Case Nos. 06-1216L and 06-1548

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBERT T. PETERSON,
Appellant

vs.

NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION; UNITED STATES DEPARTMENT OF COMMERCE; MICHAEL D. GALLAGHER, in his capacity as Assistant Secretary of Commerce for Communications and Information; CARLOS GUTIERREZ, in his capacity as Secretary of Commerce; and NEUSTAR, INC., a Delaware Corporation,
Appellees

On Appeal from the United States District Court
for the Eastern District of Virginia
Civ. Action No. 1:06cv96
Honorable Gerald Bruce Lee, United States District Judge

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Armed with little more than speculation and unsubstantiated justifications, NTIA persuaded the District Court that Peterson lacked Article III standing to challenge NTIA's rule banning proxy registrations and persuaded the District Court to deny Peterson's motion for a preliminary injunction. The District Court erred in both respects.

Peterson has standing to challenge the constitutionality of NTIA's rule and NTIA's non-compliance with the Administrative Procedure Act ("APA") for at least one simple reason: Peterson registered his website on the .us-TLD using a proxy service, and NTIA's rule now prevents him from using the proxy service for which he contracted. This alone is a concrete and particularized injury sufficient to confer Article III standing on Peterson, and Peterson can challenge NTIA's rule as an overbroad restriction on speech and can challenge the process by which NTIA made its rule. Separate and apart from that injury, Peterson suffered additional injury because NTIA's rule prevents him from continuing to engage in unfettered, partially anonymous, political speech on his website. As Supreme Court cases make clear, the First Amendment protects anonymous speech, even in instances where speakers are not completely anonymous. Thus, Peterson has standing to challenge NTIA's rule on this alternate basis.

In addition to incorrectly concluding that Peterson lacked standing, the District Court erred in denying Peterson's motion for a preliminary injunction. Indeed, the record of this case reveals there is little, if any, evidence supporting the District Court's decision. For example, despite the fact that NTIA's rule infringes Peterson's and others' First Amendment rights, the District Court concluded that the balance of harms favored NTIA. Yet, NTIA proffered no credible evidence that a preliminary injunction would cause it any harm – proxy registrations had been openly used on the .us-TLD for years and NTIA introduced no evidence supporting its claim that allowing them a short while longer would cause any harm.

While NTIA claims its rule banning proxy registrations serves many important goals, its lack of evidence shows otherwise. For example, NTIA failed to introduce any evidence that it interprets certain treaties between the United States and other countries as banning proxy registrations; instead, its attorneys simply offered a self-serving legal interpretation of the treaties. NTIA also failed to introduced any evidence, nor did it claim, that proxy registrations actually frustrated any of its management goals or that proxy registrations prevented it from obtaining the identity of a website registrant. Indeed, completely undermining NTIA's purported justifications of its rule is NTIA's claim that it was not even aware that, for years, thousands of

websites on the .us-TLD had been registered by proxy. NTIA alleged that it only discovered the proxy registrations when it began preparing for an audit, not because of any problems or complaints arising from proxy registrations.

Not dissuaded by the dearth of evidence, NTIA persists that it is "necessary" to eliminate proxy registrations, and "necessary" to *publicly* disclose the name, address, and telephone number of every website owner on the .us-TLD, regardless of how any use their website. Yet, no matter how official NTIA's justifications may sound, it cannot run roughshod over citizens' First Amendment rights without demonstrating a need – and in this case, a compelling need. NTIA did not, and cannot, demonstrate a sufficient need for publicly disclosing the information of every website registered on the .us-TLD.

In light of the striking similarity between NTIA's rule and the impermissible ordinance in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002) ("*Watchtower Bible*"), the District Court erred in concluding Peterson was not likely to succeed on the merits of his First Amendment claim, and its ruling should be reversed.

II. ARGUMENT

A. De Novo Review Demonstrates The District Court Erred In Concluding That Peterson Lacked Standing To Challenge NTIA's Rule.

