Case No. 22-2101

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

VOTER REFERENCE FOUNDATION, LLC, Plaintiff-Appellee,

v.

RAÚL TORREZ, in his official capacity as New Mexico Attorney General;[1] and MAGGIE TOULOUSE OLIVER, in her official capacity as New Mexico Secretary of State, Defendants-Appellants.

DEFENDANTS-APPELLANTS' REPLY BRIEF

On Appeal from the U.S. District Court for the District of New Mexico

The Honorable James O. Browning
Case No. 1:22-cv-222

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[1] Raúl Torrez is automatically substituted for Hector Balderas pursuant to Federal Rule of Appellate Procedure 43(c)(2).

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I. Introduction.

Voter Reference Foundation (VRF) portrays this appeal as a challenge to the district court's factual assessments in issuing a preliminary injunction that should not be disturbed by this Court. The preliminary injunction ("PI"), however, is predicated on mistaken legal rulings that warrant reversal. In particular, the district court's conclusion that the Secretary of State's (SOS) investigative referral of VRF to the Attorney General (AG) infringes VRF's First Amendment rights expands the scope of a prior restraint beyond precedent. Because this mistaken ruling, along with others, undergirds the preliminary injunction, the SOS and AG respectfully request that the injunction be vacated.

VRF does not meaningfully defend that the SOS's investigative referral, coupled with the AG's lack of a guarantee that he will not prosecute VRF, constitutes a prior restraint. Instead, VRF argues that the AG has taken additional actions to restrain its speech, such as the AG's legal representation of the SOS and communications with other government officials. These actions do not constitute prior restraints. Nor were such actions a basis of the district court's finding that the AG has imposed a prior restraint.

Perhaps it is unsurprising that the district court did not base its prior restraint ruling on these additional allegations, as the claim that the SOS's referral constituted a prior restraint was not litigated below. VRF points out that the referral was mentioned a number of times in the complaint and PI hearing. In none of these instances, however, did VRF argue that the referral was a prior restraint. Rather, VRF's prior restraint claim was a challenge to the SOS's voter data request process for applying what VRF terms the "Use Restrictions," or the permissible uses of voter data in N.M. Stat. Ann. § 1-4-5.5. VRF alternatively argues that the SOS and AG's inability to litigate this prior restraint claim is of no moment because the State lacks Fifth Amendment due process rights and Appellants were able to contest the preliminary injunction in a motion to stay. Yet before state officers' sovereign authority is enjoined, they should be afforded the opportunity to present evidence on and contest the legal basis for an injunction. That did not happen below.

VRF offers the district court's finding of likely viewpoint discrimination in the SOS's referral as an alternative basis for the preliminary injunction. First, any such discrimination cannot support an injunction of the AG, who was not found to have engaged in any viewpoint discrimination with respect to the referral. Moreover, the referral did not constitute viewpoint

discrimination. VRF does not contest that no other entity has made voter data available to the general public. Instead, it argues that viewpoint discrimination need not entail any comparison to other entities, but this misconstrues the inherently comparative nature of discrimination. Because no other entity placed voter data online, endangering public safety and violating privacy, the SOS did not discriminate against VRF's viewpoint when it suggested to the AG that VRF's actions might violate the Election Code.

The district court also erred by overlooking these harms to public safety and privacy. VRF endorses the district court's mistaken premise that evidence of harm from VRF's posting of voter data is only relevant if it is directly tied to VRF's specific posting. To the contrary, evidence of harm from others' dissemination of voters' personal information—in addition to the Court's recognition of a public interest in the privacy of home addresses—supports the State and public's interest in not enjoining the AG's prosecutorial power to enforce the Election Code.

As a final note, VRF suggests that the issues raised in this appeal are of little significance given the amendment of VRF's complaint and impending trial. (Pl.-Aplee's Ans. Br.-in-Chief ("Answer Br.") at 16, 21). The district court issued a preliminary injunction enjoining the sovereign authority of New

Mexico's Attorney General and Secretary of State. This injunction would be in place absent this Court's stay. The parties dispute how quickly the district court proceedings will be resolved—and VRF opposed a motion to extend deadlines to accommodate this Court's issuance of a ruling—but it is unlikely that all matters will be concluded before the appeal. Thus, this Court's ruling on preliminary injunction will determine whether the SOS and AG can properly be enjoined, as well as provide guidance and narrow the issues for the district court.

