IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

VOTER REFERENCE FOUNDATION, LLC,	)	**CASE NO: 22-2101**
Plaintiff-Appellee,	)	
v.	)	
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,	)	**PLAINTIFF-APPELLEE'S RESPONSE TO APPELLANT'S MOTION TO STAY PRELIMINATION INJUNCTION PENDING APPEAL**
Defendants-Appellants.	)	

PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANTS' MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

Defendants-Appellants, New Mexico Attorney General Hector Balderas ("Attorney General") and New Mexico Secretary of State Maggie Toulouse Oliver ("Secretary") (collectively, "Appellants"), attack the District Court's order ("Order") granting a preliminary injunction ("PI") but provide no legitimate basis for a stay. Appellants' Motion for Stay merely misconstrues the Order and restates the same arguments the District Court rejected below.

I. Factual and Procedural Background

Appellee, Voter Reference Foundation ("VRF") is a nonprofit organization dedicated to increasing voter participation in elections while protecting election integrity. Specifically, VRF files requests with state officials to obtain data showing who has voted in recent elections and showing how state officials are maintaining their voter lists.

VRF acquired New Mexico's voter data and published the records on its website, VoteRef.com. Mem. Op. & Order ("Order"), p. 18 (attached as Exhibit A). In addition to publishing voter data on its website, VRF also analyzed the data and prepared a corresponding report. *Id*. at 19. VRF's report identified a difference between the number of voters listed as having voted in the 2020 general election (according to the voter list acquired from the Secretary) and the number of ballots reported being cast according to New Mexico's canvass. *Id*.

Prior to posting the New Mexico data, VRF emailed the Secretary in an attempt to understand the discrepancy. *Id*. The Secretary did not respond. Instead, the Secretary wrote a letter to the Attorney General referring VRF for criminal investigation and prosecution. *Id*. at 24.

Subsequently, VRF made additional requests for New Mexico voter records. *Id*. at 26. Notably, the Attorney General instructed the Secretary to not respond to VRF's requests, and the Secretary informed her office of this instruction, stating,

"we are not fulfilling records requests from VoteRef." June 15, 2022, Tr. 47:5-7 (relevant portions attached as Exhibit B). VRF then sent a "Notice of Violation of National Voter Registration Act & Request for Records" (attached as Exhibit C) to the Secretary pursuant to 52 U.S.C. § 20501(b)(1) ("A person who is aggrieved by a violation of this chapter may provide written notice of the violation to the chief election official of the State involved."). Still, the Secretary failed to provide the requested documents.

Though the Secretary never raised any concerns with VRF, the Secretary told a reporter that VRF's speech sharing the data was impermissible under state law and that she had referred the matter to the Attorney General. Order, at 26. The Secretary Tweeted the resulting article, published by the progressive organization, ProPublica, on her official account with the caption: "Important, in-depth piece from @propublica re: coordinated cross-county attempt to impugn the integrity of our voter rolls. This org posted #NM voter data online, violating the Election Code." *Id*. at 25.

Before publishing her article in ProPublica, reporter Megan O'Matz exchanged emails with Alex Curtas, Communications Director for the Secretary. When O'Matz inquired about the voter discrepancy addressed in VRF's press release, Curtas responded by accusing VRF of spreading "misinformation" about the 2020 election and of attacking the integrity of the Secretary's work. *Id*. at 23-24.

In direct response to both the Secretary and Attorney General's actions, VRF removed New Mexico's voter data from its website. VRF feared it would be prosecuted based on the Secretary's interpretation of the law, her animus towards VRF, and her referral of VRF to the Attorney General.

VRF then filed the underlying complaint, alleging multiple violations of the First Amendment and seeking declaratory and injunctive relief. *Id*. at 26-39. VRF contemporaneously filed a motion for PI.[1] *Id*. at 39.

After two extensive hearings, the District Court issued a PI, stating, "Defendant Attorney General Balderas and Defendant Secretary of State Oliver are enjoined from prosecuting Plaintiff Voter Reference Foundation, LLC, under N.M.S.A. §§ 1-4.5 or 1-4-5.6 for publishing data it already received from Local Labs." *Id*. at 210.

