UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

ROBERT PETERSON, Plaintiff, v. NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, *et al.*, Defendants.	:	CIVIL ACTION NO. 1:06cv96 (GBL)

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

This action concerns the Internet's ".us" domain, a small region of the Internet similar to the larger, privately-run ".com" and ".net" domains. The United States administers the ".us" domain, and requires parties who contract for use of domain names in ".us" to provide direct contact information for the domain name for use in the event of technical mishap or crime. A year ago, the United States learned that some domain name registrars had deliberately offerred services that allowed domain name registrants to provide false or incomplete contact information to the United States and its contractor in order to conceal their identities, and instructed registrars to stop doing so by January 26, 2006. This instruction was published in major news outlets.

Plaintiff is a user of one of these services. Although Plaintiff knew, or certainly should have known, of the January 26, 2006 deadline, he waited until the end of business the night before the deadline to file an "emergency" motion for a injunctive relief. Plaintiff asserts that his

First Amendment right to speak anonymously will be harmed irreparably if he is forced to provide contact information for his ".us" domain name.

The Court should deny Plaintiff's motion. Plaintiff's speech is not anonymous – he freely posts his full name, city of residence, and other identifying details of his life on his website. Even if his speech were anonymous, the contact information requirement does not prevent him from *speaking* anonymously – there are many means available to him within ".us" for that. As such, the contact data requirement poses no irreparable injury to any First Amendment right he may have. More importantly, it is axiomatic that a plaintiff may not obtain emergency injunctive relief – before the Court and the defendant have had any chance to review the issue – by manufacturing his own emergency, which is what Plaintiff has done here.

By contrast with Plaintiff's non-existent injury, the harm to the government and the public from the proposed injunction is enormous. The government and the public rely on a public database of this contact information to resolve technical problems and disputes over copyright and trademark, as well as to protect against identity theft, fraud, and more serious online crime. Furthermore, the United States has entered into treaties with a number of foreign governments by which it promises to maintain accurate contact data for domain names within the ".us" domain. The proposed order would interfere seriously with these commitments. That is especially true because the order Plaintiff has requested is sweepingly overbroad – he asks the Court to order continued anonymity not only for himself but for an estimated 17,000 other users who have used similar services to conceal their identities.

Finally, Plaintiff's case is weak on the merits. The contact data requirement for domain name holders seeks no information about the identity of speakers featured on a website, does not

in any way regulate the content that appears there. Indeed, it is not addressed to speech at all, and is at most a neutral time, place or manner restriction on speech valid under the First Amendment. Plaintiff also raises an Administrative Procedure Act claim, which fails because the government's action here relates to contract, to which the rulemaking requirements of the APA do not apply. Under the law that governs the extraordinary remedy of preliminary injunction, a plaintiff must establish both an imminent, irreparable harm that outweighs any harm to the government and the public, and a likelihood of success on the merits. Plaintiff has shown neither. The government therefore respectfully requests that the Court deny Plaintiff's motion for preliminary injunction.[1]

BACKGROUND

The Internet and the Domain Name System.

The Internet is a world-wide system of connected public and private computer networks. See Island Online, Inc. v. Network Solutions, Inc., 119 F. Supp.2d 289, 292 (E.D.N.Y. 2000). Computers on the Internet are identified by numeric addresses, expressed as a series of numbers containing up to twelve digits, such as "204.146.46.9" (referred to as "Internet Protocol" or "IP" numbers). Because these numbers are difficult to remember, the practice arose of associating letters and words with individual IP addresses, for example "acme.plumbing.com." See Name.Space, Inc. v. Network Solutions, Inc., 202 F.3d 573, 576 (2d Cir. 2000). These word-based Internet addresses are expressed as a descending hierarchy of regions, called "domains,"

[1]The government defendants in this case are the National Telecommunications and Information Administration ("NTIA"); the United States Department of Commerce; Michael D. Gallagher, in his capacity as Assistant Secretary of Commerce for Communications and Information; and Carlos Gutierrez, in his capacity as Secretary of Commerce (together the "Federal Defendants").

which read from right to left. At the far right end of an Internet address is the "top-level domain," ("TLD"), for example the ".com" in "acme.plumbing.com." To the left of that is the "second-level" domain "plumbing" and to the left of that is the "third-level" domain "acme," and so on. See Island Online, 119 F. Supp. 2d at 292. The domains become more specific as one reads from right to left, until the desired region of the Internet corresponding to the sought-after computer is pinpointed.

The largest TLDs, ".com" and ".net," between them contain nearly 40 million web addresses. In addition to these generic domains, there are top-level domains for each country, such as ".fr" for France or ".uk" for the United Kingdom. See NameSpace, Inc., 202 F.3d at 577. The United States has such a domain, called ".us," which currently has about 900,000 addresses.

The ".us" Domain.

Initially the United States restricted use of the ".us" domain primarily to U.S. state and local governments. See Lewis Decl. ¶12. However, beginning in 1998, the United States began considering whether to make ".us" addresses available to individual U.S. citizens and companies. See id. ¶15. The Department of Commerce repeatedly solicited public comment and encouraged public discussion on this question. See id.; Request for Comments on the Enhancement of the .us Domain Space, Notice, Request for Public Comment, 63 Fed. Reg. 41547 (Aug. 4, 1998); see also Enhancement of the .us Domain Space, Notification of Open Electronic Mailing List for Public Discussions Regarding the Future Management and Administration of the .us Domain Space, Notice, 64 Fed. Reg. 26365 (May 14, 1999); Management and Administration of the .us Domain Space, Notice, Request for Public Comment, 65 Fed. Reg. 50964 (Aug. 22, 2000).

