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7 **OFFICE OF THE YAVAPAI COUNTY ATTORNEY**

8 **CAMPAIGN FINANCE PROCEEDING**

9 IN THE MATTER OF

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

**Final Administrative Decision
(Rejecting Recommendation of
Administrative Law Judge Decision
in Office of Administrative Hearings
Case 14F-001-AAG Dated April 14,
2014 and Affirming Order
Requiring Compliance Dated
October 17, 2013)**

16 **FINAL DECISION AND ORDER**

17 On April 14, 2014, Administrative Law Judge Tammy Eigenheer (“the ALJ”)
18 issued her Administrative Law Judge Decision (“the Decision”) in Arizona Office
19 of Administrative Hearings Case 14F-001-AAG. The Decision recommends that
20 the Yavapai County Attorney’s Order Requiring Compliance, issued on October 17,
21 2013, (“the Order”) be vacated. Sheila Polk, Yavapai County Attorney (“YCA”)
22 and agency head of the Yavapai County Attorney’s Office, has reviewed the
23 Decision and the record of this matter. Pursuant to A.R.S. §41-1092.08(B), YCA
24 accepts the Decision’s Findings of Facts, accepts in part the Decision’s Conclusions
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1 of Law, and rejects in part the Decision's Conclusions of Law.

2 The Decision is attached and incorporated herein. YCA accepts Findings of
3 Fact 1-108. YCA accepts Conclusions of Law 1-22, 24-29, 31-34, 36-39, 41-43,
4 45-47, 49-56, and 58. YCA rejects Conclusions of Law 23, 30, 35, 40, 44, 48, and
5 57. YCA rejects the Decision's Conclusions, numbered 59-60. YCA rejects the
6 Decision's Recommended Order.
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9 **STANDARD OF PROOF IS PREPONDERANCE OF EVIDENCE**

10 R2-19-119(A) states that the standard and burden of proof in administrative
11 hearings are as follows:
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13 A. Standard of Proof. Unless otherwise provided by law, the standard of
14 proof is a preponderance of the evidence.

15 B. Burden of proof. Unless otherwise provided by law:

- 16 1. The party asserting a claim, right, or entitlement has the burden of proof;
17 2. A party asserting an affirmative defense has the burden of establishing the
18 affirmative defense; and
19 3. The proponent of a motion shall establish the grounds to support the
20 motion.

21 Ariz. Admin. Code § R2-19-119.

22 "The preponderance of the evidence standard requires that the fact-finder
23 determine whether a fact sought to be proved is more probable than not." *Kent K. v.*
24 *Bobby M.*, 210 Ariz. 279, 284, ¶ 25, 110 P.3d 1013, 1018 (2005) (citing Black's
25 Law Dictionary 1201 (7th ed.1999)); see also, e.g. *Pima Cnty. v. Pima Cnty. Law*
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1 *Enforcement Merit Sys. Council*, 211 Ariz. 224, 228, ¶ 21, 119 P.3d 1027, 1031
2 (2005) (equating “preponderance of the evidence” standard with requiring facts to
3 be found “more likely than not to be true”).
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5 DISCUSSION

6 I. The October 20, 2010 Communications

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8 The Decision concludes that the Order’s inferences of coordination between
9 Mr. Horne and Ms. Winn based on the events of October 20, 2010 are plausible.
10 The Decision further concludes that it was plausible that Mr. Horne and Ms. Winn
11 were instead discussing a pending real estate deal. YCA notes that these
12 explanations are not mutually exclusive. Communications during telephone
13 conversations can cover more than one topic. The issue is whether it is more likely
14 than not that the October 20, 2010 communications contained discussions that
15 rendered BLA’s subsequent expenditures coordinated with Mr. Horne and his
16 campaign under Arizona law.
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20 On October 20, 2010, Mr. Horne and Ms. Winn exchanged phone calls.
21 YCA concludes that the timing of those calls, together with the timing and content
22 of Ms. Winn’s e-mails to Mr. Brian Murray, show that Mr. Horne contributed to
23 BLA’s commercial. Thus, the preponderance of the evidence shows that Mr. Horne
24 and Ms. Winn coordinated to develop BLA’s commercial on October 20, 2010,
25 thus rendering BLA’s expenditures non-independent from Mr. Horne and his
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1 political campaign.

2 YCA rejects Conclusion of Law 23, which finds that Ms. Winn is credible.
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4 Ms. Winn repeatedly changed her story throughout the progress of this case. Her
5 pattern of contradicting sworn affidavits to conform to newly revealed facts calls
6 into question her credibility. Some portions of Ms. Winn's testimony regarding
7 both the October 20, 2010 events and the October 27, 2010 e-mail from Mr. Horne
8 do not stand up to scrutiny, as presented below.

9
10 First Inference: "We" and Winn's "several masters": YCA concludes it is
11 more likely than not that Ms. Winn's use of the word "we" four times and her
12 statement "I have several masters" in her e-mail to Mr. Murray at 2:29 p.m. were
13 references to Mr. Horne. Ms. Winn finished speaking to Mr. Horne just two
14 minutes prior to her 2:29 p.m. e-mail to Mr. Murray. At 2:24 p.m., during her
15 phone call with Mr. Horne, Ms. Winn received the unedited voice-over file of the
16 BLA commercial in an e-mail from Mr. Murray. The Decision properly rejects
17 Appellants' argument that Ms. Winn would be unable to listen to the voice-over
18 because she was on the phone with Mr. Horne. *Conclusion of Law 29.* Although
19 the Decision finds it is plausible that Ms. Winn is referring to Mr. Wilkinson or to
20 BLA's position in general as the "we" and the "several masters," *Conclusion of*
21 *Law 30,* YCA finds it more probable than not that Ms. Winn opened the sound file
22 and played the voice-over for Mr. Horne during their phone conversation.
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1 Second Inference: “They feel” and “similar message”: YCA accepts the
2 conclusion in the Decision that it is plausible that Mr. Horne and Ms. Winn spoke
3 about the financing for Mr. Horne’s real estate transaction during their phone call
4 that began at 2:37 p.m. However, YCA concludes that it is more probable than not
5 that Ms. Winn and Mr. Horne also or exclusively spoke about the content of the
6 commercial during that same call. Shortly after that call ended, at 2:50 p.m., Ms.
7 Winn e-mailed Mr. Murray: “Okay it will be similar message just some changes.”
8 That statement likely fulfilled Ms. Winn’s previous promise to Mr. Murray to “have
9 it worked out by 5:30.” YCA concludes that the preponderance of the evidence
10 shows that Mr. Horne contributed to the decision that the commercial would be a
11 “similar message” with “just some changes.”

12 Third Inference: “Two strong personalities debating”: YCA does not accept
13 Conclusion of Law 40. That Conclusion of Law found that it was plausible that
14 Ms. Winn’s statement in her 2:59 p.m. e-mail to Mr. Murray that she had “two very
15 strong personalities debating” was a reference to her coworkers. There was no
16 testimony, other than Ms. Winn’s, to support that any of Ms. Winn’s coworkers
17 were involved with BLA or were even knowledgeable about the campaign. YCA
18 finds it highly unlikely that two unnamed employees of AmeriFirst Financial would
19 be debating the merits of the BLA commercial on company time in such a fashion
20 and with such authority that Ms. Winn would characterize them as “two strong
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1 personalities debating.” YCA finds it more probable than not that Mr. Horne was
2 one of the two strong personalities as she had spoken to him only eleven minutes
3 before e-mailing Mr. Murray about the “two strong personalities.”
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5 Fourth Inference: “I think I prevailed”: YCA does not accept Conclusion of
6 Law 44. That Conclusion of Law found that it was plausible that Ms. Winn’s
7 statement in her 3:11 p.m. e-mail to Mr. Murray that she thought she “prevailed”
8 was a reference to having prevailed over her coworkers. YCA finds it highly
9 unlikely that Ms. Winn would need to “prevail” about the merits of the BLA script
10 over the opinion of two unnamed employees of AmeriFirst Financial for the same
11 reasons that it is highly unlikely that those unnamed employees were the “strong
12 personalities debating.” Given the sequence of calls that day, YCA finds it more
13 likely than not that Mr. Horne was one of the individuals over whom Ms. Winn had
14 prevailed.
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16 Fifth Inference: Further Changes: Between 3:13 p.m. and 3:25 p.m., Ms.
17 Winn and Mr. Murray exchanged four e-mails about the length of the script. At
18 3:21 p.m., Ms. Winn received a phone call from Mr. Horne that lasted until
19 approximately 3:25 p.m. As the conversation ended, Ms. Winn e-mailed Mr.
20 Murray with the final suggested change to the script. YCA concludes it is more
21 probable than not that Ms. Winn approved the final edits only after discussing the
22 edits with Mr. Horne. YCA rejects Conclusion of Law 48 in the Decision that it is
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1 equally plausible that Ms. Winn approved the final edits without any input from
2 anyone else. Ms. Winn herself mentioned that she had “several masters” and
3 needed to “prevail” over others. Considering all of the events of October 20, 2010,
4 it is highly unlikely that Ms. Winn would have approved additional edits without
5 input from others. YCA finds it more probable than not that Ms. Winn discussed
6 the edits with Mr. Horne during the phone call that ended just minutes before Ms.
7 Winn e-mailed her changes to Mr. Murray.
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10 **II. The October 27, 2010 E-mails**

