

1 Timothy A La Sota, (Bar #020539)
2 tal@tblaw.com
3 TIFFANY & BOSCO, P.A.
4 2525 East Camelback Road
5 Third Floor
6 Phoenix, Arizona 85016-4237
7 Telephone: (602) 255-6000
8 Facsimile: (602) 255-0103
9 Attorney for Business Leaders for Arizona and Kathleen Winn

10 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

11 In the Matter Of,
12
13 TOM HORNE, Tom Horne for Attorney
14 General Committee (SOS Filer ID 2010
15 00003); KATHLEEN WINN, Business
16 leaders for Arizona (SOS Filer ID 2010
17 00375)

No. 13F-CF20120001-MCAO

**RESPONDENTS MOTION TO
DISMISS**

Tammy L. Eigenheer
Administrative Law Judge

18 RESPONDENTS respectfully move for dismissal and/or remand of this case on the grounds
19 that the Maricopa County Attorney agrees that the statute under which he is proceeding is
20 unconstitutional. This Motion is supported by the attached Memorandum of Points and Authorities
21 and transcript of the County Attorney's statement, incorporated herein by reference.

22 DATED this 5th day of March, 2013.

23 /s/ Timothy A. La Sota
24 Timothy A La Sota, (Bar #020539)
TIFFANY & BOSCO, P.A.
2525 East Camelback Road
Third Floor
Phoenix, Arizona 85016-4237
Attorney for Business Leaders for Arizona and Kathleen Winn

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. THE COUNTY ATTORNEY’S OFFICE CIVIL ENFORCEMENT ACTION IS FOR A**
3 **VIOLATION OF A.R.S. § 16-905—IF THAT STATUTE IS UNCONSTITUTIONAL THERE**
4 **IS NO BASIS FOR THIS ENFORCEMENT ACTION**

5 While the parties in this case disagree vehemently on many critical issues, it is now clear that
6 there is agreement on a dispositive issue. That is, the Maricopa County Attorney’s Office has now
7 admitted that it believes that A.R.S. § 16-905 is unconstitutional.

8 A.R.S. § 16-905 is the statute that establishes contribution limits for candidates. It also
9 establishes the penalty of up to three times the amount of money contributed to a candidate in excess
10 of the limits in § 16-905. Without this statute, the County Attorney’s Office cannot maintain this
11 civil action.

12 In testimony before the Arizona House of Representatives Judiciary Committee, Maricopa
13 County Attorney Bill Montgomery called the individual contribution limits to candidates embodied in
14 A.R.S. § 16-905 unconstitutional:

15 “The big problem that I see right now is a consequence of so many investigations that
16 my office participated in is that the low level of contribution limits, both individuals
17 and in the aggregate creates an environment in which people who want to participate
18 in the election process, those who want to advocate on behalf of a particular candidate
19 or to provide information to voters **can’t really do so in donating directly to a
20 candidate because of what I would say are unconstitutionally low contribution
21 limits.**” (Emphasis added.)

22 (County Attorney Montgomery’s testimony can be viewed at the following link, and starts
23 approximately six minutes into the hearing:

24 http://azleg.granicus.com/MediaPlayer.php?view_id=21&clip_id=11850).

The County Attorney’s case against the Appellants relies squarely on the individual
contribution limits in A.R.S. § 16-905.

In Arizona, while clearly the statutory scheme in its entirety purports to apply a civil fine for

1 coordination, there is no one statute that states specifically that it is a civil offense to coordinate.
2 Instead, if a would-be independent expenditure committee engages in coordination, all monies spent
3 by that committee are treated as in-kind contributions to the candidate. A.R.S. § 16-917(C)(“An
4 expenditure by a political committee, corporation, limited liability company, labor organization or a
5 person that does not meet the definition of an independent expenditure is an in-kind contribution to
6 the candidate.”)

7 If a significant sum is spent by the would-be independent expenditure committee, but the
8 expenditure is not in fact independent, by operation of law the result is a contribution to the candidate
9 in excess of the campaign contribution limits and a penalty of up to three times the amount
10 contributed in excess of the limits. So in the case of a civil action against an independent expenditure
11 campaign for engaging in illegal coordination with the candidate, the action is actually for violating
12 A.R.S. § 16-905.

13 This describes precisely the legal theory that the County Attorney’s Office is relying on. This
14 is what their order of compliance states:

15 “The BLA [Business Leaders for Arizona] expenditures, by not meeting the definition
16 of independent expenditure, were in-kind contributions to the candidate. A.R.S. §§ 16-
17 901(8), -917(C):

18 ‘An expenditure by a political committee, corporation, limited liability company, labor
19 organization or a person that does not meet the definition of an independent
20 expenditure is an in-kind contribution to the candidate and a corresponding
21 expenditure by the candidate unless otherwise exempted.’ A.R.S. § 16-917(C).