II. Statement of the Case and Facts.

The AG and SOS note several corrections and clarifications to VRF's Statement of the Case. First, VRF suggests that the National Voter Registration Act (NVRA) provides a right to inspect voter rolls. (Answer Br. at 4; *see also id.* at 2, 16). Appellants dispute that the NVRA provides a right to access voter data itself, as opposed to information about the programs and activities by which state voter rolls are maintained. *See* 52 U.S.C. § 20507(i)(1) (2002). Regardless, the scope of any rights under the NVRA was only raised in VRF's amended complaint filed after the preliminary injunction and is not at issue on appeal. (App. Vol. VI at 1136–37, 1158–64).

Second, Appellants dispute that they have shifted their interpretations of the Election Code. (Answer Br. at 9). The SOS consistently has taken the position, including on its voter data request forms, that Section 1-4-5.6 prohibits disseminating voter data. (Defs.-Aplts.' Corrected Br.-in-Chief ("Opening Br.") at 14; App. Vol. IV at 810, Fact Nos. 46–49 (collecting other record cites)). This prohibition would be made even more explicit by a bill that has passed both houses of New Mexico's Legislature and is awaiting signature by the Governor. N.M. House Bill 4 (2023), § 3 (defining unlawful use of voter data to include making such data publicly available on the internet).[2]

Third, and as more fully discussed herein, the preliminary injunction was not based on any alleged actions of the AG other than his unwillingness to guarantee VRF that it will not be prosecuted. *See* infra pp. 7–8, 10, 15–19. The various actions by the AG that VRF recounts (Answer Br. at 10–11) do not form the basis of any alleged violation of VRF's rights that supported the Court's issuance of a PI. (*See* Mem. Op. & Order (Opening Br., Attachment 1)

[2] https://www.nmlegis.gov/Legislation/Legislation?Chamber=H&LegType=B&LegNo=4&year=23. VRF's footnote about this bill (Answer Br. at 8, n.4) quotes a different section of a prior version of the bill that also would have amended Section 1-4-5.5.

("Mem. Op.") at 205 (only prior restraint claim involved a First Amendment injury); *id.* at 207 (combination of SOS's referral and "lack of any indication that the [AG] will not prosecute" constitute prior restraint and viewpoint discrimination)). AG employees' communication with other governmental entities or provision of legal representation to the SOS were not a basis for the preliminary injunction. (*See* Answer Br. at 1, 17, 18–19, 28–29 (making such allegations)). Likewise, VRF's allegation that the "Attorney General … has actively pursued investigation and colluded with the Secretary to deprive VRF of its right based on VRF's viewpoint" (Answer Br. at 11), was not part of the district court's findings. In fact, as Appellants' counsel recently learned and informed VRF, the AG's criminal investigation of VRF has been inactive since April 12, 2022.

III. The District Court's Theory of a Referral as Prior Restraint Cannot Support the Preliminary Injunction.

VRF defends the district court's injunction by arguing that the court did not abuse its discretion in finding that the AG and SOS were engaged in an ongoing violation of VRF's rights. (Answer Br. at 24–25). Whether the district court's holding that the SOS's investigative referral to the AG can constitute a prior restraint, however, presents a question of law. Because the referral is not

a prior restraint—and in particular, is not any violation of VRF's rights by the AG—it cannot support the preliminary injunction as a matter of law.

VRF does not contest Appellants' observation that there is no authority holding that a referral coupled with the lack of a promise not to prosecute can constitute a prior restraint. (Opening Br. at 32–33). Nor does VRF contest that the AG has the independent authority to decide whether to investigate and prosecute VRF, and on what grounds. (Opening Br. at 34). Instead, VRF alleges that the AG was properly enjoined because he "ran with [the SOS's] complaint knowing of her animus, and then devised a 'dubious' theory of prosecution to justify his investigation and cover both officials' tracks." (Answer Br. at 24; *see also id.* at 25 (stating, without citation, that the district court found "that the [AG] is investigating and taking significant steps toward prosecuting VRF")). None of these allegations underlie the injunction the court issued, which was based on a prior restraint consisting of the SOS's referral of VRF to the AG combined with the absence of an indication that the AG will not prosecute. (Mem. Op. at 205, 207). Nowhere in the court's analysis of the prior restraint claim does it point to other actions by the AG, including providing legal advice to the SOS or developing litigation positions. (Mem. Op. at 185–89 (describing

SOS's referral of VRF to the AG and the SOS's public statements about the referral as the prior restraint upon which VRF is likely to succeed)).