11 Both Mr. Horne and Ms. Winn admit that on October 27, 2010, Mr. Horne
12 forwarded to Ms. Winn an e-mail chain from Mr. Ducharme containing polling
13 information regarding the Horne/Rotellini race and strategic advice on how to
14 attack Rotellini. Mr. Horne also requested that Ms. Winn try to raise another
15 \$100,000. Within minutes of receiving Mr. Horne’s e-mail, Ms. Winn forwarded
16 the entire e-mail chain to Mr. Murray, who forwarded the communications to his
17 attorney with his concerns about Ms. Winn’s contact with Mr. Horne. YCA rejects
18 Conclusion of Law 57, which finds that it is unclear from the record if Mr. Horne’s
19 e-mail was material to the distribution of communications after October 27, 2010.
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22 Mr. Horne’s e-mail was a directive to Ms. Winn to raise \$100,000 *and*
23 *expend it* based upon the strategic information contained within it. The e-mail was
24 material to BLA’s subsequent expenditure because of that directive, and Ms. Winn
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1 sent it to Mr. Murray, the same person who had helped her raise other money and
2 produce the commercial.

3
4 YCA further finds that Ms. Winn's statement that she did not read the entire
5 e-mail from Mr. Horne is not credible. Ms. Winn testified she consulted an
6 attorney for advice about maintaining BLA as a committee independent from Mr.
7 Horne. However, she claims that when she received an e-mail from Mr. Horne, she
8 did not even read it, and simply forwarded it to Mr. Murray. Similarly, Mr. Horne
9 testified that the strategic advice in the email made no sense and that no one paid
10 attention to it, even though he suggested that Ms. Winn use that information to try
11 to raise additional money. YCA concludes that the explanations offered by Mr.
12 Horne and Ms. Winn are not credible.

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15 Further, both Mr. Horne and Ms. Winn testified under oath that no
16 coordination occurred at any time between the Horne campaign and the
17 independent expenditure committee Business Leaders of Arizona. They also
18 denied, under oath, that they ever had any telephone conversations wherein they
19 discussed the commercial in question. *Transcript of Testimony of Ms. Winn,*
20 *February 12, 2014, page 596, lines 9-17; Transcript of Testimony of Mr. Horne,*
21 *February 12, 2014, page 685, lines 8-15.* YCA concludes that the October 27,
22 2010 e-mail from Mr. Horne to Ms. Winn casts grave doubt on the denials of both
23 Mr. Horne and Ms. Winn that coordination occurred on October 20, 2010.
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CONCLUSION

Based on the totality of the evidence presented, including the events of October 20, 2010 and October 27, 2010, YCA concludes it is more probable than not that Mr. Horne’s and Ms. Winn’s communications on those dates constituted coordination sufficient to render BLA’s subsequent expenditures non-independent. Accordingly, YCA hereby REJECTS the Decision’s recommendation to vacate the Order Requiring Compliance dated October 17, 2013. The Order Requiring Compliance dated October 17, 2013, is AFFIRMED.

Pursuant to A.R.S. §41-1092.08(F), this is the final administrative decision in this matter.

DONE this 14th day of May, 2014.

By: Sheila S Polk
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1 COPIES of the foregoing MAILED this
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By: Maggie Tolbertson

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IN THE OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF:

No. 14F-001-AAG

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

**ADMINISTRATIVE
LAW JUDGE DECISION**

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HEARING: February 10, 2014, through February 12, 2014, with the record held open until March 24, 2014.

APPEARANCES: The Yavapai County Attorney's Office was represented by Deputy County Attorney Jack H. Fields and Deputy County Attorney Benjamin D. Kreutzberg. Tom Horne and the Tom Horne for Attorney General Committee were represented by Michael D. Kimerer and M.E. "Buddy" Rake, Jr. Kathleen Winn and Business Leaders for Arizona were represented by Timothy A. La Sota and Larry L. Debus.

ADMINISTRATIVE LAW JUDGE: Tammy L. Eigenheer

OVERVIEW

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This case involves an appeal of a determination by the Yavapai County Attorney's Office made pursuant to its authority under A.R.S. § 16-924(A) that Tom Horne, the Tom Horne for Attorney General Committee, Kathleen Winn, and Business Leaders for Arizona (BLA) (collectively, Appellants) violated the provisions of Title 16, Chapter 6 of the Arizona Revised Statutes by consulting and conferring on the contents of BLA's political advertisement that aired during the 2010 general election for Attorney General. The Administrative Law Judge concludes that the Yavapai County Attorney's Office failed to prove by a preponderance of the evidence that there was any illegal coordination between Mr. Horne, the Tom Horne for Attorney General Committee, Ms. Winn, and BLA.

FINDINGS OF FACT

Order Requiring Compliance

1. On June 27, 2013, the Arizona Secretary of State issued a letter to the Arizona Attorney General's Office stating that reasonable cause existed to believe that Appellants had violated campaign finance laws during the 2010 general election for Attorney General.
2. On June 27, 2013, the Arizona Attorney General's Office, through Solicitor General Robert Ellman, appointed Yavapai County Attorney Sheila Polk as a Special Arizona Attorney General to fulfill the Attorney General's role as described in A.R.S. § 16-924.
3. On October 17, 2013, the Yavapai County Attorney's Office issued an Order Requiring Compliance outlining its findings that Appellants had coordinated in violation of Title 16, Chapter 6 of the Arizona Revised Statutes. As a result of the coordination, BLA's expenditures were deemed in-kind contributions to the Tom Horne for Attorney General Committee.
4. Mr. Horne and the Tom Horne for Attorney General Committee were ordered to amend their 2010 Post-General Election Report to include the expenditures by BLA as in-kind contributions. They were also ordered to refund the amount of the deemed in-kind contributions in excess of the appropriate limits, which totaled \$397,378.00, to the persons or organizations that made the contributions.
5. Ms. Winn and BLA were ordered to amend their 2010 Post-General Election Report to reflect the coordinated nature of BLA's expenditures.
6. On October 31, 2013, Appellants filed their Notice of Appeal and Request for Hearing.
7. A Notice of Hearing was issued by the Yavapai County Attorney's Office setting this matter for a hearing before the Office of Administrative Hearings, an independent state agency.

Background

1 8. Ms. Winn formed BLA on December 23, 2009. According to Ms. Winn, the
2 original purpose of BLA was to oppose Andrew Thomas in the Attorney General
3 primary election.¹

4 9. According to Ms. Winn's March 30, 2012 affidavit, BLA was funded by
5 approximately \$2,500.00 that was given to a graphics art designer who absconded with
6 the funds. After that initial expenditure, BLA was inactive and Ms. Winn continued to
7 file the required forms with the Arizona Secretary of State that demonstrated no
8 additional funds had been raised.²

9 10. Ms. Winn was a volunteer for Mr. Horne's campaign from early 2010 until shortly
10 after the primary election. Ms. Winn was the out-of-county coordinator for all 14
11 Arizona counties, with the exception of Maricopa County. Ms. Winn traveled
12 extensively during the primary election to support Mr. Horne's election bid.³

13 11. According to the Amended 2010 Post-General Election Report filed by Ms.
14 Winn, between October 20, 2010, and October 29, 2010, BLA raised \$513,340.00 from
15 individuals and businesses, including a \$350,000.00 contribution from the Republican
16 State Leadership Committee (RSLC).⁴

17 Yavapai County Attorney's Office's Investigation

18 12. The Yavapai County Attorney's Office has premised its case on the activities of
19 Ms. Winn and Mr. Horne on October 20, 2010, and October 27, 2010, to show there
20 was coordination between Ms. Winn and BLA with Mr. Horne and the Tom Horne for
21 Attorney General Committee.

22 13. In reaching its conclusion, the Yavapai County Attorney's Office reviewed the
23 joint investigation of the Federal Bureau of Investigation (FBI) and Maricopa County
24 Attorney's Office. At hearing, the Yavapai County Attorney's Office's primary witness
25 was FBI Special Agent Brian Grehoski, who with his partner, FBI Special Agent Mervin
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29 ¹ YCA Exhibit 3 at ¶1.

² YCA Exhibit 3 at ¶1.

³ YCA Exhibit 3 at ¶ 5.

⁴ YCA Exhibit 5. The Report also includes an \$80.00 contribution from Ms. Winn on November 8, 2010.

1 Mason,⁵ conducted the investigation, interviewed witnesses, reviewed records, and
2 wrote reports.

3 14. Agent Grehoski testified as to his investigation and review of phone and email
4 records during the relevant time period, and more specifically on October 20, 2010, and
5 October 27, 2010.

