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7 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

9 In the Matter Of,

No. 13F-CF20120001-MCAO

10 TOM HORNE, Tom Horne for Attorney
11 General Committee (SOS Filer ID 2010
12 00003); KATHLEEN WINN, Business
13 leaders for Arizona (SOS Filer ID 2010
14 00375)

**REPLY TO PLAINTIFF'S
RESPONSE TO APPELLANT'S
MOTION TO DISMISS**

Tammy L. Eigenheer
Administrative Law Judge

14 **I. Introduction**

15 Though it is not our standard practice to quote television shows in legal filings, Law and
16 Order gets it right with their well-known introduction about the police investigating crime and the
17 district attorney prosecuting crime¹.

18 This case does not deal with a crime, but it does involve a civil law enforcement action. And
19 the bifurcated system that Law and Order talks about is exactly the system that the Arizona
20 Legislature has set up for dealing with campaign finance violations, only the Secretary of State plays
21 the role of the police and the Attorney General plays the role of the district attorney.

22 The County Attorney's Office offers very thin reasons as to why this system has been
23

24 ¹ That introduction is: "In the criminal justice system, the people are represented by two separate, yet equally important groups: the police, who investigate crime, and the district attorneys, who prosecute the offenders..."

1 abolished or never existed to begin with. But it remains our system for dealing with allegations of
2 campaign finance violations. And the process was not followed—instead the Plaintiff has assumed
3 the role of both police and prosecutor. This is not permitted by law, which is why this case must be
4 remanded back to the Secretary of State². This case can and no doubt will still be pursued by the
5 Secretary of State, but the process ordained by law must be followed.

6 **II. The actual legislative history does not support the Maricopa County Attorney's Office**
7 **interpretation of the session law it relies on to give it the power to bring this action**

8 The County Attorney's Office points to an affidavit by Assistant Secretary of State Jim Drake
9 as evidence that Laws 2012, ch. 361, § 25 gives the Secretary of State's office the power to pick its
10 own civil prosecutor.³

11 To begin with, Arizona courts have made it clear that statements of nonlegislators as to
12 legislative intent are generally worthless in gleaning legislative intent: "When seeking to ascertain the
13 intent of legislators, courts normally give little or no weight to comments made at committee hearings
14 by nonlegislators." *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 269-70, 872 P.2d 668, 673-74
15 (1994)(citing *Kelly v. Robinson*, 479 U.S. 36, 51 n. 13, 107 S.Ct. 353, 362 n. 13, 93 L.Ed.2d 216
16 (1986) (nonlegislators' testimony in congressional hearings accorded no significance) and *Savings &*
17 *Loan League of Connecticut v. Connecticut Hous. Fin. Auth.*, 184 Conn. 311, 439 A.2d 978, 980 n. 1
18 (1981) (statements at public hearings by nonlegislators are inadmissible and may not be considered
19 for purposes of statutory interpretation). But even if we do look at the statements of the Secretary of
20 State's Office with regard to the legislation, they squarely contradict what the Maricopa County
21 Attorney's Office is now claiming.

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23 ² The Appellant submitted a motion to dismiss, but it would probably be more properly characterized as a
motion to remand.

24 ³ Response, Attachment 3.

1 The County Attorney's Office claims that "Assistant Secretary of State Jim Drake explains in
2 his Declaration that the catalyst for the session law was the knowledge that the FBI was investigating
3 Mr. Horne and that the Secretary of State would perhaps have to initiate an enforcement action
4 against the Attorney General." (Response, p. 2, lines 16-19). But that's not at all what the Secretary
5 of State said when these bills were winding their way through the legislative process. Here is what
6 Secretary of State Ken Bennett said in Senate Judiciary committee on March 5, 2012 about the
7 language that would become the session law at issue: "The impetus for this really occurred in the
8 previous [Attorney General] administration just after I had become the Secretary of State...Like I say,
9 the impetus for this really originated a couple years ago..."

10 (http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=10452 at 47:00 and 51:30
11 minutes).

12 In addition, when the bill was in House Judiciary committee, this is what Secretary of State
13 Bennett said about the bill, according to the official committee minutes:

14 Ken Bennett, Arizona Secretary of State, in support of HB2379, offered to answer
15 questions on why changes are being proposed to the laws governing electors and
16 elections. **He advised that these changes are technical and conforming. He**
17 **noted that the policy changes on presidential preference elections requiring**
18 **some signatures on the ballot may be controversial; other changes are**
19 **technical and conforming.**

20 (See Attachment 1⁴)(Emphasis added).

