

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

VOTER REFERENCE FOUNDATION,
LLC,

Plaintiff-Appellee,

v.

No. 22-2101

HECTOR BALDERAS, in his official
capacity as New Mexico Attorney
General; and MAGGIE TOULOUSE
OLIVER, in her official capacity as
New Mexico Secretary of
State,

Defendants-Appellants.

MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

New Mexico's Attorney General and Secretary of State (collectively, "New Mexico") move for a stay of the preliminary injunction entered by the district court pending the resolution of this appeal.¹ The preliminary injunction ("PI") enjoins the Attorney General and Secretary of State from prosecuting Voter Reference Foundation ("VRF") under the New Mexico Election Code for publishing online the home addresses, voting history, and other information concerning New Mexico voters. After the PI, VRF posted

¹ Pursuant to Tenth Circuit Rule 27.1, Appellants sought Appellee's position on this motion and Appellee opposes the motion.

this information for nearly all New Mexico voters on its website. VRF intends to again post voter data following the 2022 election. VRF proudly acknowledges that this public posting of all New Mexicans' voter data is unprecedented.

By posting voters' home addresses and other personal information online, VRF has created a risk of threats, harassment, and violence to New Mexicans. VRF's actions also irreparably harm New Mexico and the public by deterring people from registering to vote when registration will result in their personal information being posted online. In contrast, VRF will not be harmed by a stay that simply stops the improper injunction of the Attorney General's prosecutorial power and does not prevent VRF from analyzing voter data.

STATEMENT OF JURISDICTION

VRF contends that the district court had jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction over the appeal of the PI pursuant to 28 U.S.C. § 1292(a)(1). The Court may stay the PI, as set forth in Federal Rule of Appellate Procedure 8 and Tenth Circuit Rule 8.1.

FACTS AND HISTORY OF THE CASE

This appeal arises out of VRF's² constitutional challenge to provisions of the New Mexico Election Code that restrict the use of voter data.³ See Mem. Op. & Order (ECF No. 51) ("Mem. Op.") (attached as Exhibit 1). VRF had posted voter data for all New Mexicans online, including their home addresses, voting history, and party registration. Mem. Op. at 7, ¶ 21 & 19, ¶ 75. Following the Secretary of State's ("SOS") referral of VRF to the Attorney General ("AG") for investigation and possible prosecution for this online posting, VRF sought declaratory and injunctive relief barring the AG and SOS from enforcing the

² Another Plaintiff, Holly Steinberg, was dismissed for lack of standing. Mem. Op. at 164-65.

³ The Election Code provisions most directly involved are:

N.M. Stat. Ann. § 1-4-5.5 ("A. The ... secretary of state shall furnish voter data ... only upon written request ... and after compliance with the requirements of this section.... C. Each requester of voter data ... shall sign an affidavit that the voter data ... shall be used for governmental or election and election campaign purposes only and shall not be made available or used for unlawful purposes."); and

N.M. Stat. Ann. § 1-4-5.6 ("A. Unlawful use of voter data ... consists of the knowing and willful use of such information for purposes prohibited by the Voter Records System Act [Chapter 1, Article 5 NMSA 1978].").

challenged provisions of the Election Code against it. Mem. Op. at 24–25, ¶ 96, & 39.

VRF moved for a preliminary injunction. VRF contended that its claimed purpose of posting the voter data online—a crowd-sourced “audit” of the data to identify errors in New Mexico’s voter rolls—was a permissible use of the data under the Election Code. *See* Mem. Op. at 40, 62–63. Alternatively, VRF argued that the SOS’s interpretation and application of the challenged provisions were unconstitutional. *See* Mem. Op. at 41–44. VRF argued that the limits on the use of voter data were direct restrictions on speech, unconstitutional prior restraints, overbroad, and void for vagueness. Mem. Op. at 41–44.

