and Winn discussed the advertisement. (County Exhibit 26, Pages 7, 10, 25, 32-33, and County Exhibit 27, Pages 8-9.)

As against this large volume of testimony supporting Winn's testimony that Horne was not included in "we" and "several masters," and supporting Appellant's inference from the facts of the phone calls, (that the phone calls were about financial matters and not about coordination), there was <u>no</u> testimony supporting the County Attorney's proposed "inference". The Administrative Law Judge found in favor of the Appellants.

B. <u>County Attorney's Second "Inference"</u>

The County Attorney's second "inference", on page 5 of the Order (Appendix A), is that the words "they feel" and "similar message" in an email from Winn to Murray must have included references to Horne.

The County Attorney's second inference focuses on an eleven minute phone call that began at 2:37 p.m. The testimony quoted above is that this eleven minute phone call was Winn filling out the financial application to get Horne's relevant data and information with which she could then attempt to secure the backup financing. Winn testified that eleven minutes is about the amount of time it normally takes to fill out one of those forms. The Administrative Law Judge observed the demeanor of the witnesses, made a demeanor based credibility judgment that that is what they spoke about in the eleven minute call, and that "they feel" and "similar message" referred to people other than Horne.

The County Attorney accepts the conclusion in the Administrative Law Judge's decision that it is plausible that Horne and Winn spoke about the financing for Horne's real estate transaction during the 8 minute phone call. (Appendix C, p.5.) The County Attorney also draws the baseless "inference" that they also spoke about the content of the commercial. The County Attorney then decides she likes her "inference" better regardless of the fact that no evidence actually supports it, and decides to rule in her own favor regardless of what the neutral found based on the actual evidence presented.

The second "inference" is directly contradicted by voluminous testimony summarized in section A above. There was <u>no</u> testimony at trial to contradict that testimony, or to support the County Attorney's second "inference".

C. County Attorney's Third "Inference"

The County Attorney's third "inference" is that a reference to "two strong personalities debating" the content of the ad must have included Horne. There was no such evidence that Horne was in contact with anyone who could have been a second "strong personality" with whom he would have been debating or that he was debating at all. The County Attorney's Order (Appendix C, p.5) admits that the Administrative Law Judge accepted Winn's testimony under oath, that the two strong personalities were her co-workers. There was no evidence at trial to the contrary.

The Administrative Law Judge observed Winn testifying, the County Attorney was not there, and the Administrative Law Judge made a demeanor-based credibility determination to believe Winn, and not accept an "inference" that had no testimony to support it and was merely the County Attorney's speculation.

D. County Attorney's Fourth "Inference"

The County Attorney's fourth "inference" (page 6 of the County Attorney's Order, Appendix A) is that the words "I think I prevail" refer to Winn prevailing over Horne. The testimony was that Winn prevailed over her co-workers, not Horne. In Conclusion of Law number 44, the Administrative Law Judge made a demeanor-based credibility judgment again, and considering the lack of any direct evidence to the contrary, accepted the testimony of Horne and Winn controverting

the County Attorney's guesswork. There was <u>no</u> evidence at trial to the contrary.

E. <u>County Attorney's Fifth "Inference"</u>

The County Attorney's fifth "inference" is that Ms. Winn could not have approved "edits" on her own, and must have had input from Horne. These edits involved the fact that the draft of the ad was too long, and the first edit involved removing 11 words. When it was still too long, there was further removal of 5 more words. It is undisputed that Horne was not sent a copy of the script. (Day 2, Page 327.) It is extremely improbable that Horne could have participated in a detailed editing process of removing 11 words, and then 5 words, when it was undisputed that he was not sent a copy of the script, or was <u>no</u> evidence at trial that he was sent a copy of the script, that he participated in the editing process.

F. <u>The Administrative Law Judge's Finding That The County Attorney's Principle Witness Had Testified Falsely Under Oath</u>

The issue, as noted, was whether Horne and Winn, when they were talking on the phone, as shown on cell phone records, were coordinating campaigns, or alternatively, talking about Horne's real estate transaction. The County Attorney's key witness[10], an FBI Agent, testified that Greg Tatham, Horne's real estate agent, had said that Winn played no role in the transaction. **<u>Tatham denied this</u>**. Tatham had recorded conversations. The recording supported Tatham. The agent

[10] The County Attorney called only one other witness, Brian Murray, whose testimony substantially supported the position of the Appellants. See Transcript Pages 396-7, 402-4.

testified that there was another unrecorded one. The phone records showed this to be false. The Administrative Law Judge found, on this key issue, that the phone call had never occurred– the County Attorney's key witness fabricated the testimony on this key issue. (See Decision of Administrative Law Judge, Appendix B, p. 9, paragraph 25.)

CERTIFICATE OF COMPLIANCE

1. This certificate of compliance concerns:

   [X] A petition for review and is submitted under Rule 23(h).

2. The under signed certifies that the brief for petition for review to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains 3,497 words.

3. The document to which this Certificate is attached does not exceed the word limit that is set by Rule 14, Rule 22, Rule 23, or Rule 29, as applicable.

/s/ Dennis I. Wilenchik
Signature of Attorney

Dennis I. Wilenchik
Printed Name of Attorney

IN THE SUPREME COURT OF STATE OF ARIZONA

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), Petitioners/Appellants, vs. SHEILA SULLIVAN POLK, Yavapai County Attorney, Respondents/Appellees.	Supreme Court No. _______________ Court of Appeals No.1 CA-CV 14-0837 Maricopa County Superior Court No. LC2014-000255-001 **CERTIFICATE OF SERVICE**

I, Dennis I. Wilenchik, Esq., and Timothy A. La Sota, Esq. hereby certify that the ORIGINAL of the foregoing PETITION FOR REVIEW was Turbo-filed and a COPY was emailed/mailed on this 3rd day of March, 2016 to:

Sheila Sullivan Polk
Yavapai County District Attorney
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Camp Verde, Arizona 86322

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Attorney for Petitioner/Appellant Tom Horne and Tom Horne for Attorney General Committee

TIMOTHY A. LA SOTA, P.L.C.

By: /s/ Timothy A. LaSota
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