22 Therefore, all contributions to BLA are considered to be contributions to Tom Horne.
23 As a candidate for statewide office, Tom Horne was required to limit the total amount
24 of contributions, including in-kind contributions, received from an individual. In the
2010 election cycle, a candidate could accept a maximum of \$840 from an individual.
A.R.S. § 16-905(B)(1)(as adjusted, A.R.S. § 16-905(H)). Table 3 below shows the
contributions made to the BLA political committee, which was being operated by the
candidate, Horne, and Winn, which exceeded the individual contribution limits [in
A.R.S. Section 16-905] of \$840.”

(Brackets Added).

1 All this means that if A.R.S. § 16-905's contribution limits are unconstitutional, or
2 "unconstitutionally low," the Maricopa County Attorney's Office simply does not have a case,
3 because without those limits, or other limits set by the Legislature that are constitutional (which the
4 Legislature has not done), there is no violation for coordination.

5 It also should be noted that given the public position on A.R.S. § 16-905 taken by the County
6 Attorney, enforcing this statute is inconsistent with the oath prescribed by A.R.S. § 38-231(E) that the
7 County Attorney took as a public official to "support the Constitution of the United States." See The
8 Attorney Gen.'s Duty to Defend & Enforce Constitutionally Objectionable Legislation, 4A Op. Off.
9 Legal Counsel 55, U.S. Department of Justice (1980)("[I]n rare cases the Executive's duty to the
10 constitutional system may require action in defiance of a statute. In such a case, the Executive's
11 refusal to defend and enforce an unconstitutional statute is authorized and lawful.")

12 **II. OTHER ANCILLARY ISSUES RAISED BY THE COUNTY ATTORNEY'S OFFICE**
13 **ARE UNAVAILING**

14 It is true that the County Attorney's Office has also alleged in the order of compliance that
15 somehow the Tom Horne for Attorney General Committee received an in-kind contribution from the
16 Republican State Leadership Committee. However, even if the expenditures by Business Leaders for
17 Arizona could be considered an in-kind contribution to the Tom Horne for Attorney General
18 committee (which we deny), those contributions came from Business Leaders for Arizona, not the
19 Republican State Leadership Committee. And Business leaders for Arizona does not meet the
20 statutory definition of political party or political organization under A.R.S. Section 16-901, and thus
21 A.R.S. § 16-905(D) is not at all implicated.

22 Further, the Republican State Leadership Committee does not appear to meet either of these
23 statutory definitions (political party or political organization), and as of yet, no proof has been offered
24 by the Maricopa County Attorney's Office that it does meet either of these definitions.

1 The County Attorney's Office also mentions A.R.S. § 16-917, and implies that it contains
2 stand-alone violations for coordination. In reality, A.R.S. § 16-917 deals with the notifications that
3 an independent expenditure committee is required to send. It has nothing to do with this matter, save
4 for subsection C. But the only relevance of subsection C is that it states that expenditures that do not
5 fact meet the definition of independent expenditure are to be treated as in-kind contributions to the
6 candidate benefitted. And that takes us right back to A.R.S. § 16-905

7 Notwithstanding unsupported references by the County Attorney's Office to other statutes,
8 this civil enforcement action relies on A.R.S. § 16-905, and simply cannot stand without the
9 contribution limits in that statute, which are unconstitutional.

10 **III. THIS CASE ILLUSTRATES EXACTLY WHY ARIZONA'S INDIVIDUAL**
11 **CONTRIBUTION LIMITS ARE UNCONSTITUTIONAL**

12 It is not surprising that the parties here agree that the individual contribution limits in A.R.S. §
13 16-905 are unconstitutional, as this case is a good illustration of why that is true.

14 The legal question regarding individual limits and their constitutionality is as the Supreme
15 Court stated in *Buckley v. Valeo*, 424 U.S. 1, 21 (1976), then restated six years ago in *Randall v.*
16 *Sorrell*: "Following *Buckley*, we must determine whether Act 64's [the challenged law] contribution
17 limits prevent candidates from "amassing the resources necessary for effective campaign advocacy."
18 548 U.S. 230, 248, 126 S. Ct. 2479, 2492, 165 L. Ed. 2d 482 (2006) (Case Attached).