Ex Parte Young does not provide VRF with authority to enjoin the AG. (*See* Opening Br. at 34–35). VRF points to general authority that under *Ex Parte Young* a state official may be enjoined to prevent the unconstitutional enforcement of a law. (Answer Br. at 25–28). VRF seems to acknowledge that this authority cannot be invoked on the grounds that the AG could enforce an unconstitutional law; the district court did not hold that VRF was likely to prevail on any of its constitutional challenges to the Election Code. (*See* Mem. Op. at 172–178, 194–204; Answer Br. at 30–31 (arguing that *Ex Parte Young* applies regardless of whether the state statute under which the official purported to act was constitutional or unconstitutional")). VRF argues, however, that the AG is properly enjoined because he is engaged in the unconstitutional *enforcement* of a law, constitutional or not. (*See* Answer Br. at 31 (contending that the "State's interpretation and application of the Election Code is unconstitutional")).[3]

[3] VRF's statement that the district court "did conclude the State's interpretation and application of the Election Code is unconstitutional" inaccurately portrays the court's opinion. The cited page for this statement is discussing whether VRF's "grievance falls within the zone of interests that the

Appellants agree with the general principle that *Ex Parte Young* can be used to enjoin the unconstitutional enforcement of laws, not only the enforcement of unconstitutional laws. *See Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (*Ex Parte Young* applies where ongoing violation of federal law and prospective relief sought). Still, under *Ex Parte Young*, the preliminary injunction must be based on an ongoing violation of federal law. And where a party is not engaged in any violation of law depriving the plaintiff of its rights, the party cannot be enjoined. (Opening Br. at 31–32 (collecting authorities)). *Greene v. Louisville & Interurban Railroad Co.*, 244 U.S. 499 (1917), discussed by VRF (Answer Br. at 30), is not to the contrary. It held simply that a "valid law … wrongfully administered by officers of the state" (in *Greene*, taxes already assessed and threatened to be enforced) may be enjoined. *Id.* at 507. By contrast, the AG has not sought to enforce the Election Code against VRF.

First Amendment protects" as part of a prudential standing analysis. The court then found this standard met because VRF "argues that the Secretary of State's unconstitutional interpretations of the Election Code chills its speech." (Mem. Op. at 164). This analysis is not discussing the AG's actions, does not make a finding that the SOS's interpretations of the Election Code actually are unconstitutional (only that VRF alleges as much), and does not find that the AG is unconstitutionally applying or enforcing the Election Code against VRF.

Perhaps recognizing that it must show unconstitutional enforcement actions by the AG to support an injunction, VRF argues that the AG took actions in addition to the receipt of the SOS's investigative referral. (Answer Br. at 28–29). These alleged actions were not part of the district court's findings supporting a preliminary injunction, including the basis for concluding that VRF was likely to prevail on a prior restraint claim. *See supra* pp. 7–8. Illustrating this, VRF's allegations that the AG "unquestionably knew the complaint was expressly motivated by the Secretary's view that VRF's speech was 'misinformation'" and "colluded with the secretary" to devise "a facially neutral theory of prosecution" (Answer Br. at 28, 29) are not supported by findings in the court's opinion, let alone findings supporting the prior restraint claim. Nor does VRF's claim that the SOS was motivated by viewpoint discrimination in referring VRF to the AG[4] establish a violation of rights by the AG, who has independent authority to decide whether VRF should be investigated or prosecuted. (*See* Opening Br. at 34); *infra* pp. 15–19

[4] VRF's citation, App. Vol. I at 51, does not support its allegation that the SOS stated "VRF should be prosecuted because spreading misinformation about voter data online was not a permissible use of that data." (Answer Br. at 28). The cited article states that the SOS "believes posting data about individual voters online is not a permissible use under state law…."

(detailing that viewpoint-discrimination claim is based solely on allegations against the SOS in its referral to the AG).

VRF's argument that an injunction of the AG is needed to afford complete relief is a recapitulation of the position that the AG is a proper defendant under *Ex Parte Young* because it "is the Attorney General who is capable of prosecution." (Answer Br. at 31). Yet there is no finding that the Election Code the AG could enforce is unconstitutional. (Opening Br. at 35). And even if the SOS's referral of VRF to the AG was improperly motivated, the AG's independent decisions of whether and on what basis to investigate and prosecute VRF does not constitute the violation of federal law needed to support a preliminary injunction. In short, the SOS's referral leaving the AG to decide if VRF should be investigated or prosecuted is not a prior restraint that can support the PI.

Lastly, VRF does not significantly contest that the preliminary injunction is improper as to the SOS because she lacks prosecutorial powers to be enjoined. (Opening Br. at 36). Although VRF contends the SOS's referral and AG's possible prosecution operate in tandem to form a prior restraint (Answer Br. at 31–32), the SOS's referral already has happened and cannot be enjoined as a component of prospective injunctive relief. (Opening Br. at 36).

