FOR PUBLICATION

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Plaintiffs - Appellees,

v.

DOJ - UNITED STATES DEPARTMENT OF JUSTICE; TODD BLANCHE, Attorney General, in his official capacity as Attorney General; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; MARKWAYNE MULLIN, in his official capacity as Secretary of Homeland Security,

Defendants - Appellants.

No. 26-7303

D.C. No.
3:26-cv-12800-TLT
Northern District of California,
San Francisco

ORDER

Before: MURGUIA, Chief Judge, and GOULD, BEA, OWENS, BENNETT, MILLER, LEE, VANDYKE, H.A. THOMAS, DESAI, and TUNG, Circuit Judges.

A majority of the en banc court has voted to reinstate the three-judge panel's order filed on November 2, 2026. Pending further order of the court, the three-judge panel order filed on November 2, 2026, and previously vacated, is reinstated.

A copy of the three-judge panel order, a concurrence by Judge Miller, and dissents by Chief Judge Murguia and Judge Desai, are attached.

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ORDER

Before: Mary H. Murguia, Chief Judge, and Consuelo M. Callahan and Carlos T. Bea, Circuit Judges.

BEA, Circuit Judge:
Dissent by Chief Judge MURGUIA

Pursuant to Circuit Rule 27-3, Defendants-Appellants ("the Government") has moved for an immediate administrative stay and a stay pending appeal of the district court's grant of a temporary restraining order in favor of Plaintiffs-Appellees. We

have jurisdiction over this case under 28 U.S.C. § 1292(a)(1). The Government's motion is **GRANTED**.[†]

I.

On October 29, 2026, Plaintiffs—two labor unions, and two political-interest groups—sued Defendants—the United States Department of Justice ("DOJ"), the Department of Homeland Security ("DHS"), the Attorney General, and the Secretary of Homeland Security (collectively, "the Government"). **D. Ct. Dkt. 26 ("Order") at 1.** Plaintiffs alleged, in relevant part, that Defendants violated the Voting Rights Act ("VRA") and the United States Constitution's Elections Clause when federal officers sent and delivered letters to California and Washington that requested that state and county election officials "sequester" the ballots of certain voters the Government believed to be aliens, **Order at 3; D. Ct. Dkt. 19-7 at 127–28.** The letters also stated that "[a]n alien voting in a federal election is a federal crime—and knowingly facilitating such conduct is equally unlawful." **D. Ct. Dkt. 29-1 at 9.** *Infra* App'x.

Plaintiffs filed an *ex parte* motion for a temporary restraining order ("TRO") to enjoin the Government from making any further requests for ballot sequestration or "threats" of prosecution. **D. Ct. Dkt. 17.**

The district court granted the motion on October 30, 2026. By its terms, the TRO will expire on November 16, 2026, seventeen days after its entry.[‡] **Order at 7.** It bars the Government from making further ballot-sequestration requests and "threats" of prosecution. ***Id.* at 6–7.** It also requires the Government to inform any state, county, or local government "to which any Defendant sent a letter regarding the processing and counting of ballots in the 2026 election . . . that the demands and threats of prosecution . . . reflected in that letter have been enjoined," and requires the DOJ to "inform the Court of any pending search warrant applications, grand jury

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[†] Plaintiffs-Appellees' motion to file an oversize brief and *amicus curiae* Justice Connection's motion to file an amicus brief are likewise **GRANTED.**

[‡] We note that the district court attempted to modify the TRO to last only fourteen days during a hearing on November 2, 2026. However, after the Government's appeal, the district court lacked the jurisdiction to do so. *E.g.*, *Davis v. United States*, 667 F.2d 822, 824 (9th Cir. 1982) ("The filing of a notice of appeal generally divests the district court of jurisdiction over the matters appealed.") Therefore, we review the terms of the TRO as they existed at the time of the Government's appeal.

subpoenas . . . pertaining to any list of individuals alleged by Defendants to be ineligible to vote." **Order at 7.**

The district court entered the TRO *ex parte*. As it was not a hearing upon notice, the Government did not appear to oppose Plaintiffs' motion in the district court.