New Mexico argued that VRF’s uploading of voter data violated a prohibition on providing access to the voter file. Mem. Op. at 47. New Mexico stated that any potential violation of the Election Code by VRF was not based on using the data for an improper purpose, but for providing access to the voter data. *See* Mem. Op. at 70; 5-17-22 Tr. at 142:5–25, 145:8–146:5, 146:17–147:5, cited portions attached as Exhibit 2; 6-15-22 Tr. at 27:8–23, 159:17–160:6, cited portions attached as Exhibit 3. New Mexico contended that the Election Code’s restrictions on the use of voter data were constitutional, but that VRF’s

actions didn't implicate these restrictions because VRF received data from a third party, not through the State's voter data request process. Mem. Op. at 47.

The district court held an evidentiary hearing on the preliminary injunction over two days. Mem. Op. at 59, 81-82. The court began the hearing by expressing its interpretation of the Election Code. *See* Mem. Op. at 60. While the court believed that VRF's use of the voter data was lawful under the Election Code, Mem. Op. at 60, it did not believe that it had the power to enjoin the AG or SOS from misconstruing their own law or prosecuting under the statute. Mem. Op. at 60-61. Rather, the court invited VRF to recast its claim, informing Plaintiffs that selective prosecution or referral for prosecution is "going to have to be your argument." 5-17-22 Tr. at 6:16-7:8; *see also* Mem. Op. at 61.

The district court entered a preliminary injunction, despite noting that VRF sought a disfavored injunction. Mem. Op. at 2, 169. Although the court reasoned that the SOS could condition access to voter data on whether the requestor intended to publish the data, it held that the Secretary's referral of VRF to the AG for investigation constituted viewpoint discrimination and prior restraint. Mem. Op. at 167. Before explaining the basis of its holding that

VRF was likely to succeed on prior restraint and viewpoint discrimination claims, the court noted that “it is not immediately clear what the Plaintiffs are challenging....” Mem. Op. at 179. Nonetheless, the court crafted three bases on which it determined VRF was likely to prevail.

First, the court held that to the extent VRF was challenging the SOS’s lack of a response to VRF’s request for voter data, it was likely to succeed on a viewpoint discrimination claim. Mem. Op. at 180. The court reasoned that the SOS distinguished between VRF and other requestors (that did not post the data online) despite VRF’s assurances that it would not post “personal information” in the voter data without a court order. Mem. Op. at 180-81.

Second, the court held that VRF was likely to succeed in a viewpoint discrimination challenge to the Secretary’s referral of VRF to the AG for investigation. Mem. Op. at 182. Calling Plaintiffs’ argument an “attenuated” “causal chain,” the court held that the combination of the SOS’s referral and public comments critical of VRF’s posting of voter data “suggests that the [SOS] had intentions beyond mere genuine concern that [VRF] may be violating the Election Code.” Mem. Op. at 183-84.

Finally, the court held that Plaintiffs were likely to succeed on their claim—not present in the complaint or the PI motion—that the SOS’s referral

of VRF to the AG for investigation was an unconstitutional prior restraint. Mem. Op. at 185-86. Without citation to any cases concerning investigative referrals as prior restraints, the court reasoned that it “sees no meaningful distinction between a law, regulation or judicial injunction that suppresses speech and a publicized criminal referral that does the same.” Mem. Op. at 186; *see also id.* at 188. Based on this holding—and the purported viewpoint discrimination and prior restraint by the SOS—the court enjoined the SOS and the AG from prosecuting VRF for publishing voter data. Mem. Op. at 167, 210.

At the same time, the court held that VRF was not likely to prevail on the claims it briefed in its complaint and the PI motion. The court held that VRF did not have a First Amendment right to access New Mexico’s voter data. Mem. Op. at 177. Therefore, it held that VRF was not likely to succeed on its overbreadth claim. Mem. Op. at 178. It also held that VRF was not likely to succeed on its claim that the SOS’s voter data request process was a content-based administrative licensing scheme. Mem. Op. at 186. And the court held that VRF was unlikely to succeed on its void-for-vagueness challenge. Mem. Op. at 201.