Based on public comments, in May 2001 the Department of Commerce published a

statement of work outlining its requirements for management of an expanded ".us" domain, and soliciting proposals from private companies. See Lewis Decl. ¶17. To ensure that ".us" would be run for the benefit of U.S. citizens and companies, the statement of work requires that ".us" registrants have specified connections to the United States. See id. ¶20 & Ex. 8a. It also requires that domain name holders agree to binding arbitration in the event of a dispute over the rights to a particular domain name. See id. Finally, the statement of work requires the manager of ".us" to maintain an accurate and up-to-date database of contact information for domain name registrants similar to the "WHOIS" databases maintained by other domains such as ".com" and ".net." See id. The statement of work requires that this database be searchable and available to the public online, and include "the name and postal address for the domain name holder"and a contact telephone number for the technical manager of the website. See id. ¶20 & Ex. 8a at B.4.

The statement of work does not require any information about the identities of speakers featured on a ".us" website, or the source of any content displayed there. See generally id. Ex. 8a. Nor does it impose any restrictions on the messages or content which may be featured on such a site. See id. And although it requires a contact address for the domain name holder, nothing in the statement of work requires that this be a residential address. See id. Ex. 8a at B.4. Furthermore, although the statement of work requires that a domain name holder provide a point of contact to the WHOIS database, it does not require a domain name holder to publish his contact information on any website he administers using his domain name. See id.

There are a number of reasons for the contact information requirement. It ensures that a responsible party for the website is immediately available in the event that a domain address experiences technical problems or causes technical problems for other users. See id. ¶18. It

assists private parties in protecting themselves against fraud, spam, and identity theft. See id. ¶18. It helps private parties to police against copyright and trademark infringement, and provides a point of contact for any disputes that arise. See id. ¶18. It assures a smooth transition of control over a domain address in the event that the holder goes bankrupt or abandons it. See id. ¶18. It assists the United States in enforcing the U.S. nexus requirement and the arbitration requirement. See id. ¶18. In the event that a website is used to violate the law, it also assists law enforcement in locating offenders. See id. ¶18. Finally, and most basically, it allows the government to provide a public record of parties using public assets. See id.

In October 2001, Defendant National Telecommunications and Information Administration ("NTIA"), an agency of the Department of Commerce, awarded a contract (the ".us Contract") to Defendant NeuStar, Inc. ("NeuStar") to manage registrations in the ".us" domain. See id. ¶19 & Ex. 9. The .us Contract incorporates the requirements of the statement of work, including the requirement that domain name registrants provide the name and address of the domain name holder, and telephone contact for a technical manager of the website. See id. & Ex. 9 at B.5.4.e. The .us Contract also specifies terms by which NeuStar may authorize private registrars to sell new addresses in the ".us" domain. See id. & Ex. 10 at B.5.2.

Using a model registrar agreement and registrar accreditation agreement, NeuStar contracted with several registrars to begin selling new addresses in the ".us" domain to U.S. companies and individuals. See id. & Exs. 11-12. The Registrar Agreement requires registrars to comply with, and to include in their agreements with individual registrants, all the substantive requirements of the .us Contract. See id. ¶¶21-24 & Ex. 11. In particular, the Agreement provides that "[t]o register a name, registrants, through their registrars will be required to provide

basic registration information to the Registry [NeuStar]. The minimum required information is . . . [t]he name and postal address of the domain name registrant" and the "voice telephone number" for the registered name holder, for inclusion in a ".us" WHOIS database. Id. ¶¶22-23 & Ex. 11 at Ex. E.

The Discovery of Anonymous Registrations.

In January, 2005, NTIA discovered that some registrars in the ".us" domain were allowing registrants to register domain names anonymously – that is, without providing accurate public contact information to the Registry. See id. ¶¶26-30. These registrars charged an additional fee for these anonymous or "proxy" registrations, on top of the normal cost for registering a domain name.

On February 2, 2005, NTIA sent a letter to NeuStar stating its conclusion that the offering of anonymous or proxy registrations was inconsistent with registrars' obligations under the Registrar Agreement and Accreditation Agreement to provide complete and accurate contact information for the WHOIS database. See id. ¶32 & Ex. 19. NTIA therefore instructed NeuStar to direct all ".us" registrars to cease offering new anonymous or proxy registrations by February 16, 2005, and to bring existing proxy or anonymous registrations into compliance no later than January 26, 2006. See id. NeuStar communicated this instruction to all ".us" registrars that same day. See id. ¶33. NeuStar also executed new accreditation agreements with all existing ".us" registrars that clarified and made more explicit the prohibition on anonymous or proxy registrations. See id. & Ex. 17. The amendment provides: "neither registrar nor any of its resellers, affiliates, partners and/or contractors shall be permitted to offer anonymous or proxy domain name registration services which prevent the Registry from having and displaying the

true and accurate data elements ... for any registered name." Id. Ex. 16 at 3.7.7.4.2.

The notice prohibiting anonymous registrations was reported widely in major news sources at the time. See Kim Zetter, Feds Catching Up with Proxies, Wired, Mar. 5, 2005 (attached as Greene Decl. Ex. 5); David McGuire, Ruling on '.us' Domain Raises Privacy Issues, Wash. Post, Mar. 4, 2005 (attached as Greene Decl. Ex. 6); Larry Abramson, New Laws on Domain Names Aim to Stem Online Fraud, National Public Radio, Apr. 15, 2005 (available at http://www.npr.org/templates/story/story.php?storyId=4601401); see also Lewis Decl. ¶35. By early March, 2005, all ".us" registrars had stopped offering new anonymous registrations. See Lewis Decl. ¶34.

