

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 IN RE COMMITTEE FOR JUSTICE AND
4 FAIRNESS

No. 11F-0001-MCAO

5 **ADMINISTRATIVE LAW JUDGE**
6 **DECISION**
7

8
9 **HEARING:** August 31, 2011

10 **APPEARANCES:** The Office of Maricopa County Attorney was represented by
11 Deputy County Attorney Colleen Connor. The Committee for Justice and Fairness was
12 represented by its attorney, Kelly J. Flood, Esq.

13 **ADMINISTRATIVE LAW JUDGE:** Brian Brendan Tully
14

15 Based upon the evidence of record, the Administrative Law Judge makes the
16 following Findings of Fact, Conclusions of Law, and Recommended Order:

17 **FINDINGS OF FACT**

- 18 1. The Committee for Justice and Fairness (“CJF”) is a political organization as
19 defined by the Internal Revenue Code at 26 U.S.C. § 527.
20 2. In its 2009 Form 90-EZ, “Short Form Return of Organization Exempt From
21 Income Tax,” filed with the Internal Revenue Service, CJF listed its “primary
22 exempt purpose” as follows:

23 The Committee for Justice and Fairness is a nonprofit organization
24 operated for the purpose of accepting donations in order to make
25 disbursements for an exempt purpose within the meaning of
26 section 527 of the Internal Revenue Code of 1986, as amended
27 (the “Code”) to indirectly influence the selection, nomination,
28 election, or appointment of individuals to state or local public
29 office[.] All references to sections of the Code include the
30 corresponding provision of any subsequent federal tax law[.]

3. CJF’s business address is P.O. Box 3526, Washington, DC.

- 1 4. CJF's primary financial contributor is the Democratic Attorneys General
2 Association located at 1580 Lincoln Street, Suite 1125, Denver, Colorado.
- 3 5. In the late summer of 2010, CJF produced and broadcasted an advertisement
4 that accused Tom Horne, then-State Superintendent of Public Instruction, of
5 "vot[ing] against tougher penalties for statutory rape" and allowing a "[p]orn-
6 viewing teacher" back in the classroom. The television advertisement was
7 entitled "Protect."¹
- 8 6. The advertisement provided information about the following two prior actions
9 taken by Mr. Horne: (1) his senatorial vote against HB 2587, a bill that would
10 have increased the penalty for having sexual conduct with a minor older than 14,
11 raising the offense from a Class 6 felony to a Class 4 felony or to a Class 2
12 felony if the perpetrator was at least five years older than the minor; and (2) his
13 alleged support as State Superintendent for reinstating the teaching license of a
14 teacher who was caught viewing adult and child pornography on his classroom
15 computer.
- 16 7. The advertisement concluded by urging viewers to "Tell Superintendent Horne to
17 protect children. Call 602.542.5393." The telephone number was Superintendent
18 Horne's office number.
- 19 8. At the time of the broadcasts, Mr. Horne was a Republican candidate for the
20 office of Attorney General of the State of Arizona. On November 2, 2010, Mr.
21 Horne was elected Attorney General.
- 22 9. Nowhere in the advertisement is there a reference to Mr. Horne as a candidate,
23 to any other candidate, to any election, or to any political party.
- 24 10. CJF did not register as a political committee before the 2010 elections in
25 Arizona, and it has not registered to date by filing the necessary paperwork with
26 the Arizona Secretary of State ("Secretary").
- 27 11. On October 22, 2010, the Secretary received a complaint from the Tom Horne
28 for Attorney General Committee alleging that CJF had engaged in express
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1 advocacy within the meaning of A.R.S. § 16-901.01(A)(2) and had made
2 expenditures in connection with the same. The complaint also alleged that CJF
3 had not registered with the Secretary as a political committee, had not filed
4 campaign finance reports, and had not disclosed information in the television
5 commercial that was required by statute regarding contributions by political
6 committees.

7 12. By email dated October 22, 2010, the Secretary asked CJF for information
8 regarding the television commercial.

9 13. On October 25, 2010, the Secretary issued the following "Reasonable Cause
10 Notice":

11 The Arizona Secretary of State, having reviewed this matter
12 pursuant to A.R.S. § 16-924, finds that reasonable cause exists to
13 believe that the [CJF] has violated a provision of Title 16, Chapter
14 6, Article 1 of the Arizona Revised Statutes, specifically A.R.S. §§
15 16-902 and 16-912, and hereby notifies the Attorney General of
16 this finding.