6 October 20, 2010 Timeline

7 15. The following timeline of events of October 20, 2010, details relevant phone
8 calls and emails between Mr. Horne, Ms. Winn, Brian Murray, a political consultant with
9 Lincoln Strategy Group (LSG), and others that the Yavapai County Attorney's Office
10 relied on to assert that Mr. Horne and Ms. Winn coordinated as to the advertisement
11 Mr. Murray was producing.⁶

12 16. At 9:47 a.m., Ms. Winn spoke to Greg Harris, an attorney who had put her in
13 contact with one of his clients who had contributed \$30,000.00 to BLA.⁷

14 17. At 10:21 a.m., Mr. Murray emailed Ms. Winn with an initial script of the
15 advertisement. The email read as follows:

16 I think the copy is pretty powerful. After reviewing the polling data I have
17 and reviewing [Mr. Horne's] ad I think he does a better job of defending
18 himself than we can, so I am suggesting through this ad that our
19 messaging be used to drive [Democratic general election opponent
20 Felicia Rotellini's] negatives. I believe this commercial will certainly
21 accomplish that. Please let me know if we are okay to get in the studio
22 and start producing the spot.

23
24 VO: "Arizona needs an Attorney General who will be tough on illegal
25 immigration.

26 But liberal Felecia Rotellini isn't.

27 She openly opposes SB 1070.

28 It gets worse:

29 When liberal special interests groups launched a boycott against Arizona,
30 Rotellini worked with them.

She took thousands of their dollars for her campaign;

Selling Arizona out.

31 ⁵ Agent Mason was not called as a witness by either party.

32 ⁶ It is noted that throughout the proceedings, Appellants referenced the unreliability of the telephone and
33 email records based on the lack of metadata. This argument will be addressed in the Conclusions of
34 Law, *infra*.

35 ⁷ YCA Exhibit 7 at 22.

1 Felicia Rotellini: opposing SB 1070, boycotting Arizona, selling us out.
2 Felicia Rotellini: If she wins, Arizona loses.
3 Paid for by Business Leaders for Arizona.”⁸

4 18. At 10:40 a.m., Ms. Winn called BLA’s treasurer, George Wilkinson.⁹

5 19. At 2:19 p.m., Mr. Horne called Ms. Winn and the two spoke for eight minutes,
6 until approximately 2:27 p.m.¹⁰

7 20. At 2:24 p.m., Mr. Murray sent an email to Ms. Winn with the unedited voice-over
8 file of the BLA advertisement.¹¹

9 21. At 2:29 p.m., approximately two minutes after finishing her conversation with Mr.
10 Horne, Ms. Winn sent an email to Mr. Murray. The email read as follows:

11 We do not like that [Ms. Rotellini’s] name is mentioned 4 times and no
12 mention for Horne. We are doing a re-write currently and will get back to
13 you. Too negative and takes away from the message we wanted which
14 we want to hire the next AG to protect and defend Arizona against the
15 federal government. I will get back to you shortly Brian sorry for the
16 confusion except I have several masters.¹²

17 22. At 2:30 p.m., Mr. Murray emailed Ms. Winn that he would stop production based
18 on the concerns that Ms. Winn raised.¹³

19 23. At 2:37 p.m., Ms. Winn emailed Mr. Murray. The email read as follows:

20 Yes I will have it worked it out by 5:30. They feel this leaves people with
21 [Ms. Rotellini’s] name 4X and with no mention of Tom It is like saying
22 don’t think about a pink elephant ..so you think about the pink elephant.¹⁴

23 24. At 2:37 p.m., Ms. Winn called Mr. Horne from her office landline and the two
24 spoke for 11 minutes, until approximately 2:48 p.m.¹⁵

25 25. At 2:50 p.m., Ms. Winn emailed Mr. Murray, “Okay it will be similar message just
26 some changes.”¹⁶

27 ⁸ YCA Exhibit 6 at 19. All quoted emails appear as sent. Any errors were in the original.

28 ⁹ YCA Exhibit 7 at 22 and YCA Exhibit 31.

29 ¹⁰ YCA Exhibit 7 at 22 and YCA Exhibit 10 at 46.

30 ¹¹ YCA Exhibit 8 at 41-42.

¹² YCA Exhibit 8 at 41.

¹³ *Id.*

¹⁴ YCA Exhibit 9 at 43.

¹⁵ YCA Exhibit 10 at 46.

¹⁶ YCA Exhibit 8 at 41.

1 26. At 2:50 p.m., Mr. Murray emailed Ms. Winn that the message should be “driving
2 [Ms. Rotellini’s] negatives” and that Mr. Horne’s name should not be “associated with
3 the negative messaging.”¹⁷

4 27. At 2:59 p.m., Ms. Winn sent another email to Mr. Murray. The email read as
5 follows:

6 The concern is you can get out [Ms. Rotellini’s] negatives without saying
7 [Ms. Rotellini’s] name 4 times. I have two very strong personalities
8 debating this moment [Ms. Rotellini] lacks name recognition we don’t want
to help her in that regard is the argument.¹⁸

9 28. At 3:00 p.m., Ms. Winn and Mr. Murray exchanged emails regarding payment
10 details for the advertisement.¹⁹

11 29. At 3:01 p.m., Ms. Winn attempted to call Mr. Horne.²⁰

12 30. At 3:11 p.m., Ms. Winn emailed Mr. Murray a revised script with the statement: “I
13 think I prevailed no mention of Tom thanks for what you said. I believe this times out
14 Let me know.”²¹

15 31. At 3:13 p.m., Mr. Murray emailed Ms. Winn that the script was still too long.²²

16 32. At 3:14 p.m., Ms. Winn emailed Mr. Murray and suggested removing one line
17 from the script.²³

18 33. At 3:15 p.m., Ms. Winn received a telephone call from Mr. Harris that lasted
19 approximately three minutes.²⁴

20 34. At 3:16 p.m., Mr. Murray emailed Ms. Winn that the script was still too long.²⁵

21 35. At 3:21 p.m., Mr. Horne called Ms. Winn and the two spoke for four minutes until
22 approximately 3:25 p.m.²⁶

23 36. At 3:25 p.m., Ms. Winn emailed Mr. Murray the following message:
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25 ¹⁷ YCA Exhibit 9 at 43.

26 ¹⁸ *Id.*

27 ¹⁹ YCA Exhibit 8 at 40-41.

28 ²⁰ YCA Exhibit 7 at 23.

29 ²¹ YCA Exhibit 6 at 18-19.

30 ²² YCA Exhibit 6 at 18.

²³ *Id.*

²⁴ YCA Exhibit 7 at 23.

²⁵ YCA Exhibit 6 at 18.

²⁶ YCA Exhibit 7 at 23 and YCA Exhibit 10 at 46.

1 Change to: Arizona needs the RIGHT attorney general
2 taking money from labor unions and special interest groups.²⁷

3 37. On October 22, 2010, Mr. Murray ordered that the advertisement start airing on
4 Monday, October 25, 2010.²⁸

5 October 27, 2010, Email

6 38. On October 27, 2010, Ryan Ducharme, who did telephone polling for John
7 Huppenthal, sent Mr. Horne the following email:

8 Recent polls show you losing ground amongst independents to Rotellini
9 and her starting to pick up more Reps than you are picking up Dems.
10 Bleeding needs to be stopped. Allegations and smears against you by
11 the DC group starting to peel away votes. They need to be addressed as
12 desperate last minute attacks with no basis in truth.²⁹

13 39. At 1:45 p.m., Mr. Ducharme resent that email to Mr. Horne and a member of the
14 Tom Horne campaign with the additional message:

15 I would link attacks directly to Rotellini as someone behind in the polls
16 trying to hide from her record (SB1070, ties to unions calling for AZ
17 boycott, etc.) The truth, once known, will undermine Rotellini's credibility
18 and call in to question her character—a very important quality for Inds.
19 You are much stronger in rural AZ.³⁰

20 40. Mr. Horne then forwarded the email with both messages from Mr. Ducharme to
21 Casey Phillips, regional director for the RSLC.³¹

22 41. At 2:02 p.m., Mr. Horne attempted to forward the email chain to Ms. Winn, with
23 the message, "I forwarded this to casey. Maybe with this we can. Try again for the
24 hundred k."³²

25 42. At 2:05 p.m., Mr. Horne received a notice that the email chain could not be
26 delivered.³³

27 43. At 2:10 p.m., Mr. Horne resent the entire email chain to Ms. Winn.³⁴

28 ²⁷ YCA Exhibit 6 at 18.

29 ²⁸ Horne-Winn Exhibit 23.

30 ²⁹ YCA Exhibit 15 at 121-22.

31 ³⁰ YCA Exhibit 15 at 121.

32 ³¹ *Id.*

33 ³² YCA Exhibit 15 at 120-21.

34 ³³ YCA Exhibit 15 at 120.

³⁴ *Id.*

1 44. At 2:31 p.m., Ms. Winn forwarded the entire email chain to Mr. Murray with the
2 message, "This just came into me read below."³⁵

3 45. Mr. Murray then sent the email on to his attorney indicating his concern that Ms.
4 Winn was in contact with Mr. Horne regarding the campaign.³⁶

5 FBI Special Agent Brian Grehoski's Testimony

6 46. Agent Grehoski testified that during his investigation, he obtained and reviewed
7 the telephone and email records of the relevant parties. Based on his review of those
8 records, he was able to create the timeline of events described above.

