Case No. 22-2101

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

VOTER REFERENCE FOUNDATION, LLC, 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, Defendants-Appellants.

DEFENDANTS-APPELLANTS' CORRECTED* BRIEF-IN-CHIEF

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

December 8, 2022

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Oral argument is not requested.

* The only change in this brief from the originally filed brief is the listing of attachments in the Table of Contents.

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STATEMENT OF PRIOR OR RELATED CASES

Pursuant to Tenth Circuit Rule 28.2(C)(1), Appellants state that there are no prior or related appeals. There is a pending motion to stay the preliminary injunction pending appeal.

JURISDICTIONAL STATEMENT

On March 28, 2022, Plaintiff-Appellee Voter Reference Foundation, LLC ("VRF") [1] simultaneously filed a complaint and moved for a preliminary injunction ("PI"). [App. Vol. I at 13–99] The motion for preliminary injunction asked the district court to enjoin the New Mexico Attorney General ("AG") and Secretary of State ("SOS") (collectively, "New Mexico") from prosecuting or otherwise prohibiting VRF for disseminating or using voters' home addresses, voting history, and other information (or "voter data"). [App. Vol. I at 66–67, ¶ 4, 81]

After an evidentiary hearing and the parties' submission of proposed findings of fact and conclusions of law, the district court granted in part VRF's motion for preliminary injunction on July 22, 2022. The preliminary injunction enjoins the AG and SOS "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." [App. Vol. V

[1] The Complaint was also filed by Holly Steinberg, whom the district court dismissed for lack of standing. [App. Vol. V at 995–96 (Mem. Op. at 164–65, see n.2 herein] Ms. Steinberg is not a plaintiff in the operative, amended complaint filed after the preliminary injunction order. [App. Vol. VI at 1129–1264]

at 1041 (Mem. Op. at 210)][2] New Mexico timely filed its notice of appeal on August 19, 2022. [App. Vol. V at 1043–44]

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) as an appeal from the preliminary injunction.

[2] The Memorandum Opinion and Order granting in part the preliminary injunction is attached to the brief and in the appendix at App. Vol. V at 832–1042. It is cited herein as "Mem. Op."

STATEMENT OF THE ISSUES

1. Whether the district court erred in enjoining the Attorney General and Secretary of State's ability to prosecute VRF where the AG's only action supporting the PI is not immunizing VRF from prosecution and where the SOS lacks prosecutorial authority.

2. Whether New Mexico's due process rights were violated when the district court issued a preliminary injunction based on a theory of prior restraint that was not alleged by VRF or litigated by the parties.

3. Whether the district court erred in finding that the Secretary of State's investigative referral of VRF and denial of VRF's voter data request was viewpoint discrimination when no other entity was similarly-situated to VRF in that it had posted voter data online.

4. Whether the district court erred by discounting New Mexico's evidence of irreparable harm, including testimony that the publication of voters' home addresses risks harassment of and danger to voters.

STATEMENT OF THE CASE AND FACTS

VRF's Posting of Voter Data and Subsequent Lawsuit

This appeal arises out of VRF's posting of "voter data" including nearly all New Mexico voters' name, home address, year of birth, party affiliation, and voting history on its public website. [App. Vol. 1 at 13–14, ¶ 1 & 23, ¶ 38; Mem. Op. at 7, ¶ 21 & 19, ¶ 75; App. Vol. VI at 1147, ¶ 71] VRF purchased this data through a third-party contractor, Local Labs, that requested the data through New Mexico's exclusive and restricted process for obtaining voter data. [App. Vol. IV at 728–29, Fact 36 & 803, Fact 3; Mem. Op. at 18, Fact 69]; N.M. Stat. Ann. § 1-4.5.5 (voter data request provision). It claimed that the purpose of its website was "to provide public access to official government data pertaining to elections, including voter registration rolls…." [App. Vol I at 16, ¶ 12] This would allow, VRF alleged, citizens to check the voting history of their neighbors, friends, and others to "'crowd-source' the process of rectifying any errors" in the voter rolls. [App. Vol. I at 22, ¶ 34] VRF also described its website as a way "to see if [one's] friends and neighbors have voted and encourage them to do so…." [App. Vol. I at 22, ¶ 36]

Concerned that VRF's posting of this information for all New Mexico voters violated the State's Election Code, the Secretary of State sent a letter to

the Attorney General titled, "Potential Criminal Transfer and Use Violation of Voter Data," requesting VRF and Local Labs' investigation and prosecution. [App. Vol. I at 170–71] The SOS noted that its referral "related to an illegal transfer and use of voter data information pursuant to NMSA 1978, Section 1-4-5.6" and concluded by stating:

> "Our office believes the transfer and publication of this voter data is in direct violation of the Election Code. We believe that both VoteRef.com and Local Labs have violated the prohibition against 'providing' voter data by posting New Mexican[s'] private voting information online, or in Local Labs['] case, providing the voter data to VoteRef.com. We also believe that VoteRef.com and Local Labs have illegally 'used' this voter data by publishing it on VoteRef.com."

[App. Vol. I at 170, 171]

VRF alleges that when it learned of the referral by the SOS to the AG, it removed the voter data from its website and filed this lawsuit. [App. Vol. I at 13–14, ¶ 1 & 18, ¶ 16] In its complaint, VRF challenged the constitutionality of what it termed the "Use Restrictions" based on VRF's understanding of how the SOS interpreted and applied Section 1-4-5.5 of the Election Code. [App. Vol. I at 19, ¶ 19 & 30–31, ¶¶ 67, 71] These "Use Restrictions" were defined as limits on the permissible purposes for which requesters of voter data must attest they are using the data. [App. Vol. I at 19, ¶ 19]; N.M. Stat. Ann. § 1-4-5.5(C).

