NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

THOMAS HORNE, individually and THOMAS HORNE, for Attorney General Committee (SOS Filer ID 2010 00003); KATHLEEN WINN, individually, and Business Leaders for Arizona (SOS Filer ID 2010 00375),
Plaintiffs/Appellants,

v.

SHEILA SULLIVAN POLK, Yavapai County Attorney,
Defendant/Appellee.

No. 1 CA-CV 14-0837
FILED 2-23-2016

Appeal from the Superior Court in Maricopa County
No. LC2014-000255-001
The Honorable Crane McClennen, Judge

AFFIRMED

COUNSEL

Wilenchik & Bartness, P.C., Phoenix
By Dennis I. Wilenchik

Kimerer & Derrick P.C., Phoenix
By Michael D. Kimerer

Tiffany & Bosco, P.A., Phoenix
By Timothy A. LaSota

Counsel for Plaintiffs/Appellants

Yavapai County Attorney, Prescott
By Benjamin D. Kreutzberg
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Lawrence F. Winthrop joined.

T H O M P S O N, Judge:

¶1 Appellants Tom Horne (Horne), Tom Horne for Attorney General Committee (THAGC), Kathleen Winn (Winn), and Business Leaders for Arizona (BLA) (collectively appellants) appeal from the trial court's order affirming the final decision and order issued in May 2014 by Appellee Special Arizona Attorney General and Yavapai County Attorney Sheila Polk (Polk) affirming her October 2013 order requiring compliance with campaign finance laws. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Horne ran for the office of Arizona Attorney General in 2010. Winn was a volunteer who worked for the Horne campaign during the primary election. Horne won the Republican primary election in August 2010. Subsequently, in October 2010, Winn decided to cease volunteering for the Horne campaign and "reactivate" BLA, her independent expenditure committee. She then began soliciting contributions for BLA.[1] The sole purpose of BLA in relation to the Horne campaign was to raise money to purchase a political commercial. BLA hired Brian Murray (Murray) and Lincoln Strategy Group to produce the commercial. The commercial started running on October 25; it was a negative ad directed

---

[1] According to Winn's March 30, 2012 affidavit she originally created BLA in 2009 to oppose Andrew Thomas's candidacy for Attorney General.

against Felecia Rotellini (Rotellini), Horne's Democratic opponent.[2] Horne was elected to the office of Arizona Attorney General in 2010.

¶3 In 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 violated state campaign finance laws during the 2010 general election. Solicitor General Robert Ellman appointed Polk as Special Arizona Attorney General to fulfill the role of Attorney General as set forth in Arizona Revised Statutes (A.R.S.) section 16-924 (2013).[3]

¶4 After investigation, Polk issued an order in October 2013 requiring compliance concluding that appellants violated campaign finance laws by coordinating their activities in order to advocate for the defeat of Rotellini. The order required Horne and THAGC to amend their 2010 post-general election report to include expenditures by BLA as in-kind contributions, required Winn and BLA to amend their 2010 post-general election report, and required Horne and THAGC to refund $397,378.00, the amount deemed in-kind contributions in excess of legal limits. Appellants filed a request for hearing pursuant to A.R.S. § 16-924(A). Polk set the matter for an administrative hearing, and an administrative law judge (ALJ) held a three-day hearing in February 2014.

¶5 In April 2014, the ALJ issued her decision concluding that Polk failed to prove by a preponderance of the evidence illegal coordination between appellants. The decision recommended that Polk vacate her order requiring compliance.

---

[2] BLA raised and expended more than $500,000 on its sole commercial. (I. 102). BLA received $350,000 from the Republican State Leadership Committee (RSLC).

[3]Section 16-924(A) provides, in relevant part: "The attorney general, county attorney or city or town attorney, as appropriate, may serve on [a person believed to have violated any provision of Title 16] an order requiring compliance with that provision. The order shall state with reasonable particularity the nature of the violation and shall require compliance 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."