Plaintiff's Registration with GoDaddy.

GoDaddy.com ("Go Daddy") is one of several registrars which has signed a Registrar Agreement and an Accreditation Agreement with NeuStar to register domain names in the ".us" domain. See id. ¶25 & Exs. 13-14. Despite having signed these agreements promising to maintain current and accurate contact information for registrants, in September 2004 Go Daddy sold plaintiff an anonymous registration in the ".us" domain. Pl. Br. at 3 and Peterson Decl. ¶4. Peterson purchased the anonymous registration through a Go Daddy service called "Domains by Proxy." Id. Under this service, Plaintiff's contact information does not appear in the WHOIS database as the registrant for his domain name. Instead, an address and telephone number for Go Daddy's Domains by Proxy service appear where Plaintiff's entry should be. See id. An example of how the WHOIS database information is displayed under this service appears at http://www.domainsbyproxy.com/popup/whoisexample.aspx (a copy of this page is attached as Exhibit 7 to the Declaration of Carlton Greene). In its contract with Plaintiff, Go Daddy does not

assume any responsibility for maintaining Plaintiff's website, and specifically disclaims any liability for injury resulting from Plaintiff's use of his domain name. See Peterson Decl. Ex. A at §6. Go Daddy agrees to "review and forward" some types of postal mail sent to Plaintiff's website, but not phone calls or faxes. See id. Go Daddy makes no provision about how quickly this will be done. See id. According to Plaintiff, under the proxy agreement his contact data will be available to the government and others only by subpoena. See Pl. Br. at 4. Plaintiff pays Go Daddy an extra fee, over and above the fee for registering his domain, for registering his domain anonymously. In advertising such "proxy" registrations, Go Daddy explains:

> The law requires that the personal information you provide with every domain you register be made public in the "WHOIS" database ... . But now there's a solution: Domains By Proxy!

Houpt Decl. Ex. M (also available at http://www.domainsbyproxy.com/).

Plaintiff's Website.

Plaintiff uses his ".us" domain name, www.pcpcity.us, to run a website discussing current events and hosting debate on current political topics. See www.pcpcity.us. Plaintiff alleges that he registered his domain anonymously with Go Daddy because he fears that publication of his contact data would expose him to retaliation for the controversial opinions he expresses on that site. See Pl. Br. at 4 and Peterson Decl. ¶4. Examples of recent topics featured on Plaintiff's website include social security reform and criticisms of Walmart. See www.pcpcity.us. Plaintiff's website discloses his full name, Robert T. Peterson, and, through pages featured on the site, the fact that he lives in Hammond, Indiana, and is a member of the Illinois Bar. See Greene Decl. ¶¶2-4; see also www.pcpcity.us.

This Litigation.

In response to NeuStar's February 2005 notice concerning proxy registrations, Go Daddy, like other ".us" registrars, signed a new Accreditation Agreement with NeuStar clarifying the prohibition on anonymous and proxy registrations, and agreed to end all existing proxy registrations by January 26, 2006. See Lewis Decl. ¶ 33. In addition to the press coverage this event received in early March 2005, Go Daddy's President, Robert Parsons, initiated a public information campaign on radio and the Internet discussing the January 26, 2006 deadline and his objections to it. See id. ¶35. This includes a website, available from Go Daddy's homepage on the web, discussing the deadline. See id.; see also http://www.bobparsons.com/february2005.html; http://www.TheDangerOfNoPrivacy.com.

Nearly one year later, on the night before the January 26, 2006 deadline, Plaintiff filed this lawsuit and Emergency Motion for Temporary Restraining Order (Docket No. 4). Plaintiff alleges that he first learned about the January 26, 2006 deadline in November 2006. See Pl. Br. at 9 n.1. In his motion, Plaintiff alleged that unless the Court granted him emergency injunctive relief, Go Daddy would, by January 26, 2006, publish Plaintiff's personal contact information (provided to Go Daddy when Plaintiff first obtained his registration) to the WHOIS database, or in the alternative that Plaintiff would be forced to de-register his website in order to avoid this and protect his alleged anonymity. See Pl. Br. at 6. Plaintiff alleges that the required disclosure of contact information for his domain name would violate his First Amendment right to speak anonymously. See id. Plaintiff also alleges that NTIA violated the Administrative Procedure Act, 5 U.S.C. § 551 et seq., by failing to conduct public notice and comment rulemaking before instructing NeuStar to end anonymous registrations in the ".us" domain. See id.

Despite Plaintiff's prediction, Go Daddy did not publish Plaintiff's contact data in the

WHOIS database on January 26, 2006. Instead, Go Daddy ignored the January 26, 2006 deadline, and continues to maintain Plaintiff's proxy registration. On January 27, 2006, NeuStar sent Go Daddy a letter advising Go Daddy that it was in breach of its Accreditation Agreement and giving it 15 days to cure before NeuStar would consider further action, up to and including de-accrediting Go Daddy as a registrar for the ".us" domain. See Lewis Decl. ¶39.

After passage of the January 26, 2006 deadline, the parties agreed to treat Plaintiff's motion as one for preliminary injunction, with Defendants' brief opposing injunction due February 10, 2006, and any reply from Plaintiff due February 15, 2006. See Stipulated Order with Amended Notice of Motion (attached to Greene Declaration as Exhibit 8).