IV. The SOS's Investigative Referral Was Not the Basis of VRF's Prior Restraint Claim Below.

VRF attempts to defend the district court's issuance of a preliminary injunction on the basis of a referral-as-prior-restraint claim by pointing out that the SOS's referral had been a subject of litigation. (Answer Br. at 32–35). While true, this observation elides the crucial fact that the referral was never a basis for VRF's prior restraint claim until the district court issued its PI opinion. As a result, Appellants were not afforded the opportunity to present evidence and argument contesting this claim before being enjoined.

VRF does not refute that the prior restraint claim contained in its original complaint challenged the voter data request process's application of the "Use Restrictions" contained in Section 1-4-5.5 as a de facto licensing scheme. (Opening Br. at 38–39; *see also* App. Vol. I at 35–39 (no mention of referral in complaint's prior restraint claim)). In fact, the district court assessed this other prior restraint claim separately, and concluded that VRF was not likely to prevail on the claim. (Mem. Op. at 194–98; *see also* App. Vol. VI at 1167-68 ¶ 167 (articulating separate prior restraint theories in amended complaint)).

VRF includes a number of quotations from its complaint mentioning the SOS's referral (Answer Br. at 32–33), but these are not part of VRF's prior

restraint claim. For example, paragraph 111 of the complaint (quoted in Answer Br. at 33) is part of VRF's vagueness challenge to Section 1-4-5.5 of the Election Code, contending that the statute's vague terms chill speech. (App. Vol. I at 41 ¶ 111). Similarly, VRF's quotations of the PI hearing contain references to the SOS referral in other contexts, not its prior restraint claim. (Answer Br. at 34–35). Even the court's suggestion to VRF that its "argument has to be … selective prosecution or attempted prosecution or referral" is discussing VRF's viewpoint discrimination claim, not a prior restraint claim. (App. Vol. II at 226–227, 6:16–7:8; *see also id.* at 251, 31:7–19 (VRF's counsel describing referral as "another way to get the content or viewpoint-based discrimination") (quoted in Answer Br. at 34)). In fact, the PI hearing contained almost no mentions of a prior restraint claim across two days. (Opening Br. at 38–39).

VRF argues in the alternative that even if it did not assert a claim that the SOS's referral constituted a prior restraint before the preliminary injunction, the AG and SOS are not entitled to due process or such due process was already provided via a motion to stay the PI. (Answer Br. at 35–36). It is true that a State is not considered a person under the Fifth Amendment. *But see* Tracy O. Appleton, *The Line Between Liberty & Union: Exercising Personal Jurisdiction Over Officials From Other States*, 107 Colum. L. Rev. 1944, 1967–68

(2007) (observing that given seeming unfairness to allow state officials to be sued under *Ex Parte Young* but not afforded due process, "a number of courts" have "recognize[d] due process restrictions on exercising jurisdiction over foreign state officials"). Nonetheless, the AG and SOS request that the Court exercise its supervisory authority over the district court to ensure that New Mexico's state officers have an opportunity to litigate a prior restraint claim before the State's sovereign prosecutorial authority is enjoined on this basis. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 879 n.2 (1982) ("This Court has not hesitated to use its supervisory power over federal courts to set standards to ensure the fair administration of justice."); *United States v. Tsarnaev*, 142 S. Ct. 1024, 1035 (2022) (recognizing precedent that at least limited supervisory authority inheres in Courts of Appeals over District Courts).

Nor were the AG and SOS afforded a fair opportunity to litigate the prior restraint claim through their motion to stay the PI. (Answer Br. at 36). The motion to stay did not entail full briefing or an evidentiary presentation on the prior restraint claim. It also presented a different procedural posture than the PI litigation: explaining why the court's ruling should be stayed pending appeal rather than defending against the merits of VRF's claims. Moreover,

the district court has not even issued a full ruling on the motion to stay, but only a short order with a longer opinion to come. (App. Vol. VI at 1126–27 & n.1). "Remand is appropriate where, as here, the record before us is incomplete and the question … was not litigated before the district court." *Evans v. Ocwen Loan Servicing, LLC*, No. 21-14045, 2022 WL 17259718, at *1 (11th Cir. Nov. 29, 2022).

V. VRF's Viewpoint Discrimination Claim Does Not and Cannot Support the Preliminary Injunction.

The district court's holding that VRF is likely to prevail on a viewpoint discrimination claim does not and cannot support the preliminary injunction.

a. The Viewpoint Discrimination Claim Based on the SOS's Referral Is Not a Basis for the Preliminary Injunction.

