

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

2 **TB** TIFFANY & BOSCO
P.A.

3 **THIRD FLOOR CAMELBACK ESPLANADE II**
4 **2525 EAST CAMELBACK ROAD**
5 **PHOENIX, ARIZONA 85016-4237**
6 **TELEPHONE: (602) 255-6000**
7 **FACSIMILE: (602) 255-0103**
8 **EMAIL: TAL@TBLAW.COM**

9 *Attorneys for Kathleen Winn and Business Leaders for Arizona*

10 **Larry L. Debus SBN 002037**
11 **DEBUS, KAZAN & WESTERHAUSEN, LTD.**
12 **335 East Palm Lane**
13 **PHOENIX, ARIZONA 85004**
14 **TELEPHONE: 602-257-8900**
15 **FACSIMILE: 602-257-0723**
16 **EMAIL: lld@dkwlawyers.com**

17 *Attorneys for Kathleen Winn and Business Leaders for Arizona*

18 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

19 In the Matter Of,

Case No. 14F-001-AAG

20 TOM HORNE, Tom Horne for Attorney
21 General Committee (SOS Filer ID 2010
22 00003); KATHLEEN WINN, Business
23 Leaders for Arizona, (SOS Filer ID 2010
24 00375)

**DEFENDANTS' BUSINESS
LEADERS FOR ARIZONA AND
KATHLEEN WINN CLOSING
ARGUMENT**

25 **I. INTRODUCTION**

26 The Yavapai County Attorney's Office utterly failed to make its case factually that Tom
27 Horne and Kathleen Winn engaged in illegal coordination. But before we get to a discussion on
28 the facts, it is critical that we focus on the law because this Court must first make a correct
determination as to what the law is, and apply the facts to the law.

1 **II. THE DISTINCTION BETWEEN CONTRIBUTIONS AND EXPENDITURES**

2 The initial legal question is whether coordination as to contributions as opposed to
3 expenditures can constitute a violation of Arizona law. And the answer to that question is no,
4 but for one narrow exception that is indisputably inapplicable here. Further, even if coordination
5 as to gathering contributions could constitute a violation in itself, a single, unanswered email that
6 had no effect does not amount to Horne and Winn “coordinating”.

7 **A. Arizona Law**

8 A.R.S. § 16-901(14) states that “‘Independent expenditure’ means an **expenditure** by a
9 person or political committee, other than a candidate's campaign committee, that expressly
10 advocates the election or defeat of a clearly identified candidate...” (Emphasis added). A.R.S. §
11 16-901(14)(b) provides that an expenditure is not an independent expenditure “[i]f there is any
12 arrangement, coordination or direction **with respect to the expenditure...**” (Emphasis added.)
13 Clearly there is nothing on coordination of contributions there.

14 However, in ruling on a motion filed in the original case¹, the Court noted the one part of
15 the Arizona law that could be applied to coordination of contributions:

16
17
18 A.R.S. § 16-901(c) provides that an expenditure is not independent if “[i]n the
19 same election the person making the expenditure, including any officer, director,
20 employee or agent of that person, is or has been . . . [a]uthorized to raise or
21 expend monies on behalf of the candidate or the candidate’s authorized
22 committees.” (Emphasis added). As such, the statute appears to contemplate
23 contributions on at least one level. [Minute Entry, 4/26/13].

24 As the Court noted, though that statute does not mention the term “contribution”, clearly
25 it is referring to contributions. That narrow area is the only time in which the Arizona
26 coordination law contemplates coordination as meaning anything other than coordination
27 regarding expenditures. And it is indisputable that YCAO has never alleged and offered no
28 evidence of a violation of this part of the statute.

¹ Cause number 13F-CF20120001-MCAO-res.

1 The fact that there is one narrow area in which coordination involving contributions
2 could be a violation proves the point even further that the Legislature consciously chose not to
3 apply a blanket ban to a candidate having any involvement in fundraising that benefits an
4 independent expenditure committee. *See, e.g., Champlin v. Sargeant In and For County of*
5 *Maricopa*, 192 Ariz. 371, 374, 965 P.2d 763, 766 (1998)(holding that the Court should not
6 interpret a statute in a manner that violates “the established rule of construction, *expressio unius*
7 *est exclusio alterius* —the expression of one or more items of a class indicates an intent to
8 exclude omitted items of the same class.”)
9

10 **B. Federal Law**

11 Federal law does not even contain that one narrow area that Arizona does in which
12 coordination involving contributions can constitute a *per se* violation. And there is no getting
13 away from the fact that federal law must be applied to give Arizona law necessary clarity.
14 Without it, Arizona’s law is unconstitutionally vague. The Secretary of State’s Office itself told
15 Agent Grehoski that Arizona’s definition of coordination was “vague” and that there is “no clear
16 Arizona standard,” and thus they rely on the FEC guidelines². [Horne-Winn Exhibit 1]. And
17 YCAO even listed these guidelines as their Exhibit 14.

