

<p>STATE OF COLORADO  SECRETARY OF STATE  ADMINISTRATIVE HEARING OFFICER  1700 Broadway #550  Denver, CO 80290</p> <hr/> <p>BEFORE THE SECRETARY OF STATE,  COLORADO DEPARTMENT OF STATE, <i>in re</i>  ED 2023-56</p> <p>ELECTIONS DIVISION OF THE SECRETARY  OF STATE,</p> <p>Complainant,</p> <p>vs.</p> <p>UNITE FOR COLORADO, d.b.a., ADVANCE  COLORADO ACTION,</p> <p>Respondent.</p>	<p>▲ COURT USE ONLY ▲</p>
<p>PHILIP J. WEISER, Attorney General  KYLE M. HOLTER, No. 52196  Assistant Attorney General*  1300 Broadway, 6<sup>th</sup> Floor  Denver, CO 80203  Telephone: (720) 508-6150  Email: kyle.holter@coag.gov  *Counsel of Record  <i>Attorneys for Elections Division  of the Secretary of State</i></p>	<p>2024 AHO 0024</p>
<p><b>ELECTIONS DIVISION'S UNOPPOSED MOTION TO STAY</b></p>	

The Elections Division hereby moves to stay the proceedings in this matter until a final judgment has issued in the related case of *Colorado Department of State v. Unite for Colorado*, currently pending a decision on Unite for Colorado's Petition for Certiorari to the Colorado Supreme Court (Case No. 2024SC281).

## **CONFERRAL**

The Division conferred by email with Unite for Colorado's counsel regarding the relief requested in this motion on July 19, 2024, and on July 22, 2024. Counsel for Unite does not oppose the relief requested herein.

## **BACKGROUND**

The complaint in this matter is the third in a series of related campaign finance matters between the parties, which present similar legal questions and rely on similar facts.

### ***Unite I***

The first matter ("*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 supporting three ballot measures in 2020. 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'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 ("*Unite II*"). The Division referred

the *Unite II* complaint 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 23.1.4.

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 later vacated this initial decision in its entirety and remanded the matter to OAC for new proceedings with a different hearing officer. *See Order Setting Aside Initial Decision*, ED Case No. 2021-27, pp. 13-14, 20-21 (Dec. 30, 2022). Relevant here, the Deputy Secretary 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*.” *Id.* at 21.

### **Appeal of *Unite I* and Stay of *Unite II***

On April 21, 2023, the District Court overturned the Final Agency Order in *Unite I*. *See Order*, Case No. 2022CV30098 (Denver. Dist. Ct. Apr. 21, 2023). The Department of State appealed. *See Notice of Appeal, Colo. Dep’t of State v. Unite for Colorado*, Case No. 2023CA989 (Colo. App. June 9, 2023).

The Court of Appeals held that “the Department’s final decision that *Unite* had a major purpose of ballot initiative advocacy in 2020 complied with the operative legal framework.” *Colorado Dep’t of State v. Unite for Colorado*, 2024 COA 31, ¶ 1. The court also rejected *Unite*’s arguments that registration and disclosure requirements “compel speech and burden anonymous speech and

association” in violation of the First Amendment or are unconstitutionally vague in violation of the due process clause of the Fourteenth Amendment. *See id.* ¶¶ 59, 76; *see also id.* ¶ 70 (“[W]e conclude that the challenged statutory scheme is narrowly tailored to the state’s informational interest in knowing who supports or opposes Colorado’s ballot initiatives, and in what amount.”).

Unite filed a Petition for Writ of Certiorari on May 30, 2024, arguing that the Court of Appeals “erred in interpreting the Colorado Constitution’s ‘major purpose’ standard” and that “the disclosures compelled by Colorado’s issue-committee regime fails exacting scrutiny and violates the First Amendment.” Pet. for Writ of Certiorari, Case No. 2024SC281 (Colo. May 30, 2024) (attached hereto as Exhibit 1). Pursuant to Colo. R. App. P. 41(c)(2), issuance of the Court of Appeals’ mandate has been stayed pending disposition of Unite’s petition for certiorari.

In the interim, on October 2, 2024, the Hearing Officer granted the Division’s Motion to Stay *Unite II* “until a final judgment is entered in the related case of *Colorado Department of State v. Unite for Colorado*, 23CA989.” Order Granting Motion to Stay, 2023 AHO 0001 (Oct. 2, 2023). That matter remains stayed pending issuance of a mandate in 23CA989 or further action on Unite’s petition for certiorari. *See id.*

### ***Unite III***

The Division filed the Complaint in this matter (*Unite III*) on June 24, 2024. As in *Unite I* and *Unite II*, the Division’s complaint in this matter brings two claims against Unite: (1) Failure to Register as an Issue Committee, § 1-45-

108(3.3), C.R.S., and (2) Failure to Report Contributions and Expenditures, § 1-45-108(1), C.R.S. *Compare Unite I* Complaint, ED Case No. 2020-57, pp. 6–7 *with Unite II* Complaint, ED Case No. 2021-27, p. 6 *with Unite III* Complaint, ED Case No. 2023-56, pp. 8–9. *Unite III* concerns Unite’s status as an issue committee in 2023, *Unite I* did in 2020 and *Unite II* in 2021.