New Mexico moved for a stay of the preliminary injunction pending appeal. ECF No. 57, attached as Exhibit 4. After a hearing, New Mexico's motion to stay was denied. ECF No. 65 at 1, attached as Exhibit 5. The court explained that, in addition to the investigative referral discussed in its opinion, the AG's unwillingness to say that he will not prosecute VRF is a prior restraint. 8-31-22 Tr. at 6:9-12, attached as Exhibit 6; *see also id.* at 6:21-7:1 (objecting to shifting theory of prior restraint). It reasoned that in isolation, the SOS's referral was not a prior restraint, but coupled with the absence of an indication that the AG would not prosecute, the possible prosecution constituted a prior restraint and viewpoint discrimination. ECF No. 65 at 2. The court seemed to acknowledge that an injunction against the SOS, who lacks prosecutorial power, was unnecessary, but did not believe that it could modify the order giving the pending appeal. 8-31-22 Tr. at 25:5-21, 41:17-20; ECF No. 65 at 2.

**A STAY OF THE PRELIMINARY
INJUNCTION PENDING APPEAL IS WARRANTED**

I. Legal Standard for Stay of PI Pending Appeal

The decision to stay a preliminary injunction pending appeal is “an exercise of judicial discretion, and the propriety of its issue is dependent upon

the circumstances of the particular case.” *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal quotation marks omitted). The Court’s discretion should be guided by “legal principles” that “have been distilled into consideration of four factors”:

- (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
- (2) whether the applicant will be irreparably injured absent a stay;
- (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and
- (4) where the public interest lies.

Id. at 434. This test is mirrored in Tenth Circuit Rule 8.1. Where a stay alters the status quo, including barring the enforcement of criminal laws, “the proponents of the injunction should have demonstrated to the district court that the right to relief was clear and unequivocal.” *O Centro Espirita Beneficiente Uniao De Vegetal v. Ashcroft*, 314 F.3d 463, 466 (10th Cir. 2002) (internal quotation marks omitted).

II. The New Mexico Attorney General and Secretary of State Are Likely to Prevail on Appeal

The preliminary injunction likely will be reversed on appeal. First, the PI enjoins the Attorney General from prosecuting VRF even though VRF has never

alleged, and the district court did not find, that the AG engaged in viewpoint discrimination or any other violation of VRF's rights. Second, the PI rests on a novel theory not briefed or argued by the parties: that a publicized referral for investigation constitutes a prior restraint in violation of the First Amendment. And third, the district court erroneously found that the Secretary of State's denial of VRF's request for voter data constituted viewpoint discrimination despite no other entity being similarly situated in that it planned to post the data online.

- a. The Court is Likely to Reverse the PI as to the Attorney General, Because He Was Not Found or Alleged to Have Violated VRF's Rights.*

The preliminary injunction enjoins "Attorney General Hector Balderas . . . from prosecuting [VRF] under N.M.S.A. §§ 1-4-5.5 or 1-4-5.6 for publishing data it already received from Local Labs." Mem. Op. at 210. Yet VRF did not allege—let alone the district court find—that the AG violated VRF's rights. Nor did the district court hold that any section of the Election Code is unconstitutional, such that would support equitable relief against parties with enforcement authority. The court's findings of a likely constitutional violation (which are disputed and mistaken) are premised on the alleged viewpoint

discrimination and actions of the SOS. Such findings cannot support a preliminary injunction against the Attorney General.

42 U.S.C. § 1983 permits a court to enjoin “[e]very person who, under color of any statute, ... custom, or usage, of any State ... subjects, or causes to be subjected, any ... person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws...” The Attorney General and Secretary of State are separate persons for the purpose of Section 1983. *See Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989) (“[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official’s office.”); N.M. Stat. Ann. §§ 8-4-1 *et seq.*; §§ 8-5-1 *et seq.* (establishing AG and SOS as distinct offices under New Mexico law). It follows that the AG must be found to be separately liable under Section 1983 for an injunction against him to stand. “Under the well-established rule that federal judicial powers may be exercised only on the basis of a constitutional violation, this case present[s] no occasion ... to grant equitable relief” against the AG. *Rizzo v. Goode*, 423 U.S. 362, 377 (1976) (internal quotation marks and citation omitted).