ARGUMENT

A preliminary injunction is "an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it." Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 811 (4th Cir. 1992) (internal quotation and citation omitted); accord Stuart Circle Parish v. Board of Zoning Appeals, 946 F. Supp. 1234-35 (E.D. Va. 1996). In deciding whether to issue such an order, a court considers: (1) whether the plaintiff will suffer irreparable harm if the injunctive relief is not granted; (2) the injury to the defendant should injunctive relief be granted; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest. See Hughes Network Sys., Inc. v. InterDigital Comm. Corp., 17 F.3d 691, 693 (4th Cir. 1994); Blackwelder Furniture Co. v. Seileg Mfg. Co., 550 F.2d 189, 195-96 (4th Cir. 1977). The harm demonstrated by plaintiff must be "neither remote nor speculative, but actual and imminent." In Re Microsoft Anti-Trust Litig., 333 F.3d 517, 526 (4th Cir. 2003). The court considers the balance of harms first. See Manning v. Hunt, 119 F. 3d 254,

263 (4th Cir. 1997). Where the balance of harms is against plaintiff, his showing of likelihood of success on the merits must be correspondingly stronger. See id. The converse also is true. See id. Plaintiff bears the burden of establishing his entitlement to emergency relief based on these factors. See id.

I. Plaintiff Has Not Demonstrated An Irreparable Harm.

A. Plaintiff Has No Anonymity to Protect and Thus Would Suffer No Cognizable Injury from Publication of His Contact Information.

Even if Plaintiff could establish a First Amendment right to anonymity under the circumstances of this case (which as discussed below he cannot), Plaintiff would suffer no new injury to this right from the exposure of his contact data because he already has made such information easily available on his website, www.pcpcity.com. Plaintiff explicitly posts on his website his full name, city of residence, his membership in the Illinois Bar Association, and other identifying details. See Greene Decl. ¶¶2-4. Plaintiff's street address is easily available from this information. See Greene Decl. ¶6. By making so much personal information easily available to casual visitors to his website, Plaintiff has waived any claim to anonymity.[2] In short, Plaintiff has no cognizable injury that would justify emergency invocation of the Court's equity powers. See Hughes, 17 F.3d at 693 (requiring irreparable harm for injunction).

B. Plaintiff Has Easy Options Available to Preserve His Anonymity, and Thus The Removal of His Proxy Registration Will Not Cause Any First Amendment Harm.

Furthermore, even if Plaintiff has any anonymity left to protect, the removal of proxy

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[2]Indeed, as the factual background above makes clear, Plaintiff already has voluntarily disclosed more information about himself on his website than the contact disclosure requirement would ever have required of him. See supra at 5-6.

registrations from the ".us" domain would not force Plaintiff to forgo it. Plaintiff has easy options available to him to preserve his privacy. Within the ".us" domain, Plaintiff could, consistent with the WHOIS requirement, provide contact information other than his home address and telephone number, for example a post office box or business address, so long as both are maintained by Plaintiff and provide a direct means of communication with him. Likewise, the telephone number for the website need not be Plaintiff's home telephone number, so long as it provides a direct means of contacting him.

Moreover, many U.S. corporations offer anonymous web hosting services using domain names for which the company is the legally responsible domain name holder.[3] As an example, Lycos offers such a service through Tripod.com. See www.tripod.com. Plaintiff could obtain anonymous hosting of his webpage through such a company.[4] The corporate domain name holder would be the responsible party for the domain name and its contact information would appear in the WHOIS database, not Plaintiff's. In short, the removal of proxy registrations from the ".us" domain does not in any way deprive Plaintiff of the opportunity for anonymous speech, and as such he fails to allege any irreparable injury.

B. Plaintiff Cannot Manufacture Imminent Irreparable Harm By Waiting Until the Last Minute to Assert His Rights.

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[3]Note, by contrast, that Go Daddy, in providing proxy registration information for Plaintiff's domain name, specifically disclaims any liability for Plaintiff's domain name or responsibility for maintaining its operations. See Peterson Decl. Ex. A at §6.

[4]The online encyclopedia Wikipedia defines a "web hosting service" as "a type of Internet hosting service that provides individuals, organizations, and users with online systems for storing information, images, video, or any content accessible via the Web." See http://en.wikipedia.org/wiki/Web_hosting_service. Wikipedia notes that many Internet service providers offer this service for free to their subscribers. See id.

It is axiomatic that a Plaintiff cannot establish an entitlement to emergency injunctive relief by sitting on his rights until a crisis develops. See Quince Orchard Valley Citizens' Assoc. v. Hodel 872 F.2d 75, 79 (4th Cir. 1989) (affirming denial of injunction because "whatever irreparable harm Plaintiffs face from the impending [event] is very much the result of their own procrastination"). That is exactly what Plaintiff has done here. On February 2, 2005, NeuStar published its notice requiring that all registrars provide correct WHOIS data for all existing anonymous or proxy registrations by January 26, 2006. See Lewis Decl. ¶¶32-33. The notice was reported in major news sources like the Washington Post, Wired Magazine and NPR at that time. See Lewis Decl. ¶35; Greene Decl. Exs. 5-6; Larry Abramson, New Laws on Domain Names Aim to Stem Online Fraud, National Public Radio, Apr. 15, 2005 (available at http://www.npr.org/templates/story/story.php?storyId=4601401). It is difficult to believe that Plaintiff, who runs a political website based on current events, would be unaware of this very public news. Furthermore, as discussed above, Plaintiff's own registrar, Go Daddy, engaged in a public relations campaign on this issue. See Lewis Decl. ¶36.

