**STATE OF COLORADO**
**Department of State**
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**Jena M. Griswold**
**Secretary of State**

Christopher P. Beall
Deputy Secretary of State

BEFORE THE
COLORADO DEPUTY SECRETARY OF STATE

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AHO Case No. **2023-003**

Election Division Case Nos: **2022-109**, **2022-110**, **2022-111**, **2022-112**, **2022-115**, **2022-116**, and **2022-117**

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In the Matter of

ELECTIONS DIVISION of the SECRETARY OF STATE

Complainant & Exceptions Respondent,

v.

COLIN LARSON and COLIN FOR COLORADO

Respondents & Exceptions Petitioners,

and

RESTORE COLORADO LEADERSHIP FUND IEC;
RESTORE COLORADO LEADERSHIP FUND 527;
DANIEL COLE;
COLE COMMUNICATIONS, LLC; and
VICTOR'S CANVASSING, LLC.

Non-moving Respondents.

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## FINAL AGENCY ORDER ON ATTORNEY'S FEES

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This matter comes before Christopher P. Beall, Colorado Deputy Secretary of State ("Deputy Secretary"), as the agency's final decision maker on campaign and

political finance matters filed with the Secretary of State, pursuant to section 1-45-111.7(6)(b), C.R.S., of the Colorado Fair Campaign Practices Act ("FCPA"), Rule 24.3.7 of the Secretary of State's Rules Concerning Campaign and Political Finance, 8 CCR 1505-6, and section 24-4-105 of the Colorado Administrative Procedures Act ("APA"), upon the exceptions filed by the respondents through their counsel in response to the Order Denying Motion for Attorney Fees ("Order Denying Fees") issued by the Secretary's Administrative Hearing Officer ("AHO") and duly served upon the parties on June 24, 2024. The Deputy Secretary, being fully informed by the briefing from both parties and after a full review of the record, as appropriate to the matter presented, issues this Final Agency Order.

As set forth in this Order, the Deputy Secretary adopts and affirms the decision of the AHO in the Order Denying Fees, which is attached and incorporated herein by reference. *See* Attachment A, *infra.*

## BACKGROUND

The matter before the Deputy Secretary is a narrow one: Did the Division's administrative action against the respondents, that is, the candidate Colin Larson and his candidate committee Larson for Colorado,[1] lack substantial justification so as to

[1] At the outset of the AHO proceedings, in its initial formal Complaint, the Division disclaimed pursuit of allegations against the 527 organization, the independent expenditure committee, and Daniel Cole and his business entities, all of whom had been targets of complaints from the underlying citizen complainant and all of whom had been joined as joint respondents early on when the Division consolidated the underlying citizen complaints. *See* CF at 203, 209-10 (Compl. ¶¶ 13-14 & 56-60). Those disclaimed parties did not join Larson's motion for attorney's fees, and they are not parties to this Exceptions proceeding.

warrant a recovery of the attorney's fees expended by those respondents in their defense of this matter?

The following summary of the history of this case provides context.

Colin Larson was a candidate for the Colorado House of Representatives, District 25, in 2022. CF at 417, 431 (FAO Initial Decision, ¶¶ 35, 93). Colin for Colorado was his candidate committee. *Id.* at 410-11 (¶ 6). Colin Larson and Colin for Colorado (collectively referred to herein as "Larson") were the targets of citizen complaints alleging violations of campaign finance law along with several other complaints against other organizations and Daniel Cole, a political consultant, all filed on November 7, 2022, the day before the 2022 General Election in which Larson was a candidate. *Id.* at 413 (¶¶ 13-15). The citizen complaints, which were consolidated for purposes of the Election Division's review, alleged that there was illegal coordination in support of Larson's candidacy. *Id.* After investigation, the Division filed a motion to dismiss the consolidated set of citizen complaints, which the Deputy Secretary granted in part. *Id.* at 414-15 (¶ 22). After the partial dismissal, the remaining respondents were Colin Larson, Colin for Colorado, Daniel Cole, Cole Communications LLC, Restore Colorado Leadership Fund IEC, Restore Colorado Leadership Fund 527, and Victors Canvassing LLC. *Id.*

The Division filed a formal administrative complaint against all seven respondents, but only the Larson parties were charged with campaign finance violations. The two counts in that AHO case alleged improper coordination by Larson with soft side political entities, through Daniel Cole. Order Denying Fees, ¶ 15; CF at

429 (FAO Initial Decision, ¶ 86). After the AHO denied two motions to dismiss filed by Larson, both relating to the timeliness rather than the merits of the administrative matter, the case proceeded to an administrative hearing before the AHO on February 16, 2024. CF at 408 (FAO Initial Decision at 1); *see also* CF at 212-14 & 254-56 (first and second motions to dismiss).