Where a party played no meaningful role in a violation of rights, a Section 1983 claim against that party fails. *See Lee v. Town of Estes Park, Colo.*,

820 F.2d 1112, 1116 (10th Cir. 1987) (must be nexus between action and deprivation of federal rights); *Pahls v. Thomas*, 718 F.3d 1210, 1243 (10th Cir. 2013) (mere knowledge of and acquiescence in decision is insufficient to establish viewpoint discrimination); *Field Day, LLC v. County of Suffolk*, 799 F. Supp. 2d 205, 214–15 (E.D.N.Y. 2011) (no equitable relief against party uninvolved in alleged violation). To be a proper party, the official being sued must be “both responsible for a constitutional deprivation and able to implement, in their official capacity, the equitable relief requested[.]” *D’Iorio v. Delaware County*, 447 F. Supp. 229, 239 (E.D. Pa. 1978), *rev’d on other grounds*, 529 F.2d 681 (3d Cir. 1978). On the other hand, when “nothing improper is alleged to have been done by [a party,]” and where that party does not “have any constitutional or statutory power” another party accused of wrongdoing, a Section 1983 claim against the party must be dismissed. *Janda v. State*, 388 F. Supp. 568, 571–72 (N.D. Ill. 1972); *see also Derrick v. Ward*, 91 Fed. Appx. 57, 62 (10th Cir. Jan. 8, 2004) (affirming dismissal of Section 1983 complaint against defendant where no allegations the defendant violated law).

The district court’s thorough PI opinion does not contain a single finding of a violation by the AG, despite making every effort to devise a theory

of liability that would support VRF's requested relief. *See, e.g.*, Mem. Op. at 173, 180–81, 185–86. Rather, the apparent basis for issuing an injunction against the AG is that he was the recipient of an investigative referral that the district court believed was partially motivated by viewpoint discrimination. *See supra* p. 6. Such a finding cannot impute animus onto the AG or serve as a basis for using to restrain the prosecutorial authority of a State's chief law enforcement officer.⁴ Without a finding that the AG has violated VRF's rights under federal law, he retains the power to make an independent assessment of whether the Election Code has been violated and whether initiating a prosecution is warranted.

In district court, VRF defended the issuance of an injunction against the Attorney General by arguing that under *Ex Parte Young* it is proper to sue officers with enforcement authority in a constitutional challenge. 8-31-22 Tr. at 16:20–17:15. This argument, however, confuses the constitutional challenges to the Election Code that VRF brought in its complaint with the viewpoint-discrimination claim that the district court developed at hearing and on which

⁴ To the extent the PI also is based on viewpoint discrimination in the Secretary's denial of VRF's voter data request, it likewise cannot support an injunction against the AG.

it based the PI. VRF's original constitutional challenges, if merited, might support relief against the AG, but the district court held that VRF was not likely to prevail on its claims that Sections 1-4-5.5 and 1-4-5.6 are unconstitutional. *See* Mem. Op. at 172-78, 194-98, 198-204. And as discussed above, any finding of improper motivation by the SOS in making a referral to the AG or denying VRF's request for voter data does not establish the violation of rights by the AG needed to support a claim under Section 1983. Simply, the ordinary situation of an injunction issuing against an officer with enforcement authority over an unconstitutional law does not apply to the preliminary injunction the district court actually issued, which was grounded in alleged animus by the SOS.

The preliminary injunction also errs in enjoining a prosecution by the Secretary of State who lacks prosecutorial powers. *See D'Iorio*, 447 F. Supp. at 238 (official enjoined under Section 1983 must be able to implement the equitable relief requested). Under New Mexico law, if the SOS suspects a possible violation of the Election Code, she shall report the matter to the AG or a district attorney who may conduct an investigation and decide whether to prosecute. *See* N.M. Stat. Ann. §§ 1-2-1.1(A); 1-2-2(D). Moreover, to the extent that the PI is intended to enjoin the SOS's past referral of VRF, it is

outside the scope of *Ex Parte Young* because it does not address an ongoing violation of law. *See Chilcoat v. San Juan County*, 41 F. 4th 1196, 1215 (10th Cir. 2022) (*Ex Parte Young* exception only applies to prospective relief and cannot be used to obtain declaration that state officer violated rights in the past). Therefore, the district court's finding of a likely violation of law does not support the injunction it issued against the Attorney General and Secretary of State.

b. The PI Was Improperly Based on a Novel Theory of Liability Not Raised or Addressed by the Parties.