Specifically, the Court held VRF is likely to succeed on three grounds: (1) its viewpoint discrimination claim based on disparate treatment; (2) its viewpoint discrimination claim regarding the Secretary's referral of VRF to the AG for prosecution; and (3) its claim that the Secretary's referral and AG's threat of prosecution constitute ongoing viewpoint discrimination. *Id*. at 180. Importantly, even though the District Court held VRF is likely to succeed on three grounds, the

[1] VRF has since filed an amended complaint.

Court only based the PI on Appellants' combined, ongoing prosecution threat. *Id*. at 205.

In reliance on the Order, VRF almost immediately resumed its speech by republishing New Mexico voter data on VoteRef.com. Almost a month later, Appellants filed their Motion to Stay the Preliminary Injunction in the District Court. *See* App. Ex. 4. The court held a hearing on Defendant's motion and subsequently denied Defendant's motion. Over two months later, and nearly four months after the District Court first issued the PI, Appellants moved this Court to stay the PI pending appeal.

During the nearly four months between the entry of the PI—which Appellants claim caused irreparable harm—and Appellants' appeal to this Court, three important things happened: (1) VRF republished New Mexico's voter data; (2) New Mexico conducted a general election, the 2022 midterms; and (3) discovery continued in the District Court.

Finally, after the District Court denied Appellants' motion to stay, VRF filed a First Amended Complaint which, in addition to the First Amendment claims in its original Complaint, stated new claims for First Amendment retaliation and a violation of the NVRA. First Amended Complaint, p. 30-55 (relevant portions

attached as Exhibit D.[2] Appellants answered rather than filing a motion to dismiss. *See* Def. Answer, p. 77 (attached as Exhibit E).

In the four months since the PI, no discovery and no pleading has shown a single New Mexico voter has been harassed, has refused to vote, or has withdrawn his or her registration as a result of VRF's online speech in sharing the single set of public data it has received from the Secretary. All of Defendants' evidence of "injury" dates from the days immediately after she issued a press release attacking the District Court's decision and warning New Mexicans that their privacy was in danger. *See* App. Mtn. For Stay, p. 20-24 (attached as Exhibit F). Defendants' papers do not discuss this lack of evidence or explain why they waited almost four months to seek relief from this Court. *Id*.

II. Standard of Review

The District Court denied Appellant's nearly identical motion to stay the PI pending appeal. For this Court to consider a request for a stay pending appeal, 10th Cir. R. 8.1 requires the applicant to address the following:

> (a) The likelihood of success on appeal; (b) the threat of irreparable harm if the stay or injunction is not granted; (c) the absence of harm to opposing parties if the stay or injunction is granted; and (d) any risk of harm to the public interest.

[2] The Amended Complaint removed the individual plaintiff, Holly Steinberg, who joined VRF in suing Appellants in the original Complaint. VRF is the only plaintiff remaining in this action.

O Centro Espirita Beneficiente Uniao De Vegetal v. Ashcroft, 314 F.3d 463, 465-66 (10th Cir. 2002).

Notably, Appellants have posed iterations of the present arguments at every step of this litigation and in every iteration, they have been rejected. Indeed, Appellants argued these factors first in their response to plaintiff's motion for preliminary injunction (*see* Defs.' Resp. to Mtn for PI, attached as Exhibit G), then Appellants took a second bite at the apple in their motion to stay in the District Court—which was denied. Now, Appellants seek a third bite at the apple, presenting the same rejected arguments, which are no more availing at this stage. There is no reason for this Court to disturb the PI below.

III. Defendants Will Not Succeed on Appeal

A stay pending appeal requires a "strong showing" the applicant is likely to succeed on the merits. *Nken v. Holder*, 556 U.S. 418, 434, 129 S.Ct. 1749 (2009). This factor, along with the irreparable harm factor, is "the most critical." *Id*. Indeed, "[i]t is not enough that the chance of success on the merits be 'better than negligible' or that success be a 'mere possibility.'" *Id*. This Circuit also requires a "strong showing" of likelihood of success for a stay pending appeal, which it recognizes is the "most critical" factor in the analysis. *KSTU, LLC v. Aereo, Inc.*, 2014 WL 1687749, at *1.

