

1 Michael D. Kimerer (Bar #002492)

2 MDK@kimerer.com

3 KIMERER & DERRICK, P.C.

4 221 East Indianola Avenue

5 Phoenix, Arizona 85012

6 Telephone: 602/279-5900

7 Facsimile: 602/264-5566

8 *Attorney for Tom Horne*

9 *And Tom Horne for Attorney*

10 *General Committee*

11 Timothy A La Sota, SBN 020539 (tal@tblaw.com)

12 **TB** TIFFANY & BOSCO
13 P.A.

14 Third Floor Camelback Esplanade II

15 2525 East Camelback Road

16 Phoenix, Arizona 85016-4237

17 Telephone: (602) 255-6000

18 Facsimile: (602) 255-0103

19 *Attorney for Kathleen Winn*

20 **OFFICE OF THE YAVAPAI COUNTY ATTORNEY**

21 **CAMPAIGN FINANCE PROCEEDING**

22 IN THE MATTER OF

23 TOM HORNE, individually; Tom Horne for
24 Attorney General Committee (SOS Filer
25 2010 00003); KATHLEEN WINN,
26 individually; Business Leaders for Arizona
27 (SOS Filer 2010 00375).

28 **RESPONSE TO ORDER
REQUIRING COMPLIANCE**

29 **I. Incorporation by Reference.**

30 This Response incorporates by reference the Response dated October 19, 2012, to
31 an Order by the Maricopa County Attorney, and the exhibits to that response. It also
32 incorporates by reference the legal issues set forth in the Notice of Appeal dated
33 November 5, 2012.

1 **II. Response to First Issue.**

2 The Order of Compliance first focuses on calls and emails from October 20, when
3 the wording of the ad was completed. The position of the County Attorney is that the
4 phone calls were about the wording of the ad, although there is no testimony from any
5 witness to that effect. What is not taken into consideration are calls to other individuals
6 or the meetings that Ms. Winn conducted in person.
7

8 The focus of the Order is based on emails from Kathleen Winn to her consultant,
9 which showed that she was speaking with someone else about the wording of the ad,
10 because she was referring to “we” and “two very strong personalities.” The theory of the
11 Order, without direct evidence, is that the other person was Tom Horne. That is
12 incorrect. The records have always shown that the other person was George Wilkinson,
13 her campaign treasurer. This is established by direct testimony, cell phone records, and
14 the fact that Winn and Wilkinson had met personally to revise the ad, prior to her emails
15 that day to her consultant.
16
17

18 On August 18, 2012, George Wilkinson testified to the FBI agents as follows:

19 [FBI Agent]: ‘And then the next thing you remember is what? You talking
20 about the Ads?’

21 [George Wilkinson]: ‘Talking about – talking about the ads and – and--,
22 you know, where we were gonna run the ads and things – and – and she
23 sent me over I think a, you know, a – copy of the ad that she put together.
Asked me what my thought was on it.’

24 The phone records attached to the Order are those for Winn and Horne, and omit
25 those for Wilkinson, even though the FBI did obtain them. A copy of George
26 Wilkinson’s phone records is attached.
27
28

1 There are several calls between Wilkinson and Winn on October 20, the date at
2 issue. The phone call marked #2 is a five-minute call between Wilkinson and Winn at
3 10:40 a.m. The column headed "origination" shows that he was located in Scottsdale,
4 where his home and business are. During that phone call, Winn and Wilkinson agreed to
5 meet personally at Winn's office, which was located in Mesa, Arizona. The phone calls
6 numbered 3, 4, and 5 originated from Mesa, showing that Wilkinson had driven from
7 Scottsdale to Mesa, where Winn's office was located, and was present in Mesa at least by
8 12:19 p.m. Therefore sometime between 12:58 p.m. and 1:58 p.m. he drove from Mesa
9 to Chandler. He was located in Mesa, where he met with Winn, at least from 12:19 p.m.
10 to 12:58 p.m., and possibly longer, with an outer limit of 1:50 p.m. The evidence is
11 conclusive that Winn and Wilkinson met to revise the ad *prior* to her emails to her
12 consultant that day.
13
14

15 When Winn refers to "we" and "two very strong personalities" she is referring to
16 herself and Wilkinson, not herself and Horne. The fact that Winn might have had a
17 phone call with Horne before sending an email that referred to "we" does not change the
18 fact that "we" refers to her and Wilkinson, not her and Horne. She also consulted with
19 other employees in her office who were interested in the election. During the course of a
20 day, no one does every task according to a logical order based on a concept.
21
22

23 If Horne had participated in the preparation of the ad, there would have been an
24 email to or from him containing the text to be revised, just as Winn's consultant sent her
25 emails with text to be revised. It is not practical to revise the text of an entire commercial
26 without having a copy in front of you. The FBI subpoenaed all of Horne's emails from
27 the provider, and the text of an ad was never sent to him or vice versa. These
28

1 conversations were between Winn and Wilkinson, not Winn and Horne. There is NO
2 evidence to the contrary.