9 47. Agent Grehoski stated that Verizon Wireless keeps its call detail records, or
10 metadata, for a period of one year. Because the FBI opened its investigation on
11 December 9, 2011, Verizon Wireless no longer had the metadata for the calls made
12 and received by Ms. Winn and Mr. Horne during October 2010.³⁷

13 48. Agent Grehoski also indicated that based on a review of the Verizon Wireless
14 policies regarding chargeable time, the lengths of the calls indicated on the records
15 were calculated starting from the time the sender pressed "send" and ending when the
16 call disconnected from the system and were rounded up to a full minute.³⁸

17 49. Agent Grehoski testified that a review of Mr. Horne's emails revealed 129 emails
18 relating to a real estate deal and none of those emails made any mention of Ms.
19 Winn.³⁹

20 50. The question of Agent Grehoski's testimony with respect to conversations he
21 and Agent Mason had with Greg Tatham, a commercial real estate broker, on May 31,
22 2012, became an issue at hearing.

23 51. At hearing, Agent Grehoski testified that he specifically recalled that he and
24 Agent Mason had two substantive telephone conversations with Mr. Tatham on May 31,
25 2012.⁴⁰

26
27 _____
28 ³⁵ *Id.*

³⁶ *Id.*

³⁷ Court Reporter's Transcript (Transcript) at 59:2-9.

³⁸ Transcript at 63:11-64:3.

³⁹ Transcript at 138:11-25.

⁴⁰ Transcript at 136:1-19.

1 52. Agent Grehoski indicated the first telephone call was initiated by Agent Mason
2 and that during that conversation, when asked if Mr. Horne had consulted with Ms.
3 Winn regarding the sale of the property at 7th Avenue and McDowell, Mr. Tatham
4 denied any knowledge.⁴¹

5 53. Agent Grehoski testified the call ended early because Mr. Tatham was not at his
6 office and/or did not have the documents on hand. After the telephone call, Agent
7 Grehoski testified that he and Agent Mason discussed the conversation and agreed
8 that the next time they spoke, they would ask broader questions.⁴²

9 54. Agent Grehoski stated that during the second substantive conversation, he and
10 Agent Mason asked Mr. Tatham if he was aware of Mr. Horne conferring with anyone
11 regarding the sale of the property, and Mr. Tatham denied having any knowledge. Mr.
12 Tatham made a recording of this conversation.⁴³

13 55. A review of Agent Mason and Mr. Tatham's telephone records show only one
14 telephone call between them on May 31, 2012.⁴⁴ Therefore, the record supports a
15 finding that the first substantive telephone conversation to which Agent Grehoski
16 testified did not occur.

17 Greg Tatham's Testimony

18 56. Mr. Tatham testified that he was the commercial real estate broker for Mr. Horne
19 on the purchase side of a "1031 exchange" in October 2010 and that he was
20 responsible for the removal of an underground storage tank at the 1515 North 7th
21 Avenue property.⁴⁵

22 57. Mr. Tatham stated that he was not the only person Mr. Horne consulted with on
23 real estate matters.⁴⁶

24 58. Mr. Tatham testified that at no time during the single conversation he had with
25 Agents Grehoski and Mason on May 31, 2012, did they ask specifically about Ms.
26 Winn's involvement with the real estate transaction in October 2010.⁴⁷

27 _____
28 ⁴¹ Transcript at 137:24-138:4.

29 ⁴² Transcript at 138:5-7.

30 ⁴³ Transcript at 138:7-10.

⁴⁴ YCA Exhibit 39 and Horne-Winn Exhibit 27.

⁴⁵ Transcript at 455:12-18.

⁴⁶ Transcript at 463:18-23.

1 Kathleen Winn's Testimony

2 59. Ms. Winn testified that she was out of the state in early October 2010, and that
3 when she returned around October 8, 2010, or October 9, 2010, she contacted Brett
4 Mecum, Executive Director of the Republican Party, to determine if any resources were
5 available to support a Republican candidate. Mr. Mecum informed Ms. Winn that there
6 were funds available from the RSLC, but that the funds would have to be given to an
7 independent expenditure committee as the Republican Party could not accept the funds
8 directly.⁴⁸

9 60. Ms. Winn then met with Mr. Horne on October 11, 2010, or October 12, 2010, to
10 discuss her plans to operate BLA as an independent expenditure committee supporting
11 Mr. Horne's campaign for Attorney General.⁴⁹ During that meeting, Mr. Horne informed
12 Ms. Winn of the "rules" with respect to an independent expenditure committee.⁵⁰

13 61. Later, Mr. Horne also advised Ms. Winn that she should consider contacting an
14 attorney for further advice.⁵¹ Following Mr. Horne's advice, Ms. Winn contacted Lisa
15 Houser, an attorney, on October 13, 2010.⁵²

16 62. On October 13, 2010, Ms. Winn also contacted Chuck Diaz, a potential donor, to
17 solicit a contribution to BLA.⁵³ Mr. Diaz expressed an interest in contributing and
18 invited Ms. Winn to his home in Tucson to meet with him.⁵⁴

19 63. On October 15, 2010, Ms. Winn went to Mr. Diaz's home and he gave Ms. Winn
20 a check for \$5,000.00 on that day.⁵⁵

21 64. While in Tucson, Ms. Winn also met with Keith Bruner, a potential campaign
22 contributor, and discussed BLA. Ms. Winn had already spoken to Mr. Bruner's
23
24
25

26 ⁴⁷ Transcript at 461:4-6.

27 ⁴⁸ Transcript at 530:1-531:19.

28 ⁴⁹ Transcript at 531:22-23; 612:6-21.

29 ⁵⁰ Transcript at 531:23-532:3; 614:19-23.

30 ⁵¹ Transcript at 532:4-9; 616:3-5.

⁵² YCA Exhibit 32 at 549; Transcript at 616:6-617:1.

⁵³ YCA Exhibit 32 at 549; Transcript at 621:19-622:3.

⁵⁴ Transcript at 622:1-3.

⁵⁵ Transcript at 624:5-14.

1 attorney, Mr. Harris, on or about October 12, 2010, regarding BLA, and Mr. Harris
2 referred Ms. Winn to contact Mr. Bruner.⁵⁶

3 65. Ultimately, Mr. Bruner contributed \$30,000.00 to BLA through two corporate
4 entities, NCP Finance Limited and Texas Loan Corporation.⁵⁷

5 66. In her conversations with Mr. Mecum, Ms. Winn asked him to recommend firms
6 to assist her with BLA's campaign. Ms. Winn was referred to at least two firms and she
7 placed calls to those firms. LSG returned her call first, so she went forward with that
8 firm.⁵⁸

9 67. Mr. Murray on behalf of LSG informed Ms. Winn that to be considered a viable
10 campaign in the eyes of the RSLC, BLA would have to raise at least \$50,000.00 from
11 other sources.⁵⁹

12 68. In a conversation between Ms. Winn and with Christine Newman, Mr. Horne's
13 sister, Ms. Newman asked about BLA and Ms. Winn explained that she had raised
14 \$35,000.00 and was working to get the additional funds to reach the \$50,000.00
15 threshold that Mr. Murray indicated was necessary to be considered viable. Ms.
16 Newman then volunteered to contribute the additional \$15,000.00 at that time.⁶⁰

17 69. After BLA had raised \$50,000.00, Mr. Murray contacted the RSLC to determine if
18 it was willing to contribute any funds to assist with Mr. Horne's campaign. Mr. Murray
19 was able to secure a contribution of \$350,000.00 from the RSLC, even though he
20 originally believed there may have been \$450,000.00 available.

21 70. BLA then worked with Mr. Murray to produce and air a television advertisement
22 expressly advocating the defeat of Felicia Rotellini.

23 71. In producing the advertisement, a number of emails were exchanged between
24 Ms. Winn and Mr. Murray on October 20, 2010, as outlined in Findings of Fact Nos. 15
25 through 36.

26
27
28 ⁵⁶ Transcript at 625:19-626:23; see also YCA Exhibit 32 at 549.

29 ⁵⁷ YCA Exhibit 5 at 13; Transcript at 537:6-12.

30 ⁵⁸ Transcript at 538:20-539:6.

⁵⁹ Transcript at 540:5-9.

⁶⁰ Transcript at 540:13-18.

1 72. On October 20, 2010, Ms. Winn met with George Wilkinson, BLA's treasurer, in
2 Mesa.⁶¹ Ms. Winn indicated she wanted to share the advertisement's script that Mr.
3 Murray had emailed her with Mr. Wilkinson to get his opinion.