A. The Attorney General and Secretary of State Must Be Enjoined

Appellants first claim the District Court improperly enjoined the Attorney General because the Attorney General has not violated VRF's rights. This argument rests on the notion that the Secretary and Attorney General are different "people" for purposes of a § 1983 claim. Though generally correct, this ignores the Defendants' conduct in this case, as the Order showed in its findings and conclusions.[3]

First, it is disingenuous for Appellants to now claim the Attorney General is not a proper party when the Attorney General's office has been taking significant steps to investigate VRF for prosecution for eight months and has at no time taken the position it would not prosecute VRF. What is more, Defendants actually presented the opposite argument at the first hearing on the PI motion in this case. At the first hearing on the PI, Appellants' counsel argued the Secretary is not a proper party, but the Attorney General is:

> [I]t's not a question of who, which is the state agency that interprets the law, rather it's a question of who can threaten with prosecution. And that's the Attorney General's Office. By statute, for every suspected violation of Election Code, the Secretary of State makes a referral to the Attorney General's Office, and the Attorney General's Office is the prosecuting entity.

May 17 Tr. (attached as Exhibit H) at 37.

[3] Appellants' argument on this point is a thinly veiled attempt to reframe their argument regarding standing—which the District Court considered and correctly dismissed.

Nonetheless, Appellants specifically claim the Order "does not contain a single finding of a violation by the Attorney General." App. Mtn. at 12. This is simply untrue. In fact, the District Court explicitly concluded:

> Here, the ***combination*** of the Secretary of State's criminal referral and the lack of any indication that the Attorney General will not prosecute Voter Reference for publishing the data that it already has constitute an ***ongoing*** form of viewpoint discrimination and prior restraint, which the First Amendment does not tolerate.

Order, at 207. (emphasis added). Given Appellants' oversight, their argument necessarily fails.

The District Court's reasoning makes sense. As Appellants point out, the Secretary does not have the power to prosecute pursuant to N.M. Stat. §§ 1-4-5.6(B). The Attorney General, on the other hand, does have the power and even the *duty* to prosecute. At the hearing on Appellants' motion to stay in the District Court, Appellants repeatedly state the Attorney General is "*required*" to prosecute VRF. *See e.g.* August 31, 2022 (relevant sections attached as Exhibit I) Tr. p 5; 14:5 ("So the Attorney General's Office is required by statute to fulfill its responsibilities of prosecuting any suspected violations of the New Mexico Election Code."); and 32:8; and 35:24. Accordingly, the ongoing threat of prosecution comes both from the Secretary (who referred VRF to the Attorney General) ***and*** the Attorney General (who holds the power to prosecute). The record also demonstrates the Attorney General colluded with the Secretary to deprive VRF of its First Amendment rights

by counseling the Secretary to ignore VRF's February 15, 2022, request. Ex. B, at 49-50.

Because of this shared liability, it makes no difference whether the Secretary and Attorney General are normally treated as distinct "persons" for purposes of a § 1983 action. Even if this Court were to follow Appellants' logic, the Attorney General is properly enjoined because of his general authority to prosecute. In *Ex parte Young*, the United States Supreme Court considered a situation much like that existing here and concluded the state attorney general was properly enjoined. 209 U.S. 123, 161, 52 L.Ed. 714 (1908). The plaintiffs in *Young*, a railroad, sued Minnesota officials, including the state's attorney general, to enjoin the officials from prosecuting the railroad for violating newly enacted legislation. *Id*. at 203. The Minnesota Attorney General argued the court did not have the power to enjoin him. *Id*. The Court disagreed, reasoning:

> It would seem to be clear that the attorney general, under his power existing at common law, and by virtue of these various statutes, had a general duty imposed upon him, which includes the right and the power to enforce the statutes of the state, including, of course, the act in question, if it were constitutional. His power by virtue of his office sufficiently connected him with the duty of enforcement to make him a proper party to a suit of the nature of the one now before the United States circuit court.