The District Court erred in at least two respects when it concluded that Peterson suffered no injury-in-fact, and therefore lacked standing to prosecute this action. It erred in concluding that NTIA's rule caused no injury to Peterson's First Amendment right to anonymous speech, and it erred by focusing only on the harm to Peterson's right to anonymous speech when NTIA's rule caused an entirely distinct injury to Peterson – NTIA's rule prevents Peterson from continuing to register his website through a proxy.

Peterson has a direct, personal stake in this litigation. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992) (stating that when the plaintiff is the object of a government action, "there is ordinarily little question that the action . . . has caused him injury"); *White Tail Park, Inc. v. Stroube.*, 413 F.3d 451, 461 (4th Cir. 2005) (noting court's standing analysis is "to determine whether plaintiff has a sufficiently 'personal stake' in the lawsuit"). The District Court thus erred in concluding otherwise and thereafter dismissing his complaint.

1. The First Amendment Protects Partially Anonymous Speech And Peterson Has Standing To Challenge NTIA's Rule On That Basis.

a. The Law Grants Redress For Limitations On Partially Anonymous Speech.

Contrary to NTIA's contention, the First Amendment protects partially anonymous speech. Prior to the exponential growth of the Internet, the Supreme Court recognized that "[h]ardly anyone in our society can keep altogether secret very many facts about himself." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 n.14 (1989). This recognition, in conjunction with the Supreme Court's later-decided anonymous speech cases, *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) and *Watchtower Bible*, both of which involved plaintiffs who revealed portions of their identities, demonstrates that the First Amendment protects speakers who are not absolutely anonymous. Thus, the fact that Peterson discloses his name and general area of residence[1] along with other trivial information about himself on his website does not categorically exclude him from the First Amendment protections given anonymous speech.

NTIA contends there is no right to partially anonymous speech because revealing one's "identity" (here, Peterson's name, indirectly, and his general area of residence) eliminates the anti-retaliation rationale of protecting anonymous speech. (Opp'n at 27-28.) However, avoiding retaliation is not the only reason a speaker may choose to remain anonymous; a speaker may choose to remain anonymous "merely by a desire to preserve as much of one's privacy as possible."[2] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995). Thus, even accepting NTIA's premise that disclosing a portion of one's identity necessarily eliminates the retaliation rationale, it does not eliminate all justifications for protecting anonymous speech.

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[1] Despite NTIA's assertion, Peterson does not disclose his city of residence on his website. NTIA purportedly obtained that information of following a link on Peterson's website to a different website. (JA741, ¶4.)

[2] NTIA incorrectly contends that Peterson has waived any argument based on privacy. (Opp'n at 30 n.4.) Peterson asserted harm to his First Amendment right to speak anonymously, which broadly encompasses a right to remain anonymous for privacy purposes as well as for purposes of self-preservation. Privacy is inextricably linked to the First Amendment's right to anonymous speech. *See McIntyre*, 514 U.S. at 341-42 (noting that privacy may motivate desire to remain anonymous); *Am. Civil Liberties Union of Nev. v. Heller*, 378 F.3d 979, 990 (9th Cir. 2004) (relating anonymity and privacy). While Peterson alleged that he feared retaliation if his information were disclosed into WHOIS, he also alleged that he did not want his personal information disclosed in a central repository. (*See* JA, ¶13.) How Peterson's private information is disseminated permeated the trial court briefing, thus precluding waiver of the issue.