The Initial Decision was issued on March 1, 2024, finding that the Division had failed to prove the alleged violations of improper coordination by a preponderance of the evidence and dismissing the complaint. CF at 441 (FAO Initial Decision, ¶ 114). Neither Larson nor the Division filed exceptions, and the Deputy Secretary did not choose to initiate review of the Initial Decision on his own motion. *See* Order Denying Fees, ¶ 2. As a result, the Initial Decision was incorporated in its entirety by the Final Agency Order on May 1, 2024, by operation of law. *Id.*; *see also* § 24-4-105(14)(b)(III), C.R.S.

On May 22, 2024—three weeks after the Final Agency Order issued— Larson filed a Motion for Attorney Fees ("Motion") seeking to recover $24,200[2] in attorney fees and costs from the Division and the citizen complainant under section 1-45-111.5(2), C.R.S. *See* Order Denying Fees, ¶ 3. The Motion was opposed by the Division and by

[2] The record before the Deputy Secretary, and apparently also before the AHO, reveals no basis for the requested amount of $24,200. There is no affidavit or accompanying exhibits documenting the amount of fees being requested, nor is there any submission attesting to the reasonableness of the fees being requested. *See generally Dubray v. Intertribal Bison Coop.*, 192 P.3d 604, 608 (Colo. App. 2008) ("The initial estimate of a reasonable attorney fee is reached by calculating the 'lodestar' amount, which represents the number of hours reasonably expended multiplied by a reasonable hourly rate."); *Hendricks v. Allied Waste Transp., Inc.*, 2012 COA 88, ¶ 36 ("[A] party is entitled to a hearing to determine a reasonable amount of attorney fees at least when ... it presents the affidavit of an expert on attorney fees raising disputed issues of fact and a significant amount of fees has been requested".").

the citizen complainant. On June 24, 2024, the AHO entered an Order Denying Motion for Attorney Fees ("Order Denying Fees"), concluding that there was no legal basis for any fee award against the citizen complainant, and that as for the potential liability of the Division, its actions in the case did not lack substantial justification and that as a result, no fee award may be entered against the Division. *See generally* Order Denying Fees. The same day, the parties were served with the Procedural Order Regarding AHO's Order Denying Motion for Attorney Fees which set out the deadlines for any exceptions on the AHO's ruling. On June 25, 2024, the AHO served a certified copy of the record.[3]

Larson timely submitted exceptions on July 23, 2024, arguing that the AHO erred in denying the Motion. Larson did not file a Designation of Record, and no transcript of the underlying merits hearing was ordered. Neither party has requested oral argument on Larson's exceptions to the AHO's ruling on attorney's fees.

## ISSUES ON REVIEW

Larson, through exceptions, challenges the AHO's Order Denying Fees against the Division. As framed by Larson, this matter is "back before the Deputy Secretary and final decision makers[4] requesting they find their prior decision ordering the Division to file the case, and the Division's filing, lacked substantial justification." Exceptions at 1. The Division disputes this and argues that the Deputy Secretary's denial of the

[3] The certified record is cited herein as "CF."

[4] The Exceptions filed by Larson repeatedly refers to "the Deputy Secretary and final decision makers" as though there are other "final decision makers" in addition to the Deputy Secretary. As section 1-45-111.7 of the FCPA makes clear, the Deputy Secretary ***is*** the agency's final decision maker on campaign finance matters, and no other person is responsible for this Final Agency Order.

Division's motion to dismiss the citizen complaints against Larson provides an alternative basis to deny Larson's fee request, in that the Division had no choice but to file an administrative complaint. *See* Div. Resp. at 2; *see also* § 1-45-111.7(5)(a)(IV).

Consistent with section 1-45-111.5(2) and the case law interpreting it, the Deputy Secretary reframes the issue on review as: Whether the hearing officer erred in concluding that the Division had substantial justification to litigate the action for violation of campaign finance law against Larson and in therefore denying Larson's post-FAO motion for attorney's fees and costs from the Division.[5]

## STANDARDS OF REVIEW

A denial of an attorney fee award is reviewed for abuse of discretion. *Front Range Resources, LLC v. Colo. Ground Water Comm'n*, 2018 CO 25, ¶ 15; *Fontanari v. Snowcap Coal Co.*, 2023 COA 29, ¶ 9 ("A trial court has broad discretion in determining whether to award attorney fees, and absent a showing of an abuse of that discretion, we will not disturb its decision."). A trial court—or hearing officer, in this case—"'does not

[5] The Division's response noted that Larson seemed to have abandoned any claim to recover fees and costs from the citizen complainant. Larson did not correct this characterization in his reply, leading the Deputy Secretary to share the Division's assessment. To the extent Larson did not intend to abandon the claim on exceptions, the Deputy Secretary adopts the conclusions of the AHO. *See* Order Denying Fees, ¶¶ 4-13.