Based on these events, Plaintiff knew, or reasonably should have known at that time, of the pending deadline. Despite this, Plaintiff has done nothing over the past year to assert his rights. Instead, he waited until the end of business the night before the deadline for termination of proxy registrations to file this emergency suit. Even by Plaintiff's own reckoning, he has known about the impending end of proxy registrations for more than 3 months. See Peterson Decl. ¶7.[5] Plaintiff's self-created emergency not only represents a misuse of this Court's equity

[5]Plaintiff alleges he spent this time writing letters to the NTIA and his congressman about the proxy registration policy. See Pl. Br. at 9 n.1. These activities are not mutually exclusive with bringing suit to protect his rights, and Plaintiff certainly cannot rely on these activities to

powers, it deprives the court of full briefing on these issues, and in particular the chance to benefit from the government's side of the case. By contrast, had Plaintiff brought this action when notice of the deadline first was published, this action would be fully briefed and decided by now.

"Equity demands that those who would challenge the legal sufficiency of administrative decisions ... do so with haste and dispatch." Quince Orchard, 872 F.2d at 80. Because the imminent nature of any potential harm to Plaintiff is "the product of his own delay in pursuing this action," Id. at 79, the Court should reject Plaintiff's assertion of imminent irreparable harm and his emergency invocation of the Court's equity powers.

II. The Government and the Public Will Be Harmed Greatly by an Injunction.

In contrast to the non-existent harm Plaintiff alleges, the United States and the public will suffer greatly from entry of the requested injunction. The United States has entered into treaties with several foreign governments, including those of Australia, Morocco, Chile, and Singapore, in which each country has agreed to maintain an accurate, searchable database of personal contact information for registrants in its respective country TLD. See, e.g., United States-Australia Free Trade Agreement, 118 Stat. 919 (May 18, 2004); United States-Chile Free Trade Agreement, 117 Stat. 909 (June 6, 2003); U.S.-Morocco Free Trade Agreement, 118 Stat. 1102 (June 15, 2004); United States-Singapore Free Trade Agreement, 117 Stat. 948 (May 6, 2003).[6]

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excuse his waiting until after the Court closed the night before the deadline to file this action.

[6]These agreements each provide that "Each party shall require that the management of its ccTLD [country top-level domain] provide online public access to a reliable and accurate database of contact information for domain-name registrations." See, e.g., 118 Stat. 919 at Art. 17.3, ¶2.

Forcing the United States to permit proxy registrations within the ".us" domain will interfere with the United States' ability to abide by these international agreements.

An order permitting proxy registrations also would prevent the United States from preserving the ".us" domain as a space for U.S. citizens and companies. Specifically, it would prevent the United States from determining whether registrants in ".us" are in fact U.S. citizens or corporations, or otherwise based in the United States, with this information being available only by a successful subpoena. See Pl. Br. at 4; see also Lewis Decl. ¶18.

Finally, the sweeping injunction Plaintiff has requested here would leave the government, its contractor, and the public with no immediately available, legally responsible contact for Plaintiff's website and the estimated 17,000 other proxy registrations Go Daddy currently maintains. It would leave the government and the public without protection or easy redress against technical problems caused by these sites as well as fraud, trademark and copyright infringement, or identity theft from them. See Lewis Decl. ¶18. In the event of business failure or other disruption of service by a registrar, the government could not assure continued service to ".us" domain name holders for whom it does not have complete and accurate WHOIS data. See id. Furthermore, a lack of complete and accurate WHOIS information would interfere with the government's ability to contract with private companies to maintain the ".us" registry. Potential bidders for such contracts, including Defendant NeuStar, rely on such information in deciding whether and how to bid on providing registry services. See id.

III. Plaintiff Has No Likelihood of Success on the Merits.

Because he cannot show any real harm or *bona fide* emergency caused by the end of proxy registrations, and the harm to the government and the public from Plaintiff's proposed

injunction is sweeping, Plaintiff must demonstrate an especially strong likelihood of success on the merits to justify an emergency injunction. See Scotts Co. v. United Indus. Corp., 315 F.3d 264, 271 (4th Cir. 2002) (plaintiff must make "clear showing of a likelihood of success" to obtain injunctive relief where balance of hardships is not clearly in its favor (quoting Direx Israel Ltd., supra 952 F.2d at 808; Blackwelder Furn., 550 F.2d at 195 n.3)). As discussed below, he has not done so.

Plaintiff's argument, see Pl. Br. 11-13, that the contact data requirement violates his First Amendment right to speak anonymously fails. As an initial matter, Plaintiff cannot show any injury to his asserted right to speak anonymously (1) because his speech is not anonymous; and (2) because the contact data requirement does not prevent him from keeping his home address and telephone private, and thus retaining any alleged anonymity. Without any injury, Plaintiff lacks standing to bring this action. Finally, even if the contact data requirement did somehow interfere with anonymity under these circumstances, it represents a reasonable, content-neutral restriction on speech valid under the First Amendment.

A. Plaintiff Has No Injury and Therefore No Standing.

"Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'" Allen v. Wright, 468 U.S. 737, 750 (1984). As part of this case or controversy requirement, a plaintiff bears the burden of establishing that he has standing to sue as to each defendant, see Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992), and the standing inquiry requires "careful judicial examination of a complainant's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." Allen, 468 U.S. at 752. In order to establish standing, a plaintiff must demonstrate, "at an

irreducible minimum," three requirements: (1) an "injury in fact" that is "concrete and particularized" and "actual and imminent, not conjectural or hypothetical,"(2) a causal connection between the injury and the conduct complained of, such that the alleged injury is "fairly traceable" to the defendant's action; and (3) that it is "likely," as opposed to "merely speculative," that the injury will be redressed by a favorable decision. Lujan, 504 U.S. at 560-61.