21 The County Attorney's Office, in asking this court to look at the legislative history of Laws
22 2012, ch. 361, § 25, implicitly admits that the actual text of the law does not state what they want it to
23 state, or at the very least, that it is ambiguous. *United Dairymen of Arizona v. Rawlings*, 217 Ariz.

24 _____
⁴ A video of Secretary of State Bennett's testimony before the House Judiciary Committee may be viewed
here. http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=9923 However, technical difficulties
prevented undersigned counsel from viewing this and quoting directly from the clip, so we have quoted the
official minutes.

1 592, 596, 177 P.3d 334, 338 (Ct. App. 2008)(“If the statutory language is clear and unambiguous, we
2 do not look to legislative history...”). And then they ask this court to credit an affidavit of a
3 nonlegislator, regarding **his** intent as to what the bill meant, apparently expressed to a handful of
4 legislators in private meetings. Meanwhile, their publicly expressed intentions as to this bill do not
5 support this position at all. The fact that they, a nonlegislator, want it to say something else cannot be
6 enough to overcome the text of the law itself. If they wanted this law to truly amend A.R.S. §§ 16-
7 924 and 16-1021 to allow the Secretary of State to divest the Attorney General of his enforcement
8 power then they should have written it that way.

9 Other state agencies, such as the State Treasurer and the Governor, do have the power that the
10 Secretary of State sought with the legislation, to “employ legal counsel.” But that does not mean that
11 these other agencies can declare a conflict for the Attorney General and retain their own attorney to
12 assume his statutory law enforcement powers.

13 **III. A.R.S. § 16-905 does not give the County Attorney enforcement power with regard to a**
14 **violation of campaign finance laws in a statewide race**

15 The Plaintiff points to A.R.S. § 16-905(K) as giving the County Attorney the power to bring a
16 civil action⁵. This is a private attorney general provision that is triggered by the filing of “a sworn
17 complaint” by “any qualified elector.” But the County Attorney’s Office glosses over the fact that it
18 never received such a sworn complaint and this private attorney general provision is inapposite.

19 The County Attorney claims that “the Secretary of State pursuant to A.R.S. § 16-905(L) had
20 the authority to bring a civil action based on Mr. Stribling’s sworn complaint [Attachment 4].”
21 (Response, p. 4, lines 1-2). In reality, this “sworn complaint” was no complaint at all, it is an
22

23 ⁵ The County Attorney’s Office also claims that this statute gives the Secretary of State the power to bring a
24 civil enforcement action. (Response, p. 4 lines 1-2). This is an odd claim because it contradicts the Secretary
of State’s claims regarding the need for the session law. We elaborate on this in Section IV below.

1 affidavit for a search warrant. And it was not “filed” with the County Attorney’s Office. As the
2 stamp clearly shows it was filed in Maricopa County Superior Court. Significant parts of it, while
3 apparently believed by the FBI and County Attorney’s Office at the time, are clearly false. Since it is
4 a criminal search warrant, it refers to a criminal statute, A.R.S. § 13-2310, not A.R.S. § 16-905.

5 In short, the provision pointed to by Plaintiff as giving it the power to prosecute this action is
6 completely inapplicable. The subsection above it, A.R.S. § 16-905(J), governs this situation, and it
7 states: “A person who violates this section is subject to a civil penalty **imposed as prescribed in**
8 **section 16-924** of three times the amount of money that has been received, expended or promised in
9 violation of this section...” (Emphasis added). While A.R.S. § 16-924 gives the Secretary of State
10 the power to send a reasonable cause finding to the Attorney General and ask him to take action, the
11 power to take further action rests exclusively with the Attorney General.

12 It must also be noted that there are very good public policy reasons why the Legislature would
13 want to set up a bifurcated enforcement system with one agency in charge of investigating an alleged
14 campaign finance violation and another agency charged with reviewing the other agency’s decision
15 and ultimately deciding whether to proceed with an enforcement action. Because these cases always
16 deal with elections the temptation for people to attempt to abuse the system for political advantage
17 cannot be ignored. Also, the statutes call for a severe penalty up to a staggering three times the cost
18 of the advertisements.