New Mexico also is likely to prevail on appeal because the PI was based on legal theories developed by the district court that had not been briefed by the parties. The court's ruling that the SOS's referral of VRF to the AG constituted a prior restraint had not been alleged in either VRF's complaint or PI motion. Because New Mexico was not afforded an opportunity to be heard on this claim, its due process rights were violated, warranting reversal of the PI.

Due process requires that a party be heard before issuing relief against that party. *See Palace Exploration Co. v. Petroleum Dev't Co.*, 316 F.3d 1110, 1120 (10th Cir. 2003) (deprivation of due process when not able to litigate issues

underlying judgment); *Facet Enters. v. NLRB*, 907 F.2d 963, 973 (10th Cir. 1990) (same). Thus, when a court bases “its decision on a novel theory ... which was not raised, briefed, or argued by either party,” in “the usual circumstances” the appellate court “would reverse and remand so that ... both parties may be given an opportunity to brief and argue the merits of this new theory.” *Brooks v. Comm’r of Internal Revenue*, 424 F.2d 116, 119 (5th Cir. 1968).

Here, the preliminary injunction was based on the novel premise that an investigative referral can operate as a prior restraint. This theory was first raised by the district court, *sua sponte*, at the PI hearing after noting that VRF’s existing claims were likely to fail. See 5-17-22 Tr. at 6:16–7:8 (advising Plaintiffs that selective prosecution or referral for prosecution “is going to have to be your argument”); *supra* p. 5. Even this theory has continued to shift; in the order denying New Mexico’s motion to stay the PI, the court reasoned that the referral alone was not a prior restraint, but it could be when coupled with the lack of a guarantee that the AG would not prosecute VRF. ECF No. 65, at 2. VRF’s prior restraint claim, by contrast, never mentioned the Secretary’s referral, but alleged that Section 1-4-5.5’s restrictions on the use of voter data operated as a prior restraint. See Mem. Op. at 37 (describing prior restraint claim in complaint), 41–43 (in PI motion); 5-17-22 Tr. at 33:16–18 (VRF

stating at PI hearing that would not go in to prior restraint claim, which had already been briefed). New Mexico is likely to prevail on its appeal of the preliminary injunction because it was based on a legal theory that has not been litigated by the parties.

c. The District Court's Conclusion That the SOS Engaged in Viewpoint Discrimination by Denying VRF's Request for Voter Data Cannot Support the PI

To the extent the PI rests on the district court's finding that the SOS's denial of VRF's voter data request was based on viewpoint discrimination, this finding cannot support the PI. The district court held that, "to the extent the Plaintiffs challenge the [SOS's] lack of response to [VRF's] request for voter data, the Plaintiffs are likely to succeed on their viewpoint discrimination claim." Mem. Op. at 180. The court reasoned that the "[SOS's] decision not to take [VRF] at its word that it will not" post online "voters' personal information without a Court order saying that it can publish it" is viewpoint discrimination. Mem. Op. at 181. Most simply, this finding cannot support the PI because the PI's injunction of a prosecution does not enjoin the alleged viewpoint discrimination of denying the voter data request. *See Buchwald v. Univ. N.M. Sch. Med.*, 159 F.3d 487, 495 (10th Cir. 1998) (*Ex Parte Young* exception only applies to prospective relief that remedies ongoing violation of

law). At most, the SOS's denial of voter data could support relief to provide the requested data, a remedy not requested by VRF nor awarded by the court.