1. Plaintiff's Speech Is Not Anonymous.

Here, Plaintiff lacks an injury in fact because his speech is not anonymous. As discussed above, Plaintiff freely posts his full name, Robert T. Peterson, on his website, and links featured on his website disclose the fact that Plaintiff lives in Hammond, Indiana and is a member of the Illinois Bar. See Greene Decl. ¶¶2-4. Also featured is the fact that Plaintiff is a former Munster, Indiana, Republican City Councilman and won a writing prize from the Acton Institute, See id. ¶5. Plaintiff's home address and telephone number are easily available from these facts.[7] Because Plaintiff has made no effort to conceal his identity or identifying details about himself, his speech cannot be deemed anonymous, and he cannot claim any new injury to his right to speak anonymously from being asked to provide contact information for the domain he has registered in ".us."

2. The Contact Information Requirement Does Not Prevent Plaintiff from Speaking Anonymously.

Plaintiff also fails to establish any injury in fact traceable to the government because, even if Plaintiff had any anonymity left to protect, the requirement against proxy registrations

[7]Indeed, a simple call to local information in Hammond, Indiana using Plaintiff's name appears to divulge them. See id. ¶6. Plaintiff also freely identifies himself as the author of many of the political opinions expressed on his website. See id. ¶7.

does not require Plaintiff to forgo it. The harm Plaintiff alleges is that he will be forced to reveal his home address and telephone. See Pl. Br. at 4-5. But the Registrar Agreement and Accreditation Agreement do not require that – they require only complete and accurate contact information for the domain name holder. Such contact information could in fact be a business address or post office box and a non-residential phone number – so long as this information is accurate for the domain holder and directly reaches him.

Indeed, Plaintiff could easily protect his anonymity further still if he so wished. As discussed above, Plaintiff could obtain anonymous hosting for his webpage through one or more of the companies that offer webhosting services. The purposes of the contact data provision would be satisfied – the company would be available as a legally responsible party for the website in the event that technical or other problems arise.

B. Requiring Contact Information for Use of a ".us" Domain Name Does Not Violate Plaintiff's First Amendment Rights.

As discussed above, the contact data requirement does not ask for any information about the speech or speakers featured on a website. It does not in any way restrict the content that may be posted on a website, and it does not prohibit any opinion or other content from being submitted anonymously or under a pseudonym. To the extent it regulates speech at all, such a requirement is, at most, only a content-neutral restriction on the time, place, or manner of speech. See Thomas v. Chicago Park Distr., 534 U.S. 316, 322 (2002); Ward v. Rock Against Racism, 491 U.S. 781, 797 (1989); see also New England Reg. Council of Carpenters v. Kinton, 284 F.3d

9, 28 (1st Cir. 2002).[8]

> In ascertaining whether a restriction is content-neutral, the Supreme Court has stated:
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> The principal inquiry in determining content neutrality, in speech cases generally and in time, place and manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.

Ward, 491 U.S. at 791. The "government's purpose is the controlling consideration," even if the restriction "has an incidental effect on some speakers or messages." Ward, 491 U.S. at 791 (quoting Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47-48 (1986)). Here, it is abundantly clear that the contact information requirement is not based on disagreement with any message: as discussed above, the requirement is not addressed to speakers or speech at all, and imposes no restriction on the content that may be featured on websites hosted in ".us" domains.

Such a content-neutral restriction is valid if: (1) it is narrowly tailored to serve (2) a significant governmental interest and (3) leaves open ample alternatives for communication. See id. The term "narrowly tailored" under this test does not carry the same exacting meaning as when used in "strict scrutiny" review. The requirement need not be "the least intrusive means," and a requirement is not invalid "simply because there is some imaginable alternative that might be less burdensome on speech." Ward v. Rock Against Racism, 491 U.S. 781, 797 (1989). Rather, the government need only show that the requirement "promotes a substantial government interest that would be achieved less effectively absent the regulation," and does not "burden

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[8]Plaintiff argues that the ".us" domain is a "public forum" for purposes of First Amendment analysis. See Pl. Br. At 10. The Court need not decide this question in order to resolve the First Amendment question presented above. Furthermore, the case Plaintiff relies on, United States v. Grace, 461 U.S. 171, 177 (1983), dealt in any case with public sidewalks surrounding Supreme Court, not the Internet generally or the ".us" domain in particular.

substantially more speech than is necessary" to achieve the government's ends. Id. at 799.

The contact data requirement easily satisfies this standard. The government's interests in support of the contact data requirement are more than substantial – they are compelling. Specifically, the government has a compelling interest in preventing identity theft, fraud and other on-line crime, in promoting the public's ability to police its rights against unlawful copyright and trademark infringement, and avoiding technical mishaps in an emerging medium. This includes ensuring a smooth transition of domain name holders in the event that a registrar goes bankrupt or otherwise becomes incapable of performing its obligations under the Registrar Agreement and Accreditation Agreement. The government also has a compelling interest in accounting to itself and the public for the use of public assets, and ensuring that those assets are used by U.S. citizens and companies, or others with an appropriate connection to the United States, in accordance with the U.S. nexus requirement. Finally, the United States has a compelling interest in abiding by its treaty obligations.