To begin, VRF argues that the preliminary injunction is based on its viewpoint discrimination claim involving the SOS's investigative referral, not only a prior restraint claim. (Answer Br. at 37, 40). Although the district court's opinion is not entirely consistent, its best reading is that the PI rests only on the prior restraint claim.

As noted in Appellants' opening brief, the district court held that of the three claims on which deemed VRF likely to prevail, only the "prior restraint claim insofar as Plaintiffs challenge the Secretary of State's prosecution if the

Plaintiffs publish voter data online[] … results in a loss of First Amendment freedoms….” (Mem. Op. at 205; Opening Br. at 21). To be sure, the district court also held that the “Secretary of State’s criminal referral and the lack of any indication that the Attorney General will not prosecute [VRF] for publishing the data that it already has constitutes an ongoing form of viewpoint discrimination and prior restraint, which the First Amendment does not tolerate.” (Mem. Op. at 207). But this passing reference to viewpoint discrimination is less informative of the district court’s basis for issuing a preliminary injunction than its explicit finding of what claims entail an injury that can support the PI.

Moreover, a review of the viewpoint discrimination claim on which the district court found VRF likely to prevail reveals that the claim only involves alleged viewpoint discrimination by the SOS and cannot support an injunction of the AG. (*See* Opening Br. at 30–32 (party must be involved in infringement of rights to support relief against it)). VRF lists several alleged actions by the AG that it contends establish viewpoint discrimination. (Answer Br. at 37 (alleging that AG “with full appreciation of [the SOS’s] animus … ran with the ball,” “reworked the Secretary’s misinformation theory,” “investigated VRF and subjected it to an ongoing threat of

prosecution," and "continued to back the Secretary in rejecting VRF's … voter data requests" [5])). None of these allegations formed a basis for the district court's finding of likely viewpoint discrimination and VRF does not cite to the court's opinion for them.

To the contrary, the district court's holding that the SOS's investigative referral was based on viewpoint discrimination only concerned the SOS, and not the AG. (Mem. Op. at 182–85; *see also id.* at 167 (describing basis for injunction as "the Secretary of State's criminal referral of Voter Reference for publishing the data it received from Local Labs constitut[ing] unconstitutional viewpoint discrimination and prior restraint"). VRF's block quotations of the opinion do not suggest otherwise. First, VRF's excerpt from page 180 (Answer Br. at 38) is assessing a potential viewpoint discrimination claim based on the SOS's prohibition on disseminating voter data—what was termed the "Data Sharing Ban"—that the court rejected. The court held that

[5] VRF agrees that the preliminary injunction is not based on the SOS's denial of VRF's voter data requests (Answer Br. at 37 n.7)—and thus, inferentially, any legal advice by AG attorneys to the SOS related to such requests. In fact, the district court held that there was no harm caused by the SOS's voter data denial because VRF already has almost identical data. (Mem. Op. at 205–06). The SOS contests Plaintiffs' allegations concerning this denial of voter data requests, but because they are not a basis for the PI, they are not "circumstantial evidence" of viewpoint discrimination at issue in the appeal. (Answer Br. at 38 n.7).

"to the extent the Plaintiffs' facially challenge the Secretary of State's Data Sharing Ban, the Plaintiffs are not likely to succeed on the merits of their viewpoint-discrimination claim" because "the Data Sharing Ban itself is viewpoint neutral on its face." (Mem. Op. at 180).

The district court did hold that VRF was likely to succeed on its viewpoint discrimination claim challenging the SOS's motive for its referral of VRF to the AG (*see* Answer Br. at 38–39), but this holding did not involve any viewpoint discrimination by the AG. VRF's statements that the "viewpoint discrimination was linked to" the AG's "subsequent investigation" (Answer Br. at 38) and that the "District Court based the preliminary injunction on the joint action of the Secretary and Attorney General" (Answer Br. at 40) are unsupported. The district court instead repeatedly described the viewpoint discrimination claim as one involving the SOS alone. (Mem. Op. at 182 ("Plaintiffs are likely to succeed in their claim that the Secretary of State's decision to refer Voter Reference to the Attorney General's Office for investigation, because there is sufficient evidence that the Secretary of State's actions caused viewpoint discrimination and that the Secretary of State acted because of, not merely in spite of, the Plaintiffs' views."), 183 ("the Secretary of State caused viewpoint discrimination by referring Voter Reference and Local

Labs for investigation"); 183 ("the Secretary of State made the referral because of Voter Reference's views"); 185 ("the Secretary of State's public criticism combined with the Referral Letter … suggest that the Secretary of State's motive is more than a routine concern of an Election Code violation"); 185 ("Plaintiffs are likely to succeed on their claim that the Secretary of State's referral constitutes impermissible viewpoint discrimination").

