

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

VOTER REFERENCE FOUNDATION, LLC,
and HOLLY STEINBERG,

Plaintiffs,

vs.

No. CIV 22-0222 JB/KK

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.

ORDER¹

THIS MATTER comes before the Court on the Defendants' Motion to Stay Preliminary Injunction Pending Appeal, filed August 19, 2022 (Doc. 57) ("Motion"). The Court held a hearing on August 31, 2022. See Clerk's Minutes at 1, filed August 31, 2022 (Doc. 64). For the reasons stated on the record at the hearing, the Court will deny the Motion. See Draft Transcript of Hearing at 38:4-39:13 (taken August 31, 2022) ("Tr.") (Court).² At issue is the ongoing threat of criminal prosecution from the New Mexico Attorney General's Office against Plaintiff Voter Reference Foundation, LLC ("Voter Reference"), which constitutes an unconstitutional prior restraint on protected speech that needs to be enjoined. See Tr. at 38:11-16 (Court); Memorandum Opinion and Order at 186-94, filed July 22, 2022, U.S. Dist. LEXIS 13085, at *266-80 (Doc. 51) ("MOO").

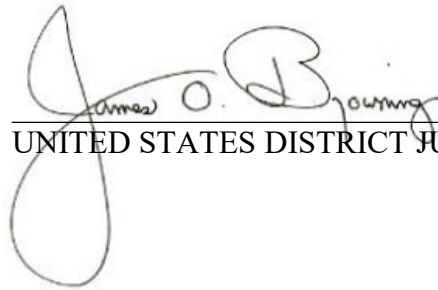
¹This Order disposes of the Defendants' Motion to Stay Preliminary Injunction Pending Appeal, filed August 19, 2022 (Doc. 57). The Court will issue at a later date, however, a Memorandum Opinion more fully detailing its rationale for this decision.

²The Court's citations to the transcript of the hearing refer to the court reporter's original, unedited version. Any final transcript may contain slightly different page and/or line numbers.

Under the unique circumstances of this case's facts, the threat of prosecution was made known to Voter Reference through the New Mexico Secretary of State's press releases, which publicized the criminal referral of Voter Reference to the New Mexico Attorney General's Office, see MOO at 185-189, U.S. Dist. LEXIS 13085, at *266-80. In isolation, the referral itself is not a form of prior restraint, because the New Mexico Secretary of State on its own has no prosecutorial authority. Here, however, it is the "combination" of the Secretary of State's public 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" that constitutes "an ongoing form of viewpoint discrimination and prior restraint . . . [that] the First Amendment does not tolerate." MOO at 207; U.S. Dist. LEXIS 13085, at *299. The Attorney General has declined the Court's invitation to represent that it will not prosecute Voter Reference during the pendency of this case and/or the pendency of the appeal. See Tr. at 4:4-6:5 (Court, Serafimova). Indeed, the Attorney General states that it has a duty to prosecute this violation of the law: "legally we're both required to and entitled to prosecute anyone for violating the New Mexico election [code]." Tr. at 5:10-12 (Serafimova).

Given that the Defendants have appealed, the Court is reluctant to touch the order without both sides' consent. The Court indicated at the hearing that, because "the Order itself is so narrow," Tr. at 38:18 (Court), and because only the New Mexico Attorney General's Office, and not the New Mexico Secretary of State's Office, has prosecutorial power, see Tr. at 23:18-21 (Court); id. at 7:18-24 (Serafimova); id. at 22:17-19 (Greim), the Court is receptive to a stipulated order removing the New Mexico Secretary of State from the Order section of the Court's Memorandum Opinion and Order at 210, U.S. Dist. LEXIS 13085, at *210, see Tr. at 38:16-21 (Court).

IT IS ORDERED that the Defendants' Motion to Stay Preliminary Injunction Pending Appeal, filed August 19, 2022 (Doc. 57), is denied.



UNITED STATES DISTRICT JUDGE

Counsel:

Carter B. Harrison IV
Harrison, Hart & Davis, LLC
Albuquerque, New Mexico

-- and --

Edward Dean Greim
Matthew Richard Mueller
Graves Garrett, LLC
Kansas City, Missouri

Attorneys for the Plaintiffs

Hector H. Balderas
New Mexico Attorney General
Olga Serafimova
Senior Civil Counsel
New Mexico Office of the Attorney General
Santa Fe, New Mexico

Attorneys for the Defendants