In setting forth the claims in its complaint, VRF first alleged that the Use Restrictions were "direct restrictions on speech" and "violate Plaintiffs' First Amendment rights...." [App. Vol. I at 33, ¶ 79 & 35, ¶ 85] Second, VRF alleged that the "Use Restrictions' wholesale prohibition ... operates as a presumptively invalid prior restraint on speech" because they only permit speech "for an approved purpose." [App. Vol. I at 35, ¶ 89] VRF described the Use Restrictions as "a de facto licensing system" whereby entities accessing voter data must be approved by the State. [App. Vol. I at 36, ¶ 92] Third, VRF alleged that the Use Restrictions were impermissibly vague as written and interpreted by the SOS. [App. Vol. I at 40, ¶ 108] And fourth, VRF alleged that the Use Restrictions are overbroad in that they restrict substantial amounts of constitutionally-protected speech. [App. Vol. I at 42, ¶ 118] Therefore, VRF requested that the court "declare that the Use Restrictions violate the First, Fifth and Fourteenth Amendments" and enjoin New Mexico "from enforcing the Use Restrictions...." [App. Vol. I at 44]

The Preliminary Injunction Motion and Hearing

VRF moved for a preliminary injunction at the same time as it filed its complaint. [App. Vol. I at 65–69] It argued that its publication of voter data was a permissible purpose under Section 1-4-5.5 [App. Vol. I at 77], and that it

believed the SOS had a narrow interpretation of the law that was incorrect. [App. Vol. I at 85–86] VRF alleged that the "Secretary also apparently believes that VRF's publication of the information on the Internet itself violates New Mexico law, though the basis for such a theory remains unclear." [App. Vol. I at 86] VRF restated its claims from the complaint, including that the Use Restrictions were direct restraints on speech, invalid prior restraints, overbroad, and vague. [App. Vol. I at 89–97] In explaining its prior restraint claim, VRF described the Use Restrictions as a de facto licensing scheme in which the SOS has "discretion to permit or refuse a request for the voter information based on the worthiness of the cause for which the requester will use the information." [App. Vol. I at 93]

New Mexico opposed the preliminary injunction motion. It explained that VRF's online posting of voter data was not a violation of the Use Restrictions or otherwise an improper purpose under Section 1-4-5.5, but that it was an unlawful use of voter data in violation of Section 1-4-5.6.[3] [App. Vol. I at 106] New Mexico explained that "[b]ecause VRF never submitted a request

[3] N.M. Stat. Ann. § 1-4-5.6(A) provides, "Unlawful use of voter data, mailing labels or special voter lists 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]."

for voter data under Section 1-4-5.5, its First Amendment claim does not implicate Subsection (C)'s restrictions on the use of such data ('Use Restrictions') as preconditions to obtaining the data." [App. Vol. I at 106] New Mexico also explained that the Election Code's restrictions on the use of voter data were part of a suite of laws designed to protect the integrity and privacy of voter files by restricting unauthorized access and reproduction. [App. Vol. I at 102–03] "Section 1-4-5.6's prohibition on disclosure of New Mexico voter data," the State explained, served important interests including "protecting registered voters from unwanted solicitations, harassment, and abuse." [App. Vol. I at 110–11]

The district court held an evidentiary hearing on the preliminary injunction over two days in May and June. At the outset of the hearing, the court opined that it believed that VRF's publication of voter data was permitted under New Mexico law. [App. Vol. II at 222–25, at 2:24-5:1] The court noted, however, that it did not believe it could enjoin the Attorney General or Secretary of State from misconstruing their own law or prosecuting under the statute. [App. Vol. II at 225–26, at 5:24-6:10] Thus, the court advised, "I think your argument has to be—I'm pointing to the plaintiffs here—that they are taking a statute … 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. And so I think that's going to have to be your argument." [App. Vol. II at 226–27, at 6:23-7:5]

In the parties' opening statements, VRF then identified its best First Amendment theory as one based on retaliation and "different than what we briefed." [App. Vol. II at 242–45, 22:10–25:2] New Mexico, in turn, objected to this as "a brand-new theory of the case, a brand-new claim" and part of a "trial by ambush" in which Plaintiffs are "changing their theory of the case the day of." [App. Vol. II at 268–69, 48:16–49:3][4] New Mexico also reiterated its position, throughout the hearing, that any violation of the Election Code by VRF was of Section 1-4-5.6, not Section 1-4-5.5 (including the purported "Use Restrictions"). [App. Vol. II at 257, 37:11–19; App. Vol. III, at 682–83, 223:9–224:5 & 688, 229:14–19]

[4] New Mexico also objected, at a status conference to schedule the second day of the PI hearing, to the PI being based on any new, alternative theory that had not been briefed. The State noted that it had requested that Plaintiffs amend their complaint and PI motion with any new theory, and that Plaintiffs had declined to do so. [App. Vol. III at 445, 7:13–19] New Mexico "ask[ed] the Court," therefore, "that … the motion for preliminary injunction be decided on the grounds that have been briefed and that have been presented to us" as it "can't defend a theory that we don't know anything about, that we haven't seen, that we haven't had an opportunity to respond to in writing or otherwise." [App. Vol. III at 445–46, 7:19–8:1]

The parties called various witnesses. VRF's Executive Director, Tina Swoboda, testified that VRF's work was "unprecedented" and that "no one has ever published the voter registration records for every state online, for free, for the public forever…." [App. Vol. II at 311, at 91:15–19 & 313, 93:1–10]

The Secretary of State's Election Director, Mandy Vigil, also testified. She stated that the SOS has never rejected an affidavit requesting voter data or investigated a requester. [App. Vol. II at 348–49, 128:16–18 & 129:8–21] Ms. Vigil testified that the SOS's concern with VRF was not that VRF was using the data for an impermissible purpose, but its distribution of the data online. [App. Vol. II at 362, 142:5–25; App. Vol. III at 486, 27:8–23; *see also* App. Vol. II at 365–66, 145:8–146:5 (doesn't think VRF analysis of data without posting would be prohibited)] She further testified that the SOS's referral of VRF to the AG was because of "the distribution of the voter data" and a "concern for the voter's privacy" not the data being used for an impermissible purpose. [App. Vol. II at 366–67, 146:17–147:5] And when questioned about the SOS not providing voter data to VRF, Ms. Vigil testified that the SOS decided not to do so given VRF's history of posting the voter data online and declared intent to do so again. [App. Vol. III at 508–10, 49:13-25 & 50:21-51:3] The SOS believed

providing the data to VRF would implicate it in a violation of the Election Code. [App. Vol. III at 512–13, 53:18-54:1; at 554, 95:7-18]