18 Federal law provides for a three prong coordination test, and “All three prongs of the
19 test—payment, content and **conduct**—must be met for a communication to be deemed
20 coordinated...” [Coordinated Contributions and Independent Expenditures, January 2013,
21 <http://www.fec.gov/pages/brochures/indexp.shtml>] [Emphasis added].
22

23 For the conduct prong, “A communication satisfies this part of the test if it meets any one
24 of the five standards...:

25 _____
26 ² Clearly the fact that at a meeting with Assistant Secretary of State Jim Drake and State
27 Elections Director Amy Chan of the Secretary of State’s Office they characterize the definition
28 of “coordination” as “vague” highlights a major problem in itself. *See Federal Election*
Commission v. Christian Coalition, 52 F. Supp. 2d 45, 91 (D.D.C. 1999)("First Amendment
clarity demands a definition of 'coordination' that provides the clearest possible guidance to
candidates and constituents.")

1
2 1. If the communication is created, produced or distributed at the request or
3 suggestion of the candidate, candidate's committee, a party committee or agents
4 of the above; or the communication is created, produced or distributed at the
5 suggestion of the person paying for the communication and the candidate,
6 authorized committee, political party committee or agent of any of the foregoing
7 assents to the suggestion. 11 CFR 109.21(d)(1).

8
9 2. If the candidate, the candidate's authorized committee or party committee is
10 materially involved in decisions regarding the content, intended audience, means
11 or mode of the communication, specific media outlet used, the timing or
12 frequency or size or prominence of a communication. 11 CFR 109.21(d)(2).

13
14 3. If the communication is created, produced or distributed after one or more
15 substantial discussions⁴ about the communication between the person paying for
16 the communication or the employees or agents of that person and the candidate,
17 the candidate's committee, the candidate's opponent or opponent's committee, a
18 political party committee or agents of the above. 11 CFR 109.21(d)(3).

19
20 4. If the person paying for the communication employs a common vendor to
21 create, produce or distribute the communication, and that vendor:

22
23 ◦ Is currently providing services or provided services within the previous 120
24 days with the candidate or party committee that puts the vendor in a position to
25 acquire information about the campaign plans, projects, activities or needs of the
26 candidate or political party committee; and

27
28 ◦ Uses or conveys information about the plans or needs of the candidate or
political party, or information previously used by the vendor in serving the
candidate or party, and that information is material to the creation, production or
distribution of the communication. 11 CFR 109.21(d)(4).

29
30 5. If a person who has previously been an employee or independent contractor of
31 a candidate's campaign committee or a party committee during the previous 120
32 days uses or conveys information about the plans or needs of the candidate or
33 political party committee to the person paying for the communication, and that
34 information is material to the creation, production or distribution of the
35 communication. 11 CFR 109.21(d)(5).

36 [Id.]

37
38 Though only 2 and 3 are applicable to this matter³, if we read the language carefully it is
clear none of the prongs deal in the slightest with coordination of fundraising. The provision of

³ YCAO's case amounts to an allegation that Prong 2 and/or Prong 3 was violated. Prong 1 is inapplicable because there is no evidence that Winn activated the independent expenditure committee at the request or suggestion of Horne, or that the actual ad was requested or suggested

1 the Code of Federal Regulations that is the basis for these guidelines also does not mention
2 contributions at all. See 11 CFR 109.21.

3 Lastly, at trial exhibits were introduced regarding the indisputable participation by federal
4 presidential candidates in fundraising efforts by independent expenditure committees supporting
5 them. [Horne-Winn Exhibits 3-5].

6 Clearly the legal prohibition on coordination of expenditures does not mean that any
7 communication with regard to contributions is also illegal. The Arizona statute does not support
8 that assertion, and neither do the FEC rules and guidelines. And there was no actual
9 coordination as to fundraising here to begin with.

10 **III. FACTUAL ANALYSIS**

11 The YCAO case focuses nearly exclusively on the events of two days, October 20 and
12 October 27.

13 **A. October 20**

14 YCAO's case, and MCAO's case before it, hinges almost entirely on their theory that the
15 "we", the "several masters" and the "strong personalities" that Winn referred to could be not one
16 other person in the world except Tom Horne.
17

18 This was always a highly dubious claim. Horne never said this, Winn never said this.
19 None of the countless witnesses the FBI interviewed claimed direct knowledge of this. In fact,
20 George Wilkinson told the FBI repeatedly that he had seen the script prior to the ad running.
21 [YCAO Exhibit 26]. But YCAO's theory went from dubious to completely discredited at the
22 hearing.
23
24
25
26

27 by Horne. Prongs 4 and 5 are necessarily inapplicable because there has never been an assertion
28 that a common vendor was used or that Winn was an employee or independent contractor of the
Horne campaign. Winn was a volunteer, not an employee or independent contractor.

1 YCAO's theory requires this Court to believe that three separate witnesses, Winn, Horne
2 and Wilkinson, are lying under oath. And YCAO counters in-court testimony, as well as
3 corroborating physical evidence discussed below, with speculation and conjecture about the
4 content of conversations from people who weren't even there! Agent Grehoski admitted as
5 much on the stand:

6 Q [by Larry Debus]. My question was, what evidence do you have that Tom Horne
7 influenced -- had a substantial conversation with Kathleen about TV or radio?