Additionally, the Deputy Secretary notes that the framing offered by Larson is an indirect attempt to raise, once again, the issue previously raised during the merits proceedings before the AHO, *i.e.*, that the Deputy Secretary should not have denied the Division's initial motion to dismiss the citizen complaints during the Division's initial investigatory phase of this case. If that interlocutory issue ever was ripe – arguably it never was, *see Carothers v. Archuleta County Sheriff*, 159 P.3d 647, 650 (Colo. App. 2006) ("A trial court's order denying a motion to dismiss pursuant to C.R.C.P. 12(b)(5) is likewise not an appealable final order.") (citation omitted) – it is far too late now for Larson to attempt to raise that bygone issue through a fees motion when Larson failed to undertake any review through exceptions of the initial merits decision by the AHO or through judicial review under the APA of the Final Agency Order issued by the Deputy Secretary.

abuse its discretion unless its ruling is manifestly arbitrary, unreasonable, or unfair' or 'it bases its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence.'" *See Front Range Resources, supra*, ¶ 15 (citation omitted). *De novo* review may be appropriate for the legal analysis employed by the trial court. *Colo. Citizens for Ethics in Gov't v. Committee for the Amer. Dream*, 187 P.3d 1207, 1220 & 1222 (Colo. App. 2008).

A hearing officer's findings of evidentiary fact may not be set aside by the Deputy Secretary on review of an initial decision unless, and only if, they are contrary to the weight of the evidence. § 24-4-105(15)(b). Evidentiary facts are the detailed factual or historical findings upon which a legal determination rests. *State Bd. of Med. Exam'rs v. McCroskey*, 880 P.2d 1188, 1193 (Colo. 1994). By contrast, the Deputy Secretary may substitute his judgment for that of a hearing officer with respect to an ultimate conclusion of fact. *See* § 24-4-105(15)(b). Findings of ultimate fact involve a conclusion of law, or at least a mixed question of law and fact, and settle the rights and liabilities of the parties. *Reiff v. Colo. Dep't of Health Care Policy & Fin.*, 148 P.3d 355, 357 (Colo. App. 2006).

## ANALYSIS

### A. Only the Order Denying Fees is before the Deputy Secretary.

The posture of this matter is somewhat unusual. Unlike a typical case on exceptions, what is challenged here is the AHO's ruling on a motion filed ***after*** the Final Agency Order. As such, the Deputy Secretary's scope of review does not extend to the underlying Final Agency Order on the merits of the Division's formal complaint, which found the asserted campaign finance violations against Larson were not proven by a preponderance of the evidence. The findings of fact and conclusions of law in the AHO's Initial Decision from March 1, 2024, were not challenged and were subsequently adopted by the Deputy Secretary's Final Agency Order on May 1, 2024. To the extent any of the findings or conclusions from that Final Agency Order are relevant to this analysis, they are no longer subject to judicial review and are binding on the Deputy Secretary and on any appellate court. *See* § 24-4-105(14)(c), C.R.S.; *see, e.g.*, *Gibbs v. Colo. Mined Land Reclamation Bd.*, 883 P.2d 592, 595 (Colo. App. 1994) (failure to seek timely review of agency action deprives reviewing court of jurisdiction).

### B. The Division's administrative action did not lack "substantial justification."

Larson seeks an award of fees against the Division under § 1-45-111.5(2), which allows a hearing officer to award attorney fees and costs in an FCPA case against any party who the hearing officer finds brought or defended a campaign finance action that lacks substantial justification. A claim lacks substantial justification if it is substantially frivolous, substantially groundless or substantially vexatious. *Id*. Larson argues that the

Division's claims lacked substantial justification because they were substantially groundless.

