

**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.**

**REPLY IN SUPPORT OF  
MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL**

Voter Reference Foundation (“VRF”) does not refute the basic factors that warrant staying the district court’s preliminary injunction (“PI”) pending this appeal. New Mexico’s Attorney General and Secretary of State (collectively, “New Mexico”) are likely to prevail in their appeal on one of several grounds. First, VRF does not identify any action by the Attorney General (“AG”) that supports the PI’s restraint of his prosecutorial power. The only action the district court relied on in issuing the PI was the AG’s unwillingness to guarantee that he would not prosecute VRF for posting

voters' information online. But this is an exercise of prosecutorial discretion independent from the Secretary of State's ("SOS") referral of VRF for investigation and does not warrant an injunction of the AG's enforcement authority.

Second, VRF fails to show that the novel basis on which the district court issued the PI was litigated below: that the SOS's investigative referral and the AG not promising VRF will not be prosecuted combined to create an unconstitutional prior restraint. VRF argues that the SOS referral was a subject of litigation, but it was never a basis for a prior restraint claim until the district court issued its opinion. Finally, VRF agrees that the PI is not based on the SOS's denial of VRF's voter data request, and therefore any claims concerning the denial cannot support the PI.

Equitable factors also support staying the PI. VRF criticizes the timing of this motion and the content of some public complaints about VRF's posting of voters' personal information. These criticisms fail to rebut the fundamental interest in preventing the widespread disclosure of voters' home addresses, including testimony that VRF's posting risks public safety and invites harassment. Nor does VRF contest that it will not be injured by staying the PI.

As New Mexico is likely to prevail in its appeal and equitable interests support a stay of the PI, the motion should be granted.

**I. VRF Does Not Undermine New Mexico’s Showing That It Is Likely to Prevail**

VRF does not refute New Mexico’s showing that it is likely to prevail on appeal. As an initial note, VRF agrees that the district “[c]ourt only based the PI on Appellants’ combined, ongoing prosecution threat,” not the refusal to provide voter data or any other actions. Pl.-Aplee’s Resp. Defs.’ Mot. Stay PI Pending Appeal (“Response”) at 4–5 (citing Mem. Op.<sup>1</sup> at 205 (explaining that only VRF’s “prior restraint claim insofar as the Plaintiffs challenge the [SOS’s] threat of prosecution” ... “results in a loss of First Amendment freedoms” that can support a PI)). Therefore, VRF acknowledges that the PI is only based in the unlitigated claim that the State cannot impose, without a compelling interest, a prior restraint on the publication of voter data that an entity has received “without getting that information by signing an affidavit or agreement with the State....” Mem. Op. at 194. New Mexico is likely to prevail on appeal that this prior restraint claim cannot support the PI.

---

<sup>1</sup> ECF No. 51 (attached to Mot. Stay PI Pending Appeal (“Motion”) as Ex. 1).

*a. The AG's Refusal to Disclaim Any Prosecution of VRF Does Not Warrant an Injunction.*

In response to New Mexico's argument that no actions support enjoining the AG's prosecutorial power, VRF argues that the PI is warranted because the AG has investigated VRF and "has at no time taken the position it would not prosecute VRF." Response at 8. This argument endorses the district court's reasoning that, although not prior restraints independently, the SOS's investigative referral combined with the AG's unwillingness to guarantee that he will not prosecute VRF, merge to form an unconstitutional prior restraint. See Motion at 8.

The lack of a guarantee that the AG will not prosecute VRF, however, is not a violation of VRF's federal rights that can support the PI. Even if the SOS's investigative referral were improper, the AG retains independent prosecutorial discretion to decide whether or not VRF should be investigated and prosecuted for a violation of the Election Code. See Motion at 14 (discussing AG's statutory authority for enforcing election code).<sup>2</sup> At a

---

<sup>2</sup> Statements by the State's counsel that the AG is "required" to prosecute violations of the Election Code, Response at 9, do not refute the basic principle that the AG has discretion to decide whether to bring a prosecution. See *United States v. Robertson*, 45 F.3d 1423, 1438 (10th Cir. 1995) ("prosecutorial discretion is nearly absolute" in decision whether to bring charges). Indeed,

minimum, enjoining the AG from prosecuting VRF because of an improper referral by the SOS is overbroad relief, because it stops the AG from prosecuting not only based on the SOS's inquiry but also any independent determination that VRF has violated the Election Code.

The AG's independent prosecutorial authority also undermines VRF's contention that enjoining the AG is "necessary for the court to grant complete relief to VRF." Response at 11. The district court's holding that New Mexico's actions constitute a prior restraint of VRF is predicated on the "combination of the [SOS's] criminal referral and the lack of any indication that the [AG] will not prosecute [VRF]...." Mem. Op. at 207. Because the AG may independently decide whether to prosecute VRF, however, and on what grounds, the AG's unwillingness to disclaim any future prosecution is no violation of "VRF's rights ... by the Attorney General." Response at 12. The district court cites to no authority that the absence of a promise not to prosecute an entity can constitute a prior restraint, especially when it has not held the underlying law unconstitutional. The district court's reasoning

---

the State's counsel stated that whether to agree not to prosecute VRF was a decision for her client, the AG. 8-31-22 Tr. at 5:15-20, attached to Response as Exhibit I.

results in the peculiar result that New Mexico could prohibit entities that receive voter data from the State from posting the data, but if an entity receives the same data through a third-party agent, merely considering that entity's actions without promising not to prosecute it is a prior restraint. See Mem. Op. at 194 (prohibition on requesters who obtain voter data directly from State does not implicate First Amendment, but restriction on VRF who obtained data through a third party is a prior restraint).