Id.

Here, the District Court correctly found "[t]he New Mexico Attorney General is responsible under state law for investigating and prosecuting violations of the

Election Code, including the unlawful use of voter data under § 1-4-5.5 and § 1-4-5.6." Order, at 5. Due to the powers and responsibilities conferred upon the Attorney General, he is sufficiently connected to the threatened prosecution of VRF. Accordingly, as in *Young*, the District Court properly enjoined the Attorney General.

Appellants' attempt to distinguish this case from *Young* is unavailing. In essence, Appellants argue that because the District Court initially concluded the statutes at issue are not facially unconstitutional, the Attorney General may not be enjoined. Appellants do not and cannot support this argument with caselaw.

The argument also completely ignores ample record evidence the Attorney General is actively investigating VRF at the Secretary's urging. On Wednesday, January 26, 2022, a Special Agent in the Attorney General's office sent a copy of the Secretary's Referral to the Federal Bureau of Investigation. Ex. H at 11. Then, in an April 2022 email communication (attached as Exhibit J) with the California Attorney General, Sharon Pino confirms the Secretary of State "ha[s] been working with the Chief Deputy AG of Criminal Affairs, Anne Kelly." Ex. K at 2.

The presence of the Attorney General in this action is also necessary for the court to grant complete relief to VRF. As the Defendants aptly note, while both the Attorney General and Secretary are capable of threatening VRF with prosecution, only the Attorney General is capable of prosecution. If the District Court were only

to enjoin the Secretary (who cannot prosecute) but not enjoin the Attorney General (who can prosecute), VRF's rights may still be violated by the Attorney General.

To the extent Appellants now also argue the Secretary of State is improperly enjoined because the District Court did not find an "ongoing" violation, that argument is wholly rebutted by the record. As previously referenced, the District Court explicitly stated the "combination" of the Secretary and AG's action create an "ongoing" violation. Order, at 207. Therefore, the District Court properly enjoined both the Attorney General and Secretary of State after finding VRF was likely to succeed on the merits of its First Amendment claims.

B. The District Court did not Deprive Appellants of an Opportunity to Respond

Appellants next claim they will succeed on appeal because the issue of the Secretary's Referral of VRF to the Attorney General for potential criminal prosecution was raised as a basis for liability for the first time in the District Court's Order, improperly depriving Appellants "an opportunity to be heard on this claim." Def. Mtn. to Stay, at 15. Again, this assertion is clearly refuted by the record. VRF raised the issue of the Secretary's Referral throughout its First Verified Complaint, arguing the Secretary was hostile to VRF's views and, thus, threatened to prosecute for political gain:

> 42. VRF removed this data from its website on March 28, 2022- just before this lawsuit was filed - - out of fear that it would be prosecuted based on the Secretary of State's interpretation of the law *and her*

> *referral of VRF to the Attorney General's office for potential prosecution.*
>
> 50. Because the Secretary of State claims that these are not lawful purposes for which the voter information can be used *and referred VRF to the Attorney General's office for prosecution*, Plaintiff Steinberg is afraid to continue using the data for her desired purposes and will cease her efforts to use the data to increase voter participation and to advance election integrity unless and until it becomes clear that doing so will not expose her to criminal prosecution by the Defendants.
>
> 53. Prior to the publication of the Article, VRF was never informed by the Secretary of State or Attorney General that they viewed VRF's use of the voter information as unlawful *or that the Secretary had made a criminal referral to the Attorney General to investigate and prosecute VRF*.
>
> 54. The day after the Article was published, Secretary Toulouse Oliver shared it on her official Twitter account, @NMSecOfState, *again accusing VRF of violating the election code*[.]
>
> 65. [. . .] ProPublica argues that VRF is dangerous because it allows citizens to access public data and thereby, allegedly, contributes to an "echo chamber" of concern regarding election participation and integrity. *Rather than simply contacting VRF to understand its mission and raise her concerns, the Secretary simply accepted ProPublica's politically charged attacks as true and made a public criminal referral.*
>
> 66. [. . . Voter data] is not a resource that can be selectively released only to those groups whose political views the Secretary deems "not nefarious," and *New Mexico's statutes should not be used to ensnare and selectively punish those whose election and governmental uses do not meet whatever unwritten criteria the Secretary and law enforcement apply to deem data usage "lawful."*