8 A [by Brian Grehoski]. I don't have specific information.

9 [Transcript, p. 220⁴]

10 Q [by Ben Kreutzberg]. Did your investigation reveal who the "we" would have
11 been?

12 A [by Brian Grehoski]. It did not.

13 Q. Did the investigation describe who the several masters would have been?

14 A. It did not.

15 [Transcript, p. 106]

16 Kathleen Winn testified over and over again that there was no coordination, as did Tom
17 Horne. Perhaps Winn stated it best on cross examination:

18
19 Tom Horne was not involved in the process of this ad. I don't know how many
20 different ways to say this, and I appreciate that both things were going on at the
21 same time, except both things were going on at the same time and they were
22 separate matters. I didn't combine them. I didn't make fruit salad out of them. I
23 dealt with Mr. Horne on his real estate matters, and I dealt with the -- putting an
24 ad together and I did them separately, and I didn't combine them, and I didn't
25 involve either party in what was going on. And I dealt with Brian Murray to get
26 the ad done, and got the ad done. We were on a tight deadline. I met my
27 deadline. I did everything I was supposed to do to get that ad produced. I also
28 helped my friend Tom Horne with his real estate transaction. It doesn't mean
there was an inner -- a commingling of these events.

[Transcript, p. 670].

⁴ We have included, as Attachment 1, parts of the transcript that are quoted or cited.

1 Though Agent Grehoski admitted, as noted above, that they did not have any direct
2 evidence to demonstrate that Winn coordinated with Horne, their case rests heavily on claims
3 regarding emails Winn sent indicating that she was working with others. Of course, that was
4 perfectly legal, as long as she was not coordinating messaging with Horne.

5 **1. THE “WE”**

6 In terms of who the “we” was, for example when Winn indicated in an email to Brian
7 Murray⁵ that “[w]e do not like that her name [Rotellini] is mentioned four times and no mention
8 for Horne”, both Wilkinson and Winn testified that Wilkinson made this point.

9 Here is Winn:

10 I printed off this, whatever you just showed, the Brian Murray ad, and brought it
11 to -- in my car on a piece of paper. And we went over it and read it out loud. And
12 he gave me some input. He thought we should-- if we're going to attack Felecia,
13 he thought we should say something good about Tom. And so we were just kind
14 of struggling with did we want to go to negative -- there were a lot of negative
15 ads out, and I thought we'd just get lost with all the other negative ads.

16 [Transcript, p. 562].

17 And here is Wilkinson, after testifying that Kathleen Winn had given him a script of the
18 ad in person:

19 Q. Now, did you -- do you remember -- do you remember having any
20 impressions about the ad that Kathleen Winn presented to you?

21 A. I don't remember the specific details, but I do know that there was -- it was
22 my opinion there was too much Felecia and not enough Tom. And there was
23 always the, you know, the argument as to, you know, negative versus positive.
24 think that's, you know, somewhere along those lines. I knew there were some
25 discussions in that regard.

26 Q. Do you think you were a-- what did you—how would you characterize your
27 opinion?

28 A. Less negative.

⁵ YCAO Exhibit 8.

1 Q. Okay. But did you-- in terms of how you expressed it, were you-- would you
2 say-- you know, was it weak? Was it strong? How—

3 A. Well, I think I would have a fairly strong opinion.

4 [Transcript, pp. 478-79].

5 Both Winn and Wilkinson testified that they had an in person meeting at the Bank of
6 America building in Mesa. [Transcript, pp. 480, 562]. And this testimony is corroborated by the
7 phone records. Wilkinson travelled from Scottsdale to Mesa. He is in Mesa at 12:19 and 12:58
8 p.m., but sometime between 12:58 and 1:58 p.m. he arrives in Chandler. [YCAO Exhibit 31].

9 Winn travelled from Phoenix to Mesa—she is in Phoenix at 12:35 p.m. but in Mesa at
10 12:47 p.m., and in fact in Mesa until at least 3:37 p.m. Their time in Mesa clearly overlaps, and
11 the phone records confirm there was easily enough time for them to have an in person meeting.

12 In addition, both Horne and Winn testified that the “we” could **not** have been Tom Horne
13 because Horne had no input into the ad.

14 Lastly, there is significant corroboration on this point from YCAO’s own witness Brian
15 Murray. Murray testified that he had a back and forth with Winn on the content of the ad, and
16 this is clear from the emails. But in addition to this, Murray testified that whoever was making
17 these comments did not seem to be a seasoned campaigner⁶. In fact, he told the FBI this two
18 years ago. [Horne-Winn Exhibit 9.]

19 Murray also stated that Horne was a seasoned campaigner. As such, even absent the
20 testimony from Horne, Winn and Wilkinson, it actually makes more logical sense that the “we”
21 was Wilkinson (or someone else with more limited campaign experience), not Tom Horne!
22

23 **2. THE “SEVERAL MASTERS”**

24 Winn testified at hearing that she consulted with Greg Harris, an attorney for two of the
25 funders, as well as with Wilkinson and others:

26 Q. And what about the "several masters" comment?
27

28 ⁶ See generally Transcript, p. 403.