Nor is anonymity an "all-or-nothing" proposition. *See Justice For All v. Faulkner*, 410 F.3d 760, 765 (5th Cir. 2005) (stating that student who must identify himself to university officials as a prerequisite to speaking on campus, still has constitutionally protected "residual" anonymity). To the contrary, the Supreme Court's decisions in *Buckley* and *Watchtower Bible*, recognize that individuals can disclose certain information about themselves without compromising their First Amendment right to anonymity. In *Buckley*, for instance, the Court held that a law requiring petition circulators to wear a badge with their name on it – and no other personal information – unconstitutionally abridged the circulator's First Amendment right to anonymous speech, even though the circulators necessarily revealed their physical identities while petitioning. 525 U.S. at 188, 198-99. Similarly, the Court in *Watchtower Bible* held that an ordinance requiring door-to-door solicitors to disclose their name and home address implicated First Amendment anonymous speech rights. 536 U.S. at 155 n.2, 166-67. Even though the Court in *Watchtower Bible* recognized that solicitors would disclose their physical identities and could be known to some residents, the Court nevertheless invoked its decision in *Buckley* to conclude that the ordinance implicated the right to speak anonymously. 536 U.S. at 166-67.

Contrary to NTIA's contention, neither *Buckley* nor *Watchtower Bible* stand for the proposition that disclosing one's name or other trivial information, without more, vitiates anonymity. (Opp'n at 27-29.) Instead, *Buckley* stands for the proposition that a speaker cannot be compelled to reveal information sufficient to increase the likelihood that someone will retaliate against him, if the regulation results in chilled speech. Under the face-to-face encounters in *Buckley*, compelling the circulators to disclose their names, in the Court's view, was sufficient to increase the chance of retaliation. 525 U.S. at 645-46. *Watchtower Bible*, of course, stands for the proposition that compelling canvassers to disclose their names and addresses to whomever they speak implicates anonymity concerns. 536 U.S. at 166-167 & n.14. In both cases, the plaintiffs disclosed part of their "*identities*," yet still had a cognizable interest in protecting their anonymity. *See Watchtower Bible*, 536 U.S. at 167 (discussing *Buckley*) (emphasis added).

Together, *Buckley* and *Watchtower Bible* stand for the proposition that the government cannot compel a speaker to disclose so much of his identity that it will chill speech – whether from a fear of retaliation, or because the speaker simply wishes to preserve as much of his privacy as possible. *See Justice For All*, 410 F.3d at 765 (recognizing protection for "residual anonymity").

Aside from lacking support in case law, NTIA's contention that disclosing one's name and general area of residence vitiates protectable anonymity makes little sense when it comes to the Internet. Since the Internet does not involve the type of face-to-face encounters envisioned in *Buckley* or *Watchtower Bible*, disclosing one's name or other minimal identifying information on a website is unlikely to assist one bent on retaliation or compromise the speaker's privacy. Disclosing an address and telephone number, however, would more readily allow retaliation and distinguishes an otherwise generic name on a website. Thus, the compelled disclosure of one's address and telephone number, regardless of the medium, implicates the exact anonymity concerns the Court highlighted in *Buckley* and *Watchtower Bible.*

"[A]n author generally is free to decide whether or not to disclose his or her true identity." *McIntyre*, 514 U.S. at 341. Concomitant is a speaker's right to determine how much of his identity he wants to disclose for purposes of his message, and how much he does not want to disclose in order to avoid retaliation, ostracism, or simply because he wants to keep certain information relatively private. As the Supreme Court's holdings of *Buckley* and *Watchtower Bible* recognize, the First Amendment protects partially anonymous speech. Were it otherwise, there would be little speech

to protect. *Cf. United States Dep't of Justice*, 489 U.S. at 763 n.14 ("Hardly anyone in our society can keep altogether secret very many facts about himself.").

b. NTIA's Rule Causes Concrete And Particularized Injury To Peterson's First Amendment Right To Speak Anonymously.

The District Court incorrectly concluded that Peterson would not be injured by NTIA's rule. Perpetuating that error, NTIA sets forth three reasons why its rule causes no harm to Peterson: (1) Peterson's injury is "conjectural"; (2) causing Peterson to disclose his home address and telephone number into WHOIS will not increase the likelihood of retaliation; and (3) Peterson need not disclose his home information. (Opp'n at 30-33.) None of these arguments support the District Court's finding.