19 It makes perfect sense that the Legislature would be concerned with both of these things and
20 seek to build some checks into the system. And that they would follow the normal law enforcement
21 model in which one agency investigates crime and a separate agency, after making an independent
22 decision, decides whether to prosecute. This check on civil prosecutorial abuse would be destroyed if
23 this court agrees with the position of the Maricopa County Attorney’s Office.

24

1 The obviously staged process followed here is not at all what the Legislature had in mind.
2 The Maricopa County Attorney's Office investigated this, along with the FBI, as a criminal matter.
3 When their lengthy investigation did not lead to a criminal case, they sent this to the Secretary of
4 State and "volunteered" to serve as the civil enforcement agency, having clearly already concluded
5 enforcement was appropriate. A mere two days after receiving thousands of pages of documents, the
6 Secretary of State then handed it back to the Maricopa County Attorney along with a reasonable
7 cause finding and a request for civil enforcement.

8 **IV. The Attorney General did not give the Secretary of State the power to pick its own civil**
9 **prosecutor**

10 In response to Appellant's claim that it was the Attorney's General's, not the Secretary of
11 State's job to conflict this matter out when it reached him, the County Attorney's claims that "the
12 Attorney General did not send this case to an independent law enforcement officer and did not
13 'find a suitable replacement for the Attorney General' to investigate even though he was
14 aware of the FBI investigation since late 2011⁶." This betrays a misunderstanding of the campaign
15 finance laws, and a misunderstanding of the Attorney General's role in enforcing these laws.

16 Again, A.R.S. § 16-924 clearly delineates the roles of the Secretary of State and the Attorney
17 General:

18 [I]f the filing officer [Secretary of State]... has reasonable cause to believe that a
19 person is violating any provision of this title, except for violations of chapter 6,
20 article 2, **the secretary of state shall notify the attorney general for a violation**
regarding a statewide office or the legislature, the county officer in charge of

21 ⁶ As long as the County Attorney's Office has brought up the issue of conflicts, we feel the need to point out a
22 couple of glaring conflicts also. Since the 2010 election, Tom Horne and Ken Bennett have been mentioned
23 many times as potential political rivals in the 2014 race for Governor. "All eyes on 2014 race for Arizona
24 governor", *The Arizona Republic*, 11/12/12, <http://www.azcentral.com/news/politics/articles/20121107arizona-governor-race-focus.html> . Secretary of State Bennett has already formed an exploratory committee for
Governor. In 2006 Bill Montgomery ran for the position of Attorney General, losing in the general election.
He is widely rumored to still have designs on that office or the Governor's office. [CITE TO
MONTGOMERY PRESSER ANNOUNCING CIVIL ACTION AGAINST HORNE/WINN?]

1 elections shall notify the county attorney for that county for a violation regarding
2 a county office or the city or town clerk shall notify the city or town attorney for a
3 violation regarding a city or town office. **The attorney general, county attorney
or city or town attorney, as appropriate, may serve on the person an order
requiring compliance with that provision...**

4 Until the Attorney General receives a reasonable cause finding from the Secretary of State, he
5 did not have the power to refer this matter to someone else. In fact, doing so would usurp the
6 Secretary of State's powers under this statute, just as the Secretary of State is now attempting to do to
7 the Attorney General.

8 The Secretary of State simply failed to follow this critical step. Had the Secretary of State
9 forwarded this notice to the Attorney General, Appellant has complete confidence that the Attorney
10 General, or his designee would have sent this matter to an independent law enforcement officer. And
11 if he failed to do so any citizen could have instituted a *mandamus* action compelling him to do so. *Cf.*
12 *State ex rel. Sawyer v. LaSota*, 119 Ariz. 253, 255, 580 P.2d 714, 716 (1978)("[T]he Attorney
13 General, like any other public officer, may not arbitrarily refuse to discharge the duties of his
14 office...")

15 The Maricopa County Attorney's Office also points to a letter from Chief Assistant Attorney
16 General Eric Bistrow and claims the following:

17 On April 16, 2012, the Attorney General's Office appointed outside counsel to
18 represent the Arizona Secretary of State in matters concerning Tom Horne's
19 campaign for Attorney General and any other political committee that may have
been involved in supporting Mr. Horne's campaign.