Additionally, the district court's finding of viewpoint discrimination is likely to be reversed because no similarly-situated entity has requested and obtained data from the SOS. *See Pahls v. Thomas*, 718 F.3d at 1238 (viewpoint-discrimination claim requires intentional, not even mere knowing, disparate treatment of two similarly-situated groups). VRF stated in its data request that it would publish current voter registration data online, but only publish voters' "personal information" if granted relief by the court. Mem. Op. at 28, ¶ 116. The SOS denied this data request pending the outcome of this case. ECF No. 57, Ex. A. The SOS explained that she believed "publishing *any* New Mexico voter data on a website is a violation of the New Mexico Election Code" and did not want to conspire to violate this law given VRF's stated plans. *Id.* That is, even though VRF committed not to post online certain voter data—that containing "personal information" online—until obtaining a favorable order, VRF's request stated that it would post other voter data online immediately.

The SOS's denial does not meet the exacting standards for viewpoint discrimination. *See Pahls*, 718 F.3d at 1230 ("demanding" test requires a

plaintiff to show that defendant targeted speech because of, not merely with knowledge of, the plaintiff's views). First, no other similarly-situated entity—an entity that the SOS knew intended to post voter data online—has requested or obtained voter data from the SOS. Indeed, VRF testified that its work is “unprecedented” and that “no one has ever published the voter registration records for every state online, for free, for the public forever.” Mem. Op. at 81 (quoting VRF's Executive Director).

Second, the court mistakenly determined that VRF's promise not to post certain voter data—that containing an undefined category of “personal information”—eliminated any legitimate reason for the SOS to deny the request. Thus, it concluded, VRF's “‘perspective’ is the ‘rationale’ for the [SOS's] decision.” Mem. Op. at 181. As the SOS's denial letter documents, however, the SOS was concerned with the posting of voter data that VRF deemed not to include “personal information” and would be posted online immediately. ECF No. 57, Ex. A. Therefore, the SOS did not decide “not to take Voter Reference at its word that it will not use the data contrary to the [SOS's] interpretation of [] § 1-4-5.5[.]” Mem. Op. at 181. The SOS *did* take VRF at its word that it plans to upload *some* voter data on its website—namely, all voter data VRF receives pursuant to its request that VRF unilaterally determines

does not constitute “personal information of voters.” For these reasons, New Mexico is likely to prevail on its appeal of the preliminary injunction.

III. The Equitable Factors Support a Stay

In addition to the likelihood that the PI will be reversed on appeal, the other crucial consideration in determining whether to stay a preliminary injunction are the parties’ and the public’s equitable interests. *Nken*, 556 U.S. at 434. When the government is a party, the public interest factor merges with the government’s equitable interest. *See id.* at 435; *Sierra Club v. Trump*, 929 F.3d 670, 704–05 (9th Cir. 2019) (noting that in the “variant” on the situation in *Nken*, where it is the government “who seek[s] a stay, ... the question of whether Defendants will be irreparably injured absent a stay, may in practical terms, merge with consideration of the public interest”).

Both New Mexico and the public are irreparably harmed by the posting of voter data online. This privacy interest is straightforward: many members of the public do not wish to have their home addresses, party registration, and voting history posted online for all to see. *See Forest Guardians v. FEMA*, 410 F.3d 1214, 1220 (10th Cir. 2005) (recognizing “significant” “privacy interest of an individual in avoiding the unlimited disclosure of his or her name and address” (internal quotation marks omitted)); *Dep’t of Defense v. FLRA*, 510 U.S. 487, 501

(1994) (“We are reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions.”). This is a particular concern for people who are at risk for stalking, harassment, or even violence, including public figures, people in law enforcement or other sensitive professions, and those who are likely targets for threats based on their personal relationships. Moreover, the knowledge that registering to vote will result in one’s home address and party registration being placed on the internet will deter some New Mexicans from voting.

The district court acknowledged these harms but mistakenly determined that they had not been sufficiently established. *See* Mem. Op. at 192 (“[I]f there is evidence that [VRF’s] publication of voter data eroded trust in the voter registration system, led to voters cancelling their registrations, or gave rise to incidences of solicitation, harassment, or abuse, this State interest would be important.”). Despite summarizing testimony by the Deputy Secretary of State that posting voter data could cause people not to vote and result in door-to-door harassment—which had already occurred—the court concluded that “there is no evidence in the record that posting the data caused any of the problems about which the [SOS] is concerned.” Mem. Op. at 193–94. Not only does this erroneously discount the Deputy Secretary of State’s testimony, it

overlooks the fact that there was only a three-week period, well before the election, between the time when VRF's website received media attention and the data was taken down. Mem. Op. at 25-26, ¶¶ 98-102.