New Mexico's Deputy Secretary of State, Sharon Pino, corroborated this testimony. She testified that the basis of the SOS's referral of VRF to the AG was that VRF "unlawfully disposed of a voter file … when they posted it on a public website." [App. Vol. III at 618–19, 159:17-160:6] The intent or purpose of the website posting the data, she explained, was immaterial to the violation. [App. Vol. III at 629–30, 170:6-171:14]

Ms. Pino also testified about the harm of posting voter data, including personal information such as home addresses, online. She explained that as a public official, she has used a "scrubbing service" and Post Office Box to keep her personal address off the internet, and that VRF's posting home addresses will cause her irreparable harm, especially given threats against election officials. [App. Vol. III at 639–41, 180:22-182:3] Ms. Pino testified that she believed disclosing voters' home addresses would have "a chilling effect … where people don't want to participate and don't want to vote" based on her experience with voter files being shared and used to interrogate voters door-to-door. [App. Vol. III at 644–45, at 185:1–186:12]

After the hearing, the parties submitted proposed findings of fact and conclusions of law. VRF acknowledged that its website typically permits users to view voters' name, address, year of birth, party affiliation, and voting history, among other information. [App. Vol. IV at 726, Fact No. 28] VRF submitted proposed conclusions of law that the SOS's referral of VRF to the AG was "motivated by the Defendants' disagreement with the content or viewpoint of VRF's speech." [App. Vol. IV at 776–77, COL Nos. 64-66] VRF alleged that the AG was aware of "the content and viewpoint-based motivation" behind the referral, and still opened an investigation and represented the SOS in this litigation, including by leading "the Secretary's witnesses through testimony…." [App. Vol. IV at 782–83, COL No. 84] VRF also criticized the Attorney General's Office for providing legal advice to the SOS not to provide VRF with voter data. [App. Vol. IV at 784, COL No. 87] Lastly, VRF continued to describe its prior restraint claim as a challenge to the SOS's voter data request process as a de facto licensing system. [App. Vol. IV at 793–96, COL Nos. 111–20]

New Mexico, in its proposed findings and conclusions, reiterated that it does not intend to prosecute VRF for violating Section 1-4-5.5 and does not dispute that VRF's proposed uses of voter data meet the broad definition of a

"governmental purpose." [App. Vol. IV at 821, COL Nos. 25, 29] Rather, VRF's potential violation was in posting data online, for which the SOS would refer any other entities to the AG, regardless of their viewpoint or purpose. [App. Vol. IV at 813–14, Fact Nos. 65, 70] New Mexico pointed out that the SOS's consistent interpretation of Section 1-4-5.6 has been that it prohibits providing access to voter data. [App. Vol. IV at 810, Fact Nos. 46-49; at 824, COL No. 44] New Mexico explained that, in enforcing this Section, it has not treated VRF differently than any other similarly situated entities, as "VRF admits that it is the only entity to have ever tried to upload to a publicly available website the voter data of each and every registered voter in New Mexico." [App. Vol. IV at 829–30, COL No. 64] Finally, New Mexico explained that VRF is not irreparably harmed absent an injunction, because it can still conduct and share voter data analysis without posting the voter data itself and voters can still check the accuracy of their own voter registrations on the SOS's website. [App. Vol. IV at 830, COL No. 66]

The District Court's Preliminary Injunction Order

The district court granted in part VRF's motion for preliminary injunction. It held that "[VRF] is entitled to a PI, because, although [VRF] seeks a disfavored injunction, [VRF] is likely to succeed on the merits of part

of its viewpoint discrimination and prior restraint claims, and [VRF] shows that it will suffer irreparable injury absent a PI." [Mem. Op. at 2]

The court began with findings of fact. It noted that VRF's website was unprecedented and provides access to voters' addresses, party affiliation, voting history, and other information. [Mem. Op. at 7, ¶ 21 & 10, ¶¶ 31–32] It also noted that the SOS has never rejected a signed voter data request form and does not investigate requesters as long as the application is complete. [Mem. Op. at 31, ¶ 131] Furthermore, the district court entered a finding of fact that the "[SOS] referred Local Labs and [VRF] to the [AG's] Office for investigation due to their 'concerns with the data being made available online.'" [Mem. Op. at 31, ¶ 132 (quoting Mandy Vigil's testimony)]

After a procedural history and summaries of legal doctrine, the court began its analysis by describing its disagreement with the SOS's interpretation of New Mexico's Election Code. The court explained it believes the Election Code does not prohibit VRF from posting voter data online because VRF's use was for a governmental purpose and restrictions on sharing data only apply to government workers and data processors. [Mem. Op. at 148–54] Next, the court "determine[d] that a requestor who signs the Voter Data Request Form authorization with the intent to share that data with the general public may

face liability for false swearing," but that to prosecute only VRF under this theory "would support [VRF's] viewpoint discrimination claim...." [Mem. Op. at 155–56]

The district court next considered standing. It concluded that the SOS's referral of VRF to the AG was an injury in fact sufficient for standing. [Mem. Op. at 161] It held that VRF's "injury fairly is traceable to the [SOS's] and [AG's] conduct, because the [SOS] referred [VRF] to the [AG] for criminal prosecution" [Mem. Op. at 162], but does not explain to what conduct of the AG any injury can be traced. The court concluded that Plaintiff Holly Steinberg, on the other hand, who wanted to use VRF's website, lacked standing. [Mem. Op. at 164–65]