20 (Response, p. 2, lines 4-7). But the clear wording of the letter shows that this is a gross
21 mischaracterization of the authority that the Attorney General's Office gave to outside counsel in this
22 matter:

23 This letter will confirm that you have been retained as outside counsel, effective
24 as of April 16, 2012, for the purpose of advising and **representing the SOS in
matters concerning public records requests for documents concerning**

1 **Tom Horne's campaign** for the office of Arizona Attorney General and
2 other political committees that may allegedly be involved in supporting Mr.
3 Horne's campaign."

4 Attachment 2. Far from being *carte blanche*, this was a limited grant of authority, and it was
5 a grant of authority that dealt with actual representation of the client agency, not a law enforcement
6 function. When serving in a law enforcement capacity, the Attorney General's Office is representing
7 the people of Arizona, not the Secretary of State's Office. *See, e.g. Hadley v. Ryan*, 345 Ill. App. 3d
8 297, 303, 803 N.E.2d 48, 54 (2003)(holding that the Attorney General represents the people of a
9 state, not private individuals).

10 **V. The position of the Maricopa County Attorney's Office as to whether it has legal
11 authority to engage in this civil prosecution is inherently contradictory**

12 Lastly, it is important to note the inherent conflicts in the State's response. On the one hand
13 they claim that "the catalyst for the session law⁷ was the knowledge that the FBI was investigating
14 Mr. Horne and that the Secretary of State would perhaps have to initiate an enforcement action
15 against the Attorney General." (Response, p. 2 lines 17-19). But later on they claim that "the
16 Secretary of State pursuant to A.R.S. § 16-905(L) had the authority to bring a civil action based on
17 Mr. Stribling's sworn complaint..." (Response, p. 4, lines 1-2.)

18 The County Attorney ignores the obvious question: if the Secretary of State already had the
19 authority under A.R.S. § 16-905(L) to bring a civil action, why was there this pressing and
20 compelling need for the legislative change? And if the Secretary of State had the authority to bring a
21 civil action, why has he sent this case to the Maricopa County Attorney's Office?

22 There is a reason that the Maricopa County Attorney's Office is having a hard time coming up
23 with a consistent rationale for its involvement in this matter. It is because the law simply does not

24 ⁷ Laws 2012, ch. 361, § 25.

1 allow for that office to prosecute this civil matter merely because the Secretary of State's Office has
2 purported to give them this power. Again, they are trying to fit a square hole into a round peg, and
3 this court should not allow it.

4 **VI. Conclusion**

5 Our U.S. Constitution, Arizona Constitution and state statutes set out extensive and sometimes
6 complex procedures for government agencies to follow. Adherence to these rules is especially
7 important when they are acting in a law enforcement function and seeking to levy a staggering fine.

8 That the Attorney General's office had a conflict or that it made practical sense for the
9 Secretary of State to ask the Maricopa County Attorney's Office to take this case is irrelevant. The
10 Legislature, in A.R.S. § 16-924, has ordained a bifurcated system for law enforcement involving
11 alleged campaign finance violations. In this instance, the process for bringing an action for a
12 violation of a civil campaign finance law was simply not followed, and the law that the Secretary of
13 State cites does not give it the power to usurp the law enforcement functions of the Attorney
14 General's Office and pick its own civil prosecutor.

15 As it stands before this court today, the Maricopa County Attorney's Office simply is without
16 legal authority to maintain this civil action. As such, this court must remand this matter back to the
17 Secretary of State. The Secretary of State could continue to pursue it, but he would have to do so
18 within the confines of the law.

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21 ///

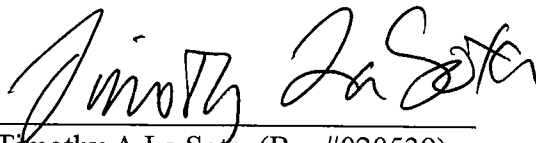
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1 DATED this 18th day of January, 2013.

2 

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9 ORIGINAL OF THE FOREGOING e-filed
10 this 18th day of January, 2013, to:

11 Honorable Tammy Eigenheer
12 Administrative Law Judge
13 ARIZONA OFFICE OF ADMINISTRATIVE
14 HEARINGS

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