Because the term substantially groundless is not defined in the statute, the Deputy Secretary looks for guidance from Colorado case law construing the identical language in the general attorney fee statute, section 13-17-102, C.R.S. *See Colorado Ethics Watch v. Senate Majority Fund, LLC*, 275 P.3d 674, 686 (Colo. App. 2010), *aff'd on other grounds*, 269 P.3d 1248 (Colo. 2012). A claim is considered groundless "if there is ***no*** credible evidence to support the allegations in the complaint." *Black v. Black*, 2020 COA 64M, ¶ 133 (citing *Zivian v. Brooke-Hitching*, 28 P.3d 970, 974 (Colo. App. 2001)) (emphasis added). The fact that a plaintiff was ultimately unable to prove a claim does not mean it was groundless. *Munoz v. Measner*, 247 P.3d 1031, 1035 (Colo. 2011); *Remote Switch Sys., Inc. v. Delangis*, 126 P.3d 269, 275 (Colo. App. 2005) (a determination that a party is not entitled to relief does not automatically make its claims frivolous). The question is whether the Division's trial presentation, after having made sufficient allegations to survive a motion to dismiss, was so devoid of any evidentiary support that it was unable to present ***any*** credible evidence to prevail on its allegations during the hearing. The Deputy Secretary agrees with the AHO's conclusion that the Division's claims were not substantially groundless under this standard.

In his Order denying Larson's motion, the AHO engaged in a thorough analysis of the evidence submitted by the Division in support of the Administrative Complaint. Larson takes issue with the AHO's focus in the Order Denying Fees on apparent coordination efforts of a witness and Larson's counsel during the investigatory phase of

this case and on circumstantial evidence related to motive and opportunity, arguing that the Division never produced any evidence beyond inferences. Exceptions at 1-2.

While the AHO did conclude on the merits that the evidence related to the GOTV effort for the primary election was insufficient to support even an inference of coordination, the underlying Initial Decision that was adopted by the May 1, 2024, FAO is clear that the AHO found the evidence related to the October 25, 2022, opposition mailer and the non-specific expenditures for canvassing to pose much closer questions. *See* CF 432-33 (FAO Initial Decision, ¶¶ 97-100). As the AHO found in his recitation of the facts from that merits hearing, the common consultant between Larson and the independent entities that were statutorily prohibited from coordinating with Larson – that is, Daniel Cole, who shared the same attorney as the Larson respondents – could not remember at trial whether he had worked for the independent entity (Ready Colorado) that ultimately paid for the expenditures that supported Larson's campaign. *See* Order Denying Attorney Fees, ¶ 17. In his prior merits decision adopted in the May 1, 2024, FAO, the AHO found as a matter of fact that "Daniel Cole is an articulate political consultant who is in high demand." CF at 431 (FAO Initial Decision, ¶ 93). The AHO alluded to that finding in his Order Denying Attorney Fees, when he concluded that "I found it to be odd and out of character that Mr. Cole could not remember whether he did work for Ready Colorado that benefited Colin Larson's race. This was a key fact that would bear on an essential issue in the case." Order Denying Attorney Fee, ¶ 17. As the

AHO pointed out, “Mr. Cole’s not remembering at trial whether he worked for Ready at the time put a hole in the Division’s proof.”[6] *Id.* ¶ 19.

Ultimately, the AHO concluded that the Division’s trial presentation established more than mere “plausibility,” it established “motivation,” “conduits,” “opportunity,” and “a lot of money flowing through the entities.” CF at 434 (FAO Initial Decision ¶ 103). That conclusion is final and binding in this case. *See Gibbs*, 883 P.2d at 595. Even though this final, unappealed conclusion was not sufficient to establish a preponderance of evidence in support of the Division’s claims at trial, it certainly establishes that the Division’s case was not groundless.

Larson provides no legal support for treating circumstantial evidence—whether that evidence was “post-election” or otherwise—any differently from other types of evidence. *See People v. Buckner*, 2022 COA 14, ¶ 83; *In re Estate of Ramstetter*, 2016 COA 81, ¶¶ 53-54. And he ignores the substantial evidence – much of it credited by the AHO – submitted by the Division to support its claims. *See* CF 427-33 (FAO Initial Decision, ¶¶ 82-100). That the AHO ultimately concluded the Division was not able to prove its claims by a preponderance of the evidence is immaterial. Section 1-45-111.5(2) does not create a prevailing party standard whereby the successful party automatically gets their fees. To the contrary, the statute is clear that an award of fees should only be granted when a hearing officer determines that the opposing party

[6] Larson’s exceptions attempt to throw shade on the Division for Mr. Cole’s memory lapse during the hearing, suggesting that his faulty memory should be attributed to the Division for allegedly failing “to prepare his testimony.” Exceptions, at 2. This rejoinder ignores the fact that Mr. Cole was represented by the same attorney who was also representing Larson. Mr. Cole was hardly a “friendly” witness for the Division.

proceeded to hearing without any competent evidence. The AHO is in the best position to determine the credibility of evidence presented to him, and the Deputy Secretary sees no basis to disturb his conclusion. Indeed, to the extent the AHO's evidentiary assessments were included in the Initial Decision that was adopted through the underlying FAO, those findings cannot be overturned at this date or through this mechanism.[7]

## CONCLUSION

For the reasons stated above, the Deputy Secretary enters this Final Agency Order affirming the AHO's Order Denying Fees.