Afterwards, the district court explained its basis for issuing a preliminary injunction. The court "conclude[d] that [VRF] is entitled to a PI enjoining the [AG] from prosecuting [VRF] for publishing the data it received from Local Labs under N.M.S.A. §§ 1-4-5.5 and 1-4-5.6, because, although the [SOS] constitutionally may condition voter access on whether the requestor intends to publish it, the [SOS's] criminal referral of [VRF] for prosecution for publishing the data it received from Local Labs constitutes unconstitutional viewpoint discrimination and prior restraint." [Mem. Op. at 167]

The court first held that VRF was unlikely to prevail on its overbreadth claim. It reasoned that because there generally is no First Amendment claim based on the government's denial of access to information, a State can control the access it provides based on non-discriminatory policy considerations. [Mem. Op. at 177] Thus, the court "conclude[d] that [VRF] does not have a First Amendment right to access New Mexico's voter data." [Mem. Op. at 177] "[T]he [SOS] can prohibit access to voter information to a party who will share it outside of the requesting organization or that will post that data on the internet." [Mem. Op. at 177] "Having decided that there is no right to access the voter data information … the [c]ourt conclude[d] that the Data Sharing Ban[5] is not overbroad, because it does not proscribe any protected activity." [Mem. Op. at 177]

Next, the district court held that VRF was likely to prevail on part of its viewpoint discrimination claim. Noting that "it is not immediately clear what the Plaintiffs are challenging," the court posited "three available options." [Mem. Op. at 179] It explained that "Plaintiffs might challenge the [SOS's]

[5] The District Court defined the "Data Sharing Ban" as the SOS's position that the Election Code prohibits the sharing of voter data with individuals who may or will use the voter data for unlawful purposes or with individuals outside the organization that requests it. [Mem. Op. at 167]

Data Sharing Ban," the SOS's "lack of response to [VRF's] request for New Mexico's voter data," or "the [SOS's] decision to refer [VRF] to the [AG] for investigation." [Mem. Op. at 179–80] Of these, the court found that VRF was not likely to prevail on a facial challenge to the Data Sharing Ban because it is "viewpoint neutral on its face." [Mem. Op. at 180] The court did, however, find that VRF was likely to prevail "to the extent the Plaintiffs challenge the [SOS's] lack of response to [VRF's] request for voter data" because the [SOS] has conditioned its decision not to respond to [VRF's] data request on … the fear that giving the data to [VRF] may reveal that the [SOS] is lax about maintaining the State's voter data." [Mem. Op. at 180]

The court also found that Plaintiffs were likely to succeed on a claim that the SOS's referral of VRF to the AG was based in viewpoint discrimination—an argument the court observed was "attenuated but finds support in the record." [Mem. Op. at 182] The court explained that the "combination of the referral and the public comments about it suggests that the [SOS] had intentions beyond mere genuine concern that [VRF] may be violating the Election Code." [Mem. Op. at 184] It reached this conclusion despite observing that the SOS's concern with misinformation "is a real phenomenon of real concern" and that "multiple legal justifications—accurate

or not—does not necessarily transform the referral into evidence of a discriminatory purpose." [Mem. Op. at 184–85]

The district court next assessed VRF's prior restraint claim, based both on an unlitigated theory that the SOS's referral of VRF to the AG is a prior restraint and the theory that the SOS's voter data request process is a content-based administrative licensing scheme. [Mem. Op. at 185] Considering the referral-as-prior-restraint theory, the court explained 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] Without identifying any other cases finding referrals to be prior restraints, and noting that "a publicized criminal referral is not a typical type of prior restraint," the court concluded that the SOS's referral "functions as a de facto prior restraint." [Mem. Op. at 188–89] Although there is no First Amendment right to access government information, it reasoned that once an entity "has obtained that information from a source other than the government … the publication of that information is protected speech and any restrictions on that publication are subject to scrutiny." [Mem. Op. at 186–87]

The court then determined that while "the State has important interests in prohibiting the publication of voter data online, … these interests do not

rise to the level of compelling State interests to justify a prior restraint." [Mem. Op. at 189][6] The court did not consider state interests in making or receiving the referral itself, which had not been litigated as a prior restraint, but the State's interests in the Data Sharing Ban. [Mem. Op. at 190–91] It recognized that "the State has an important interest in fostering trust in the voter registration system and protecting voters from solicitations, harassment, and abuse." [Mem. Op. at 192 (quotation omitted)] The court described the State's testimony that posting voters' data could result in people not wanting to vote and that sharing voter files had resulted in door-to-door harassment, but discounted such testimony because it did not "connect[] reports of voter harassment … with VoteRef.com's data." [Mem. Op. at 193-94] It concluded that the "Defendants' important State interest may be good policy reasons to condition access to voter data in the first place" but when an individual gets voter data without "signing an affidavit or agreement with the State, the State must show compelling interests to justify a prior restraint on that data's publication by this third party." [Mem. Op. at 194]

[6] The court noted that it was applying strict scrutiny "[i]n the absence of a Supreme Court or Tenth Circuit case with similar facts as this case, but given the Supreme Court's admonition to apply the highest level of scrutiny to prior restraints, the individualized nature of the [SOS's] criminal referral …, and evidence of the [SOS's] hostility towards [VRF]…." [Mem. Op. at 190]

The district court held that VRF was not likely to prevail on several other claims. It held that VRF was not likely to succeed on the merits that the SOS's voter data request process is an unconstitutional prior restraint as a content-based administrative licensing scheme. [Mem. Op. at 194–98] It reasoned that the SOS's review of voter data requests were ministerial checks and not a content-based assessment. [Mem. Op. at 195–96] The district court also held that VRF was unlikely to succeed on its claim that the Election Code or SOS's data request forms are unconstitutionally vague. [Mem. Op. at 198–204] It concluded that "the statutory definitions and the … Request Form are not so vague that a person of common intelligence must guess whether his or her intended use … would be vulnerable to criminal penalties." [Mem. Op. at 201–02]