¶6 In May 2014, pursuant to A.R.S. § 41-1092.08 (B) (2013)[4], Polk issued her final administrative decision rejecting the ALJ's recommendation and affirming her order requiring compliance. In her final decision, Polk accepted all of the ALJ's findings of fact, accepted in part the ALJ's conclusions of law, and rejected in part the ALJ's conclusions of law. She found that the evidence showed that Winn and Horne coordinated to develop BLA's commercial on October 20, 2010, and that subsequently, on October 27, Horne directed Winn to raise another $100,000 and expend it in accordance with advice Horne received from Ryan Ducharme (Ducharme), an individual who was working on a different campaign.

¶7 Appellants filed a notice of appeal for judicial review of administrative decision in May 2014. Neither party requested an evidentiary hearing. In October 2014, the trial court affirmed Polk's final administrative decision. Appellants timely appealed from the judgment, and the trial court stayed the case below pending appeal. We have jurisdiction pursuant to A.R.S. § 12-913 (2003).

DISCUSSION

A. Standard of Review

¶8 Section 12-910 (E) (2003) provides that the superior court, in reviewing a final administrative decision, "shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion." The superior court defers to the agency's factual findings and affirms them if they are supported by substantial evidence. *Gaveck v. Ariz. State Bd. of Podiatry Exam'rs*, 222 Ariz. 433, 436, ¶ 11, 215 P.3d 1114, 1117 (App. 2009) (citation omitted). "If an agency's decision is supported by the record, substantial evidence exists to support the decision even if the record also supports a

---

[4] Section 41-1092.08(B) provides, in relevant part: "Within thirty days after the date the office sends a copy of the administrative law judge's decision to the head of the agency . . . the head of the agency . . . may review the decision and accept, reject or modify it. . . . If the head of the agency . . . rejects or modifies the decision the agency head . . . must file with the office . . . and serve on all parties a copy of the administrative law judge's decision with the rejection or modification and a written justification setting forth the reasons for the rejection or modification."

different conclusion." *Id.* (citations omitted). "On appeal, we review de novo the superior court's judgment, reaching the same underlying issue as the superior court: whether the administrative action was not supported by substantial evidence or was illegal, arbitrary and capricious, or involved an abuse of discretion." *Carlson v. Ariz. State Pers. Bd.,* 214 Ariz. 426, 430, ¶ 13, 153 P.3d 1055, 1059 (App. 2007). *See also Eaton v. Ariz. Health Care Cost Containment Sys.*, 206 Ariz. 430, 432, ¶ 7, 79 P.3d 1044, 1046 (App. 2003) ("The court will allow an administrative decision to stand if there is any credible evidence to support it, but, because we review the same record, we may substitute our opinion for that of the superior court.") (citation omitted). We review de novo any legal issues. *Comm. for Justice & Fairness (CJF) v. Ariz. Sec'y of State's Office*, 235 Ariz. 347, 351, ¶ 17, 332 P.3d 94, 98 (App. 2014) (review denied April 21, 2015).

B. Polk's Final Decision Was Supported by the Evidence and Was Not Arbitrary or an Abuse of Discretion

¶9 Under Arizona's campaign finance laws, independent expenditures are not considered to be contributions to a candidate's campaign. A.R.S. 16-901(5)(b)(vi) (2010). A.R.S. 16-901(14) (2010) defines an "independent expenditure" as:

> [A]n expenditure by a person or political committee, other than a candidate's campaign committee, that expressly advocates the election or defeat of a clearly identified candidate, that is made without cooperation or consultation with any candidate or committee or agent of the candidate and that is not made in concert with or at the request or suggestion of a candidate, or any committee or agent of the candidate. . . .

Under A.R.S. § 16-917(C) (2010), an expenditure by a political committee or person that does not meet the definition of an independent expenditure is considered to be an in-kind contribution to the candidate and a corresponding expenditure by the candidate. Federal guidelines provide further guidance as to coordinated communications and independent expenditures. *See* 11 C.F.R. 109.21 (2010).