4 73. With respect to various phrases and/or terms used in the emails described
5 above, Ms. Winn gave the following explanations:

6 a. The "we" and "several masters" used in the 2:29 p.m. email and the "they
7 feel" used in the 2:37 p.m. email to Mr. Murray referred to BLA in general, Mr.
8 Wilkinson in particular, and Mr. Harris and his client who had contributed a great
9 deal of money to BLA.⁶²

10 b. The "two strong personalities debating" mentioned in the 2:59 p.m. email
11 referred to two coworkers in Ms. Winn's office that she had asked for their
12 opinions.⁶³

13 74. After the advertisement had been produced and while it was airing, Ms. Winn
14 had another conversation with Ms. Newman, in which Ms. Newman asked about BLA
15 and the campaign. Ms. Winn explained that BLA originally believed that it would
16 receive \$450,000.00 from the RSLC, but ended up receiving only \$350,000.00. Ms.
17 Newman volunteered to contribute \$100,000.00 to make up the difference. That
18 contribution was wired to the BLA account on October 27, 2010.⁶⁴

19 75. As to the October 27, 2010 email from Mr. Ducharme that Mr. Horne had
20 forwarded to her, Ms. Winn testified that she did not read the entire email when she
21 received it. She saw that it contained polling data and believed that Mr. Murray might
22
23
24

25 ⁶¹ Mr. Wilkinson's phone records show he was in Scottsdale at 10:40 p.m. and was in Chandler at 1:58
26 p.m. Mr. Wilkinson made or received calls from Mesa at 12:19 p.m., 12:21 p.m., and 12:58 p.m. YCA
27 Exhibit 31.

28 Ms. Winn's phone records show she was in Phoenix at 12:35 p.m. and was in Tempe at 3:41 p.m. Ms.
29 Winn first made a call from Mesa at 12:47 p.m. and last received a call while in Mesa at 3:37 p.m. YCA
30 Exhibit 7.

Therefore, Mr. Wilkinson and Ms. Winn could have met in Mesa at some point shortly after 12:35 p.m.
and shortly before 1:58 p.m.

⁶² Transcript at 565:10-566:7.

⁶³ Transcript 590:20-591:3.

⁶⁴ Transcript 552:9-24.

1 be able to use the information to get additional funds from the RSLC as Mr. Horne had
2 suggested, so she forwarded the email to Mr. Murray.⁶⁵

3 76. Ms. Winn testified as to her extensive real estate background. Ms. Winn has 27
4 to 28 years of experience in real estate lending and real estate sales. She was a real
5 estate broker and a mortgage banker. At the time in question, Ms. Winn worked at
6 AmeriFirst Financial as a senior loan officer.⁶⁶

7 77. Ms. Winn explained that throughout the campaign, she assisted a number of
8 people with real estate and lending issues.⁶⁷

9 78. Ms. Winn testified that Mr. Horne was selling a property at 7th Avenue and
10 McDowell in Phoenix and was doing a "1031 exchange," a mechanism by which a seller
11 of a property can avoid tax consequences by rolling the proceeds of the sale into the
12 purchase of a new property. Ms. Winn was aware Mr. Horne had been attempting to
13 sell the property for some time and had assisted in finding a potential purchaser, Mike
14 Hogarty, months prior, but that sale fell through.⁶⁸

15 79. Ms. Winn testified that she knew Mr. Horne was attempting to close the real
16 estate transaction during October 2010.⁶⁹

17 80. Ms. Winn stated that her mother had surgery on October 19, 2010; therefore,
18 Ms. Winn was not available to talk to Mr. Horne on that day.⁷⁰

19 81. Ms. Winn maintained that Mr. Horne informed her on October 20, 2010, that he
20 had just been informed that the revenue from the sale of his property would not cover
21 the funds necessary to close on the purchase of a new property. Ms. Winn stated that
22 Mr. Horne was using her as a sounding board to consider different options and she
23 ultimately assisted him in applying for a loan to make up the difference.⁷¹

24 82. Ms. Winn testified that two of the conversations that she had with Mr. Horne on
25 October 20, 2010, the 2:19 p.m. call of 8 minutes and the 2:37 p.m. call of 11 minutes,
26

27 ⁶⁵ Transcript at 653:15-20.

28 ⁶⁶ Transcript at 526:21-24, 528:11-21.

29 ⁶⁷ Transcript at 572:21-574:4.

30 ⁶⁸ Transcript at 569:2-570:4.

⁶⁹ Transcript at 569:15-18.

⁷⁰ Transcript at 583:15-20.

⁷¹ Transcript at 576:5-19.

1 were regarding the real estate deal. Ms. Winn testified she believed the first call was
2 probably when Mr. Horne was describing his need for a loan to close the real estate
3 deal and the second call was when she filled out a loan application for him.⁷²

4 83. Ms. Winn denied any coordination with Mr. Horne with respect to the BLA
5 advertisement. Ms. Winn stated,

6 I appreciate that both things were going on at the same time, except both
7 things were going on at the same time, and they were separate matters.
8 I didn't combine them. I didn't make fruit salad out of them. I dealt with
9 Mr. Horne on his real estate matters, and I dealt with the – putting an ad
10 together. And I did them separately. And I didn't combine them. And I
11 didn't involve either party in what was going on.

12 And I dealt with Brian Murray to get the ad done, and got the ad done.
13 We were on a tight deadline. I met my deadline. I did everything I was
14 supposed to do to get that ad produced.

15 I also helped my friend Tom Horne with his real estate transaction. It
16 doesn't mean there was an inner – a commingling of these events.⁷³

17 Ms. Winn's Affidavits

18 84. In her May 25, 2012, affidavit, Ms. Winn stated that "Activity for the Independent
19 campaign did not begin until October 17th, and the first contribution was made on
20 October 20th."⁷⁴

21 85. Ms. Winn admitted during her testimony that that statement was false. BLA's
22 activity began around October 12, 2010, and the first contribution was received on
23 October 15, 2010.

24 86. Ms. Winn also stated in her March 30, 2012 affidavit that "[i]t was my
25 independent campaign, my ideas, and the money I raised by my own efforts that
26 created the ad."⁷⁵ In her May 30, 2012, affidavit, Ms. Winn similarly stated that "I raised
27 every dollar for this campaign myself, produced the advertisement, and bought the air
28 time without the assistance of anyone other than Mr. Murray."⁷⁶

29 ⁷² Transcript at 584:5-8.

30 ⁷³ Transcript at 670:9-25.

⁷⁴ YCA Exhibit 4 at ¶2.

⁷⁵ YCA Exhibit 3 at ¶6.

⁷⁶ YCA Exhibit 11 at ¶4.

1 87. However, Sharon Collins informed the FBI during a February 17, 2012 interview
2 that she referred Mr. Diaz to Ms. Winn.⁷⁷ During a February 21, 2012 interview with the
3 FBI, Ms. Collins reiterated that she put Mr. Diaz in contact with Ms. Winn to help
4 support Mr. Horne's campaign.⁷⁸

5 88. Ms. Winn's emails to Mr. Murray on October 20, 2010, indicated she was
6 consulting with someone else as to the content and script of the advertisement.

7 Mr. Horne's Testimony

8 89. Mr. Horne testified that Ms. Winn was an extremely effective and productive
9 volunteer during the primary campaign and that as a result, they became good personal
10 friends.⁷⁹

11 90. Mr. Horne stated that during the campaign, he and other volunteers became
12 aware that Ms. Winn had been in the real estate business and that many people went
13 to her with real estate questions or concerns based on her expertise.⁸⁰

14 91. Mr. Horne indicated that on or about October 11, 2010, Ms. Winn approached
15 him to let him know that she was leaving to start an independent expenditure
16 campaign.⁸¹

17 92. Mr. Horne had a meeting with Ms. Winn to go over the election laws to ensure
18 that she was aware of what was and was not allowed under the statutes. Mr. Horne
19 provided Ms. Winn with a copy of the statutes and highlighted relevant portions. Mr.
20 Horne also referred Ms. Winn to an attorney to obtain further advice.⁸²

21 93. In addition to the campaign, Mr. Horne also had a real estate transaction
22 pending at the same time.

23 94. Mr. Horne testified that he had first attempted to sell the property at 1515 N. 7th
24 Avenue in 2005, but several transactions since then had failed mostly because the
25 buyers could not obtain financing.

26
27 ⁷⁷ YCA Exhibit 29 at 395 and 404.

28 ⁷⁸ Horne-Winn Exhibit 16 at 1.

29 ⁷⁹ Transcript at 685:20-23.

30 ⁸⁰ Transcript at 686:16-24.

⁸¹ Transcript at 687:11-16.

⁸² Transcript at 688:1-20.

1 95. On October 19, 2010, Mr. Horne received notification that at the time of closing
2 on the new property in Sun City West, he would be required to pay no less than
3 \$100,000.00 and no more than \$217,500.00.⁸³

4 96. Mr. Tatham was working on securing financing, but Mr. Horne knew these
5 matters could often fall through and he felt insecure. Therefore, Mr. Horne contacted
6 Ms. Winn for advice.

7 97. Mr. Horne testified that Ms. Winn was not listed on any real estate documents
8 because she was not a broker or lender in the transaction, but was merely assisting
9 him as a courtesy to a friend. This is corroborated by a review of the real estate
10 documents.⁸⁴

11 98. Mr. Horne testified that he knew Ms. Winn was unavailable on October 19, 2010,
12 because her mother was having a serious surgery. Therefore, the first time he could
13 talk to Ms. Winn about the real estate transaction was on October 20, 2010.