Finally, the district court assessed the equities in issuing a preliminary injunction. The court determined that of the three claims on which it deemed VRF likely to prevail—the two viewpoint-discrimination claims and the referral-as-prior-restraint claim—only the prior restraint claim "results in a loss of First Amendment freedoms" that supports a preliminary injunction. [Mem. Op. at 205] The court recognized that to "interfere with State processes like" the referral and possible prosecution requires "'exceptional

circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights.'" [Mem. Op. at 207 (quoting *Spielman Motor Co. v. Dodge*, 295 U.S. 89, 95 (1935))] The court found this lofty standard met, however, by "the combination of the [SOS's] criminal referral and the lack of any indication that the [AG] will not prosecute [VRF] for publishing the data that it already has…." [Mem. Op. at 207]

The court concluded that VRF's "claimed injury outweighs any harm to the public interest that a PI may cause" because vindicating First Amendment freedoms is in the public interest. [Mem. Op. at 208] "While there may be harm to the public interest from posting the data online," it noted, "the First Amendment injury that occurs absent a narrow PI outweighs that harm." [Mem. Op. at 209] In particular, the court observed that the "State has legitimate policy reasons supporting its decision not to make all voter data available to anyone for any reason," but determined that this interest was undermined by SOS's Voter Information Portal through which "the public already has access to much of the information [VRF] wants to provide."[7] [Mem. Op. at 208] Therefore, the court held that the AG and SOS "are

[7] As discussed in Part IV of the Argument section, this rests on a misapprehension of the Voter Information Portal, which only permits people to view their own voter data.

enjoined from prosecuting [VRF] under [Sections] 1-4-5.5 or 1-4-5.6 for publishing data it already received from Local Labs." [Mem. Op. at 210]

The Motion to Stay and Appeal

New Mexico filed a notice of appeal of the preliminary injunction order. [App. Vol. V at 1043–44] At the same time, the State filed a motion in the district court to stay the PI pending appeal. [App. Vol. V at 1045–68] Among other arguments, New Mexico objected that the PI rested on a theory of prior restraint that had not been alleged by VRF or litigated by the parties. [App. Vol. V at 1050–53] New Mexico also argued that the State and public would be harmed by the PI, including describing the danger of posting home addresses and noting inquiries from court, corrections, and Marshal Service officials seeking ways to keep judges, prosecutors, and law enforcement officers off VRF's website. [App. Vol. V at 1056]

The court held a hearing on the motion to stay the PI. New Mexico objected that the PI violated its due process rights because it was based on a claim—a combined referral and lack of a promise not to prosecute operating as a prior restraint—that no one had briefed or argued. [App. Vol. V at 1076–77, 8:24–9:19; at 1101–04, 33:21–34:9 & 35:6–36:1] The State further explained that because the Court had not found Section 1-4-5.6 unconstitutional,

prosecution under that statute does not infringe protected speech and cannot be a prior restraint. [App. Vol. V at 1082–83, 14:16–15:1; at 1101, 33:5–12] New Mexico also argued that the SOS lacks prosecutorial power and this thus the PI enjoining her prosecutions is improper as to the SOS. [App. Vol. V at 1076, 8:5–17]

The district court denied the motion to stay. [App. Vol. VI at 1126–28;[8] App. Vol. V at 1109, 41:4–16] The court explained that the SOS referral of VRF is not a prior restraint in isolation, but is in combination with the lack of an indication the AG will not prosecute VRF. [App. Vol. VI at 1127] The court noted that it did not think it could amend the PI order given the appeal, but would be receptive if the parties submitted an amended order removing the injunction of the SOS. [App. Vol. V at 1093, 25:5–21; at 1109, 41:17–20; App. Vol. VI at 1127]

While this appeal has been pending, VRF filed an amended complaint. [App. Vol. VI at 1129–1264] Among other revisions, the amended complaint for the first time includes the claim underlying the PI: that the SOS's referral of VRF and the AG's unwillingness to guarantee he will not prosecute VRF

[8] The court's order denying the motion to stay notes that a memorandum opinion will be forthcoming more fully detailing the rationale for the ruling (App. Vol. VI at 1126 n.1). This memorandum opinion has not yet been issued.

constitute a prior restraint. [*Compare* App. Vol. I at 35–39, ¶¶ 89–101 *with* App. Vol. VI at 1167, 1170–71, ¶¶ 167, 179–84]

SUMMARY OF THE ARGUMENT

The preliminary injunction enjoins New Mexico's Attorney General and Secretary of State from prosecuting VRF for posting voters' home addresses and other information online. The preliminary injunction rests on a novel prior restraint theory raised *sua sponte* by the district court and not litigated below. This theory—that the Secretary of State's referral of VRF to the Attorney General for investigation combines with the AG's unwillingness to guarantee he will not prosecute VRF to form a prior restraint—cannot support the PI.

First, the court's prior restraint theory does not identify a violation of VRF's rights by the Attorney General that supports the preliminary injunction. The only action by the AG that the district court identifies as part of the prior restraint is his unwillingness to promise VRF that it will not be prosecuted for posting voter data. The district court opinion does not offer any precedent that the absence of a guarantee that someone will not be prosecuted is a sufficient basis to support injunctive relief under 42 U.S.C. § 1983. Nor does the SOS's referral of VRF support an injunction against the AG, as the AG has

the independence to decide whether and on what basis to bring any prosecution. Finally, the preliminary injunction also cannot rest on the AG's capacity to enforce an unconstitutional statute, since the district court did not hold that VRF was likely to prevail on any of its constitutional challenges to the New Mexico Election Code.

The Secretary of State also was improperly enjoined on the basis of the court's prior restraint theory. The SOS lacks authority to bring a prosecution under the Election Code, so the PI is not necessary to remedy any wrongdoing. Furthermore, to the extent that the preliminary injunction is targeted at the SOS's referral of VRF to the AG, that referral has already happened and is not the proper subject of prospective equitable relief.

