

1 Sheila Sullivan Polk
2 Yavapai County Attorney

3 Jack H. Fields, SBN 012470
4 Benjamin D. Kreutzberg, SBN 027984
5 Deputy County Attorneys

6 255 East Gurley Street
7 Prescott, Arizona, 86301
8 (928) 771-3344
9 YCAO@yavapai.us

10 **ARIZONA OFFICE OF ADMINISTRATIVE HEARINGS**

11 IN THE MATTER OF

No. 14F-001-AAG

12 TOM HORNE, individually; Tom
13 Horne for Attorney General
14 Committee (SOS Filer 2010 00003);
15 KATHLEEN WINN, individually;
16 Business Leaders for Arizona (SOS
17 Filer 2010 00375).

**YAVAPAI COUNTY
ATTORNEY'S NOTICE OF
FILING MCAO'S RESPONSE TO
PRIOR MOTION TO DISMISS**

(The Honorable Tammy Eigenheer)

17 The Yavapai County Attorney's Office ("YCAO") hereby files the Maricopa
18 County Attorney's Office's ("MCAO's") response to Kathleen Winn and Business
19 Leaders for Arizona's ("BLA's") Motion to Dismiss in the prior iteration of this
20 case, 13F-CF20120001-MCAO. YCAO incorporated MCAO's arguments in
21 responding to Winn and BLA's Motion to Dismiss in this case. *See* Response to
22 Motion to Dismiss, Document Number 55. Pursuant to Case Management Order
23 10, however, it is necessary to file MCAO's Response in this case for it to a part of
24 this case's record. That response is attached to this pleading. The tribunal has
25
26

Office of the Yavapai County Attorney

255 E. Gurley Street, Suite 300

Prescott, AZ 86301

Phone: (928) 771-3344 Facsimile: (928) 771-3110

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

already Denied Winn and BLA’s Motion to Dismiss in this case, and no additional relief is requested by this filing.

RESPECTFULLY SUBMITTED this 26th day of February, 2014.

Sheila Sullivan Polk
YAVAPAI COUNTY ATTORNEY

By: /s/ Benjamin Kreutzberg
Jack Fields
Benjamin Kreutzberg
Deputy County Attorneys

Office of the Yavapai County Attorney

255 E. Gurley Street, Suite 300

Prescott, AZ 86301

Phone: (928) 771-3344 Facsimile: (928) 771-3110

1 ORIGINAL OF THE foregoing was
2 E-FILED to the Office of Administrative
3 Hearings this 26th day of February, 2014
4 and electronically submitted to registered
parties of record:

5 Michael Kimerer, Esq.
6 Kimerer & Derrick
7 1313 East Osborn Road, Suite 100
8 Phoenix, AZ 85014
9 MDK@kimerer.com
10 *Counsel for Tom Horne and Horne for Attorney General*

11 Timothy A. La Sota, Esq.
12 Tiffany & Bosco, P.A.
13 Camelback Esplanade II, Third Floor
14 2525 East Camelback Road
15 Phoenix, AZ 85016
16 tal@tblaw.com
17 *Counsel for Kathleen Winn and BLA*

18 M.E. "Buddy" Rake, Jr., Esq.
19 Daniel T. Benchoff
20 Rake Law Group
21 2701 E. Camelback Road, Suite 160
22 Phoenix, AZ 85016
23 brake@aztriallaw.com
24 dbenchoff@aztriallaw.com
25 *Counsel for Tome Horne and Horne for Attorney General*

26 Larry L. Debus, Esq.
Debus, Kazan & Westerhausen, Ltd.
335 East Palm Lane
Phoenix, AZ 85004
lld@dkwlawyers.com
Counsel for Kathleen Winn and BLA

By: /s/ Benjamin Kreuzberg _____

1 WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

2 By: M. COLLEEN CONNOR
3 State Bar No. 015679
MICHAEL R. MCVEY
4 State Bar No. 006926
Deputy County Attorneys

5 CIVIL SERVICES DIVISION
6 Security Center Building
222 North Central Avenue, Suite 1100
7 Phoenix, Arizona 85004-2206
Telephone (602) 506-8541
8 MCAO Firm No. 00032000
ca-civilmailbox@mcao.maricopa.gov