¶10 Appellants argue that Polk's final decision was unsupported by substantial evidence, was arbitrary, or was an abuse of discretion pursuant to A.R.S. § 12-910 (E). We disagree. On October 20, 2010, Winn and Murray designed BLA's political commercial. The evidence showed

that Murray emailed Winn a draft script of the commercial at 10:21 a.m. that day. The draft script provided:

> The Federal Government is suing Arizona. Arizona needs the right attorney general. An Attorney General who will be tough on illegal immigration. Liberal Felicia Rotellini isn't. She openly opposes SB 1070. It gets worse: taking money from labor unions and special interest groups who launched a boycott against Arizona. She sold Arizona out. Opposing SB 1070, boycotting Arizona, selling us out. If she wins Arizona loses.

Around lunchtime, Winn met with George Wilkinson (Wilkinson), BLA's treasurer, to discuss the commercial. At 2:19 p.m. on the 20th, Horne called Winn and spoke with her for about eight minutes. In the middle of this phone call, Murray emailed Winn an unedited voice-over file of the commercial. At 2:29 p.m., a few minutes after ending the phone call with Horne, Winn emailed Murray the following:

> We do not like that her name is mentioned 4 times and no mention for Horne. We are doing a re-write currently and will get back to you. Too negative and takes away from the message we wanted which [sic] we want to hire the next AG to protect and defned [sic] Arizona against the federal government. I will get back to you shortly Brian sorry for the confusion except I have several masters.[5]

[5] Winn testified that "we" in the 2:29 p.m. email to Murray referred to herself and Wilkinson, not Horne, and that her "several masters" included Wilkinson and attorney Greg Harris (Harris), who represented one of BLA's donors. She denied discussing the commercial's script with Horne on the 20th and testified instead that she only spoke with Horne about a real estate transaction and her mother's surgery. Appellants provided no emails or real estate documents at trial which would corroborate that Winn was working on Horne's real estate transaction in October 2015.

At 2:30 p.m., Murray emailed Winn telling her he would halt production of the commercial. At 2:37 p.m., Winn emailed Murray saying that she would "have it worked out by 5:30," and that:

> [t]hey feel [the commercial] leaves people with [Rotellini's] name 4 X and with no mention of [Horne] it is like saying don't think about a pink elephant . . so you think about the pink elephant.

Also at 2:37, Winn called Horne again and they spoke for eleven minutes. At 2:50 p.m., two minutes after that phone call ended, Winn emailed Murray: "Okay it will be similar message just some changes." At 2:53 p.m. Murray responded:

> It is kind of the point, driving [Rotellini's] negatives. We don't want Tom's name associated with the negative messaging. From a timing standpoint in order to be on the air Monday we will have to produce and make all edits tomorrow. . . .

At 2:59 p.m. Winn responded:

> The concern is you can get out her negatives without saying her name 4 times. I have two very strong personalities debating this moment she lacks name recognition we do now want to help her in that regard is the argument.[6]

At 3:11 p.m., Winn emailed Murray a revised script of the commercial, stating: "I think I prevailed no mention of [Horne] thanks for what you said. I believe this times out let me know." At 3:13 p.m., Murray emailed Winn that the script was too long. At 3:14 p.m. Winn responded suggesting he remove a sentence. At 3:15 p.m., Winn received a phone call from attorney Harris that lasted three minutes. At 3:16 p.m., Murray emailed Winn that

---

[6] Winn testified that the "two very strong personalities debating" in her 2:59 p.m. email were coworkers in her office at AmeriFirst. She denied that Horne was one of the "strong personalities" debating the commercial's script. In contrast, in her May 30, 2012 affidavit, Winn stated that she "produced the ad, and bought the air time without the assistance of anyone other than Mr. Murray."

the script was still too long. At 3:21 p.m., Horne called Winn again for about four minutes. At 3:25 p.m., Winn emailed Murray stating:

> Change to: Arizona needs the RIGHT attorney general
>
> taking money from labor unions and special interest groups

The final script of the commercial that aired provided:

> The Federal Government is suing Arizona. But, Arizona needs the right Attorney General. Liberal Felicia Rotellini isn't. She openly opposes SB 1070. It gets worse: Rotellini took money from labor unions and special interest groups who boycott Arizona. She sold Arizona out. Opposing SB 1070, boycotting Arizona, selling us out. If Rotellini wins, Arizona loses. Paid for by Business Leaders for Arizona. Major funding by the Republican State Leadership Committee (571) 480-4860.