{Attachment A – Order Denying Motion for Attorney Fees}

[7] Larson also criticizes the AHO for calling attention to the joint representation by the same attorney of all of the complaint respondents where she also represented Larson at the hearing, the attorney who is also now representing the exceptions petitioners in this Exceptions proceeding. *See* Exceptions at 1. However, as the AHO found in his now-final initial decision, "[t]he responses of counsel to discovery on behalf of Mr. Larson, Mr. Cole and RCLF . . . invite a conclusion of coordination and control. . . . That discovery responses are orchestrated by counsel filtered through her knowledge of the FCPA, is the very metaphor for the coordination at the center of the Division's claims." CF at 435 (FAO Initial Decision, ¶ 104). Setting aside the question of whether these various clients of Larson's counsel held inherently conflicting interests at the time she provided discovery responses for them, including a submission that Mr. Cole "said that he had never seen . . . before," *id.* (FAO Initial Decision ¶ 105), the AHO's conclusions about the joint representation of those parties by the same attorney is certainly well within the AHO's discretion to consider.

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**DONE** and **ORDERED** this 4th day of October 2024.

CHRISTOPHER P. BEALL
Deputy Secretary of State

**This decision becomes final upon electronic mailing.**

**Pursuant to section 24-4-105(14)(c), C.R.S., a party who has failed to file an exception to the AHO's initial decision is deemed to have waived their right to judicial review of the Final Agency Order except for those portions different from the content of the initial decision.**

**Any party may appeal the portions of the Final Agency Order that have modified the Initial Decision by commencing an action for judicial review before the District Court in the City & County of Denver within thirty-five (35) days after the date of service of this Order. *See* §§ 1-45-111.7(6)(b) and 24-4-106(4), C.R.S.**

**In addition, the underlying citizen complainant also is entitled to seek judicial review of the Final Agency Order by a state district court under section 24-4-106(4). *See* § 1-45-111.7(5)(b), C.R.S.**

## CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this **FINAL AGENCY ORDER ON ATTORNEY'S FEES** was served on the following parties via electronic mail on October 4, 2024:

Complainant –
Peter Baumann, Senior Assistant Attorney General
Colorado Department of Law
Peter.Baumann@coag.gov

Respondent –
Suzanne Taheri, Esq.
Counsel for Colin Larson and Colin for Colorado
st@westglp.com

Courtesy copy to Citizen Complainant –
Marcie Little
marcielittleCO@proton.me

Courtesy copy to Administrative Hearing Officer Macon Cowles –
AdministrativeHearingOfficer@ColoradoSOS.gov

Courtesy copy to Elections Division –
Colorado Secretary of State, Elections Division:
cpfcomplaints@coloradosos.gov

*/s/ Christopher P. Beall*
Deputy Secretary of State

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| STATE OF COLORADO<br>SECRETARY OF STATE<br>BEFORE THE ADMINISTRATIVE HEARING OFFICER<br>1700 Broadway #550<br>Denver, CO 80290 | |
| ELECTIONS DIVISION OF THE SECRETARY OF STATE,<br><br>Complainant,<br>vs.<br><br>COLIN LARSON; COLIN FOR COLORADO; RESTORE COLORADO LEADERSHIP FUND IEC, RESTORE COLORADO LEADERSHIP FUND 527; DANIEL COLE, COLE COMMUNICATIONS, LLC; and VICTOR'S CANVASSING, LLC,<br><br>Respondents. | ▲ COURT USE ONLY ▲<br><br>Case Number: 2023 AHO 0003 |

**ORDER DENYING MOTION FOR ATTORNEY FEES**

1. Pursuant to § 1-45-111.7(6)(a), C.R.S., this initial determination on Respondents' Motion for Attorney Fees is subject to review by the Deputy Secretary of State for issuance of a final agency decision.

2. The Administrative Hearing Officer's Initial Decision on the merits was entered March 1, 2024 and it was attached to a Procedural Order of the Deputy Secretary of State on the same day. The parties are those listed in the caption and none other. No party filed exceptions or objections to the Initial Decision. Accordingly, as noted in the Final Agency Order dated May 1, 2024, by operation of section 24-4-105(14)(b)(III), C.R.S., of the Colorado Administrative Procedures Act, the Initial Decision has "become the decision of the agency."