14 99. Mr. Horne stated that, while he could not remember the specific contents of their
15 conversations, he felt that the 3-minute call would have been him asking about Ms.
16 Winn's mother, the 8-minute call would have been when he explained the problem with
17 the property, and the 11-minute call would have been when Ms. Winn took the
18 information for his loan application.⁸⁵

19 100. Mr. Horne categorically denied discussing the advertisement with Ms. Winn on
20 October 20, 2010, during any of their conversations.⁸⁶

21 101. Mr. Horne was aware that Ms. Winn did not receive as much money as expected
22 based on an October 27, 2010 article and various rumors from people in the
23 Republican party.⁸⁷

24 102. Mr. Horne acknowledged that he received the emails from Mr. Ducharme
25 regarding the polling numbers. Mr. Horne testified that because Mr. Horne was worried
26
27

28 ⁸³ YCA Exhibit 33 at 620.

29 ⁸⁴ Horne-Winn Exhibit 6, Transcript at 138:11-25.

30 ⁸⁵ Transcript at 699:1-15.

⁸⁶ Transcript at 700:3-4.

⁸⁷ Transcript at 702:17-25, Horne-Winn Exhibit 10.

1 about the polling data, he forwarded the email chain to Ms. Winn in the hope that she
2 could use the information to raise more money.⁸⁸

3 103. Mr. Horne represented that he did not act on Mr. Ducharme's strategic advice
4 because he did not consider Mr. Ducharme to be an expert and Mr. Horne did not pay
5 any attention to Mr. Ducharme's suggestions.⁸⁹

6 Other witnesses and evidence

7 104. Mr. Wilkinson testified that he met with Ms. Winn in Mesa and reviewed the
8 script at that time. Mr. Wilkinson stated that he believed the advertisement was too
9 negative and focused too much on Ms. Rotellini.

10 105. Mr. Murray testified that Mr. Horne did not have enough money behind his
11 advertisement, so his approach was to take what Mr. Horne had "already done and
12 build upon it."⁹⁰

13 106. Mr. Murray stated that he created the original script for the advertisement based
14 on the messaging of Mr. Horne.⁹¹ Mr. Murray indicated that with the exception of some
15 minor changes, he wrote the final advertisement.⁹²

16 107. The original script read:

17 Arizona needs an Attorney General who will be tough on illegal
18 immigration.

19 But liberal Felicia Rotellini isn't.

20 She openly opposes SB 1070.

21 It gets worse:

22 When liberal special interests groups launched a boycott against Arizona,
23 Rotellini worked with them.

24 She took thousands of their dollars for her campaign;

25 Selling Arizona out.

26 Felicia Rotellini: opposing SB 1070, boycotting Arizona, selling us out.

27 Felicia Rotellini: If she wins, Arizona loses.

28 Paid for by Business Leaders for Arizona.⁹³

29 108. The final script of the advertisement that aired read:

30 ⁸⁸ Transcript at 703:11-704:16.

⁸⁹ Transcript at 705:24-706:2.

⁹⁰ Transcript at 401:18-19.

⁹¹ Transcript at 375:16-376:8.

⁹² Transcript at 392:23-25.

⁹³ YCA Exhibit 6 at 19.

1 The Federal Government is suing Arizona. But, Arizona needs the right
2 Attorney General.
3 Liberal Felicia Rotellini isn't.
4 She openly opposes SB 1070.
5 It gets worse: Rotellini took money from labor unions and special interest
6 groups who boycott Arizona.
7 She sold Arizona out.
8 Opposing SB 1070, boycotting Arizona, selling us out.
9 If Rotellini wins, Arizona loses.
10 Paid for by Business Leaders for Arizona. Major funding by the
11 Republican State Leadership Committee (571) 480-4860.⁹⁴

12 CONCLUSIONS OF LAW

13 Standard of Proof

14 1. Appellants argued that the standard of proof in this matter should be clear and
15 convincing evidence based on the possibility that if the Order Requiring Compliance
16 were upheld and Appellants failed to comply with the Order Requiring Compliance
17 within 20 days, the Yavapai County Attorney's Office could seek to impose treble
18 damages under A.R.S. § 16-924(B) and A.R.S. § 16-905(J). Appellants argued that
19 "[w]here the consequences of establishing a conclusion can be a punitive remedy, then
20 that conclusion must be established by clear and convincing evidence."⁹⁵

21 2. The Order Requiring Compliance was issued to Appellants pursuant to A.R.S. §
22 16-924(A). There is no provision within A.R.S. § 16-924(A) that provides for a civil
23 penalty or any other form of punitive remedy.

24 3. It is undisputed that before imposing a civil penalty for treble damages, the
25 Yavapai County Attorney's Office would have to issue a separate Order Assessing a
26 Civil Penalty, from which Appellants would have appeal rights. Appellants argue any
27 determination on an Order Assessing a Civil Penalty would be a simple ministerial
28 question of whether Appellants had complied with the Order Requiring Compliance
29 within 20 days, and therefore, that the heightened burden of proof should apply to the
30 underlying determination. The cases cited by Appellants in support of such a
determination are not on point and are not persuasive.

⁹⁴ YCA Exhibit 23.

1 4. The Administrative Law Judge concludes that burden of proof in this matter is on
2 the Yavapai County Attorney's Office to establish by a preponderance of the evidence
3 that Appellants violated the provisions of Title 16, Chapter 6 of the Arizona Revised
4 Statutes and the Order Requiring Compliance issued pursuant to A.R.S. § 16-924(A)⁹⁶
5 was proper.⁹⁷

6 Use of Telephone and Email Records

7 5. It is noted that throughout the proceedings, Appellants referred to the
8 unreliability of the telephone and email records based on the lack of metadata. While
9 Appellants mentioned an expert witness that they had standing by to testify as to the
10 necessity of metadata to properly evaluate electronic records, Appellants did not call
11 the expert witness during the hearing.

12 6. Without expert testimony or other evidence addressing the reliability of the
13 electronic records, the electronic records will be considered on their face.

14 Applicable Law

15 7. A.R.S. § 16-901(14) defines an "independent expenditure" as
16 an expenditure by a person or political committee, other than a
17 candidate's campaign committee, that expressly advocates the election or
18 defeat of a clearly identified candidate, that is made without cooperation
19 or consultation with any candidate or committee or agent of the candidate
20 and that is not made in concert with or at the request or suggestion of a
21 candidate, or any committee or agent of the candidate. Independent
22 expenditure includes an expenditure that is subject to the requirements of
23 section 16-917, which requires a copy of campaign literature or
24 advertisement to be sent to a candidate named or otherwise referred to in
25 the literature or advertisement.

25 ⁹⁵ Horne Rebuttal p. 9.

26 ⁹⁶ A.R.S. § 16-924(A) provides in relevant part:

27 The attorney general, county attorney or city or town attorney, as appropriate, may serve
28 on the person an order requiring compliance with that provision. The order shall state
29 with reasonable particularity the nature of the violation and shall require compliance
30 within twenty days from the date of issuance of the order. The alleged violator has
twenty days from the date of issuance of the order to request a hearing pursuant to title
41, chapter 6.

⁹⁷ See A.A.C. R2-19-119.

1 An expenditure is not an independent expenditure if any of the following
2 applies:

3
4 (b) There is any arrangement, coordination or direction with respect to the
5 expenditure between the candidate or the candidate's agent and the
6 person making the expenditure, including any officer, director, employee
7 or agent of that person.

8
9 (d) The expenditure is based on information about the candidate's plans,
10 projects or needs, or those of his campaign committee, provided to the
11 expending person by the candidate or by the candidate's agents or any
12 officer, member or employee of the candidate's campaign committee with
13 a view toward having the expenditure made.

14 8. Independent expenditures are not considered contributions to a candidate's
15 campaign.⁹⁸ In contrast, "[a]n expenditure by a political committee, corporation, limited
16 liability company, labor organization or a person that does not meet the definition of an
17 independent expenditure is an in-kind contribution to the candidate and a
18 corresponding expenditure by the candidate unless otherwise exempted."⁹⁹

19 9. Arizona has established contribution limits that vary depending on the type of
20 election and the type of donor.¹⁰⁰ Arizona candidates cannot accept contributions from
21 corporations or limited liability companies.¹⁰¹ All political committees in Arizona must
22 file periodic reports identifying all contributions received.¹⁰²

23 10. Because Arizona statutes do not provide a great deal of specificity with how to
24 interpret coordination activities, authorities often look to the federal guidelines for
25 instruction.¹⁰³ Federal law provides for a three-prong coordination test to determine
26 whether a communication is coordinated. The three prongs—payment, content, and
27 conduct—must be met for a communication to be deemed coordinated.¹⁰⁴ The only
28 prong at issue in this matter is the conduct prong.

29 11. 11 C.F.R. § 109.21(d) provides:

30 ⁹⁸ A.R.S. § 16-901(5)(b)(vi).