¶11 The evidence supports Polk's conclusion that Horne and Winn coordinated on October 20, 2010. The content and timing of Winn's emails to and from Murray and the timing of her phone calls with Horne support Polk's findings that Horne and Winn discussed the wording of the commercial on October 20 and that their discussion led to changes in the wording of the commercial.[7] Although the record may also support a different conclusion, we must defer to Polk's decision. *See Gaveck*, 222 Ariz. at 436, ¶ 11, 153 P.3d at 117; *Blake v. City of Phoenix*, 157 Ariz. 93, 96, 754 P.2d

---

[7] Appellants argue that the changes to the commercial were not material, and thus, even if Winn and Horne discussed the commercial those discussions would not constitute actual coordination. Under 11 C.F.R. § 109.21(d)(2), a communication is deemed coordinated if the candidate "is materially involved in decisions regarding the content, intended audience, means or mode of the communication, specific media outlet used, the timing or frequency or size or prominence of a communication." Even if the changes to the commercial were not material, it does not follow that Horne could not have been materially involved in the revisions.

1368, 1371 (App. 1988). Polk was free to reject Winn and Horne's testimony as to the content of their discussions as "not credible."[8] Appellants argue that all of the evidence of coordination was circumstantial rather than direct evidence. However, even if the evidence here was circumstantial we assign no less weight to it. *See State v. Harvill*, 106 Ariz. 386, 391, 476 P.2d 841, 846 (1970) ("direct and circumstantial evidence are [of] intrinsically similar [probative value]; therefore, there is no logically sound reason for drawing a distinction as to the weight to be assigned each.").

¶12 Additionally, the evidence supports Polk's finding that Horne and Winn coordinated on October 27, 2010. On that day, Ryan Ducharme sent Horne an email stating:

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

Ducharme followed up with a second email to Horne stating:

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

---

[8] Citing a Maryland case, *State of Md. Comm'n on Human Relations v. Kaydon Ring & Seal, Inc.*, 818 A.2d 259 (Md. Ct. Spec. App. 2003), appellants argue that Polk's decision was not based on substantial evidence because she did not defer to the ALJ's credibility findings. But A.R.S. § 41-1092.08(B) expressly permits "the head of the agency . . . [to] review the [ALJ's] decision and accept, reject or modify it."

Horne forwarded this email chain to Winn at 2:10 p.m. on the 27th stating: "I forwarded this to [C]asey.[9] Maybe with this we can. Try again for the hundred k." Winn forwarded Horne's email chain to Murray at 2:31 p.m., stating, "[t]his just came into me read below."[10] At 2:55 p.m., Murray forwarded the chain of emails to his firm's attorney, stating:

> I wanted to make you aware of an incident that occurred with one of our clients. [Winn] is running an [independent expenditure] committee called [BLA] which is in support of Tom Horne for AG. I was hired to do the TV component. I warned her on numerous occasions that she needed to cease contact with the candidate and any agents of the campaign. I then received the following email. I then called her and informed her again that she should not have any contact. She assured me that this was unsolicited and had not in several days. As our firm's attorney I wanted to make you aware of this situation should something arise at a later date.

From this evidence, Polk concluded that Horne was trying to get Winn to raise an additional $100,000 and expend it attacking Rotellini.[11] Polk further found that the October 27, 2010 email from Horne to Winn "casts grave doubt on the denials of both [Horne and Winn] that coordination occurred on October 20, 2010." Because there was evidence in the record supporting

---

[9] Casey Phillips was a regional director for the RSLC.