First Verified Complaint (relevant sections attached as Exhibit K). (emphasis added). The Secretary's Referral and the associated threat of prosecution are the basis for VRF's argument:

> 111. This chilling effect is both real and substantial, as VRF has been forced to stop disseminating voter information and seek judicial intervention out of fear of prosecution. And Plaintiff Steinberg, who—after VRF's takedown—would otherwise have to pay for her own personal data set, and who has an objectively reasonable fear that she, too, would be prosecuted were she to purchase the data and share it with associates for election transparency, participation, and integrity purposes, is also chilled.

Id. Beyond VRF's First Verified Complaint, the record is replete with references to and arguments stemming from the Secretary's Referral. The Referral was a prime focus of the May 17, 2022, hearing in which the District Court explicitly confirmed VRF was making the very argument Appellants now ignore:

> If I understand the briefing—and I could be wrong here—that basically the plaintiffs are asserting two First Amendment rights. The first right that is being asserted is that, of course, they're saying this is their interpretation. But I think I've got to go back—once I make a determination that their interpretation of state law is incorrect, then I think your argument has to be—I'm pointing to the plaintiffs here—that they are taking a statute that is—that allows the conduct that you're trying to do, and selectively saying: You can't do that. *And so it's some sort of selective prosecution or attempted prosecution or referral.*

Ex. H at 6-7 (emphasis added). The rest of the record fleshes out VRF's argument.

> However, *if you look at the actual referral* . . . the actual reason that we were targeted was because of the content of our speech. And if that's true . . . it doesn't matter that the statute itself, as they construe it, is content neutral. The subjecti[ve] motivation actually is a secondary prong. It's another way to get the content or viewpoint-based discrimination.

Id. at 31 (emphasis added).

> Because we read in the ProPublica article that the New Mexico Secretary of State thought we were violating the law *and had referred the matter to the Attorney General for prosecution*. And so we took it

> down until we could figure out what we had [d]one wrong and how to be in compliance.

Id. at 69 (emphasis added).

> Okay. Now, part of your claim today, and in this case today is that Catalist, and potentially i360 are doing something illegal, but they have not been referred for prosecution by the Secretary of State's Office; is that correct? If you know, if you understand.

Id. at 94-95.

> *Have you ever referred Catalist to the Secretary of State's Office as a potential violator of New Mexico State law?*

Id. at 96 (emphasis added).

> *We did refer both Local Labs and VRF to the Attorney General's Office due to the use, and our concerns with the data being made available online.*

Id. at 129 (emphasis added).

> And we are here—we're just about done—*we are here to understand exactly what parts of VRF's conduct caused the referral.* And so my question is: Is it the use, or is it the sharing?

Id. at 147 (emphasis added).

The record clearly demonstrates VRF raised the issue of the Referral and threat of prosecution prior to the District Court's Order. Appellants were, in fact, not deprived of an opportunity to respond to VRF's theory that the Referral and threat of prosecution violated VRF's constitutional rights, nor was this a novel theory raised for the first time by the District Court in its Order. Accordingly, Appellants fail to make a strong showing they will succeed on appeal on this basis.

C. The Preliminary Injunction is Supported by the District Court's Findings

Finally, Appellants claim they will succeed on appeal because one of the District Court's multiple findings of viewpoint discrimination does not support the PI. Appellants take issue with the fact that the District Court found the Secretary engaged in viewpoint discrimination by not honoring VRF's request for data, but the PI does not enjoin the Secretary from withholding that data. This argument exemplifies Appellants' misunderstanding of both the Order and VRF's Motion for Preliminary Injunction. The District Court addressed this very issue in the Order:

> Although the Secretary of State's decision not to honor Voter Reference's [. . .] request for data constitutes impermissible viewpoint discrimination, the Plaintiffs do not ask the Court to enjoin the Secretary of State to honor their request[.] There is, therefore, no harm, because there is nothing for the Court to remedy, whether the Plaintiffs ask for a remedy or not.