9 *Attorneys for Maricopa County Attorney's Office*

10 **IN AND FOR THE STATE OF ARIZONA**

11 **THE OFFICE OF ADMINISTRATIVE HEARINGS**

12
13 In The Matter Of,

14 TOM HORNE, Tom Horne for
Attorney General Committee (SOS
15 Filer ID 2010 00003); KATHLEEN
WINN, Business Leaders for Arizona
16 (SOS Filer ID 2010 00375)

NO. 13F-CF20120001-MCAO

**RESPONSE OF THE MARICOPA
COUNTY ATTORNEY'S OFFICE TO
THE MOTION TO DISMISS**

(Assigned to the Honorable Tammy
Eigenheer)

17
18 The Maricopa County Attorney's Office requests the Motion to Dismiss
19 filed by Appellants' Business Leaders for Arizona ("BLA") and Kathleen Winn
20 ("Appellants") be denied. This Court lacks the authority to determine the
21 Constitutionality of an Arizona statute, and Appellants BLA and Winn lack
22 standing to make the argument in their Motion.

1 First, this Court should deny the Motion to Dismiss because it is not
2 charged with the duty to determine the constitutionality of Arizona's campaign
3 contribution limits. Instead, the scope of this administrative hearing is for the
4 administrative law judge to make findings of fact, conclusions of law, and a
5 recommended order to the Maricopa County Attorney. See A.R.S. § 41-1092.08.

6 The Administrative Law Judge has no statutory authority to dismiss a case
7 based on the Maricopa County Attorney's legislative testimony regarding his
8 personal opinion on proposed legislation. The County Attorney has every right
9 like any other citizen to freely express his opinion on proposed legislative
10 changes. "Citizen participation in legislative proceedings is absolutely vital to
11 ensure a fully-informed and representative legislature. When acting in the narrow
12 role of being a participant in a legislative committee hearing, a citizen should be
13 able to freely address the committee." *Riddle v. Perry*, 40 P.3d 1128, 1132 (Utah
14 2002). Appellants attempt to leverage the County Attorney's testimony in the
15 context of a legislative committee meeting should not be tolerated.

16 As a member of the executive branch of government, the Maricopa County
17 Attorney does not adjudicate the constitutionality of Arizona's laws. The judicial
18 branch of government is vested with that authority. Ariz. Const. art. VI. The
19 Appellants could have sought declaratory and injunctive relief three years ago if
20 the contribution limits hindered Mr. Horne's campaign in the 2010 election for
21 Attorney General. But Appellants did not, and have not, filed any declaratory
22 action in superior court to adjudicate this issue.

1 Moreover, statutes are presumed to be constitutional, and the party
2 asserting that a statute is unconstitutional has the burden of clearly
3 demonstrating that it is. *Hall v. A.N.R. Freight System, Inc.*, 149 Ariz. 130, 717
4 P.2d 434 (1986); *Chevron Chem. Co. v. Superior Court*, 131 Ariz. 431, 641 P.2d
5 1275 (1982). If possible, the courts will construe a statute so as to avoid
6 rendering it unconstitutional, resolving any doubts in favor of its constitutionality.
7 *Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 872 P.2d 668 (1994). At present,
8 no court in Arizona has determined that the contribution limits set forth in A.R.S.
9 § 16-905 are unconstitutional, and Appellants have offered no factual evidence to
10 support their argument.

11 Second, Appellants BLA and Winn lack standing to bring this Motion
12 because neither BLA nor Ms. Winn were candidates subject to the contribution
13 limits set forth in A.R.S. § 16-905. Appellant Winn created the BLA committee
14 and identified it as an independent expenditure committee on the statement of
15 organization paperwork filed with the Secretary of State. An independent
16 expenditure committee that truly is independent would not be subject to
17 contribution limits. In *Citizens United v. Federal Election Comm'n*, 558 U.S. 310,
18 ____, 130 S.Ct. 876 (2010), the Supreme Court made it clear that regulations that
19 limit independent political expenditures¹ are unjustified precisely because they
20 are uncoordinated with candidates. 130 S. Ct. 908-909.