NTIA first contends that Peterson's alleged injury is "conjectural" because he did not produce any evidence that he has been retaliated against. (Opp'n at 31.) However, Peterson need not demonstrate that he has actually suffered retaliation to establish standing. *See Lujan*, 504 U.S. at 561 (explaining that allegations of injury are sufficient to withstand motion to dismiss). Indeed, it would be highly illogical to require an anonymous speaker such as Peterson, who has always registered his website through a proxy, to come forward with evidence of actual retaliation. Peterson must

simply establish that retaliation is possible under the circumstances, which it is, and that the possibility of retaliation chills his speech. (*See id.*) He alleged these facts, and NTIA did not contradict them with evidence of its own.

NTIA next contends that its rule compelling Peterson to disclose his information into WHOIS cannot not injure him because a review of Peterson's website, coupled with a diligent search of his writing and publicly available records, reveals his home address and phone number. From that, NTIA contends that it is "implausible" that compelling Peterson to disclose his contact information into WHOIS will increase the likelihood that Peterson will suffer retaliation.

However, it is not "implausible" that inextricably linking Peterson's identifying information to the messages on his website in a publicly searchable database increases the likelihood of retaliation, increases Peterson's rational fear of retaliation, and therefore chills his speech. (JA12, ¶ 17; JA21, ¶ 6.) It is entirely plausible. The WHOIS database would allow anyone to easily and unmistakably associate a message on Peterson's website with Peterson's home address. (*See* Superseding Br. at 18; *see also* JA814-15, ¶¶ 2-4 (explaining Peterson would have to disclose his home information).) Unlike the multi-step identification approach NTIA

discusses, the WHOIS database quickly and unmistakably identifies *the* Robert Peterson who operates the website with *a* Robert Peterson who lives in the same geographic area referenced in his website. In other words, WHOIS leaves no room for error. (*See* Superseding Br. at 18.)

Disclosing Peterson's personal information in a central, public database, linked directly to the message on his website, also offends his First Amendment right to preserve as much of his privacy as possible.[3] *See, e.g.*, *McIntyre*, 514 U.S. at 341-42. In this respect, the injury to Peterson's First Amendment right to anonymous speech is virtually indistinguishable from *Watchtower Bible* where the Court stated that an ordinance requiring door-to-door solicitors to disclose their names and addresses "implicate[d] anonymity interests," even though the solicitors might already be known to some of the residents. 536 U.S. at 166-67. While some Internet users may be astute enough, and patient enough, to connect the references on Peterson's website to other publicly available records, and thereby get his home address and telephone number, not all are. As in *Watchtower Bible*, the fact that some may know Peterson, or be able to find him, does not

[3] Contrary to NTIA's claim, Peterson has not based his First Amendment injury exclusively on fear of retaliation. *See supra* footnote 2.

diminish the injury NTIA's rule causes to his First Amendment right to anonymous speech.

Finally, NTIA contends that its rule does not compel Peterson to disclose "materially greater" information than what he already posts on his website, thus NTIA's rule will not injure him. (Opp'n at 32-33.) According to the government, Peterson can disclose a business address or post office box address, and any telephone number that will reach him. However, this argument ignores the facts of this case showing these alternatives are not viable for Peterson, *see* JA814-15, ¶¶ 2-4, and disingenuously implies that Peterson discloses much of this information on his website, which he does not. (*See* Superseding Br. at 18; JA740-41, ¶¶ 2-5, 7.)

In sum, NTIA's rule has caused injury to Peterson's First Amendment right to speak anonymously, and the District Court erred in concluding otherwise.

2. Because NTIA's Rule Precludes Peterson From Continuing To Use A Proxy Service, He Has Suffered Injury And Can Challenge NTIA's Rule As An Overbroad Restriction.