VRF's ancillary arguments for enjoining the AG also fail. First, VRF contends that the AG "colluded with the Secretary to deprive VRF of its First Amendment rights by counseling the Secretary to ignore VRF's [voter data] request." Response at 9–10. This allegation concerns the legal advice of counsel within the Attorney General's Office to their client, the SOS. It does not involve the AG's role as a potential prosecutor of VRF (through different attorneys). Regardless, because the PI is not based on the SOS's denial of VRF's voter data request, the legal advice of counsel cannot support the PI. See *supra* p. 3.

Second, VRF does not refute New Mexico's argument that *Ex Parte Young's* exception for enjoining a party enforcing an unconstitutional statute does not apply. See Motion at 13–14; Response at 10–11. VRF contends that New

Mexico does not support this contention with authority, Response at 11, but the *Buchwald* case cited by the State (Motion at 17–18), holds that “*Ex Parte Young* recognizes an exception ... under which a state officer may be enjoined from ‘taking any steps towards the enforcement of an unconstitutional enactment.....’” *Buchwald v. Univ. of N.M. Sch. of Med*, 159 F.3d 487, 495 (10th Cir. 1998) (quoting *Ex Parte Young*, 209 U.S. 123, 159 (1908)); see also *Cressman v. Thompson*, 719 F.3d 1139, 1146 n.8 (10th Cir. 2013) (same); *Peterson v. Martinez*, 707 F.3d 1197, 1205 (10th Cir. 2013) (“exception permits suits against state officials seeking to enjoin alleged ongoing violations of federal law” (quotation omitted)). The AG’s general enforcement authority, without the finding of an unconstitutional statute or another ongoing violation of federal law, is not grounds for an injunction.

Lastly, VRF does not dispute that the injunction of a prosecution by the SOS is improper where the SOS lacks prosecutorial powers. Motion at 14. Although VRF contends that the combination of the SOS’s referral and AG’s not disclaiming a possible prosecution are an ongoing violation of law, Response at 12, the SOS’s action in making a referral is complete and does not support prospective equitable relief. See *Chilcoat v. San Juan County*, 41 F.4th

1196, 1215 (10th Cir. 2022) (*Ex Parte Young* cannot be used to remedy past violation).

*b. The SOS Referral Was Not Litigated as a Prior Restraint.*

VRF does not contest several elements of New Mexico's argument that the PI is likely to be reversed because it is based on a prior restraint claim not litigated below. VRF does not dispute that due process requires an opportunity to be heard and warrants remand if a ruling is based on an unlitigated theory. Motion at 15–16. Nor does VRF contest that its prior restraint claim was previously based on Section 1-4-5.5's "use restrictions," rather than an investigative referral, and not argued at the PI hearing. Motion at 16–17.

Instead, VRF points out that the SOS referral was discussed in its complaint and PI motion. Response at 12–13. While true, VRF's challenge to the referral was that it was based on viewpoint discrimination, not that it was a prior restraint. See Response at 12 ("VRF raised the issue of the Secretary's Referral ... arguing the Secretary was hostile to VRF's views...."), 14 (referral is "another way to get the content or viewpoint-based discrimination"); 8-31-22 Tr. at 8:24–9:19, 33:21–34:9, 35:6–36:1 (objections to claim as new), relevant portions attached as Exhibit 8. That the referral-as-prior-restraint claim was



not litigated also is evidenced by VRF's addition of this claim when it amended its complaint after the PI Order. *Compare* Pls.' Verif. First Am. Compl. Decl. J. & Prelim. & Permanent Inj. Relief (ECF No. 74), ¶¶ 167, 179–84, with Verif. Compl. Decl. J. & Prelim. & Permanent Inj. Relief (ECF No. 1), ¶¶ 89–101, relevant excerpts attached as Exhibits 9 & 10.

*c. The SOS's Denial of VRF's Voter Data Request Does Not Support the PI.*

VRF appears to acknowledge that the PI is not based on any denial of voter data. Response at 4–5, 16. Therefore, any viewpoint discrimination in the SOS's provision of voter data cannot support the PI. Still, New Mexico is likely to prevail in its appeal of the ruling that the SOS's denial of voter data constituted viewpoint discrimination.

As explained in the Motion, no other entity is similarly-situated to VRF in requesting voter data to post online. Motion at 18–20. VRF argues that other entities requested and received voter data. Response at 17. But VRF does not point to any evidence that such entities were posting voter data online like VRF. Thus, the SOS's intent in denying VRF's data request, unlike those of entities not posting voter data, is immaterial. *Pahls v. Thomas*, 718 F.3d 1210, 1238 (10th Cir. 2013).