[10] Winn testified that she "didn't even really read [the email]," but just forwarded it to Murray without asking him to take any action. Horne testified that he paid no attention to the strategic advice in Ducharme's email and that part of the email was "utterly meaningless." He maintained that all he cared about in the email was the polling data.

[11] Appellants argue that the October 27 email only concerned fundraising and that A.R.S. § 16-901(14) and the relevant federal guidelines apply only to "expenditures" (how money is spent such as the content of the commercial) and not contributions. Horne's October 27 email, however, did more than request Winn to raise an additional $100,000, it also contained strategic advice from Ducharme concerning attacking Rotellini.

Polk's finding that Horne and Winn coordinated on October 27, 2015, we find no abuse of discretion.

C. Appellants' Due Process Rights Were Not Violated

¶13 Appellants argue that their due process rights were violated because Polk was both an advocate and judge in this case and necessarily biased. It is well established under Arizona law that an agency employee can investigate, prosecute, and adjudicate a case. In *Comeau v. Ariz. State Bd. of Dental Exam'rs*, 196 Ariz. 102, 108, ¶¶ 26-27, 993 P.2d 1066, 1072 (App. 1999), where the appellant argued that his due process rights were violated because the Board of Dental Examiner's investigator functioned in several capacities in his professional discipline matter, we noted:

> An overlap of investigatory, prosecutorial, and adjudicatory functions in an agency employee does not necessarily violate due process. An agency is permitted to combine some functions of investigation, prosecution, and adjudication unless actual bias or partiality is shown. (citations omitted).

Similarly, in *Rouse v. Scottsdale Unified Sch. Dist.*, 156 Ariz. 369, 371, 374, 752 P.2d 22, 24, 27 (App. 1987), we held that due process was not violated when a school board participated in a decision to terminate a teacher, and then reviewed and affirmed the termination, concluding:

> Due Process . . . is not violated unless there is a showing of actual bias or partiality. A mere joining of investigative and adjudicative functions is not sufficient. [Appellant] has made no such showing of actual bias or partiality here.

In this case, appellants make no showing of actual bias. Accordingly, their due process rights were not violated.

D. Polk Did Not Err By Applying the Wrong Standard of Proof

¶14 Appellants next argue that Polk erred by applying the wrong standard of proof. They maintain that the standard of proof should have been clear and convincing evidence instead of a preponderance of the evidence. They base their argument on the future possibility that, if they do not come into compliance with Polk's order requiring compliance, Polk

could then assess a civil penalty pursuant to A.R.S. § 16-924(B) and A.R.S. § 16-905(J) (civil penalty for violating contribution limits). However, the clear and convincing standard of proof does not apply in this case. Arizona Administrative Code R2-19-119(A) (2013) provides that the standard of proof in administrative hearings is a preponderance of the evidence, unless otherwise provided by law. Although appellants cite cases holding that the recovery of punitive damages requires a clear and convincing standard of proof, *see e.g., Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 332, 723 P.2d 675, 681 (1986), the order requiring compliance was issued pursuant to A.R.S. § 16-924(A). That section does not provide for civil penalties, nor did Polk's order assess civil penalties. The remedy in Polk's order required a repayment of contributions that exceeded the relevant limits.[12] Accordingly, we find no error.

E. Arizona's Campaign Finance Contribution Limits Were Constitutional

¶15 Appellants argue that A.R.S. § 16-905, which limited individual political contributions in Arizona to $840 per election cycle, violated the United States and Arizona Constitutions because the limits were too low.[13] They argue that, with a limit of $840 per election cycle (primary and general elections) Arizona really had a "per election" limit of $420.