19 The answer to this in our case is so obvious it seems almost silly to ask the question. .
20 Attached are the findings of a Hearing Officer regarding the Committee for Justice and Fairness¹, an

21 _____
22 ¹ This is the purported name of the group. But in reality, Committee for Justice and Fairness is a phony, illegal front
23 group for the Democratic Attorneys General Association. DAGA provided over 99% of the group's \$1.5 million funding
24 to attack Horne (see Exhibit 2), and Committee for Justice and Fairness used the same political consultants as those that
serve DAGA. So while Committee for Justice and Fairness cashed checks written by DAGA, the source of the money
was these big unions and corporations. Further, neither DAGA nor the Committee for Justice and Fairness even bothered
to register as a political committee in Arizona, and they failed to include the legally required disclosure statement with
their ads. Committee for Justice and Fairness is now the subject of a civil enforcement action being prosecuted by the

1 independent campaign that spent \$1.5 million attacking Tom Horne in the waning days of the 2010
2 general election (Exhibit 1). This \$1.5 million came from some of the richest, largest unions and
3 corporations in the world². Many of the corporations are, of course, regulated by the Democratic
4 Attorneys General.

5 In contrast to the millions that could be raised to attack him via massive checks from
6 corporations and unions, Horne was limited to contributions of no more than \$840 per person to try to
7 counter these ads, and he was not permitted to raise union or corporate money. But by October of
8 2010, Mr. Horne had tapped out the pool of donors that typically donate to the Attorney General's
9 race in Arizona, he had no money to respond, and his poll numbers took a big hit.

10 To look at this another way, Tom Horne started his exploratory committee on December 8,
11 2008. In the nearly two years he was running, he raised \$540,000 from individuals and political
12 committees. Felicia Rotellini raised \$699,000 in her campaign. Both of the candidates' campaigns
13 were dwarfed by the money spent by the Democratic Attorney's General Association.

14 Maricopa County Attorney's Office.

15 ² Here is a sampling of money raised in 2010 ONLY:

16 American Federation for State, Municipal and County Employees (AFSCME), \$50,000

17 United Food and Commercial Workers (UFCW), \$50,000

18 Microsoft \$70,000

19 CitiGroup, \$60,000

20 Pfizer, \$60,000

21 Walmart, \$50,000

22 VISA USA, \$50,000

23 Google, \$50,000

24 Yahoo \$50,000

Facebook, \$25,000

Anheuser Busch, \$25,000

JP Morgan Chase, \$25,000

United Health Care, \$25,000

State Farm Insurance, \$25,000

Apollo Group, \$25,000

Bank of America, \$25,000

AT & T \$25,000

Coca Cola, \$25,000

Walgreen's, \$25,000

General Motors, \$10,000

(See Exhibit 3).

1 Under these circumstances, the individual contribution limits in Arizona law prevented Mr.
2 Horn “from amassing the resources necessary for effective campaign advocacy.” *Id.* These limits are
3 violative of free speech rights and rights to Equal Privileges and Immunities and Equal Protection of
4 the law under the U.S. and Arizona Constitutions.

5 **IV. CONCLUSION**

6 This Court is charged with issuing a decision that the County Attorney may then accept or
7 modify in whole or part. A.R.S. § 41-1092.08(B). It is apparent that regardless of what the
8 testimony at hearing shows, the recommendation should be to the County Attorney that he not
9 proceed with a civil enforcement action in a case in which he has stated publicly that he believes the
10 statute he is enforcing is unconstitutional. It is impossible for any testimony at the hearing to change
11 that, so there is no need for the hearing at all, there is no real case or controversy to adjudicate. There
12 is no need for this Court to hear testimony and side with one of the parties over the other when the
13 parties agree on a dispositive issue.

14 It is therefore respectfully requested that this case be dismissed.

15 RESPECTFULLY SUBMITTED this 5th day of March, 2013.

16 /s/ Timothy A. La Sota
17 Timothy A La Sota, (Bar #020539)
18 TIFFANY & BOSCO, P.A.
19 2525 East Camelback Road
20 Third Floor
21 Phoenix, Arizona 85016-4237
22 Attorney for Business Leaders for Arizona and Kathleen Winn
23
24

1 ORIGINAL OF THE FOREGOING e-filed
this 5th day of March, 2013, to:

2
3 Honorable Tammy Eigenheer
4 Administrative Law Judge
5 ARIZONA OFFICE OF ADMINISTRATIVE
6 HEARINGS
7 1400 West Washington Street, Suite 101
8 Phoenix, Arizona 85007
9 casemanagement@azoah.com

10 COPIES of the foregoing emailed
11 (through OAH electronic filing) this
12 5th day of March, 2013, to:

13
14 Colleen Connor
15 Maricopa County Attorney's Office
16 Maricopa County Attorney
17 222 N. Central Avenue, Suite 1100
18 Phoenix, AZ 85004
19 connorc@mcao.maricopa.gov

20
21 Michael D. Kimerer
22 KIMERER & DERRICK, P.C.
23 221 East Indianola Avenue
24 Phoenix, Arizona 85012

Larry Debus
DEBUS, KAZAN AND WESTERHAUSEN, LTD.
335 East Palm Lane
Phoenix, Arizona 85004

By: /s/ Jenne Warrington

17746-001/538700