The SOS contests this viewpoint-discrimination holding. (*See* Opening Br. at 41–43). As the district court acknowledged, the SOS repeatedly expressed its concern with VRF posting voter data. (Mem. Op. at 31 ¶ 132, 183; *see also* Opening Br. at 11–12, 14). VRF was the only entity that has posted voter data online, accessible to the general public. The SOS has not contested VRF's ability to post its "analyses" of voter data, including those critical of the SOS, but only the privacy-infringing voter data itself. (Opening Br. at 42 n.12; App. Vol. II at 365–66, 145:8–146:5). And the district court found evidence of multiple, non-viewpoint based reasons for the SOS's referral. (Mem. Op. at 183–85); *see also Esperanza Peace & Just. Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433, 449 (W.D. Tex. 2001) (applying *Mt. Healthy* test for mixed motives in viewpoint-discrimination context and holding that no violation if

defendant would have made same decision in the absence of the protected conduct).

Pertinently for the purpose of this appeal, however, the holding of a likely violation by the SOS cannot support the injunction of the AG's prosecutorial discretion. The district court found that the "prohibition on sharing voter data publicly online" was "content-neutral." (Mem. Op. at 198) The AG has independent prosecutorial authority whether, and under what conditions, to enforce this prohibition. (Opening Br. at 34). Any viewpoint discrimination in referring VRF to the AG can't be imputed to establish the AG's viewpoint discrimination and enjoin any possible prosecution. *Pahls v. Thomas*, 718 F.3d 1210, 1236–37 (2013) ("[P]laintiffs must show that each defendant harbored a discriminatory purpose. Thus, even if it is reasonable to infer that one public official acted with discriminatory intent, it does not necessarily follow that another official did so as well."). "Nor can the inference of discriminatory intent be drawn by aggregating one or more officials' actions and simply pointing to the discriminatory effect thereof. This is especially true when officials are employed by different government sovereigns...." *Id.* (citation omitted).

b. The Viewpoint Discrimination Claim Requires VRF to Be Treated Discriminatorily to Other Entities.

For the reasons above, the Court need not decide whether the district court erred in concluding that the SOS engaged in viewpoint discrimination in referring VRF to the AG. But if it reaches this question, the SOS's referral of VRF for posting voter data online when no other entity had done so cannot support a viewpoint-discrimination claim. (*See* Opening Br. at 40–43). VRF attempts to rebut this argument by claiming that a viewpoint-discrimination claim need not include disparate treatment, and thus even if the SOS did not treat VRF differently than any other entity in referring VRF for investigation, the SOS discriminated against VRF. (Answer Br. at 41–44).[6]

The Court's opinion in *Pahls v. Thomas* discusses the requirements for a viewpoint discrimination claim. VRF interprets *Pahls* as requiring only a discriminatory purpose, and not any disparate treatment. (Answer Br. at 41–42). *Pahls*, however, repeatedly suggests that disparate treatment is an initial requirement for viewpoint discrimination in addition to which a discriminatory purpose must be found. *See* 718 F.3d at 1235–36 ("disparate

[6] VRF contends that the SOS's decision not to fulfill VRF's voter data requests was based in viewpoint discrimination, Answer Br. at 43–44, but as noted above this viewpoint-discrimination claim is not a basis for the PI. *See supra* p. 17 n.5.

impact alone is not enough to render a speech restriction content- or viewpoint-based"), 1236 ("Where … the government policies are themselves viewpoint-neutral but in tandem create a disparate impact, plaintiffs must show that the policies were brought together for the purpose of discriminating against or in favor of a particular viewpoint."), 1238 ("must be additional evidence" beyond disparate consequences "that the defendant acted 'for the purpose of discriminating on account of' viewpoint" (*quoting Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009)). VRF contends that this language is only addressing the *Pahls* plaintiffs' efforts to prove discriminatory purpose through disparate impact. (Answer Br. at 41–42) Yet the definitional nature of discrimination is that it is comparative: that one is treated differently than others. *See* "Discrimination" (definition 3), *Black's Law Dictionary* (11th ed. 2019) ("Cf. Differential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.").