⁹⁹ A.R.S. § 16-917(C).

¹⁰⁰ A.R.S. § 16-905.

¹⁰¹ A.R.S. § 16-919(A).

¹⁰² A.R.S. § 16-913, A.R.S. § 16-915.

¹⁰³ See Transcript at 215:3-8.

¹⁰⁴ YCA Exhibit 14 at 111.

1 (d) *Conduct standards*. Any one of the following types of conduct satisfies
2 the conduct standard of this section whether or not there is agreement or
formal collaboration, as defined in paragraph (e) of this section:

3
4 (2) *Material involvement*. This paragraph, (d)(2), is not satisfied if the
5 information material to the creation, production, or distribution of the
6 communication was obtained from a publicly available source. A
candidate, authorized committee, or political party committee is materially
involved in decisions regarding:

- 7 (i) The content of the communication;
8 (ii) The intended audience for the communication;
9 (iii) The means or mode of the communication;
10 (iv) The specific media outlet used for the communication;
11 (v) The timing or frequency of the communication; or
12 (vi) The size or prominence of a printed communication, or duration of a
communication by means of broadcast, cable, or satellite.

13 (3) *Substantial discussion*. This paragraph, (d)(3), is not satisfied if the
14 information material to the creation, production, or distribution of the
15 communication was obtained from a publicly available source. The
16 communication is created, produced, or distributed after one or more
17 substantial discussions about the communication between the person
18 paying for the communication, or the employees or agents of the person
19 paying for the communication, and the candidate who is clearly identified
20 in the communication, or the candidate's authorized committee, the
21 candidate's opponent, the opponent's authorized committee, or a political
party committee. A discussion is substantial within the meaning of this
paragraph if information about the candidate's or political party
committee's campaign plans, projects, activities, or needs is conveyed to
a person paying for the communication, and that information is material to
the creation, production, or distribution of the communication.

22 12. As to subsection (2) above, Appellants argued the Yavapai County Attorney's
23 Office must prove that Mr. Horne's input, assuming there was any, was material to the
24 actual advertisement that aired.

25 13. However, the plain language of the regulation provides that the conduct prong is
26 met if "a candidate . . . is *materially involved*" in the decisions being made. Being
27 "materially involved" in the decisions does not mean that the candidate must prevail on
28 every decision. Furthermore, subsection (d) above specifically provides that the
29 conduct may satisfy the standard "whether or not there is agreement."
30

1 14. Also as to subsection (2) above, Appellants argued that to satisfy the material
2 involvement standard, the Yavapai County Attorney's Office would have to establish
3 that the information material to the advertisement was not publicly available.

4 15. In contrast, the language quoted above provides that the material involvement
5 standard is not satisfied if the information material to the advertisement "*was obtained*
6 from a publicly available source." If the information material to the advertisement was
7 the opinion and input of the candidate, as alleged here, it is unlikely that those opinions
8 and that input would be available from a publicly available source.

9 16. As to subsection (3) above, a "substantial discussion" requires that information
10 about a candidate's plans, projects, activities, or needs must be conveyed to a person
11 paying for the communication and that the information must be material to the
12 communication. Appellants again argued that the Yavapai County Attorney's Office
13 must prove that Mr. Horne's input, assuming there was any, was material to the
14 communication itself.

15 17. However, the plain language of the regulation provides that the conduct prong is
16 met if "*information* about the candidate's . . . plans, projects, activities, or needs is
17 conveyed . . . and that *information* is material" to the communication. Thus, if a
18 candidate were to convey to an independent expenditure committee that he or she was
19 in need of a negative advertisement against an opponent in a specific region and that
20 the candidate was planning to release an advertisement highlighting the candidate's
21 positive record in that same region on a certain day, that *information* could be
22 considered material to the communication even if the candidate had no input on the
23 specific contents of the final communication.

24 Credibility of Agent Brian Grehoski

25 18. While the telephone records of Agent Mason and Mr. Tatham support a finding
26 that the first substantive telephone conversation on May 31, 2012, to which Agent
27 Grehoski testified did not occur, such a finding does not mean Agent Grehoski's
28 testimony is not credible with respect to other material aspects of this matter.
29
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1 19. Much of Agent Grehoski's testimony involved a review of his analysis of the
2 email and telephone records in this matter to establish the timeline based on the
3 documentation.

4 20. The Administrative Law Judge is capable of independently reviewing those
5 documents to evaluate the accuracy of that timeline and the weight to be given to the
6 events that occurred.

7 Credibility of Kathleen Winn

8 21. The Yavapai County Attorney's Office highlighted those statements in Ms.
9 Winn's affidavits that contradicted her statements, Secretary of State filings, and other
10 records in this matter.

11 22. Ms. Winn argued that the incorrect dates in her affidavit were an error that she
12 did not notice until later. Ms. Winn asserted that her statements that she conducted the
13 BLA activities on her own without the assistance of anyone other than Mr. Murray were
14 meant to address the specific allegations that she coordinated with Mr. Horne.

15 23. While there may be some inconsistencies in the dates of activities, those are not
16 enough to determine Ms. Winn is not credible. And while Ms. Winn's explanation as to
17 the limited nature of coordination described in her affidavits may mean those affidavits
18 were less than fully accurate, it does not render Ms. Winn's testimony in this matter as
19 not credible.

20 Yavapai County Attorney's Office's Inferences

21 *October 20, 2010*

22 24. The Yavapai County Attorney's Office acknowledged that it had no knowledge or
23 evidence as to the content of the telephone conversations between Ms. Winn and Mr.
24 Horne. Instead, from the circumstances surrounding the phone calls and the emails,
25 the Yavapai County Attorney's Office drew five inferences from the October 20, 2010
26 course of events to support a finding of coordination.

27 *First Inference: "We" and Winn's "several masters"*

28 25. Mr. Horne called Ms. Winn at 2:19 p.m. and they spoke for eight minutes until
29 approximately 2:27 p.m. During their conversation, Mr. Murray emailed Ms. Winn the
30 unedited voice-over file of the BLA advertisement. Just two minutes after finishing her

1 conversation with Mr. Horne, Ms. Winn emailed Mr. Murray. In that email, Ms. Winn
2 expressed her concern with the number of times Ms. Rotellini's name was used without
3 any mention of Mr. Horne. In so stating, Ms. Winn used the word "we" four times and
4 ended with "I have several masters."

5 26. Ms. Winn testified that the "we" used in that email was in reference to BLA in
6 general, Mr. Wilkinson in particular, and Mr. Harris and his client who had contributed a
7 great deal of money to BLA. Ms. Winn stated she met with Mr. Wilkinson to go over the
8 script earlier in the day and that he thought the advertisement was too negative and
9 focused too much on Ms. Rotellini and not enough on Mr. Horne.

10 27. Based on telephone records, the meeting between Ms. Winn and Mr. Wilkinson
11 in Mesa ended prior to 2:00 p.m. on October 20, 2010, and Ms. Winn had no further
12 telephone contact with him the rest of the day. Also, Ms. Winn last spoke to Mr. Harris
13 at 9:47 a.m. on October 20, 2010, before she had the script or voice-over file.

14 28. The Yavapai County Attorney's Office asserted that it was not possible Ms. Winn
15 was doing a re-write of the script with either Mr. Wilkinson or Mr. Harris at 2:29 p.m.
16 that afternoon when she emailed Mr. Murray. The Yavapai County Attorney's Office
17 maintained that the evidence established by a preponderance of the evidence that Mr.
18 Horne was part of the "we" and one of her "several masters."

19 29. Appellants argued that because the email was a sound file, Ms. Winn would be
20 unable to listen to it while she was on the phone with Mr. Horne, so her comments must
21 have been a reflection of her earlier conversation with Mr. Wilkinson. This argument
22 ignores the possibility that Ms. Winn opened the sound file and played it over the
23 phone to Mr. Horne and that he then gave his thoughts on the advertisement.

24 30. The Administrative Law Judge concludes that while the Yavapai County
25 Attorney's Office's inference is plausible, it is just as equally plausible that Ms. Winn
26 was referencing her earlier conversation with Mr. Wilkinson when she said "We do not
27 like" and "We are doing a re-write." The statement made that it "takes away from the
28 message we wanted which we want to hire the next AG" could also be a reference to
29 BLA's position in general. It is also reasonable that Ms. Winn felt she had a certain
30

1 duty to the contributors, including both Mr. Harris and his client, and considered them
2 among her “several masters.”

3 *Second Inference: “they feel” and “similar message”*

4 31. At 2:37 p.m., Ms. Winn emailed Mr. Murray that she would have the script
5 worked out by 5:30 p.m. and included in her email the statement that “[t]hey feel this
6 leaves people with [Rotellini’s] name 4X.” At the same time of the email, Ms. Winn
7 called Mr. Horne from her office phone line and they spoke for 11 minutes until
8 approximately 2:48 p.m. Two minutes later, at 2:50 p.m., Ms. Winn emailed Murray,
9 “Okay it will be similar message just some changes.”