17 14. By letter dated January 26, 2011, the Attorney General's Office requested that
18 the Office of Maricopa County Attorney ("MCAO") handle further enforcement
19 and any litigation in the matter.

20 15. On May 23, 2011, the MCAO issued an "Order Requiring Compliance" that
21 ordered CJF to register as a political committee with the Secretary, pursuant to
22 A.R.S. § 16-902.01, to provide the Secretary with CJF's financial institution,
23 pursuant to A.R.S. § 16-902(C), to file all statutorily required campaign finance
24 reports, pursuant to A.R.S. §§ 16-913 and 16-915, to provide the financial
25 records that reflect the cost for the production of the television advertisement;
26 pursuant to A.R.S. § 16-904(J), and pursuant to A.R.S. § 16-924, to comply with
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28 ¹ CJF spent approximately \$1,500,000.00 to produce and broadcast the advertisement, as shown in
29 Exhibit D and as stated in MCAO's opening statement found at 8/31/11 Hearing Record at 8:26-8:42 that
30 was not disputed by CJF.

1 Arizona's campaign finance laws A.R.S. §§ 16-902, 16-902.01, 16-912,² 16-913,
2 16-915, 16-916,³ 16-916.01,⁴ and 16-918 .

- 3 16. CJF appealed the "Order Requiring Compliance."
4 17. MCAO forwarded CJF's appeal to the Office of Administrative Hearings, an
5 independent agency, for formal hearing.
6 18. The television advertisement contains inaccurate information. The reference to
7 the schoolteacher who had been discovered viewing child pornography on his
8 classroom computer is false. An EnCase forensic review of the computer by the
9 Maricopa County Sheriff's Office found adult pornography on the teacher's
10 computer but not child pornography.

11 **CONCLUSIONS OF LAW**

- 12 1. Pursuant to A.A.C. R2-19-119(B), MCAO has the burden of proof in this matter.
13 The standard of proof is by a preponderance of the evidence. A.A.C. R2-19-
14 119(A).
15 2. Pursuant to A.R.S. § 16-901.01, the term "expressly advocates" is defined as
16 follows:

17 A. For purposes of this chapter, "expressly advocates" means:

18 1. Conveying a communication containing a phrase such as "vote
19 for," "elect," "re-elect," "support," "endorse," "cast your ballot for,"
20 "(name of candidate) in (year)," "(name of candidate) for (office),"
21 "vote against," "defeat," "reject," or a campaign slogan or words
22 that in context can have no reasonable meaning other than to
23 advocate the election or defeat of one or more clearly identified
24 candidates, or

25 2. Making a general public communication, such as in a broadcast
26 medium, newspaper, magazine, billboard, or direct mailer referring
27 to one or more clearly identified candidates and targeted to the
28 electorate of that candidate(s):

29 (A) That in context can have no reasonable meaning other than to
30 advocate the election or defeat of the candidate(s), as evidenced
by factors such as the presentation of the candidate(s) in a

² This statute sets forth the requirements for candidates and independent expenditures, campaign literature and advertisement sponsors, identification, and civil penalty.

³ This statute sets forth the requirements for filing statements of contributions and expenditures and public inspection of those filings.

⁴ This statute sets forth the requirements for electronic filing and statements of contributions and expenditures.

1 favorable or unfavorable light, the targeting, placement, or timing of
2 the communication, or the inclusion of statements of the
3 candidate(s) or opponents, or

4 (B) In the sixteen-week period immediately preceding a general
5 election.

6 B. A communication within the scope of subsection A, paragraph 2
7 shall not be considered as one that “expressly advocates” merely
8 because it presents information about the voting record or position
9 on a campaign issue of three or more candidates, so long as it is
10 not made in coordination with a candidate, political party, agent of
11 the candidate or party, or a person who is coordinating with a
12 candidate or candidate’s agent.