Moreover, it is clear that all of these interests are advanced by the ability of the government and the public to directly and rapidly contact the domain name holder. Nor does the contact information requirement "burden substantially more speech than is necessary" to achieve the government's ends. Id. at 799. It seeks only that information needed to reach and obtain a rapid response from the domain name holder, and does not ask for residential information or seek any information about persons involved in posting content on the domain. Plaintiff's only proffered alternative to the address and number requirement, that the government and the public can get accurate contact information by successfully litigating a subpoena, see Pl. Br. at 4, represents the kind of extreme, least-burdensome-imaginable result that the government is not

required to satisfy here. See Ward, 491 U.S. at 799. Finally, the third prong is satisfied: there are ample alternative opportunities for anonymous speech within ".us," as discussed above. See supra at 19.

In Thomas, petitioners challenged an ordinance which required a permit for any use of a public park involving more than 50 people. The petitioners wished to use the public park for political speech, and alleged that the permit requirement was facially unconstitutional under the First Amendment.[9] In a unanimous decision, the Supreme Court rejected this argument. The Court reasoned that the ordinance at issue was "not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum," noting first that it applied equally to all activities conducted at the park: "The picnicker and soccer player, no less than the political activist...must apply for a permit." 534 U.S. at 322. The Court went on to uphold the requirement because "the object of the permit system" was "not to exclude communication of a particular content," but to "coordinate multiple uses of limited space," to "assure preservation of" public facilities, to "prevent uses that are dangerous, unlawful, or impermissible," and to "assure financial accountability for damage caused" by the use of public property. Id.

These same reasons justify the contact information requirement for domain name holders here. As in Thomas, the contact information requirement here assures the preservation and uninterrupted operation of the ".us" domain, helps the public to resolve disputes arising from

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[9]It is clear from the facts in that case that the permit application at issue required the identification of the person seeking the permit. Among the grounds for denying the permit was whether the applicant was legally competent, or the person seeking the permit had on prior occasions damaged park property without paying for it, or owed other debts to the park system. See 534 U.S. at 318 n.1 and 324. The permit application also could be denied if it contained "a material falsehood or misrepresentation." Id.

multiple independent users, and ensures that domain name holders are accountable to each other and the government for damage caused by the use of public assets. If anything, the government's rationales for the contact data requirement here are more numerous and compelling than those upheld in Thomas. See id. Furthermore, as in Thomas, the requirement applies equally to all holders of public assets, regardless of whether they use those assets for speech or not. See 534 U.S. at 322.

Plaintiff's reliance on McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995), is misplaced. In McIntyre, the Court concluded that a state ordinance was an invalid content-based restriction: (1) because it was directed specifically at speech, affirmatively prohibiting anonymous speech and requiring all speakers to include within their messages an identification of the speaker; and (2) because the restriction selectively targeted speech on a specific topic: speech intended to "influence the voters in an election." Id. at 345.[10] Likewise, in Talley v. California, 362 U.S. 60 (1960), on which Plaintiff relies, the challenged ordinance directly regulated speech, prohibiting the "distribution of any handbill in any place under any

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[10]The state law provided that:

> No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, or make an expenditure for the purpose of financing political communications through newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other nonperiodical printed matter, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor.

Id. at 338 (quoting Ohio Rev. Code Ann. § 3599.09(A) (1988)).

circumstances" where the communication did not identify the speaker. See id. at 64. Here, by contrast, the contact data requirement does not apply to speech or speakers, and any resulting effect on speech is incidental. See Ward, 491 U.S. at 791. Moreover, neither McIntyre nor Talley dealt with parties contracting for the use of public assets, and thus the Court in these cases was not called upon to address the government's and public's proprietary interest in requiring basic contact information from public asset holders. See McIntyre, 514 U.S. at 345; 362 U.S. at 64.

Even in the case of laws that specifically target speech, the Supreme Court and other courts repeatedly have upheld identification requirements far more intrusive and content-focused than the one at issue here. See McConnell v. F.E.C., 540 U.S. 93, 195 (2003) (requiring public disclosure of names of persons contributing $1,000 or more toward electioneering communications); Buckley v. Valeo, 424 U.S. 1, 63, 83-86 (1976) (requiring public records of the full name and address of each person making a contribution to a political party in excess of $10 and, in the case of persons donating $100 or more, that person's occupation and principal place of business); Frank v. City of Akron, 290 F.3d 813, 819 (6th Cir. 2002) (requiring all contributors to political candidates to identify their "home address" on public document associated with candidate); Gable v. Patton, 142 F.3d 940, 943 (6th Cir. 1998) (requiring that all advertisements advocating election of a particular candidate identify the name and address of sponsor in communication); see also Buckley, 424 U.S. at 67 (identifying the deterrence and detection of violations of law as a "substantial" government interest).

Furthermore, in reconciling these cases with prior holdings invalidating identification requirements imposed on speech, both Buckley and McConnell suggest that any First

Amendment right to refuse disclosure of personal identifying information is limited to cases where there is a demonstrated expectation of retaliation against the disclosing party. See Buckley, 424 U.S. at 69-70 (requiring showing that was more than "speculative" and noting by contrast "uncontroverted showing" in NAACP v. Alabama, 357 U.S. 449 (1958), that parties' past disclosure of their identities had exposed them to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility" (quoting NAACP, 357 U.S. at 462)); McConnell, 540 U.S. at 198-99 & n.82 (distinguishing NAACP by noting "lack of specific evidence" supporting plaintiff's averred fear of retaliation).