Second, New Mexico's due process rights were violated by the issuance of an injunction on a legal theory where the State was not afforded the opportunity to be heard. VRF's prior restraint claim was based on a challenge to the SOS's voter data request process, which VRF alleges is a de facto content-based licensing system, not based on the SOS's referral to the AG. The theory that the SOS's referral could combine with the AG's unwillingness to guarantee that he would not prosecute VRF first appeared in the Court's PI Order. Due process warrants that New Mexico be permitted to challenge this

novel theory of prior restraint before being enjoined on a claim the parties had not raised or litigated.

Third, although the PI does not rest on VRF's viewpoint discrimination claim, the district court erred in concluding that the SOS discriminated against VRF. No other entity had posted New Mexicans' home addresses and other voter data online, and so was similarly situated to VRF. The SOS's decisions to refer VRF to the AG for investigation and possible prosecution and not to provide voter data to VRF cannot be compared to the SOS's treatment of entities that did not post voter data online. As well, the district court's factual findings reveal that the SOS was motivated by some legitimate concerns in referring VRF and denying the data request. Thus, even if VRF could be compared to other entities, the SOS had non-viewpoint based reasons for the referral and data request handling.

Lastly, the district court erred by misunderstanding or not considering New Mexico's evidence of irreparable harm in the court's weighing of the parties' equitable interests. New Mexico presented evidence that posting voters' home addresses and other information risks harassment and abuse. The court mistakenly discounted this evidence because it was not directly tied to VRF's data. It also concluded that VRF's harm outweighed this public

interest based on a misunderstanding that much voter data was already available to the public on the SOS's website.

Because the injunction against the Attorney General and Secretary of State rests on a mistaken, unlitigated theory of prior restraint, it should be reversed. In addition, the preliminary injunction should be reversed because it overlooks the public's interest in preventing the public disclosure of their home addresses and the consequent risk of harassment, violence, and abuse.

STANDARD OF REVIEW

This Court reviews the grant of a preliminary injunction for abuse of discretion. *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1153 (10th Cir. 2001). A district court abuses its discretion if it "commits an error of law, or is clearly erroneous in its preliminary factual findings." *Id.* "Thus," the Court "review[s] the district court's factual findings for clear error and its conclusions of law de novo." *DTC Energy Grp., Inc. v. Hirschfeld*, 912 F.3d 1263, 1269 (10th Cir. 2018) (internal quotation marks, ellipsis, and citation omitted). This de novo review includes the ultimate conclusion of whether New Mexico's due process rights were violated without notice and an opportunity to be heard on the prior restraint theory on which the PI is based.

United States v. One Parcel of Real Property Described as Lot 41, Berryhill Farm Estates, 128 F.3d 1386, 1391 (10th Cir. 1997).

The Court conducts this review "keeping in mind that a preliminary injunction is an extraordinary remedy never awarded as of right." *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (quotation omitted). Where as here, a preliminary injunction is particularly disfavored because it 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) (quotation omitted).

ARGUMENT

I. The District Court Erred in Enjoining the Attorney General and Secretary of State from Prosecuting VRF.

The district court erred by enjoining the Attorney General's prosecutorial power, when his only alleged action—or more precisely, inaction—underlying the PI was an unwillingness to guarantee VRF that it will not be prosecuted. No authority supports the district court's ruling that a prosecutor may be enjoined from enforcing a law that has not been deemed unconstitutional, and where it is unknown whether and on what basis the prosecutor might enforce the law. The district court's injunction of the

Secretary of State was also in error, as the SOS lacks authority to prosecute the Election Code.

A. The Attorney General Has Not Violated Any of VRF's Rights That Would Warrant the Preliminary Injunction.

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. Rather, the PI is predicated on the SOS's public referral of VRF to the AG being a prior restraint, at least when coupled with the lack of a guarantee that the AG will not prosecute. *See supra* p. 21; [Mem. Op. at 207].[9] Inaction alone, or the absence of a prosecutor's promise of immunity, does not deprive VRF's rights and support a preliminary injunction.

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

[9] VRF alleged other wrongdoing by the AG, even including Office of the Attorney General attorneys providing legal advice and examining witnesses in this case on behalf of the SOS. *See supra* p. 13. However, as VRF acknowledged in the briefing on the motion to stay the PI in this Court, the PI is only based on the threat of prosecution from the SOS's referral and AG's unwillingness to stay he will not prosecute VRF. *See* Pl.-Aplee's Resp. Defs.' Mot. Stay PI Pending Appeal at 4–5, 16.

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 who played "no meaningful role" 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 over the Secretary of State[,]" a Section 1983 claim against the party should be dismissed. *Janda v. State*, 348 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 AG's only action, in the prior restraint that district court identified and underlies the PI, is refusing to guarantee VRF that it will not be prosecuted for posting voter data after receiving the SOS's referral. *See supra* p. 21; [Mem. Op. at 205 (only prior restraint causes First Amendment injury and supports PI), 207 (prior restraint consists of combined SOS referral and AG lack of guaranteed immunity)]. This receipt of a referral from the SOS does not

constitute a prior restraint. The district court does not appear to cite to any precedent for finding a referral to a prosecutor and the prosecutor's unwillingness to disclaim potential prosecution to be a prior restraint.[10] The closest analogue the State's counsel could find was the Sixth Circuit's opinion in *Novak v. City of Parma* holding that a television interview announcing an investigation was not a prior restraint. 33 F. 4th 296, 308 (2022). Nor is it clear how even a possible prosecution for VRF's *past* posting of voter data is a *prior* restraint when the referral occurred after the speech in question. Indeed, the district court's prior restraint holding 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

[10] The district court quotes *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101–02 (1979), for the proposition that "[w]hether we view [the criminal referral] as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information is not dispositive because even the latter action requires the highest form of state interest to sustain its validity." [Mem. Op. at 188] But the bracketed "criminal referral" in this sentence replaces "statute."