¶16 In *Randall v. Sorrell*, 548 U.S. 230 (2006), the United States Supreme Court addressed the constitutionality of Vermont's campaign contribution limits. Vermont limited political contributions to candidates for state office by individuals, political committees and, and political parties ($400 for a candidate running for governor, lieutenant governor or other statewide office, $300 for state senator, and $200 for state representative, per two-year general election cycle with no index for inflation). *Id.* at 238-39. In *Randall*, the Supreme Court found that Vermont's contribution limits

---

[12] Appellants also argue for heightened scrutiny because this case implicates their First Amendment rights. They maintain that Polk relied on "mere conjecture" in reaching her decision. However, as discussed in section B, *supra*, there was sufficient evidence from which Polk could find coordination by a preponderance of the evidence.

[13] In 2013 the Arizona legislature raised contribution limits to $2500 from an individual. A.R.S. § 16-905 (2013).

failed to satisfy the First Amendment's requirement that contribution limits be "closely drawn." *Id.* at 238, 249, 253.

¶17 The plurality opinion set out a two-part, multi-factor test. First, a court should look for "danger signs" that the limits are too low, such as 1) limits are set per election cycle rather than divided between primary and general elections, 2) limits apply to contributions from political parties, 3) the limits are the lowest in the country, and 4) the limits are below those the Supreme Court has previously upheld. *Id.* at 249-53 & 268 (Thomas, J., concurring). Then, if danger signs exist, the court must determine whether the limits are closely drawn. *Id.* at 249, 253. To determine whether the limits are closely drawn, the court considers:

> 1. [Whether the] contributions limits will significantly restrict the amount of funding available for challengers to run competitive campaigns.
>
> 2. [Whether] political parties [must] abide by *exactly* the same low contribution limits that apply to other contributors.
>
> 3. [Whether an] Act excludes from its definition of "contribution" [volunteer services].
>
> 4. [Whether or not] contribution limits are . . . adjusted for inflation.
>
> 5. Any special justification that might warrant a [low or restrictive] contribution.

Id. at 253-62. Arizona's contribution limits in 2010 were $840 per election cycle in comparison to Vermont's limit of $400 per two-year election cycle for candidates for governor and lieutenant governor. Section 16-905 provided for higher total contribution limits for candidates to accept contributions from political parties and organizations. Section 16-901(5)(iv)(b) further exempted a volunteer's unreimbursed payment for personal travel expenses from being considered contributions, and A.R.S. § 16-905(H) adjusted contribution limits for inflation. Given all of the factors, and lack of a showing that a candidate for attorney general in Arizona could not run a competitive campaign under the 2010 contribution limits, we find that the contribution limits did not violate the First Amendment.

F. Appellants Waived Their Argument that A.R.S. § 16-901(19) Was Unconstitutional

¶18 Finally, appellants argue that there was no statutory basis for Polk's enforcement action because A.R.S. § 16-901(19), which defines "political committee," is unconstitutional.[14] Because appellants failed to raise the argument concerning section 16-901(19) below, they have waived it. *See Rand v. Porsche Fin. Servs.*, 216 Ariz. 424, 434, ¶ 39, n.8, 167 P.3d 111, 121, n.8 (App. 2007) (arguments not raised in the trial court are waived on appeal). We decline to accept appellants' suggestion that we consider this argument even though they failed to raise it because they make a constitutional argument. *See Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 503, 733 P.2d 1073, 1086 (1987).

G. Attorneys' Fees and Costs

¶19 Appellants request attorneys' fees pursuant to A.R.S. § 12-348 and costs pursuant to A.R.S. § 12-341 and -342. We deny the request for fees and costs.

CONCLUSION

¶20 For the foregoing reasons, the decision of the trial court

---

[14] Appellants offer an additional constitutional argument concerning whether the definition of "independent expenditure" was unconstitutionally overbroad. They cite our opinion in *Comm. for Justice & Fairness*, 235 Ariz. 347, 332 P.3d 94 (App. 2014), where we found that section to be constitutional, and note that review was still pending at the time of briefing in this appeal. However, our supreme court denied review of *Committee for Justice & Fairness* in April 2015.

affirming Polk's final decision and order requiring compliance is affirmed.