In addition to satisfying the requirement of first-party standing, Peterson also satisfies the requirements of third-party standing. Peterson alleged in his Complaint that he registered his website on the .us-TLD by proxy and that NTIA's rule would prevent him from continuing to use the

proxy service for which he had contracted. (JA12, ¶ 13; JA13, ¶ 20.) NTIA does not dispute this allegation. This alleged (and now actual) deprivation of proxy registration services is sufficient injury – traceable to NTIA's rule and correctable by a favorable decision – to confer Article III standing on Peterson for purposes of challenging NTIA's rule as an overbroad restriction on speech. *See, e.g., Lujan*, 504 U.S. at 561-62; *see also Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1983) (holding that plaintiff could challenge constitutionality of statute regardless whether its First Amendment rights were at stake); Superseding Br. at 23 (attributing Peterson's injury to fact that Go Daddy is forbidden from offering proxy registrations).

NTIA's reliance on *Gilles v. Torgerson*, 71 F.3d 497 (4th Cir. 1995) is entirely misplaced. The infirmity that existed with the plaintiff's standing in *Gilles* does not exist in this case because Peterson challenges the government action that caused him injury – NTIA's rule. Unlike the plaintiff in *Gilles*, Peterson has suffered "some injury." *See Gilles*, 71 F.3d at 501.

3. Peterson Has Standing To Bring An APA Claim Because NTIA's Rule Precludes Him From Continuing To Use A Proxy Registration Service On The .US-TLD.

For the same reason Peterson has standing to challenge NTIA's rule as an overbroad restriction on speech, he also has standing to challenge it under the APA. The injury to Peterson's First Amendment rights is not determinative of his standing to bring an APA claim, and the District Court erred by confining its analysis of injury to Peterson's First Amendment rights. Peterson's allegations that he used a proxy service, that NTIA's rule prevents him from continuing to use the service for which he contracted, and that he was not given notice or an opportunity to comment on NTIA's proposed rule establish Article III standing. *See Lujan*, 504 U.S. at 561-62; *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152-53 (1970) (holding that business had standing to challenge agency action that directly affected third parties and indirectly affected plaintiff).

NTIA contends that Peterson fails to satisfy the prudential standing limitations under the APA because NTIA's action falls within the contracts exception to the APA. (Opp'n at 34 n.6.) This reasoning, however, conflates the merits of Peterson's claim with his right to bring the claim, and runs afoul of this Court's admonition against such a standing analysis. *See White Tail Park, Inc.*, 413 F.3d at 460-61 ("The standing doctrine, of course,

depends not upon the merits . . . ."). NTIA's agreement is also an incorrect interpretation of the APA. In any event, Peterson's injury is within the zone of interest because he is directly affected by NTIA's rule. He thus satisfies the prudential limitation to standing necessary to bring an APA claim, and the district court erred in dismissing his claim.

B. The District Court Erred By Denying Plaintiff's Motion For A Preliminary Injunction.

1. Peterson Established That He Would Suffer Irreparable Harm In The Absence Of A Preliminary Injunction, And The District Court Erred In Finding That The Balance Of Harms Favored Defendants.

a. Peterson's Loss Of First Amendment Rights Establishes Irreparable Harm.

As discussed above, Plaintiff has a cognizable First Amendment right to speak anonymously, on which NTIA's rule infringes. The loss of Peterson's First Amendment freedoms, even for a minimal period of time, constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The District Court incorrectly found, however, that Peterson could move to another domain (such as ".com") and speak anonymously there. This finding is clearly erroneous. Because other domains are not administered by the government, they are not adequate alternatives for anonymous speech. These non-governmental domains are not burdened with the Constitutional requirement to permit Peterson to speak

anonymously. Even if Peterson were permitted to speak anonymously, he could lose that privilege on the whim of unknown, private third-parties. The District Court's finding also disregards that Peterson chose the .us-TLD because of its expressive meaning – a meaning that is exclusive to the .us-TLD. (JA20, ¶ 3 (explaining expressive design of Peterson website).)

b. Neither NTIA's Evidence Nor Its Logic Supports The Finding That A Preliminary Injunction Would Harm NTIA.

