

<p>COLORADO SECRETARY OF STATE 1700 BROADWAY, SUITE 200 DENVER, CO 80290</p> <hr/> <p>BEFORE THE SECRETARY OF STATE, COLORADO DEPARTMENT OF STATE, <i>in re</i> ED 2021-27:</p> <p>ELECTIONS DIVISION OF THE SECRETARY OF STATE,</p> <p>Complainant,</p> <p>vs.</p> <p>UNITE FOR COLORADO,</p> <p>Respondent.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>PHILIP J. WEISER, Attorney General MICHAEL KOTLARCZYK, No. 43250 Senior Assistant Attorney General* JASON P. MARQUEZ, No. 56361 Assistant Attorney General* 1300 Broadway, 6<sup>th</sup> Floor Denver, CO 80203 Telephone: (720) 508-6763 Email: mike.kotlarczyk@coag.gov jason.marquez@coag.gov *Counsel of Record <i>Attorneys for Elections Division of the Secretary of State</i></p>	
<p><b>ELECTIONS DIVISION’S MOTION TO STAY</b></p>	

The Elections Division hereby moves to stay the proceedings in this matter until a final judgment has been entered in the related case of *Colorado Department of State v. Unite for Colorado*, 23CA989, now pending in the Colorado Court of Appeals.

**CONFERRAL**

The Division conferred by email with Unite for Colorado’s counsel regarding the relief requested in this motion on June 16, 2023. Unite for Colorado opposes the requested relief.

## **BACKGROUND**

The procedural history relevant to this motion is largely summarized in the Deputy Secretary’s Order Setting Aside Initial Decision, Remanding Complaint for Further Consideration, and Directing Reassignment to New Hearing Officer (“Order”). It involves two separate campaign finance matters between the parties, which present nearly identical legal questions, and rely on similar facts.

### **Unite I**

The first matter (referred to as “Unite I”) arose from an August 2020 campaign finance complaint against Unite for Colorado (“Unite”), which the Election Division (“Division”) later filed with the Office of Administrative Courts (“OAC”). The complaint alleged that Unite failed to register as an “issue committee” based on its activities in 2020 supporting three statewide ballot measures on the November 2020 ballot. Following a bench trial on August 12, 2021 and an initial decision on August 17, 2021, the Deputy Secretary issued a Final Agency Order on December 8, 2021, holding that Unite for Colorado’s support of the three ballot measures evinced “a major purpose” of issue advocacy, and that Unite for Colorado was an issue committee. (*see* Final Agency Order, ED Case No. 2020-57, pp. 3-4, 15).

### **Unite II**

Prior to the Deputy Secretary’s Final Agency Order in Unite I, the Division received a second campaign finance complaint, this time regarding Unite for Colorado’s issue advocacy in 2021 in support of two different statewide

ballot measures on the November 2021 ballot (referred to as “Unite II”). The Division referred the complaint in Unite II to OAC on October 21, 2021, and moved to stay the proceedings until an FAO had been issued in Unite I, consistent with 8 CCR 1505-6, Rule 23.1.3.

ALJ Norwood held a bench trial and issued an initial decision in Unite II on November 17, 2022. *Initial Decision* (styled as “Decision”). The Deputy Secretary’s Order vacated this initial decision in its entirety, as well as overturning a September 19, 2022 “Order Regarding Discovery” and remanded the matter to OAC for new proceedings (including the right of both parties to engage in discovery) with a different hearing officer. *Order* pp. 13-14, 20-21.<sup>1</sup>

Relevant here, the Deputy Secretary explicitly ordered that on remand, the hearing officer consider “whether the interests of justice and the preservation of the parties’ and the hearing officer’s resources warrant a stay until a *fully appealed, final judgment* is entered in the judicial review proceedings involving Unite I.” *Order* at p. 21, emphasis added.

### **Events Following the Deputy Secretary’s Order**

On April 13, 2023, the Deputy Secretary reassigned the remand of Unite II for new proceedings (including discovery) to an Administrative Hearing Officer following termination of the agreement between the Department of State and OAC. *Id* at p. 2.

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<sup>1</sup> A full procedural history of the Unite II proceedings from the May 11 Notice of Hearing through the Deputy Secretary’s remand may be found on pages 10-12 of the Order.

On April 21, 2023, the District Court issued its order in Unite I, which overturned the Final Agency Order in that matter. The Department of State has appealed. (Exhibit 1, Notice of Appeal.)

## **ARGUMENT**

Unite I and Unite II rely on similar fact patterns and pose nearly identical questions of law. As a result, it is highly likely that Unite I will be dispositive of Unite II.

The Secretary of State’s rules provide for a stay until all “appeals are resolved” when complaints “stem from a common set of operative facts as a pending complaint” and “the initial case will be determinative of the later case.” 8 CCR 1505-6, Rule 23.1.3. Section 1-45-111.7(6)(a) of the Colorado Revised Statutes also permits the hearing officer to continue a hearing “for good cause.” Similarly, the Deputy Secretary in this case directed the hearing officer to consider “whether the interests of justice and the preservation of the parties’ and the hearing officer’s resources warrant a stay until a fully appealed, final judgment is entered in the judicial review proceedings involving Unite I.” *Order* at p. 21.

A stay is appropriate here. The legal issues that will be resolved in Unite I will likely be dispositive of Unite II. The claims in the two cases are the same—failure of Unite to register as an issue committee and reports its contributions and expenditures. The only difference is the year in which Unite was alleged to be an issue committee: 2020 for Unite I, 2021 for Unite II. Though the facts differ slightly based on its activity in 2020 and its activity in

2021, Unite’s legal defenses are the same in both cases. (*see* Unite for Colorado Response pp. 10-11; Complaint 2022CV30101, ¶¶ 86-152 ). Accordingly, because the manner in which Unite I is resolved will largely, if not fully, resolve the issues in this case, the parties and the hearing officer will benefit from a stay until Unite I is finally and fully resolved. *See generally Nationwide Mut. Ins. Co. v. Mayer*, 833 P.3d 60, 62 (Colo. App. 1992) (discussing considerations for stay of matter pending resolution of previously filed action); *see also In re Telluride Global Develop., LLC*, 380 B.R. 585, 592–93 (Br. 10th Cir. 2007) (discussing “the prior pending action doctrine,” where when two pending federal actions “involve the same or similar claims and parties,” the second action may be stayed).

### CONCLUSION

Because good cause exists for a stay, the Division respectfully respects the Hearing Officer stay proceedings on Unite II until all appeals for Unite I have concluded.

Respectfully submitted this 27<sup>th</sup> day of June, 2023.

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Attorney General

*/s/ Jason P. Marquez*

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CERTIFICATES OF SERVICE

This is to certify that I will cause the within filing to be served this  
27th day of June, 2023, by email, addressed as follows:

Suzanne Taheri  
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*Counsel for Respondent Unite for Colorado*

*/s/ Jason P. Marquez*