21

22 ¹ Although a corporation may make contribution to an independent expenditure committee, it remains unlawful for a corporation to make a contribution to a candidate. A.R.S. § 16-919

1 Although Appellant Horne was subject to campaign contribution limits,² he
2 did not file this motion challenging the constitutionality of such limits. “In order to
3 possess standing to assert a constitutional challenge, an individual must himself
4 have suffered ‘some threatened or actual injury resulting from the putatively
5 illegal action.’” *State v. B Bar Enters., Inc.*, 133 Ariz. 99, 101, 649 P.2d 978, 980
6 (1982), citing *State v. Herrera*, 121 Ariz. 12, 15, 588 P.2d 305, 308 (1978). Here,
7 Appellants Winn and BLA allege neither threatened nor actual injury, as
8 Appellant Winn was not bound by the contribution limits.

9 Individuals generally do not have standing to allege harms to third parties.
10 *Barrows v. Jackson*, 346 U.S. 249, 255 (U.S. 1953) (“Ordinarily, one may not
11 claim standing in this Court to vindicate the constitutional rights of some third
12 party.”). The Arizona Supreme Court has articulated a three-part test to
13 determine whether third party standing is proper: “[A] third party has standing to
14 assert the constitutional rights of others if a substantial relationship exists
15 between the claimant and the third party, assertion of the constitutional right by
16 the claimant is impossible, and the claimant’s constitutional right will be diluted if
17 the third party is not allowed to assert it.” *Rasmussen v. Fleming*, 154 Ariz. 207,
18 219, 741 P.2d 674, 686 (1987).

19 Appellant Winn insists that the Business Leaders for Arizona committee
20

21 ² Appellant argues that the Republican State Leadership Committee was not a political party
22 organization pursuant to A.R.S. § 16-905(D). If so, the Committee would fall under the general
category of political committee and Appellant Horne could not have accepted more money the
limit set forth in A.R.S. § 16-905(C). It is unclear what point Appellant Winn is trying to make by
challenging whether Appellant Horne was subject to the contribution limits in subsection C or D.

1 was completely independent from the candidate committee thereby making it
2 impossible for Appellants Winn and Horne to pass the “substantial relationship”
3 part of the test. Similarly, Appellants are not able to satisfy the second part of the
4 test because they state no reason why Appellants Horne and the Horne for
5 Attorney General Committee could not themselves bring this challenge. Thus,
6 because Appellants fail to satisfy the first or second part of the test, there is no
7 need to continue the analysis. In short, Appellant Winn simply does not have
8 standing to make this claim on behalf of Appellant Horne.

9 Appellants' Motion to Dismiss seems to concede that Ms. Winn and BLA
10 were not independent of Mr. Horne. That question, independence, is both the
11 very essence, of this enforcement proceeding. But Appellants' argument goes
12 afield. They say that Mr. Horne could not have amassed enough money to run a
13 winning campaign, given the statute's low the contribution limits. Whether he
14 could, or could not, have raised enough money to run a winning campaign is
15 entirely beside the point. This proceeding is not over whether the present
16 Attorney General of the State of Arizona raised too much money in winning that
17 position. It is whether, in raising whatever amounts he did raise, he violated the
18 non-independence requirements of a statute he has sworn to defend and
19 uphold. That he has used his co-appellants to argue, on his behalf, against
20 constitutionality of the operative statute demonstrates that the lack of
21 independence among Mr. Horne, Ms. Winn and the BLA continues to this day.
22 Therefore, this Motion to Dismiss should be denied.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

RESPECFULLY SUBMITTED this 12TH day of March, 2013.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY: /s/ Colleen Connor
COLLEEN CONNOR
Deputy County Attorney
*Attorney for the Maricopa
County Attorney's Office*

ORIGINAL of the foregoing Electronically
Submitted this 12TH day of March 2013 to:

Honorable Tammy Eigenheer
Administrative Law Judge
ARIZONA OFFICE OF ADMINISTRATIVE HEARINGS
casemanagement@azoah.com

Michael Kimerer, Esq.
KIMERER & DERRICK
MDK@kimerer.com
Attorney for Tom Horne

Timothy A. La Sota, Esq.
TIFFANY & BOSCO, P.A.
tal@tblaw.com
*Attorney for Business Leaders for
Arizona and Kathleen Winn*

Larry L. Debus, Esq.
DEBUS KAZAN & WESTERHAUSEN LTD
lld@dkwlawyers.com
Attorney for Kathleen Winn

/s/Jennifer Christiansen

S:\COUNSEL\CivilMatters\CF2012\CF12-0001 Home & Winn Campaign Finance Enforcement\Pleadings\Response to MTD re legislative testimony
030813.docx