While Peterson established that he would suffer irreparable harm from the loss of his First Amendment rights, NTIA did not establish a credible basis supporting a finding that a preliminary injunction would cause it harm. To the contrary, NTIA's argument that a preliminary injunction would cause NTIA harm lacked a sound basis in reason and evidentiary support. The District Court thus erred in crediting NTIA's arguments.

(1) NTIA Failed To produce Evidence That Any Treaties Prohibit Proxy Registrations.

NTIA contended in the District Court that NTIA would be harmed by a preliminary injunction because a preliminary injunction would prevent the government from satisfying purported obligations under certain treaties. This justification, however, is devoid of factual evidence.

NTIA offered no *evidence* that the agency made a reasoned determination that treaties ban proxy registrations. Instead, NTIA's

attorneys simply rendered one interpretation of the treaties without any reasoned analysis. Aside from this legal assertion, however, nothing in the record establishes that NTIA – as an agency – interprets the treaties as banning proxy registrations. Indeed, this evidence is conspicuously absent from the Lewis Declaration. (*See* JA311-27.) Nor, as discussed below, is there any evidence that any treaty requires that the actual registrant be the "legally responsible" party.

As *amicus curiae* point out, NTIA's proffered interpretation of the treaties is inconsistent with how other countries interpret them. (*See* EPIC Br. at 8 (discussing Australia).) Thus, even if there were evidence that NTIA interprets the treaties as banning proxy registrations, the fact that signatory countries do not ascribe the same meaning to the treaties belies NTIA's claim that it will suffer harm under the treaties from a preliminary injunction. It is highly improbable that any signatory country would complain that the United States allows proxy registrations, if the other country does not require domain-name holders on the country's top-level domain to identify themselves.

(2) NTIA's Substantial Delay In Banning Proxy Registrations Belies Its Claim Of Harm.

NTIA's substantial delay in banning proxy registrations also demonstrates the District Court's error in finding that NTIA would be

harmed by an injunction. For instance, Congress approved the treaty with Chile – one of the treaties the government relied on to establish harm – in September, 2003, nearly *sixteen months* before the government decided to ban proxy registrations. (Def.'s Opp'n to Prelim. Inj. 15; *see also* 117 Stat. 909, 910-11; JA324-25, ¶ 32.) The government then waited almost another *year* to implement the ban on proxy registrations. (*See* JA323-25, ¶¶ 27-32.) Despite this long delay, NTIA offered no explanation why a relatively short preliminary injunction would suddenly cause harm. Nor did NTIA introduce any evidence that any signatory to a treaty had demanded that the United States ban proxy registrations.

The government permitted proxy registrations on the .us-TLD for over *three years*, apparently never suffering any sort of harm.[4] Now, without any change of circumstance, NTIA unreasonably contends it will suffer harm from a preliminary injunction. This transparent claim of harm is insufficient to overcome the harm Peterson will suffer through the infringement of his First Amendment rights, and the District Court erred in denying Peterson's motion for a preliminary injunction on that basis.

[4] NTIA claims to have been unaware that proxy registrations existed until it began preparing for a General Accounting Office audit. (JA323, ¶¶ 27-28.)

2. Peterson Established A Likelihood Of Success On The Merits Of His First Amendment Claims As Well As His Administrative Procedure Act Claim.

a. Peterson Established That NTIA's Rule, Like The Ordinance In *Watchtower Bible*, Impermissibly Restricts His Right Of Anonymous Speech.

Peterson established that NTIA's rule infringes on his right to anonymous speech. Indeed, NTIA's rule is completely analogous to the ordinance the Supreme Court expressed grave concern about in *Watchtower Bible*. In *Watchtower Bible*, the plaintiffs challenged an ordinance requiring door-to-door solicitors to obtain permits from the mayor's office before soliciting. 536 U.S. at 153. The would-be solicitors were required to disclose their names and addresses in the permit application, which was available for public inspection. *Id.* at 155 n.2. The ordinance also required solicitors to show their permits, bearing their name and address, to any person they solicited. *Id.* at 155 n.3. While reviewing the ordinance in the context of an overbreadth analysis, the Supreme Court held that the ordinance violated the First Amendment's protection of anonymous speech.