Additionally, once VRF reposted voter data following the PI, the SOS received many more complaints from voters concerned about their personal information being posted online. See ECF No. 57, at 12 & Ex. B (20 complaints received, 16 after re-posting of data); Decl. of Mandy Vigil ("Vigil Decl."), ¶ 5 (23 complaints), attached as Ex. 7. The SOS also has received inquiries from court officials, the Department of Corrections, and the U.S. Marshals Service, seeking ways to keep judges, prosecutors, corrections officers, parole officers, and law enforcement safe. ECF No. 57 at 12; Vigil Decl., ¶ 6.

These concerns with public safety and endangerment are preeminent. But New Mexico also is irreparably injured by the PI's restraint on its ability to enforce the Election Code. See *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (enjoining enforcement of state statutes is irreparable injury). This sovereign injury is particularly acute here, where the AG is not alleged to have engaged in any viewpoint discrimination and has been enjoined from enforcing laws that have not been deemed unconstitutional.

The irreparable harm to New Mexico and its public will be magnified by VRF's planned posting of data from the 2022 election. VRF's currently-posted data is from prior elections; it has stated that it wants to post new voter data after the 2022 election. Vigil Decl., ¶ 3 & Ex. A. Except for a limited program for crime victims, the only option for voters not to have their home addresses posted by VRF are to move and not re-register to vote. See N.M. Stat. Ann. § 40-13B-1 to -9 (Confidential Substitute Address Act, or "Safe at Home" program); Mem. Op. at 157 (VRF acknowledges that other than website terms of service, it has no ability to prevent harassment or intimidation of voters). And even for those few voters who are eligible for a confidential address, VRF requires them to disclose their address to VRF staff, contrary to New Mexico law. See Mem. Op. at 20-21, ¶ 79 (VRF will remove Safe at Home voters upon submission of official documentation); N.M. Stat. Ann. §§ 40-13B-3(A) & 40-13B-5(A) (participants are only required to disclose status to SOS and other agencies that require a residential address), 40-13B-8(C) (background check and training requirements to access Safe at Home records).

For all the foregoing reasons, the public interest and irreparable harm factors weigh heavily in favor of a stay. On the other hand, VRF will not suffer any injury from a stay. First, VRF has no interest in an erroneous preliminary

injunction founded upon mistakes of law. *See supra* Part II(a). Second, VRF can still analyze and review voter data without a PI, so long as it does not post that voter data online. *See* Mem. Op. at 70 (any potential prosecution is for providing access to voter data). Finally, VRF can still argue in any state court prosecution that New Mexico law permits the posting of voter data. Enjoining such a prosecution preemptively, when the Election Code has not been deemed unconstitutional and the Attorney General has not engaged in any viewpoint discrimination, was erroneous.

CONCLUSION

Therefore, the New Mexico Secretary of State and Attorney General respectfully request that the Court stay the preliminary injunction pending appeal. In the alternative, New Mexico requests that the Court stay the preliminary injunction's bar on prosecution as it relates to the posting online of voters' home addresses, which poses a particular threat of violence and harassment.

By: /s/ Nicholas M. Sydow
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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 the most recent version of Webroot SecureAnywhere, version 9.0.33.35, last updated on September 19, 2022, and, according to the program, is free of viruses.

CERTIFICATE OF SERVICE

On November 10, 2022, 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
Nicholas M. Sydow

CERTIFICATE OF COMPLIANCE

1. This filing complies with the word limitation of Fed. R. App. P. 27(d)(2) because it contains 5,167 words, excluding the parts exempted by Fed. R.App. P. 32(f).
2. This filing complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word Standard 2016 in 14-point Constantia type.

/s/ Nicholas M. Sydow

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