Order, at 207. Essentially, the District Court specifically did not base the PI on the violation about which the Appellants complain. Instead, as already referenced, the District Court based the PI on the "ongoing" viewpoint discrimination and prior restraint regarding Appellants' "combined" threat of prosecution, which the PI specifically enjoins. *Id*.[4] Therefore, this point is entirely irrelevant and provides no basis to disturb the PI.

[4] To the extent Appellants cite *Buchwald v. University of N.M. Sch. Med.*, 159 F.3d 487, 495 (10th Cir. 1998) for the proposition that the *Ex Parte Young* exception only applies to prospective relief that remedies ongoing violations of law, they are

Even if this Court were to consider Appellants' arguments pertaining to this finding, those arguments still fail. First, Appellants cite *Pahls v. Thomas*, 718 F.3d 1210, 1238 (10th Cir. 2013) for the proposition that a "viewpoint discrimination claim requires . . . disparate treatment of two similarly-situated groups." App. Mtn. at 18. This is a curious reference and misstatement of this Court's own holding in *Pahls*. Nowhere in *Pahls* does this Court purport to require a showing of disparate treatment. It is true the plaintiff in *Pahls* sought to prove the defendant's "discriminatory purpose" through evidence of disparate treatment, but this Court nowhere held disparate treatment is necessary for viewpoint discrimination. Even if disparate treatment were required, it exists here. VRF requested voter data, promising it would not share the data on the internet absent a court order. Order, at 28. VRF's promise situates it alongside other organizations who requested the data[5] and actually received it. Yet unlike those groups, VRF is threatened with prosecution and cannot receive data due to the Secretary's open animosity to VRF's political views.

In grasping for a non-discriminatory reason to deny VRF's request for voter information, Appellants quibble that even though VRF promised the Secretary it

absolutely correct. The District Court specifically found such an ongoing violation. Order, at 207.

[5] The Order recognizes several of these organizations: i360, Catalist, Local Labs, L2 Inc., and Data Targeting. Order, at 16.

would not post "personal information of voters" online, the phrase, "personal information of voters," does not encapsulate *all* data the Secretary may make available. The implication is that VRF may post that "non-personal" data online. This after-the-fact hair-splitting—raised only in argument, and with no effort to clarify terms with VRF—is puzzling. The Secretary never explains what information is (a) *not* "personal voter information," but (b) would have been produced, and (c) if posted online, would have broken the law. The Secretary's own request form is entitled "Voter Information Authorization." In short, Defendants' argument utterly fails as a "neutral" explanation for the Secretary's discrimination against VRF, and certainly provides no basis for a stay.

IV. The Equitable Factors Do Not Support a Stay

In seeking a stay pending appeal, Appellants face a steep uphill battle:

> A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant.

Nken v. Holder, 556 U.S. 418, 427 (2009).

The District Court applied the correct standard:

> [Appellants] must show that the threatened injury outweighs whatever harm the proposed PI may cause the opposing party and that the injunction, if issued, will not affect adversely the public interest. The harm-to-the-opposing-party factor and public-interest factor "merge" when the opposing party is the federal government.

Order, at 207-08. (internal quotations omitted). Applying this framework, the court correctly concluded, "Voter Reference's claimed injury outweighs any harm to the

public interest that a PI may cause" and "[w]hile there may be harm to the public interest from posting the data online, the First Amendment injury that occurs absent a narrow PI outweighs that harm." *Id*. Appellants provide no reasonable basis for abandoning this conclusion.

First, Appellants' lengthy delay in moving for stay belies their claimed "irreparable injury." The District Court granted the PI on July 22, 2022. Appellants immediately dropped press releases attacking the Court's decision, sounding the alarm regarding injuries to voter privacy, and claiming—as they do here—that voters would need to "de-register" to protect themselves. When worried voters responded with notes to the Secretary, Defendants collected them as "evidence." Yet Appellants acted with far less urgency in the court of law than in the court of public opinion. They waited almost a month to seek a stay. Then, after the District Court promptly ruled, Appellants waited over *another* two months to approach this Court. And despite professing alarm over impending voter de-registrations against the backdrop of a national midterm election in just three and a half months, Defendants failed to push their underlying appeal of the PI, instead seeking briefing extensions. Appellants' own inaction belies their claims of irreparable harm and public interest.

