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6 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

7 In the Matter Of,

No. 13F-CF20120001-MCAO

8 TOM HORNE, Tom Horne for Attorney
9 General Committee (SOS Filer ID 2010
10 00003); KATHLEEN WINN, Business
11 leaders for Arizona (SOS Filer ID 2010
12 00375)

MOTION IN LIMINE

Tammy L. Eigenheer
Administrative Law Judge

13 COMES NOW, Respondent Tom Horne, Tom Horne for Attorney General Committee, by and
14 through his undersigned Attorney, Michael D. Kimerer and motions this Court for an Order in
15 Limine.

16 **I. Introduction**

17 An Order in Limine is requested limiting this case to alleged coordination of expenditures,
18 and excluding evidence pertaining to alleged coordination of contributions.

19 If alleged coordination of contributions were litigated, the Feds would show that there was no
20 such coordination. However, that would be a waste of time and resources, as, for the reasons
21 discussed below, that should be excluded as matter of law.

22 Under A.R.S. § 16-901, the remaining emails referred to concern contributions as opposed to
23 “expenditures”. Consultation about “expenditures” would include choice of consultant, wording of
24 ad, placement of ad in different geographical locations, etc., but not “contributions” which is a

1 different category under A.R.S. § 16-901 from “expenditures”. The Arizona Legislature carefully
2 drafted A.R.S. § 16-901 et seq. to limit its application to expenditures only so there would be no
3 infringement or challenge to an individuals’ First Amendment rights.

4 The issue of contributions not being included in the prohibition of coordination of
5 expenditures was addressed in Horne’s first statewide race. Horne’s first statewide race was against
6 Jamie Molera in 2002. Molera’s campaign sent out an email to its email list directing people to an
7 independent campaign being run for him in case they wanted to contribute to the independent
8 campaign. The Secretary of State’s Office took the view that this was not a violation. Molera’s
9 campaign obviously had coordination of contributions, but the Secretary Of State’s Office did not
10 view that as a violation of a statutory prohibition against the coordination of “expenditures” found in
11 the relevant statutes.

12 This can be understood by looking at the Arizona statute. A.R.S. § 16-901(14)(b) provides
13 that an expenditure is not an independent expenditure: “If there is any “arrangement, coordination or
14 direction with respect to the expenditure...” (Emphasis added.)

15 A.R.S. § 16-901(14)(b) makes a clear distinction between an “expenditure” and a
16 “contribution”, each of which has its own separate definition. To be a violation, the coordination or
17 direction must be with respect to how the money is spent or the content of the ad, not with respect to
18 contributions.

19 The FBI report dated May 25, 2012, recorded a discussion with Jim Drake, Assistant
20 Secretary of State, and others, regarding how the Secretary of State’s Office enforces and interprets
21 the law:

22 *“When asked what constituted “coordination” Drake and Chan advised that the definition is*
23 *vague and that there is no clear Arizona standard. The Arizona Attorney General’s Office*
24 *(AG) has not provided legal opinion on the matter. The SOS follows the guidelines set forth*
by the federal government and the Federal Elections Committee (FEC). Drake provided a

1 *copy of the Coordinated Communications and Independent Expenditures, Federal Election*
2 *Commission. Published in June 2007 (Updated February 2011 brochure (FEC's brochure).*
3 *Drake noted the "Three-Prong Coordination Test" which is outlined started on page 2 and*
4 *consists of: payment, content, and conduct."*

4 These Federal Election Commission guidelines make it clear that coordination refers to
5 expenditures and not to contributions. Attached as Exhibit 1 is a copy of the Federal Election
6 Commission guideline's "conduct prong", under which a violation of any one of five standards
7 constitutes a violation of law. The relevant language for each of the five standards is: 1) A
8 "communication is created, produced or distributed" (no reference to contributions); 2) Material
9 involvement in "decisions regarding the content, intended audience, means or mode of
10 communication" (no reference to contributions); 3) A "communication is created, produced or
11 distributed" (no reference to contributions); 4) The parties employ "a common vendor" (no reference
12 to contributions); 5) Information is provided that is material to the "creation, production, or
13 distribution of the communication" (no reference to contributions). This language, which the Arizona
14 Secretary of State's Office "follows", makes it clear that prohibited coordination is regarding
15 "expenditures", not regarding "contributions".

16 A USA Today article dated February 8, 2012; (P.A4) states that "Obama's campaign now is
17 encouraging Democratic fundraisers to back priorities USA action, a Super PAC [independent
18 expenditure] led by two former staffers." It states further "Other officials who do appear at Super
19 PAC events will not solicit donations..." This shows that administration officials are in fact
20 appearing at Independent Expenditures (Super PAC) events.

21 Another USA Today story states that "President Obama's Campaign manager Jim Messina
22 appeared at a fundraiser Friday for Priorities USA Action, a Super PAC credited by two former
23 Obama aides. Cabinet officials are slated to attend future events in an effort to boost donations to the
24

1 group, which has lagged being Republican groups.”

2 A February 25, 2012, article in the New York Times states that “Priorities USA Actions,
3 which supports President Obama, was formed by two former White House aides, and Obama
4 administration officials are helping it raise money.”

5 The same is true of both parties. The article states further: “Mr. Romney...appeared at a
6 fundraiser for Restore Our Future [an independent expenditure] and has publically encouraged people
7 to donate to it.”

8 In Horne’s case, he never referred anyone to an independent campaign to make a contribution.
9 He never suggested to the person running an independent campaign names of people to be solicited
10 for contributions. He never attended an event for an independent campaign. He never spoke to
11 anyone about making a contribution to an independent campaign. As shown in the articles above,
12 national candidates have had far more active involvement in their independent campaigns regarding
13 contributions than even the false allegations against Tom Horne.

14 However, the fact that the prohibition applies to expenditures, and not the contributions, under
15 both the State and Federal law, makes irrelevant any evidence regarding contributions.

16 It is therefore respectfully requested that the Hearing be limited to expenditures.

17 DATED this 5th day of December, 2012.

18 /s/ Michael D. Kimerer

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1 ORIGINAL OF THE FOREGOING
2 electronically filed this 5th day of December, 2012,
3 and submitted to:

4 Honorable Tammy Eigenheer
5 Administrative Law Judge
6 ARIZONA OFFICE OF ADMINISTRATIVE
7 HEARINGS
8 1400 West Washington Street, Suite 101
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11 COPIES of the foregoing served via OAH
12 electronic filing this 5th day of December, 2012, to:

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