Even considering the SOS's intent, the district court erred in concluding that the SOS lacked any legitimate reason to deny the data request. Motion at 18–19. VRF's argument that it will now only post “non-personal” information online without a court order, Response at 18, does not alleviate the SOS's legitimate concerns. Personal data still will be posted with a court order and undefined “non-personal” data will be posted regardless, in violation of the Election Code's restrictions on disseminating voter files.

## **II. VRF Does Not Refute New Mexico's Showing of Irreparable Harm**

VRF does not dispute many of New Mexico's arguments concerning the irreparable harm the State and the public will suffer absent a stay. VRF does not refute that courts have recognized a strong privacy interest in the ability to avoid the disclosure of one's home address. Motion at 20–21. VRF does not rebut testimony that the disclosure of voters' addresses has resulted in the harassment of voters and poses a danger to public officials. Motion at 21–22. Nor does VRF respond to New Mexico's argument that enjoining the enforcement of state statutes inflicts an irreparable sovereign injury. Motion at 22. And VRF does not refute New Mexico's reasons why staying the PI would not harm VRF. Motion at 23–24.

Instead, VRF offers several criticisms that do not undermine New Mexico's showing of irreparable harm. Initially, VRF criticizes New Mexico for not filing its motions to stay quickly enough. Response at 19. The timing of these motions, however, does not refute the irreparable harm discussed above. Moreover, this timing is explained by circumstances apart from any lack of concern regarding the PI. New Mexico's prior counsel, who had been the sole attorney handling this case, left the Attorney General's Office requiring new counsel to be assigned and become familiar with a sizable record.<sup>3</sup> As well, once VRF posted voters' home addresses, some harm was already done given the difficulty of erasing data posted to the internet. See Catherine Thorbecke, "Why Deleting Something from the Internet Is 'Almost Impossible,'" CNN Business, Sept. 18, 2022, <https://www.cnn.com/2022/09/18/tech/deleting-data/index.html>. New Mexico moved to avoid VRF's posting of a second, more current set of voter data from being posted following the 2022 election. Engaging in a flurry of emergency filings before the election could,

---

<sup>3</sup> VRF also criticizes New Mexico for seeking "briefing extensions." Response at 19. The only extension New Mexico sought was based on its appellate counsel having three immediate family members sick with COVID-19 and other obligations. Unopposed Mot. Extension File Aplt's.' Opening Br., ¶ 3.

counterproductively, have resulted in added attention to VRF's website and more harm to the public.

VRF also criticizes the complaints New Mexico attached to its district-court stay motion as outdated and partisan. Response at 19–20. This criticism ignores the declaration of the SOS's Election Director, who testified that the SOS has received inquiries from judicial and law enforcement officials seeking to keep themselves safe after the posting of their home addresses. Motion at 22. It also overlooks the Deputy Secretary of State's testimony concerning harassment and danger, discussed above. See Motion at 21; *supra* p. 10. And that some complaints to the SOS contained partisan criticism is not “[a]dopting such comments as a basis for state action,” Response at 20, but simply including those complaints, among others, in the record of members of the public concerned about the disclosure of voter data.

New Mexico's limited “Safe at Home” program does not resolve many of the State's public safety concerns. Motion at 23. VRF contends that much voter data is already on the SOS's website. Response at 21. But this data is only available if you already know the voter's first and last names, date of birth, and

county.<sup>4</sup> VRF also states that New Mexico has declined to expand its Safe at Home program. Response at 21 n.6. While New Mexico has not expanded this limited program to provide substitute addresses, it does control and limit the use of voter registration data, which is one of the few places where individuals are required to provide a home address. *See* N.M. Stat. § 1-4-5.1(I)(3)(a). VRF's disclosure of these home addresses creates irreparable harm and merits a stay of the PI.

### CONCLUSION

Therefore, New Mexico respectfully requests that the Court grant its motion to stay the preliminary injunction pending appeal.

By:     /s/ Nicholas M. Sydow      
Nicholas M. Sydow  
Solicitor General  
Office of the New Mexico Attorney  
General  
201 Third St. NW, Suite 300  
Albuquerque, NM 87102  
Tel.: (505) 717-3571  
Fax: (505) 490-4881  
[nsydow@nmag.gov](mailto:nsydow@nmag.gov)

---

<sup>4</sup> The SOS's webpage for a voter to access this information is here:  
<https://voterportal.servis.sos.state.nm.us/WhereToVote.aspx>

*Counsel for Defendants-Appellants  
New Mexico Attorney General Hector  
Balderas and New Mexico Secretary of  
State Maggie Toulouse Oliver*

**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 9.0.33.39, last updated on November 16, 2022, and, according to the program, is free of viruses.

**CERTIFICATE OF SERVICE**

On December 5, 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 2,578 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

RETRIEVED FROM DEMOCRACYDOCKET.COM