13 3. CJF’s advertisement constituted express advocacy pursuant to A.R.S. § 16-
14 901.01(A)(2). The advertisement referred by name to Tom Horne, who was by
15 that time clearly identified as the Republican candidate for Attorney General. It
16 was aired on Channel 12, which broadcasts in the greater Phoenix metropolitan
17 area and beyond, and thus may be presumed to have targeted the electorate for
18 such a statewide office. Although the advertisement only referred to Tom Horne
19 in his then position of Superintendent of Public Instruction and called upon
20 viewers to contact him at his office in the Department of Education, the only
21 reasonable purpose for running an advertisement, during an election campaign,
22 which cost approximately \$1.5 million to produce and broadcast, to critique Tom
23 Horne’s past actions as a former member of the legislature and as an occupant
24 of a post he would soon vacate, was to advocate his defeat as candidate for
25 Attorney General. This meets the test of A.R.S. § 16-901.01(A)(2)(A). However,
26 even if it were assumed *arguendo* that reasonable minds could differ, and that
27 the advertisement was merely to encourage viewers to contact Superintendent
28 Horne to support protecting children, the advertisement was broadcast in the
29 sixteen-week period immediately preceding the general election held on
30 November 2, 2010, and thus met the alternative test of A.R.S. § 16-
901.01(A)(2)(B).

4. CJF is a political committee, as defined by A.R.S. § 16-901(19), because of its
stated purpose “of accepting donations in order to make disbursements...to

1 indirectly influence the selection, nomination, election, or appointment of
2 individuals to state or local public office.”⁵ CJF disclosed that fact in its
3 “Statement of Program Service Accomplishments” contained in its Form 990-EZ
4 “Short Form Return of Organization Exempt From Income Tax” for 2009.

- 5 5. CJF violated the provisions of A.R.S. § 16-902.01(A)⁶ by failing to register as a
6 political committee in the State of Arizona.
- 7 6. CJF violated the provisions of A.R.S. § 16-902(C)⁷ by failing to designate a
8 financial institution as its campaign depository or to notify the Secretary of such
9 designation.
- 10 7. As a political committee, CJF was required to file campaign finance reports
11 setting forth its receipts and disbursements pursuant to A.R.S. §§ 16-913⁸ and
12 16-915,⁹ and 16-918(D).¹⁰
- 13 8. CJF violated the provisions of A.R.S. § 16-913 by failing to file campaign finance
14 reports as a political committee.
- 15 9. CJF violated the provisions of A.R.S. § 16-904(J) by failing to respond to
16 MCAO’s request for financial records that reflect the cost for the production of
17 the television advertisement.

18 **RECOMMENDED ORDER**

19 IT IS ORDERED that MCAO’s Order Requiring Compliance dated May 23, 2011,
20 issued to CJF be affirmed and upheld. Therefore:

21 CJF is ordered to register as a political committee with the Secretary, pursuant
22 to A.R.S. § 16-902.01 within 20 days of the effective date of the Order entered in this
23 matter.

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⁵ See Finding of Fact No. 2.

27 ⁶ This statute sets forth the requirements for the registration of political committees.

28 ⁷ This statute requires a political committee to inform the Secretary, who is the filing officer, of its
29 financial institution(s) before accepting contributions or making expenditures.

29 ⁸ This statute sets forth the requirements for the filing of campaign finance reports and reporting receipts
and disbursements by a political committee.

30 ⁹ This statute sets forth the requirements for campaign finance reports filed by a political committee.

¹⁰ This statute defines a failure to timely file a campaign finance report by a political committee.

1 CJF is further ordered to provide notification to the Secretary of its financial
2 institution in accordance with A.R.S. § 16-902(C) within 20 days of the effective date of
3 the Order entered in this matter.

4 CJF is further ordered to file all campaign finance reports in accordance with
5 A.R.S. §§ 13-913 and 13-915 within 20 days of the effective date of the Order entered
6 in this matter.

7 Pursuant to A.R.S. § 16-924, CJF is further ordered to comply with the
8 provisions of A.R.S. §§ 16-902, 16-902.01, 16-912, 16-913, 16-915, 16-916, 16-916.01,
9 and 16-918 within 20 days of the effective date of the Order entered in this matter.

10 CJF is further ordered to comply with the provisions of A.R.S. § 16-904(J) by
11 furnishing the financial records requested by MCAO within 20 days of the effective date
12 of the Order entered in this matter.

13 *In the event of certification of the Administrative Law Judge Decision by the*
14 *Director of the Office of Administrative Hearings, the effective date of the Order will be*
15 *five days from the date of that certification.*

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17 Done this day, September 23, 2011.

18 /s/ Brian Brendan Tully
19 Administrative Law Judge
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22 Transmitted electronically to:

23 Bill Montgomery, Maricopa County Attorney
24 Maricopa County Attorney's Office
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