Amendment, but restriction on VRF who obtained data through a third party is a prior restraint)].

The AG retains independent authority to decide whether VRF should be investigated and prosecuted—power that would exist whether or not the SOS had ever referred VRF to the AG. *See United States v. Robertson*, 45 F.3d 1423, 1438 (10th Cir. 1995) ("prosecutorial discretion is nearly absolute" in decision whether to bring charges). Because the AG may independently decide whether to prosecute VRF, and on what grounds, the AG's unwillingness to disclaim any future prosecution does not violate VRF's rights or warrant an injunction. At a 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.

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. [App. Vol. V at 1084–85, 16:20–17:15]. This argument, however, muddles the constitutional challenges to the Election Code that VRF brought in its complaint with the prior-restraint claim that the district court developed *sua*

sponte and on which 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 supra* pp. 17, 21; [Mem. Op. at 172–78, 194–98, 198–204.]

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 the AG's receipt of a referral by the SOS. *See Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 495 (10th Cir. 1998) ("*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…..'" (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.

B. The Injunction of the Secretary of State Is Improper.

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.

II. The District Court's Issuance of a Preliminary Injunction Based on a Prior Restraint Claim That Was Not Alleged or Litigated Below Warrants Reversal and Remand.

Even if the SOS referral and AG's unwillingness to disclaim VRF's prosecution could constitute a prior restraint and warrant the PI, the district court's ruling should be reversed and remanded because this claim was not litigated below. VRF did not allege such a theory in its complaint, motion for preliminary injunction, proposed findings of fact and conclusions of law, or at the PI hearing. The first development of this theory was in the district court's PI Order. 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); *see also Schwegel v. Milwaukee County*, 859 N.W.2d 78, 95 (Wis. 2015) (Abrahamson, C.J., dissenting) ("When a court raises an issue *sua sponte*, fairness requires that the parties have the opportunity to develop the relevant facts and to present legal arguments on the issue." (internal quotation marks and citation omitted)).

Here, the preliminary injunction was based on the novel premise that an investigative referral combined with a prosecutor's unwillingness to guarantee that he will not prosecute can operate as a prior restraint. This theory was first raised by the district court, *sua sponte*, in its Order granting the PI. Before the Order was issued, VRF's prior restraint claim had been based on the theory that the SOS's voter data request process, including the "Use Restrictions," operated as a content-based licensing scheme. [App. Vol. I at 35–36, ¶¶ 89, 92; at 38, ¶ 99 (Complaint); at 85–86, 93 (PI Motion); App. Vol. II at 423 (PowerPoint presentation listing "Legal Issues: Merits … Prior Restraint: *de facto* licensing regime"); App. Vol. IV at 793 (labeling section of proposed conclusions of law "Plaintiffs' challenge to the [SOS's] voter data request process as a de facto licensing system and prior restraint on speech")] The only mentions of the phrase "prior restraint"—on any theory—in the two

days of PI hearing transcripts, are VRF's counsel saying in his opening statement that he wouldn't "go into … prior restraint" because it's "all been briefed," [App. Vol. II at 253, 33:16–17] and New Mexico's counsel noting that VRF lacks standing to bring its prior restraint challenge to Section 1-4-5.5. [App. Vol. III at 683, 224:4–5; at 701, 242:8–10]

That the referral-as-prior-restraint claim was not litigated also is spotlighted by VRF's addition of this claim when it amended its complaint after the PI Order. [*Compare* App. Vol. I at 35–39, ¶¶ 89–101 *with* App. Vol. VI at 1167, 1170–71, ¶¶ 167, 179–84] VRF's original complaint did not contain a single mention of the SOS referral in Count II, titled "Violation of First Amendment—Prior Restraint." [App. Vol. I at 35–39, ¶¶ 89–101] By contrast, the amended complaint's revised Count (now Count IV) is titled "Data Sharing Ban and Threat of Prosecution: Violation of First Amendment Prior Restraint" and mirrors the district court's prior restraint analysis from the PI Order. [App. Vol. VI at 1167–72, ¶¶ 167–86] New Mexico should be afforded the opportunity to be heard on this novel prior restraint theory before its sovereign prosecutorial power is enjoined.

III. The District Court Erred in Finding That the Secretary of State Engaged in Viewpoint Discrimination When No Entity Other Than VRF Had Posted Voter Data Online.

Although, as noted above, the PI only rests on the prior restraint claim, the district court also erred in finding that VRF was likely to prevail on its claim that the SOS engaged in viewpoint discrimination.[11] No other entity was similarly situated to VRF in that it posted New Mexicans' voter data on a public website. Therefore, the SOS did not discriminate against VRF, as compared to other entities, by referring VRF to the AG for investigation or by not providing VRF with requested voter data.

Viewpoint discrimination requires both the disparate treatment of two entities and the intent to discriminate on the basis of viewpoint. *See Pahls*, 718 F.3d at 1238. This is a "demanding" test that requires a plaintiff to show that the defendant targeted speech because of, not merely with knowledge of, the plaintiff's views. *See id.* at 1230. The district court erred in concluding that VRF meets this test when, by the organization's own testimony, its work posting voter data online is unprecedented. *See supra* p. 11; [App. Vol. II at 311, at 91:15–

[11] VRF's viewpoint discrimination claim cannot support a preliminary injunction against the AG for the additional reason that he is not alleged to have treated VRF differently than other entities in the enforcement of the Election Code.

19 & 313, 93:1–10] Moreover, when the SOS did not provide voter data in response to VRF's request, VRF had already posted voter data online once and had declared its intent to do so again—some data immediately, and other data if it received a favorable court ruling. [App. Vol. I at 13, ¶ 1; at 23, ¶ 38; Mem. Op. at 28, ¶ 116; App. Vol. V at 1060] No other entity was in a similar posture.