3. Respondents Colin Larson and Colin for Colorado filed a Motion for Attorney Fees and costs seeking $24,200 from Marcie Little, the resident who filed the initial complaint, and from

the Division. The Motion cites no caselaw that is relevant to the main contention of the Motion, mainly, that the filing of an Administrative Complaint and the evidence at trial showed that the action lacked "substantial justification," Mot. ¶¶1, 3 and 13, entitling Respondents to an award of fees and costs.

**PART I—AS TO MARCIE LITTLE**

4. Before addressing the issue of "substantial justification," I examine the contention of Respondents in the Motion that Marcie Little can be liable for fees and costs.

5. Ms. Little filed the informal complaint pursuant to §1-45-111.7(2) with the Secretary of State that began the whole process of investigation, discovery, motion practice and ultimately the filing of a hearing officer complaint pursuant to §1-45-111.7(5). The Fair Campaign Practices Act (FCPA) makes it very clear, however, that the person who files the informal complaint is NOT a party to the case.

> A complainant or any other nonrespondent is not a party to the division's initial review, cure proceedings, investigation, or any proceedings before a hearing officer as described in this section.
>
> §1-45-111.7(5)(a)(V)(b).

6. In 2018, the federal district court in *Holland v. Williams*, 457 F. Supp. 3d 979, 996 (D. Colo. 2018) declared Colo. Const. art. xxviii §9(2) to be unconstitutional. That section of Colorado's campaign finance law stated "if *any person* believes that a violation of Colorado's campaign and political finance rules . . . has occurred, that person may file a written complaint with Colorado's Secretary of State, which the Secretary of State *must* refer to an administrative law judge within three days." *Id.* at 988. [Emphasis in original.] This mandatory process gave untrained persons, often political operatives and opponents of the target of the complaint, the power to regulate core political

speech by filing a complaint and prosecuting the case in an administrative court. This forced the respondent to answer "any person's" complaint, likely incurring the considerable expense of hiring a lawyer to defend the case. *Holland*, *id.*

7. The district court, following *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2227, 192 L. Ed. 2d 236 (2015), found that Colo. Const. art. xxviii §9(2) regulated core political speech and was therefore content based, *Holland* at 989 and thus subject to strict scrutiny. *Holland* at 989, citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345-347, 115 S.Ct. 1511, 131 L. Ed. 2d 426 (1995). Content-based laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Holland* at 987-988 quoting *Reed* at 2226.

8. The enforcement mechanism required by §9(2) was not narrowly tailored. Defendant Secretary of State in *Holland* was not able to explain to Judge Moore, if campaign finance rules were a compelling interest to Colorado, why the state was not the enforcer rather than leaving enforcement in the hands of "any person." The problem that did not withstand strict scrutiny was "allowing ***any*** person to enforce the enforcement provisions" of campaign finance laws. *Holland* at 991 (emphasis supplied). The fix for "the problem" was to take the prosecution of campaign finance complaints out of the hands of untrained persons or persons who may bring FCPA complaints merely to chill political speech to settle a score or for other improper purposes.

9. As a consequence of the *Holland* case, the Secretary of State implemented emergency rules, later codified in section 111.7 of the FCPA, to ensure that no complaint filed by "any person" alleging a violation of Colorado's campaign finance laws can proceed without first undergoing the administrative review that is now specified in that section. If an administrative complaint is filed, it is

the Elections Division of the Secretary of State that makes that decision and prosecutes the case in the administrative court on behalf of the Office of the Secretary of State.

10. The effect of the FCPA post *Holland* was to remove complainants such as Marcie Little—people with no knowledge, training or experience—from the investigation and enforcement of campaign finance violations. For the conduct that is regulated almost always involve political speech and therefore implicates important First Amendment rights.

11. This case was brought in 2023 against Respondents under §1-45-111.7 of the FCPA, effective July 1, 2019. Under that section, one who believes that an FCPA violation may have occurred can file a complaint, but once filed, the complainant has no further role in the investigation, analysis or enforcement of campaign finance laws and rules.[1]

12. That is the case here. Once Marcie Little filed a complaint with the Secretary of State, the role she had as a complainant was complete. She had no control of the case. She is not a party to the case and is therefore not liable for attorney fees and costs even if the Division's case, in whole or in part, "lacked substantial justification." §1-45-111.5(2), C.R.S.

13. For the reasons set forth above, Respondent's Motion to recover fees and costs from Marcie Little is DENIED.

**PART II—AS TO THE ELECTIONS DIVISION**

14. The Initial Decision, confirmed in the Agency's Final Order, found that the Division did not prove the violations alleged in the Administrative Complaint by a preponderance of the

[1] A party filing an informal complaint has two residual rights in the matter. They "may seek permission from the hearing officer to file a brief as an amicus curiae." §1-45-111.7(5)(a)(V)(b). They "may also seek judicial review by a state district court of a final agency action under section 24-4-106." *Ibid.* But they are emphatically not a party and their limited role as complainant, per se, does not elevate their status to one who is "affected or aggrieved by the secretary's action on the complaint." *Ibid.*

evidence. This is very far from Respondent's assertion in the Motion for Attorney Fees that the Division's case lacked substantial justification.