Other authority is not contrary. In *Ashcroft v. Iqbal*, 556 U.S. at 676–77 (cleaned up), the Supreme Court similarly described viewpoint discrimination as requiring "more than" an awareness of adverse consequences, but undertaking a course of action "because of, not merely in spite of, the action's

adverse effects upon an identifiable group." Likewise, in *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011) (discussed in Answer Br. at 43), the Court considered both the "express purpose and practical effect" of a law in concluding that it constituted content- and viewpoint-based regulation of pharmaceutical marketing. *See also Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 169 (2015) (observing that law is content-based when it "singles out specific subject matter for differential treatment"); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658–59 (1994) (explaining that strict scrutiny is applied to "laws favoring some speakers over others" when this differential treatment "reflects a content preference").

Therefore, VRF's claim that other organizations have shared voter data—but not posted such data online for the general public—cannot support a claim of viewpoint discrimination. (*See* Answer Br. at 41, 44–45).[7] Such

[7] VRF's block quotation of page 156 of the opinion is discussing a potential prosecution "for false swearing," the words omitted by ellipsis. (Answer Br. at 45). The court's discussion concerns whether VRF's actions could violate the false swearing prohibition in N.M. Stat. Ann. § 1-20-10 if VRF posted voter data that it obtained directly from the SOS after swearing not to post the data on a request form. The court opined that such an action could violate Section 1-20-10, but would be evidence of viewpoint discrimination if other entities were not prosecuted under this section. (Mem. Op. at 156). The discussion does not concern the SOS referral of VRF and is not pertinent to the viewpoint discrimination claim at issue in the PI.

organizations, like Catalist and Data Targeting, that curate voter data for political campaigns, use the State's voter data request process and do not post voter data on a public website. (*See* Mem. Op. at 16–18, ¶¶ 56–66). Although the district court found that VRF was treated differently to other entities in the voter data request process (*see* Answer Br. at 45 (quoting Mem. Op. at 181)), this viewpoint discrimination claim is not the basis for the PI. *See supra* p. 17 n.5. By contrast, the court's analysis of a viewpoint discrimination claim concerning the SOS's referral of VRF does not compare VRF to any other entities as no other entity has published voter data to the general public. (*See* Mem. Op. at 182–85). As a result, VRF's viewpoint discrimination claim cannot support the preliminary injunction.

VI. The District Court's Dismissal of Evidence and Precedent Regarding the Importance of Voters' Residential Privacy Merits Reversal.

VRF begins its defense of the district court's assessment of the equities on preliminary injunction by stating that the weighing of harms is a discretionary exercise this Court should not disturb. (Answer Br. at 46). Of course, the balancing of equitable harms is subject to the district court's discretion. But when, as here, the court misapprehends objective facts, declines to consider relevant evidence, and overlooks controlling law regarding the

privacy interest at stake, the court abuses its discretion. *See Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997) ("A clear example of an abuse of discretion exists where the trial court fails to consider the applicable legal standard or the facts upon which the exercise of its discretionary judgment is based."); *see also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 500 (1984) (presumption of correctness that attaches to factual findings "has lesser force" when considering documentary evidence). As well, this review is conducted keeping in mind that the court's issuance of a preliminary injunction conferred an extraordinary, disfavored remedy. (*See* Opening Br. at 23).[8]

It is proper for the Court to consider the district court's balancing of harms on preliminary injunction. VRF argues that once a court has found viewpoint discrimination, no balancing is needed because "there can be no justification for that discrimination." (Answer Br. at 47). VRF offers no authority, however, that a court issuing a preliminary injunction on a viewpoint-discrimination claim can ignore the factors considered on

[8] VRF portrays the district court's assessment of facts as the judgment of witnesses' credibility and a decision to discount the testimony of the Deputy Secretary of State. (Answer Br. at 47–48). But VRF does not cite to any portion of the court's opinion suggesting that its findings rested on credibility assessments, including that the court found the SOS's witnesses to not be credible.

preliminary injunction. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). *Iancu v. Brunetti*, cited by VRF (Answer Br. at 47), holds that overbreadth analysis isn't applied once a court finds viewpoint discrimination; it does not discuss how the public interest is assessed on preliminary injunction. 139 S. Ct. 2294, 2302 (2019).

VRF next endorses the district court's mistaken view that the AG and SOS did not establish harm to the public caused by VRF's posting of voter data because "no evidence was presented that any voter had been harassed, or had canceled his or her registration, *as a result of VRF's speech*." (Answer Br. at 47 (emphasis added); *see also* Mem. Op. at 194 (discounting evidence of harm where not tied to VRF's specific posting)). This narrow definition of relevant evidence improperly overlooks a suite of law and evidence demonstrating the harm caused by posting voters' home addresses online. First, as noted in the Opening Brief, the Court has recognized an interest in residential privacy. (Opening Br. at 43–44). Second, by discounting evidence not linked to VRF's posting, the Court dismissed evidence of New Mexico voter rolls being used to go door-to-door to harass voters. (Mem. Op. at 35 ¶¶ 154–56, 193). Finally, the absence of precise evidence tying VRF's publication of voters' addresses to violence or harassment doesn't suggest such harm is illusory. *See* Christina A.