Here, Plaintiff's only evidence that he will suffer retaliation for the political discussions featured on his website is his unsubstantiated opinion that someone might take offense at his views and seek him out. See Pl. Br. at 4. As in the cases above, this belief is not enough to establish a violation of Plaintiff's First Amendment right to speak – and in any case does not reflect the facts of the information Plaintiff actually is asked to provide here.

In sum, the contact data requirement, to the extent it can be deemed to regulate speech at all, represents at most an incidental, content-neutral time, place or manner restriction valid under the First Amendment. Plaintiff accordingly fails to state any significant likelihood of success on the merits of his First Amendment claim.

C. Plaintiff Lacks Standing to Assert the First Amendment Rights of Parties Not Before the Court.

Plaintiff did not file this suit as a class action under Federal Rule of Civil Procedure 23. Nevertheless, Plaintiff purports to assert the rights of the approximately 17,000 other anonymous registrants in ".us," See Pl. Br. at 6-7, relying on the overbreadth doctrine announced in

Broadrick v. Oklahoma, 413 U.S. 601 (1973). Under that doctrine, a plaintiff may "challenge a statute on its face" where it "also threatens others not before the court ... who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987).

However, it is axiomatic that a plaintiff may not purport to represent the First Amendment rights of others where he lacks standing himself. As the Supreme Court noted in Golden v. Zwicker, 394 U.S. 103 (1969):

> It was not enough to say, as did the District Court, that nevertheless Zwickler has a `further and far broader right to a general adjudication of unconstitutionality * * * (in) (h)is own interest as well as that of others *110 who would with like anonymity practise free speech in a political environment * * *.' The constitutional question, First Amendment or otherwise, must be presented in the context of a specific live grievance.

Id. 109-110 (precluding plaintiff from asserting rights of others where he could not show an immediate threat of actual injury to himself). Here, as discussed above, Plaintiff has failed to show any legally cognizable injury to his First Amendment rights, and accordingly cannot, despite the existence of the overbreadth exception, purport to represent the rights of parties not before the Court.

Furthermore, the overbreadth doctrine's unusual exception to the standing requirement is "a narrow one" to be employed "as a last resort." Newsome v. Albemarle Co. Sch. Bd., 354 F.3d 249, 257 (4th Cir. 2003). Because of the "wide reaching" effects of a successful overbreadth challenge (preventing any enforcement of the challenged rule against the plaintiff or anyone else), any asserted overbreadth of a statute must be "substantial" in order to justify the "strong

medicine" of this doctrine. See Newsome, 354 F.3d at 257. Here, under the facts above, Plaintiff cannot make the initial showing that the contact data requirement forces any speaker to forego anonymity, much less that the statute additionally reaches "substantially" beyond the scope of the government's asserted interests. Nor, finally, has Plaintiff provided any specific evidence that other proxy registrants desire to challenge the contact data requirement, or explained why they are not able to assert their own rights in this Court, anonymously if necessary, rather than having this Court indulge in an unusual deviation from normal standing principles that deprives it of information about the nature of their claims. The Court should reject Plaintiff's attempt to assert standing on behalf of the other 17,000 proxy registrants.

D. The Plaintiff Has No APA Claim Against NTIA Because the Notice and Comment Requirement Does Not Apply to Government Contracts.

In the alternative, Plaintiff alleges that NTIA violated the Administrative Procedure Act, 5 U.S.C. §§ 551, 553, when it failed to provide public notice and comment before acting pursuant to its contract with NeuStar to clarify the prohibition on proxy registrations. See Pl. Br. at 16-17. But the APA's notice and comment requirements, and other requirements related to rulemaking, specifically do not apply to agency action related to government contracts or benefits. See 5 U.S.C. § 553(a)(2) ("This section applies, ... except to the extent that there is involved a matter relating to agency management or personnel or to public property, loans, grants, *benefits, or contracts*." (emphasis added)); see Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250, 1253 (9th Cir. 1979) (government decision to restrict licenses for use of public river exempted from notice and comment under public contracts exception); Rainbow Valley Citrus Corp. v. Federal Crop Ins. Corp., 506 F.2d 467, 468-69 (9th Cir. 1974) (decision to

discontinue federal crop insurance contracts in blighted area was exempted from notice and comment requirement by government contracts exemption); see also Thomas v. Network Solutions, Inc., 2 F.Supp.2d 22, 36-7 (D.D.C. 1998), vacated on other grounds 1998 WL 1738189, judgment aff'd. 176 F.3d 500 (D.C. Cir. 1999) (pursuant to section 553(a)(2), the APA rulemaking requirements did not apply to agency cooperative agreement for the administration of domain name registration system). Because the action Plaintiff challenges here – NTIA's management of its contract with NeuStar – is exempted from the notice and comment requirement, Plaintiff's APA claim necessarily fails.

Moreover, even if the notice and comment requirement did apply here, Plaintiff's APA claim still would fail because NTIA's actions would satisfy that rule. The contact data requirement has been a part of the contract between NTIA and NeuStar since 2001, and in establishing that contract NTIA held public hearings and repeatedly solicited public comment on its proposals for management of the ".us" domain, including the requirement that domain name holders provide accurate and complete contact data. See Lewis Decl. ¶¶15-17. For all these reasons, Plaintiff has no likelihood of success on the merits of its APA claim.

CONCLUSION

Because Plaintiff cannot show that he would suffer any legally cognizable injury from the cessation of proxy registrations, because the government and the public would be greatly injured by the relief Plaintiff has asked for, and because Plaintiff has failed to demonstrate any significant likelihood of success on the merits of his First Amendment and APA claims, this Court should deny Plaintiff's Motion for Preliminary Injunction (Docket No. 4).

Respectfully submitted,

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