15. The facts of the case and the applicable law are fully set forth in the Initial Decision, and I will not repeat them here. Pertinent to the Motion for Attorney Fees, however, there are two counts in the Administrative Complaint. Both counts allege improper coordination between soft side political entities, Ready Colorado and Unite IEC, and the Colin Larson campaign for House District 25. Both counts alleged that Ready and Unite spent money to support the Larson campaign, but reported them as independent expenditures which they were not allowed to do because they were coordinated through Daniel Cole. Count 1 alleged that money spent to support the Larson campaign by Ready and Unite should have been reported as contributions to the Larson campaign—and not as independent expenditures—because of the coordination through Cole. Count 2 alleged that the Larson campaign accepted contributions from Ready and Unite in excess of the $400 contribution limit. The gravamen of each count was coordination through Daniel Cole.

16. Daniel Cole is a highly compensated, articulate political consultant in great demand by a number of entities in this case, both on the soft side and the hard side of political advocacy. Init. Dec. ¶¶91-92. Mr. Cole did not give a complete client list, but at trial he was able to remember nine for whom he worked in 2022. These included Colin Larson's campaign committee as well as Restore Colorado Leadership Fund (RCLF), Ready Colorado Action Fund, and Unite IEC, that spent several hundreds of thousands of dollars on campaign related advocacy, GOTV and electioneering communications that benefitted a variety of campaigns, including Larson's.

17. I found it to be odd and out of character that Mr. Cole could not remember whether he did work for Ready Colorado that benefitted Colin Larson's race. This was a key fact that would bear on an essential issue in the case: was the payment of $8,882 to Axiom Strategies by Ready

Colorado for an opposition mailer, Ex. 11, supporting Larson's campaign coordinated by Daniel Cole?

18. In not recalling whether he worked for Ready Colorado, Mr. Cole cited the many clients that employ him during election season.

> He did work for a couple of organizations that worked to elect Colin Larson in 2022. He worked for Unite for Colorado Action and doesn't specifically recall working for Ready Colorado. The reason he doesn't recall is that during an election cycle, they are working for so many different entities—and sometimes they are not working *for* such entities, but *with* them.
>
> Init. Dec. ¶62.

19. He did not deny working for Ready, but he did not confirm it, either. Init. Dec. ¶64. Cole did work for Restore Colorado Leadership Fund (RCLF) which, beginning in August 2022, was directed by Colin Larson.[2] Since RCLF was directed by Larson, RCLF was disqualified from making an independent expenditure in support of Larson's campaign. That is why the Tracer filing that showed RCLF paying the Axiom invoice was promptly reversed and then was paid by Ready Colorado, which is not directed by Colin Larson. If paid by RCLF, it goes far in proving both counts 1 and 2 of the Administrative Complaint. If paid by Ready Colorado, there is still circumstantial evidence that could support a finding of coordination, but Mr. Cole's not remembering at trial whether he worked for Ready at that time put a hole in the Division's proof.

20. Whether or not there was unlawful coordination between one or more soft side entities and the Colin Larson campaign was an open question at trial. The appearance of coordination was greatly enhanced by the fact that Respondent's counsel coordinated discovery responses of four respondents. She did not allow her clients to answer the Division's discovery,

[2] Larson described his oversight of RCLF as "provid[ing] high level guidance about where to spend money on Colorado House races. Decisions were made in consultation with ten other consultants, including Daniel Cole. Init. Dec. ¶37.

choosing instead to answer it herself. She answered the discovery that was propounded by the Division to Colin Larson and Larson for Colorado in Ex. 2, and to Daniel Cole and his two companies in Ex. 3. The discovery answers each contain a highly unusual jurat that only undermines the assertion of the facts being "true and correct."

> "These declarations are made under penalty of perjury under the law of Colorado and are true and correct *to the best of our knowledge*." [Emphasis supplied.]

21. Looking at Ex. 3, his lawyer's discovery answers, Daniel Cole testified at trial that he had never seen them before until his attention was directed to the assertion in the first paragraph that it is a letter sent on behalf of his two companies Cole Communications and Victor's Canvassing. He then recanted and said he "probably did review this." Init. Dec. ¶53.