The Government filed a notice of appeal and, on November 1, 2026, filed the instant motion.

II.

We review the Government's motion for a stay pending appeal under four factors: "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (citation omitted). A stay "is not a matter of right, even if irreparable injury might otherwise result." *Id*. at 433 (citation omitted). It is "an exercise of judicial discretion," and "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id*. at 433–34.

The first two factors "are the most critical." *Id*. at 434. On the first, "[i]t is not enough that the chance of success on the merits be 'better than negligible.'" *Id*. (citation omitted). On the second, "simply showing some 'possibility of irreparable injury'" does not suffice. *Id*. at 434–35 (citation omitted); *see Doe #1 v. Trump*, 957 F.3d 1050, 1058 (9th Cir. 2020); *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011) (per curiam). Once an applicant satisfies the first two factors, we assess the harm to the opposing party and weigh the public interest. *Nken*, 556 U.S. at 435. Those factors merge when the government is a party. *See id*.; *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

In evaluating the Government's likelihood of success, we "review an order regarding preliminary injunctive relief for abuse of discretion, but review any underlying issues of law de novo." *Norbert v. City & Cnty. of San Francisco*, 10 F.4th 918, 927 (9th Cir. 2021) (citation omitted).

III.

The Government has established a likelihood of success on the merits.

A.

First, we clarify that the district court's order, though styled as a TRO, is reviewable as a preliminary injunction. Whether a court of appeals has jurisdiction to review an order styled in this manner depends on the "practical effect" of the order, not the order's title. *Abbott v. Perez*, 585 U.S. 579, 594 (2018) ("We have previously made clear that where an order has the 'practical effect' of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction); *Sampson v. Murray*, 415 U.S. 61, 86 n.58, 88 (1974) (construing a TRO as a preliminary injunction based on, in relevant part, "the possibility of drastic consequences which cannot later be corrected. . . . To deny review of an order that has all the potential danger of a preliminary injunction in terms of duration, because it is issued without a preliminary adjudication of the basic rights involved, would completely defeat the purpose [of appellate review of preliminary injunctions].")

A TRO has the effect of a preliminary injunction (and is therefore reviewable by the court of appeals) when it lasts longer than the default TRO period of fourteen days, *id.* at 1043–44, when it requires mandatory action, *Adams v. Vance*, 570 F.2d 950, 953 (D.C. Cir. 1978), or when, absent review, the appellant "would be effectively foreclosed from pursuing further interlocutory relief," *Newsom v. Trump*, 141 F.4th 1032, 1044 (9th Cir. 2025) (per curiam) (quoting *Env't Def. Fund, Inc. v. Andrus*, 625 F.2d 861, 862 (9th Cir. 1980)).

The TRO here has all three features. It lasts an initial period of seventeen days, it requires mandatory action by the Government (notifying every recipient of the letters and disclosing pending subpoenas and warrant applications), and it bars the Government from demanding ballot sequestration until and beyond Election Day, which renders later interlocutory relief meaningless for the Government's purposes. Therefore, we have jurisdiction to review it.

B.

Next, we review the substance of the district court's order. The district court's order is based on its conclusion that Plaintiffs had established that the Government's conduct likely violated Section 11(b) of the VRA and the Elections Clause.

The district court is likely wrong on both counts.

Section 11(b) of the VRA, 52 U.S.C. § 10307(b), provides:

> No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 10302(a), 10305, 10306, or 10308(e) of this title or section 1973d or 1973g of title 42.

Plaintiffs' VRA claim faces an immediate problem: Section 11(b) does not contain an express private cause of action. *See* 52 U.S.C. § 10307(b). Instead, the VRA's text vests enforcement authority in the Attorney General. *Id.* § 10308(d) ("Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section . . . 10307 . . . , the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief . . . ."). "The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001).