Cassidy, "New Mexico Shootings Follow Two Years of Election Assaults," *AP* (Jan. 18, 2023) (legislative candidate who believed that election he lost was "rigged" hired people who shot at the homes of four Democratic lawmakers); [9] Vera Bergengruen, "Accused 'Mastermind' of New Mexico Political Shootings Left a Chilling Digital Trail," *Time* (Jan. 18, 2023) (candidate targeted election officials who certified results candidate believed were fraudulent). [10] It is very difficult to know, for example, that someone committed a crime after finding their victim's address on a particular website. Reflecting these concerns, New Mexico's Legislature recently passed a bill, awaiting the Governor's signature, amending the Election Code to make public officials' home addresses confidential in disclosures filed with the SOS. N.M. Senate Bill 180 (2023), § 1.[11]

VRF's suggestion that its posting of voter data poses no greater harm than the SOS's Voter Information Portal ignores the dramatic differences between the two websites. (*See* Answer Br. at 48–50). As discussed in the Opening Brief and misapprehended by the district court, the Voter Information Portal

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[9] https://apnews.com/article/politics-new-mexico-state-government-michigan-2022-midterm-elections-fc96f8ea93cfc5107bf4e9bfaa55482

[10] https://time.com/6247844/new-mexico-shootings-targeting-democrats/

[11] https://www.nmlegis.gov/Legislation/Legislation?Chamber=S&LegType=B&LegNo=180&year=23

requires a user to enter a voter's full name, date of birth, and county to obtain the voter's information. (Opening Br. at 45). VRF's website does not contain such limitations. In fact, VRF touts its searching on its website as "vastly more efficient" and possessing "ease of use." (Answer Br. at 49, 50).

Lastly, VRF's criticisms of the complaints received by the SOS regarding VRF's posting of voter data do not undermine the AG and SOS's showing of harm. (*See* Answer Br. at 50–51). The Court need not even consider such evidence to recognize the interest in residential privacy set forth in law or the other evidence of harm from VRF's publication of voters' personal information—including inquiries by court and correction officials seeking to keep judges, prosecutors, and law enforcement officers safe. (Opening Br. at 43–44). Also, that some complaints to the SOS contained partisan criticism is not "[a]dopting such comments as a basis for state action" (Answer Br. at 51), but simply including those complaints (among others) in the record of concerned members of the public about the disclosure of voter data. Lastly, these complaints are properly part of the record on appeal, as they were presented to the district court in litigation over Appellants' motion to stay the PI. A preliminary injunction is subject to the ongoing jurisdiction of the court and may be modified or dissolved. *Cablevision of Texas III, L.P. v. Oklahoma W.*

Tel. Co., 993 F.2d 208, 210 (10th Cir. 2013). Thus, the district court "could … have weighed them" in deciding whether to continue to enforce the PI. (Answer Br. at 51). All told, the complaints are a single piece in a collection of legal authority and evidence demonstrating the public's interest in the privacy of their personal information and the harm posed by that information's disclosure. The district court erred by discounting such danger in issuing a preliminary injunction.

VII. Conclusion.

For these reasons, New Mexico's Attorney General and Secretary of State respectfully request that the Court vacate the preliminary injunction and remand the case for further proceedings in accordance with its opinion.

STATEMENT OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I certify that:

1) This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(7)(B)(ii). It contains 6,443 words, excluding the parts of the brief excluded by Federal Rule of Appellate Procedure 32(f) and Tenth Circuit Rule 32(b).

2) This brief complies with the typeface and typestyle requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6). It is printed in Constantia, 14-point.

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

In accordance with the court's CM/ECF User's Manual, I hereby certify that all required privacy redactions have been made. In addition, I certify that the hard copies of this pleading that may be required to be submitted to the court are exact copies of the ECF filing, and the ECF submission has been scanned for viruses with Webroot Endpoint Protection (version 9.0.33.39, last updated November 16, 2022) and, according to the program, is free of viruses.

CERTIFICATE OF SERVICE

On March 15, 2023, I filed the foregoing document through the Court's CM/ECF system, which caused all parties or counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Nicholas M. Sydow
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