22. Having the lawyer answer discovery in this way—for Mr. Cole and his two companies and for Mr. Larson and his campaign committee—severely impairs the credibility of the answers. It almost cries out for a hearing so that witnesses can be placed under oath and observed while answering questions rather than standing behind the lawyer's coordinated response.

23. As stated in Init. Dec. ¶104, "The issue in the case is coordination *in making expenditures*. That discovery responses are orchestrated by counsel filtered through her knowledge of the FCPA, is the very metaphor for the coordination at the center of the Division's claims."

24. Mr. Cole worked for Colin Larson and Colin for Colorado as well as Restore Colorado IEC that was precluded by the FCPA from from making independent expenditures coordinated with the Larson campaign. In discovery, Mr. Cole's two companies were asked to "describe any barriers in place" that would prevent unlawful coordination between the soft side of his work and the hard side. Answers provided by Respondents' counsel failed to mention any barrier at all, leading the Division to the reasonable inference that there were none in Mr. Cole's two

companies during the 2022 election season. Gebhardt, Init. Dec. ¶16. Ex. 3 pp. 27-28/73.[3] Trial testimony established that a written policy was not put in place until after Marcie Little filed her complaint. *See*, Ex. 1; Init. Dec. ¶55. Trial testimony also revealed that there was an unwritten policy in the two companies to prevent unlawful coordination during the 2022 election cycle, Init. Dec. ¶¶54-56, but there was no mention of such a policy in companies' discovery responses.

25. There are other facts that, occurring during the pertinent time in the election cycle, constitute circumstantial evidence that support an inference of coordination:

a. Unite made two large payments benefitting the Colin Larson's campaign, among others: $110,476.16 to Victor's Canvassing (a Cole company) in July 2022, Ex. 13, and $200,000 paid to Victor's Canvassing in October 2022, Ex. 14. Daniel Cole was a consultant to Unite in 2022.

b. Daniel Cole was paid $229,276.20 for his consulting services for only two of the entities above, Restore 527 and Restore IEC—the "arms" of House Republican leadership. Ex. 7, p. 47/73.

c. Colin Larson took "oversight" of Restore in August 2022, providing "high level guidance about where to spend money on Colorado House races." Init. Dec. ¶37. He spoke "to Daniel Cole about every two weeks, about how much money was available and where it should be spent." Init. Dec. ¶47. "Decisions were made in [consultation] with about ten consultants, including Daniel Cole." *Id.* ¶37.

[3] 17 exhibits were in a single .pdf file of 73 pages. This citation refers to the part of Ex. 3 that is found on pp. 27-28 of the 73 page .pdf.

26. Mr. Cole's multiple involvements with RCLF IEC (directed for three months by candidate Larson), Ready Colorado Action Fund, and Unite IEC, and his frequent work with Colin Larson as well as ten other consultants in RCLF is all circumstantial evidence supporting the allegation of coordination in both counts of the complaint.

27. As stated in the Initial Decision, there is more than plausibility from the set of facts presented in this case. There is motivation: the desire to win, to regain control or to hold a party majority that can control the General Assembly. There are conduits: sophisticated, experienced, knowledgeable "common consultants" moving between entities whose boundaries and management are porous.[4] There is opportunity: meetings, fundraisers, discussions of polling, media buzz and issues, cooperative management, friendships. And there is a lot of money flowing through the entities and being placed in support of campaign committees to accomplish shared goals.

28. There was much circumstantial evidence of coordination, even though, weighing all the evidence and testimony, I concluded that the Division had not met its burden of proof. Init. Dec. ¶114. I find, however, that the Administrative Complaint did not lack substantial justification, nor was it commenced for delay or harassment nor was the case unnecessarily expanded by improper conduct.

29. There is no evidence of bad faith on the part of the Division. On the contrary, the Division appeared to act in good faith, with no hint of animus, forthrightly acknowledging in opening and closing statements that the Division's case rested primarily on circumstantial evidence.

[4] Not only was Cole a consultant to RCLF. But so too was Tyler Sandberg—the man who, seeing the $8,882 payment to Axiom by RCLF, reacted as though he had touched a hot stove. He ordered a reversal of the entry and in a few keystrokes assigned the payment to Ready instead. "That's an issue because Rep. Larson oversees RCLF and thus the IE cannot be spending on his race," he wrote in an email to a colleague. Init. Dec. ¶39; Ex. 4, p. 32/73.

30. Just because a claim may ultimately lack merit or fail does not necessarily mean it lacks substantial justification. *Munoz v. Measner*, 247 P.3d 1031, 1035-36 (Colo. 2011). Respondent's Motion for Attorney Fees is DENIED.

**SO ORDERED** this 24th day of June, 2024.

Macon Cowles, Hearing Officer