In its Answer, Unite contends, among other things, that 8 CCR 1505-6, Rule 1.36 “exceeds the Department’s rule making authority” and “is unconstitutional on its face and as applied to Unite.” Answer, pp. 9–10. Unite has also asserted in response to the Division’s requests for information that 8 CCR 1505-6, Rule 4.3.3 “exceeds the Department’s rulemaking authority and is an unconstitutional abridgment of our First Amendment right to freedom of speech and association and Fourteenth Amendment right to due process.” Answer, ¶ 21.

## ARGUMENT

*Unite I*, *Unite II*, and *Unite III* rely on similar fact patterns and pose similar questions of law. As a result, it is likely that final judgment in *Unite I* will be determinative of—or provide significant guidance concerning the resolution of—the same disputed legal issues in *Unite III*. Like *Unite II*, therefore, *Unite III* should be stayed pending a final judgment in *Unite I*.

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 23.1.4. A hearing may also be continued upon a showing of

good cause. See § 1-45-111.7(6)(a), C.R.S. These principles are consistent with the Deputy Secretary’s direction in *Unite II*, that the hearing officer should 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 Setting Aside Initial Decision*, ED Case No. 2021-27, p. 21.

A stay is appropriate here for the same reasons it was appropriate in *Unite II*. The legal issues addressed in *Unite I* (and again in *Unite II*) will either be dispositive of—or will provide significant guidance concerning—the same issues presented in *Unite III*. The claims raised in the three cases are the same: failure to register as an issue committee and report contributions and expenditures. The primary difference is the year in which Unite was alleged to be an issue committee: 2020 for *Unite I*, 2021 for *Unite II*, and 2023 for *Unite III*. Unite’s legal defenses are the same or similar in all three cases.<sup>1</sup> See *Unite I* Dist. Ct. Compl., Case No. 2022CV30101, ¶¶ 86-135 (Unite raising no major purpose, First Amendment challenges, and due process challenge); *Unite II* Answer, Case No. ED 2021-27, pp. 10–11 (same); *Unite III* Answer, ¶ 21, pp. 9–10 (same). The grant or denial of Unite’s petition for certiorari—resulting in a

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<sup>1</sup> The opinion in *Colorado Dep’t of State v. Unite for Colorado*, 2024 COA 31, states that the “General Assembly amended the definition of a ‘major purpose’” in 2022. See *id.* ¶ 32. Unite’s Petition for Certiorari asserts, however, that the legal issues in *Unite I* are not limited to the pre-2022 statute but include the “Colorado Constitution’s ‘major purpose’ standard” as well as the application of the First Amendment to “Colorado’s issue-committee regime.” See Ex. 1, Issues Presented for Review, p. 1. Guidance on these constitutional questions from Colorado’s appellate courts could therefore impact the parties’ briefing in *Unite III* regardless of the statutory amendments in 2022.

written decision from the Colorado Supreme Court or issuance of the mandate from the Court of Appeals—will provide significant legal guidance to the parties concerning Unite’s constitutional challenges to Colorado’s campaign finance laws.

Neither the parties nor the hearing officer’s resources would be conserved by beginning to address those same or similar legal issues while awaiting that guidance. The hearing officer observed in his July 18, 2024, Order that Unite’s “affirmative defenses are potentially outcome determinative and present legal questions” and “the legal issues . . . *do* require briefing that must be submitted prior to the hearing . . . so that the parties can present their views of the relevant law for consideration by the hearing officer.” *Id.* ¶ 6. Granting a stay and allowing the parties to submit that briefing and litigate this matter after a final judgment (and with the benefit of any subsequent appellate opinions) in *Unite I* will streamline the presentation of those legal issues and will curtail the necessity of re-briefing in *Unite I*’s wake.

Accordingly, because the manner in which *Unite I* is resolved may significantly, if not fully, resolve potentially dispositive legal issues in this case, good cause exists for a stay until *Unite I* is finally and fully resolved. *See generally* *Nationwide Mut. Ins. Co. v. Mayer*, 833 P.2d 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 (Bankr. 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 in *Unite III* until all appeals for *Unite I* have concluded.

Respectfully submitted this 22nd day of July 2024.

PHILIP J. WEISER  
Attorney General

*/s/ Kyle M. Holter*

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## CERTIFICATE OF SERVICE

This is to certify that I will cause the within filing to be served this 22nd day of July, 2024, by email, addressed as follows:

Suzanne Taheri  
[st@westglp.com](mailto:st@westglp.com)

*Counsel for Respondent Unite for Colorado*

*/s/ Kyle M. Holter*