The more fundamental problem is that Plaintiffs' claim would require us to recognize an implied private cause of action *against the Executive*. *Cf. Ziglar v. Abbasi*, 582 U.S. 120, 133 (2017) ("it is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation."). The VRA's text, which prohibits conduct by "person[s]," counsels against such a reading, as courts apply a "longstanding interpretive presumption that 'person' does not include the sovereign," *Return Mail*, 587 U.S. at 626–27, and require "an express statement by Congress" before subjecting the Executive to a generally applicable statute. *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

This separation-of-powers concern has particular weight in this case. Consider the conduct at issue here: the Government delivered letters to state and local officials that requested that the states implement the Executive's preferred policy, warned those states of the strictures of federal law, and instigated investigations into suspected violations of that law. These are core Executive functions. Congress cannot be lightly presumed to have imposed new liability for that conduct. *See Trump v. United States*, 603 U.S. 593, 609 (2024) ("Congress cannot act on, and courts cannot examine, the President's actions on subjects within his 'conclusive and

preclusive' constitutional authority."); *id.* at 620 ("the Executive Branch has 'exclusive authority and absolute discretion' to decide which crimes to investigate and prosecute, including with respect to allegations of election crime," and "[i]nvestigative and prosecutorial decisionmaking is 'the special province of the Executive Branch.'"); *id.* at 627 (explaining that the Take Care duty "plainly encompasses enforcement of federal election laws," and the Executive "may speak on and discuss such matters with state officials . . . to encourage them to act in a manner that promotes the President's view of the public good."); *cf. Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 188 (2024) ("A government official can share her views freely and criticize particular beliefs, and she can do so forcefully in the hopes of persuading others to follow her lead.").

We therefore decline Plaintiffs' invitation to read the VRA as rendering the Executive's exercise of those functions as unlawfully intimidating, threatening, or coercive.

The Government is also likely to prevail on Plaintiffs' Elections Clause claim. The Elections Clause assigns to the states the authority "to prescribe the manner by which congressional elections are conducted." *United States v. California,* ___ F. 4th ____, 2026 WL 3268272, at *3 (9th Cir. Oct. 30, 2026). In this case, the Government requested that the targeted states sequester certain ballots. They refused, and that refusal was ratified by this Court, *see generally id.*, and the Supreme Court declined to grant emergency relief, *United States v. California*, 610 U.S. __ (Nov. 2, 2026). The states' constitutional authority to regulate their elections is therefore unaffected. *See Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that the federal government may request, but not compel, the states to enact or enforce a federal program).

Plaintiffs treat *California* as dispositive on this point. The present case, however, poses a different question from that posed to the *California* panel: there, the panel decided whether a state *must* adopt the ballot-sequestration process requested by the Government here. *California*, ___ F. 4th ____, 2026 WL 3268272, at *1. Here, we consider only whether the Government *can* make such a request in the first place. And as we explained above, we think that the Government has established that it likely can. We find these requests to be core Executive functions that did not actually disturb the states' regulation of their own elections.

C.

The remainder of the factors do not counsel against a stay. Absent a stay, the Government will be irreparably injured. *Noem v. Vasquez Perdomo*, 146 S. Ct. 1, 4 (2025) (mem.) (Kavanaugh, J., concurring in the grant of application for stay) ("As the Court has indicated, any time that the Government is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." (cleaned up) (quoting *Trump v. CASA, Inc.*, 606 U.S. 831, 835 (2025)).[§]

At most, Plaintiffs fear a possibility of a future prosecution. If such a prosecution is ever brought, the prosecution itself supplies the means by which any defect, vindictiveness included, can be raised and remedied. *See Sampson*, 415 U.S. at 90 (citation omitted) ("The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm."). The Government's injury—being barred from requesting that the states segregate ballots from suspected non-citizens—cannot be undone after the fact.

IV.

For these reasons, we **GRANT** the Government's motion for stay.

[§] This case is distinguishable from *California Nurses Ass'n v. Mullin*, No. 26-7139, ___ F.4th ___, 2026 WL 3268397 (9th Cir. Oct. 30, 2026) (per curiam). There, we held that the Government "cannot suffer harm from an injunction that merely ends an unlawful practice." *Cal. Nurses*, 2026 WL 3268397, at *6 (quoting *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013)). As we explained above, the conduct by the Government here was likely not unlawful.