As well, even if VRF and other entities are similarly situated, the district 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. [App. Vol. V at 1060] 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. [App. Vol. V at 1060] That VRF will still post personal data with a court order and will post undefined "non-personal" data regardless, in violation of the Election

Code's restrictions on disseminating voter files, was a legitimate, non-viewpoint based reason to deny VRF's voter data request.

Likewise, the district court erred in concluding that the SOS's referral to the AG constituted viewpoint discrimination. The district court's factual findings do not support the "demanding" test that the SOS targeted VRF for the referral because of its viewpoint. First, the court did not consider in its analysis that no other entities have posted voter data online like VRF. [*See* Mem. Op. at 182–85] Second, the court recognized that "misinformation is a real phenomenon of real concern" that "does not necessarily indicate discriminatory purpose." [Mem. Op. at 184–85] And the court recognized that "[e]ven if the [SOS] had multiple legal justifications … for the referral, multiple legal justifications—accurate or not—does not necessarily transform the referral into evidence of a discriminatory purpose."[12] [Mem. Op. at 184] Nonetheless, the court concluded that the SOS's public criticism of VRF together with a referral letter that the court deemed "grounded in a dubious interpretation of the Election Code suggest that the [SOS's] motive is more

[12] The court also overlooked testimony that by the SOS that it did not believe that VRF's posting of voter roll analyses, which were more critical of SOS than the voter data itself, violated the Election Code. *See supra* p. 11; [App. Vol. II at 365–66, 145:8–146:5].

than a routine concern of an Election Code violation." [Mem. Op. at 185] This conclusion does not meet the high standard for establishing viewpoint discrimination nor a discriminatory purpose follow from the multiple, legitimate reasons that the court identified for the referral. For these reasons, the district court also erred in concluding that the SOS engaged in viewpoint discrimination in referring VRF to the AG and not completing VRF's voter data request.

IV. The District Court Improperly Overlooked New Mexico's Evidence of Harassment and Danger to Voters in Assessing the Parties' Equitable Interests.

Lastly, the district court erred by overlooking and misinterpreting New Mexico's evidence concerning harm to the public caused by the preliminary injunction. The privacy of one's home, and home address, is an interest provided special protection by the Constitution. New Mexico presented evidence that the posting of voters' home addresses and other information that would occur with a preliminary injunction endangers the public, invites harassment, and discourages people from voting.

The district court overlooked the irreparable harm to New Mexico and the public that results from VRF's online posting of voter data, especially home addresses. This privacy interest in one's home, and home address, is well

established by this Court and the Supreme Court. *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."). New Mexico offered specific evidence of how VRF posting voter data would harm this interest, including testimony by the Deputy Secretary of State concerning her efforts to avoid the disclosure of her home address given threats to election officials. *See supra* p. 12. The Deputy Secretary of State also testified that voter rolls had been used for door-to-door harassment of voters which discouraged people from voting. *See supra* p. 12. And New Mexico presented testimony that once the PI was granted, the SOS received many more complaints from voters concerned about their personal information being posted online. [App. Vol. V at 1056, 1061–68] These inquiries included those by court and correction officials, as well as the U.S. Marshals Service, seeking ways to protect judges, prosecutors, and law enforcement officers. [App. Vol. V. at 1056; Mot. Stay PI Pending Appeal, Ex. 7, ¶ 6]

Despite this harm, the district court determined that VRF's "claimed injury outweighs any harm to the public interest that a PI may cause" because vindicating First Amendment freedoms is in the public interest. [Mem. Op. at 208] The court reached this faulty conclusion by mistakenly noting that the State's "legitimate policy reasons supporting its decision not to make all voter data available" is undermined because "the public already has access to much of the information [VRF] wants to provide" through the SOS's Voter Information Portal. [Mem. Op. at 208] The Voter Information Portal, however, is only designed for a voter to look up their own voter data, and requires you to enter your first and last name, date of birth, and county.[13]

Although the district court did not otherwise discuss the harm to the public from the PI in its analysis of the equities, the court improperly discounted New Mexico's testimony regarding privacy interests elsewhere in its opinion. In the court's analysis of the State's interest in prohibiting the posting of voter data, the court summarized the Deputy Secretary of State's testimony regarding her personal safety concerns and the harassment that had resulted from the disclosure of voter rolls. [Mem. Op. at 193–94] Nonetheless,

[13] The SOS's webpage for a voter to access this information is here: https://voterportal.servis.sos.state.nm.us/WhereToVote.aspx

because evidence did not sufficiently connect such harassment with VRF's data, the court concluded that there was an "absence of any evidence that posting the voter data has or will cause" solicitations, harassment, and abuse. [Mem. Op. at 193–94] This misdescribes the evidentiary record, which at a minimum contains evidence that the disclosure of home addresses and other data risks harassment and abuse of the voting public. This harm also is irreparable, as VRF's counsel acknowledged that once someone obtains voter data, VRF cannot stop them—other than a hope the person abides VRF's terms of service—from harassing or intimidating voters. [App. Vol. II at 240–41, 20:17-21:4; Mem. Op. at 65] And the harm will recur, as VRF acknowledges that it wants to post voter data again from the 2022 election. [App. Vol. IV at 745, Fact No. 100; Mot. Stay PI Pending Appeal, Ex. 7, ¶ 3 & Ex. A] The district court's cursory conclusion that the public's harm is outweighed by VRF's interest in posting voter data, primarily based on a misapprehension of the SOS website, was in error and should be reversed.

CONCLUSION

For these reasons, New Mexico's Attorney General and Secretary of State respectfully request that the Court reverse and vacate the preliminary

injunction against the Attorney General and Secretary of State and remand the case for further proceedings.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

New Mexico does not request oral argument unless the Court deems it useful. Although the case involves important interests of the public and New Mexico's state government, New Mexico does not want to defer the resolution of this appeal for the sake of holding oral argument. If, however, the Court grants New Mexico's pending motion to stay the preliminary injunction pending appeal, the exigency of the case would be less acute and New Mexico would be pleased to present its appeal at oral argument.

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)(1). It contains 10,205 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.

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 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 December 8, 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