10 32. It was pointed out that Ms. Winn did not speak to Mr. Wilkinson or Mr. Harris
11 between her 2:37 p.m. email promising to have it worked out by 5:30 p.m. and her 2:50
12 p.m. email consenting to a “similar message” with “some changes.” However, during
13 that time, Ms. Winn had a long conversation with Mr. Horne and had little time to
14 discuss the BLA advertisement with anyone else.

15 33. The Yavapai County Attorney’s Office maintained that these activities
16 established by a preponderance of the evidence that Mr. Horne was part of the “they”
17 and agreed to the similar message with some changes.

18 34. Appellants argued that this inference simply calls into question Ms. Winn’s ability
19 to make decisions on her own to approve the message and to make some changes
20 without direction from others, specifically Mr. Horne.

21 35. The Administrative Law Judge concludes that while the Yavapai County
22 Attorney’s Office’s inference is plausible, it is equally plausible that Ms. Winn approved
23 the similar message with some changes after considering the earlier input of Mr.
24 Wilkinson.

25 *Third Inference: “two strong personalities debating”*

26 36. After Mr. Murray emailed Ms. Winn explaining that part of the message was to
27 focus on Ms. Rotellini’s negatives without associating Mr. Horne’s name with the
28 negative messaging, Ms. Winn replied via email at 2:59 p.m. and stated that “I have
29 two very strong personalities debating.”
30

1 37. The Yavapai County Attorney's Office asserted that the record established by a
2 preponderance of the evidence that one of the two strong personalities debating was
3 Mr. Horne.

4 38. Ms. Winn testified that she had asked some of her coworkers their opinion about
5 the advertisement and that they were concerned that the advertisement mentioned Ms.
6 Rotellini's name four times when Ms. Rotellini lacked name recognition. Ms. Winn
7 indicated these coworkers were the "two strong personalities debating."

8 39. The Yavapai County Attorney's Office argued that Ms. Winn's explanation
9 strained credulity. Ms. Winn's explanation was further diminished by the fact that her
10 affidavits did not mention discussing or debating the advertisement's contents with
11 anyone other than Mr. Murray and specifically stated that she created the
12 advertisement without anyone's assistance other than Mr. Murray's.

13 40. The Administrative Law Judge concludes that while the Yavapai County
14 Attorney's Office's inference is plausible, it is equally plausible that Ms. Winn was
15 referring to coworkers when she referenced the "two strong personalities debating."

16 *Fourth Inference: "I think I prevailed"*

17 41. At 3:01 p.m., Ms. Winn attempted to call Mr. Horne but the call did not appear in
18 Mr. Horne's phone records, indicating he did not answer the call. At 3:11 p.m., Ms.
19 Winn emailed Mr. Murray a revised script of the BLA advertisement with the statement
20 that "I think I prevailed."

21 42. The Yavapai County Attorney's Office stated that it was logical to infer that Ms.
22 Winn's opinion must have "prevailed" over someone else's opinion. And thus, the
23 Yavapai County Attorney's Office maintained that a preponderance of the evidence
24 established that it was Mr. Horne over whom she prevailed, given that he was one of
25 the "strong personalities debating" just moments before.

26 43. Appellants argued that Ms. Winn "prevailed" against Mr. Wilkinson, Mr. Harris,
27 and the coworkers.

28 44. Ms. Winn had not been in contact with Mr. Wilkinson or Mr. Harris since the prior
29 email that "two strong personalities were debating," so it is unlikely she was referring to
30 either of them as there was no ongoing debate in which she could prevail. The

1 Administrative Law Judge concludes that while the Yavapai County Attorney's Office's
2 inference is plausible, it is equally plausible that Ms. Winn was referring to the
3 coworkers that she stated were debating with her when she stated that she believed
4 she had "prevailed."

5 *Fifth Inference: further changes*

6 45. At 3:13 p.m., Mr. Murray emailed Ms. Winn that the script was still too long. At
7 3:14 p.m., Ms. Winn replied with the removal of one line. At 3:15 p.m., Ms. Winn
8 received a call from Mr. Harris that lasted approximately three minutes. At 3:16 p.m.,
9 Mr. Murray emailed Ms. Winn that the script was still too long. At 3:21 p.m., Ms. Winn
10 received a call from Mr. Horne that lasted four minutes, until approximately 3:25 p.m.
11 As the conversation ended, Ms. Winn emailed Mr. Murray at 3:25 p.m. with a final
12 suggested change.

13 46. Because Ms. Winn had a conversation with Mr. Horne in the moments preceding
14 her email to Mr. Murray, the Yavapai County Attorney's Office concluded that Mr. Horne
15 and Ms. Winn were discussing the advertisement's script.

16 47. Appellants argued that because the script was never forwarded to Mr. Horne, it
17 was extremely improbable that Mr. Horne could have participated in the detailed editing
18 that was occurring at this point. Such an argument presupposes that Ms. Winn did not
19 read the script to and/or play the sound file for Mr. Horne over the phone.

20 48. The Yavapai County Attorney's Office alleged that the weight of the evidence
21 showed that Mr. Horne contributed to the changes in the script. However, the
22 Administrative Law Judge concludes that it is equally plausible that Ms. Winn approved
23 the final edits without any input from anyone else.

24 *October 27, 2010*

25 49. The Yavapai County Attorney's Office asserted that the October 27, 2010 email
26 was more than mere polling numbers and involved strategic advice that constituted
27 coordination.

28 50. Appellants argued that because the email was in reference to fundraising and
29 nothing in the state or federal statutes or regulations prohibits coordination of
30 contributions, this email cannot be considered a violation.

1 51. The first sentence of the first email referenced recent polls showing Mr. Horne
2 was "losing ground" with independents. Following that, Mr. Ducharme gave advice as
3 to how to deal with that issue. The second email from Mr. Ducharme expanded on that
4 advice.

5 52. Appellants argued the campaign was over and that there was nothing more to be
6 done when the email was sent. Appellants also dismissed the strategic advice that was
7 included in the email because Mr. Ducharme was not a strategist with the campaign
8 and his opinion was not important to Mr. Horne.

9 53. According to the Yavapai County Attorney's Office, Mr. Horne must have
10 believed when he forwarded the email to Ms. Winn that there was something more that
11 could be done in the campaign, or he would not have forwarded the email or suggested
12 to Ms. Winn that she use the information to get the additional \$100,000.00 from the
13 RSLC.

14 54. However, if the only relevant information that Ms. Winn needed was the polling
15 numbers, Mr. Horne could have forwarded just the first email from Mr. Ducharme
16 instead of the second email that included the original message and the additional
17 strategic advice.

18 55. In contrast, based on their interpretation of the statutes and regulations,
19 Appellants argued that the information could not be considered "substantial" or as
20 having had a "material" effect on the expenditures of BLA because the advertisement
21 had already been produced and was running on October 27, 2010.

22 56. The analysis of the applicable law above does not necessarily require that Mr.
23 Horne attempted to have a material effect on the contents of the advertisement, but
24 only that he provided information as to his campaign needs that was material to the
25 distribution of the communication.

26 57. It is unclear from the record if Mr. Horne's email was material to the distribution
27 of the communication after October 27, 2010. Ms. Winn had already received the
28 additional \$100,000.00 from Ms. Newman and used those funds to buy more airtime for
29 the advertisement. Nothing in the record shows that the October 27, 2010 email
30

1 changed the way those funds were spent. No new ads were produced and it does not
2 appear that the distribution markets changed based on the email.

3 Real Estate Transaction

4 58. The evidence established that Mr. Horne had a real estate transaction pending
5 at the same time of these activities. Both Ms. Winn and Mr. Horne asserted that their
6 communications with each other on October 20, 2010, related only to the health of Ms.
7 Winn's mother and Mr. Horne's real estate transaction. Both Ms. Winn and Mr. Horne
8 flatly denied any coordination with respect to the advertisement.

9 Conclusion

10 59. Ultimately, the Yavapai County Attorney's Office failed to establish by a
11 preponderance of the evidence that the telephone calls between Mr. Horne and Ms.
12 Winn on October 20, 2010, constituted improper coordination of expenditure in
13 violation of Title 16, Chapter 6 of the Arizona Revised Statutes. While there are
14 inferences that can be made, there are also reasonable explanations that the
15 communications related to Mr. Horne's real estate transaction that was pending at the
16 same time.

17 60. The Yavapai County Attorney's Office also failed to establish by a
18 preponderance of the evidence that the October 27, 2010 email from Mr. Horne to Ms.
19 Winn constituted improper coordination in violation of Title 16, Chapter 6 of the Arizona
20 Revised Statutes. No evidence was presented to show that the email had a material
21 effect on BLA's expenditure.

22 **RECOMMENDED ORDER**

23 Based on the above, the October 17, 2013 Order Requiring Compliance is
24 vacated.

25 Done this day, April 14, 2014.

26
27 /s/ Tammy L. Eigenheer
28 Administrative Law Judge

29 Transmitted electronically to:

30 Benjamin Kreuzberg, Deputy Attorney

Yavapai County Attorney's Office

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