3 If someone were to go through the email and phone records of an average citizen,
4 they would find instances in which an email or phone call with person A was followed by
5 one with person B. They could say: he must have talked to both of them about the same
6 thing. The citizen could respond: no, I spoke with them about different things. The fact
7 that one follows another in time does not produce a reasonable inference that they spoke
8 about the same thing.
9

10 Here, the Order creates the impression that Horne could have been the only person
11 in Winn's reference to "we" or "two strong personalities," because there was no one else
12 in the campaign she was talking to in that time span. The calls, and personal meeting,
13 with Wilkinson, negates that argument. Wilkinson and Winn both say they spoke about
14 revising the ad, Winn and Horne both say THEY spoke about other things, and not the
15 ad, because they knew they were not allowed to do that. This testimony, by Winn and
16 Horne, is as consistent with the records as any other theory, and therefore there is no case
17 that Winn and Horne spoke about the ads.
18

19 The evidence being cited does not create an inference of coordination, because (1)
20 that evidence is equally consistent with Horne and Winn speaking about other things; (2)
21 all of the testimony is that they spoke about other things, and that Winn spoke with
22 WILKINSON about revising the ad. The lack of any email to or from Horne about the
23 wording of the ad also reinforces this because it is impractical to revise an ad without
24 written copy. As with the example of the average citizen, mere timing is no evidence that
25 two calls back to back with different people were about the same thing.
26
27
28

1 **III. Response to Second Argument.**

2 The second issue raised by the Order pertains to a single email chain from October
3 27, 2010 and is answered on pages 3-6 of the response dated October 19, 2012. Those
4 pages present considerable authority that the Arizona statute, as well as the federal
5 statute, which provides guidance in interpreting the Arizona statute, prohibit coordination
6 of expenditures, not coordination of fundraising.
7

8 However, even if that were not so, there was no coordination as a factual matter in
9 this case. The Order argues that Winn sharing information from Horne's e-mail with her
10 consultant, Murry, constituted coordination. That is incorrect. If she had, as a result of
11 the e-mail, gone to the RSLC to raise additional funds, and had succeeded in raising
12 additional funds, then that would have been coordination. But her consultant advised her
13 not to do so, and she took his advice, and did not do so. Therefore, there was no
14 coordination.
15

16
17 The United States Supreme Court has held:


18 We have never accepted mere conjecture as adequate to carry a First Amendment
19 Burden. *Nixon_v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392 (2000).

20 In *Federal Election Commission v. The Christian Coalition*, 52 F.Supp.2d 45
21 (D.D.C. 1999), the Court stated: "I take from Buckley [The Landmark United States
22 Supreme Court Case on this subject] and its progeny the directive to tread carefully,
23 acknowledging that considerable coordination will convert an expressive expenditure into
24 a contribution but that the spender should not be deemed to forfeit First Amendment
25 protections for her own speech merely by having engaged in some consultation or
26 coordination with a federal candidate." 52 F.Supp.2d at 91 (emphasis added).
27
28

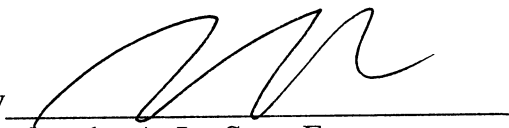
1 Here, all of the evidence is consistent with there having been no coordination, and
2 all of the relevant testimony is that there was no coordination.

3 RESPECTFULLY SUBMITTED this 31st day of October, 2013.

4 KIMERER & DERRICK, P.C.

5
6
7 By 
8 Michael D. Kimerer (Bar #002492)
9 MDK@kimerer.com
10 221 East Indianola Avenue
11 Phoenix, Arizona 85012
12 Attorney for Tom Horne and
Tom Horne for Attorney
General Committee

13 TIFFANY & BOSCO, P.A.

14
15 By 
16 Timothy A. La Sota, Eq.
17 Camelback Esplanade II, Third Floor
18 2525 East Camelback Road
Phoenix, AZ 85016
Counsel for Kathleen Winn and BLA

19
20 ORIGINAL of the forgoing hand-delivered
this 31st day of October, 2013, to:

21 Sheila Sullivan Polk
22 Yavapai County Attorney
23 255 East Gurley Street
24 Prescott, AZ 86301

25
26 By: _____
27
28