Next, Appellants' scant evidence of purported citizen complaints cut against their position. First, just a few complaints were received, they appear to have been provoked by the Secretary's own press release, and for that reason, not a few are

from out of state. App. Exhibit B. Second, the last complaint is from August 15, 2022, and Appellants have provided no new complaints during discovery, even though these crucial months of public focus on elections before the midterms are precisely when Appellants would expect an increase in complaints. A handful of dates notes, then, are bellwether for public interest.

Finally, some of the complaints mimic Appellants' partisan political animus against VRF. In one email, a citizen, not confirmed to be a New Mexico citizen, warns the Secretary that VRF is "a subsidiary of a conservative *pro-Republican* Restoration PAC." *See* App. Exhibit B at 1 (emphasis added). Some of these citizens seem to have been inflamed by the Secretary's own hyperbolic reaction to the Order and suggestion VRF's work will lead to voter intimidation *Id*. (citing the Secretary's own statement about VRF). Adopting such comments as a basis for state action is simply another form of viewpoint discrimination and retaliation, considerations which cannot constitute a legitimate public interest—whether articulated by the Secretary or by members of the public inflamed by her misinformation about VRF and this case.

Insomuch as Appellants are concerned over public safety for certain individuals, VRF already provides safeguards to allay those concerns. Any person who believes they qualify for protected voter status under their resident state's own mechanism may notify VRF and have their information removed. In New Mexico,

this mechanism is an application to the Safe at Home program under the Confidential Substitute Address Act, NMSA 1978, §§ 40-13B-1-9. Thus, the process for removing a citizen's name from VoteRef.com is identical to the State's own process.[6] Appellants provide no reason, and none exist, that VRF should be held to a higher standard than the state itself. Additionally, as correctly observed by the District Court, much of the information published on VoteRef.com is available through the Secretary's own website. *See* New Mexico Secretary of State, Voter Information Portal, https://www.sos.state.nm.us/voting-and-elections/voter-information-portal/. Appellants do not address what harm can possibly exist from posting information on VoteRef.com which is already available on the Secretary's own website.

Finally, VRF notes that on two different occasions since the District Court's Order was entered in this matter, the Secretary contacted VRF (through counsel) asking VRF to remove the data of certain voters which the Secretary provided to VRF before subsequently discovering that they were enrolled in the New Mexico Safe at Home Program. VRF acted promptly on both occasions, removing over one hundred names within hours of receiving notice from the Secretary. The Secretary

[6] During the June 15, 2022 hearing regarding VRF's Motion for Preliminary Injunction, Sharon Pino, Deputy Secretary of State, testified the only confidentiality program New Mexico recognizes for voter data is the Safe at Home Program which the state has the power to expand, but has chosen not to. Ex. J at 190.

cannot now assert VRF is subverting the Safe at Home Program despite its swift and unconditional assistance on two occasions to help safeguard that very program. VRF has no quarrels with following the law, but expects government officials to do the same, particularly with political speech protected by the First Amendment.

The equitable factors simply do not weigh in Appellants' favor and provide no basis for a stay.

V. Conclusion

For the foregoing reasons, this Court should deny the Appellants' Motion for Stay Pending Appeal.

Respectfully submitted this 28th day of November 2022.

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CERTIFICATE OF 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.

CERTIFICATE OF SERVICE

I, Edward D. Greim, certify that on November 28, 2022, a copy of Plaintiff's Response to Defendants' Motion to Stay Preliminary Injunction Pending Appeal was filed with the Clerk of the Court using the CM/ECF system, which sent notification to the following via e-mail:

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CERTIFICATE OF COMPLIANCE

1. This filing complies with the word limitation of Fed. R. App. P. 27(d)(2) because it contains 5,146 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 Times New Roman type.

/s/ Edward D. Greim