Just as the ordinance in *Watchtower Bible* ran afoul of the First Amendment's protection for anonymous speech, so too does NTIA's rule compelling Peterson (and every other .us-TLD website owner) to disclose his or her name and address in a publicly searchable database as a condition

to using "America's Internet address." Indeed, NTIA's rule is the electronic equivalent of the impermissible ordinance in *Watchtower Bible* because it compels Peterson to publicly disclose his identifying information, and allows any reader to instantaneously link the message on Peterson's website to his home address. *See also Buckley*, 525 U.S. at 199-200 (holding name badge requirement unconstitutional).[5]

The District Court avoided analyzing NTIA's rule as a restriction on anonymous speech by simply concluding that the rule did not restrict the content of speech or prohibit anonymous submissions. However, NTIA's rule clearly prohibits Peterson from speaking anonymously on his website, which is the *only* place where *he* can control the content of his message. Further, the District Court's conclusion that NTIA's rule does not restrict the content of speech does nothing to distinguish the rule from the ordinance in *Watchtower Bible*, or the law in *Buckley*, neither of which restricted the content of the solicitors' or petitioner's messages.

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[5] Though the Court in *Buckley* acknowledged that petition circulators could be required to reveal their names and addresses *after* they collected signatures, 525 U.S. at 198, 200, such identification was permissible only because the case arose in the context of political campaigning. *See id.* at 199-200 (noting limited exception for identification requirements in election cases).

In any event, NTIA's rule fails as a content neutral time, place, and manner restriction, and the District Court's analogy between NTIA's rule and a park permit simply does not work. (*See* JA961 (citing *Thomas v. Chicago Park District*, 534 U.S. 316 (2002)).) Peterson has never disputed that he must register for a website on the .us-TLD; in fact, he did register, via proxy, for a spot on the .us-TLD. Thus, any similarity between NTIA's rule and the permit requirement in *Thomas* would exist only if the park district in *Thomas* compelled applicants, whether individuals or groups, to post the completed permit application in the park as a prerequisite for any expressive activity. *Buckley* and *Watchtower Bible* clearly would prohibit such compelled disclosure as a condition of speech.

b. Even As A Content-Neutral Time, Place, And Manner Restriction, NTIA's Rule Is Not Narrowly Tailored To Achieve A Significant Governmental Interest.

Even if NTIA's rule were a proper content neutral regulation of speech, it is unconstitutional nevertheless because it is not narrowly tailored to achieve the interests on which the District Court based its decision.[6]

(1) No Evidence Supports The Conclusion That Treaties Require Public Disclosure of Personal Information.

NTIA contends that treaties justify NTIA's rule "[b]ecause the actual

[6] NTIA does not press its other unsubstantiated justifications on this appeal.

registrant must be the legally responsible party for the domain name." (Opp'n at 51.) However, NTIA cites no law or evidence in support of this claim. Indeed, there is none. Nor is there any evidence that NTIA made a reasoned determination that treaties ban proxy registrations. This essentially "made-up" justification is not a significant governmental interest, and cannot serve as a justification for NTIA's rule.

(2) Nor Does Any Evidence Show That NTIA's Rule Is Narrowly Tailored.

The District Court also erred in concluding that the *public* disclosure of website registrants' information is narrowly tailored to achieve NTIA's purported interests. For instance, though the District Court found that publicly disclosing website registrants' private information assisted NTIA in "avoiding technical mishaps on the Internet" (JA961) no admissible evidence supports this conclusion.[7] Indeed, NTIA failed to show that the information in WHOIS has ever assisted in avoiding a technical mishap, that

[7] Instead, NTIA simply relied, and continues to rely, on the conclusory statements in the Lewis declaration (JA319, ¶ 18), to which Peterson objected on the basis that statements therein lack foundation and are conclusory (JA773-75). Regardless of Lewis' asserted credentials as a Senior Analyst and Contracting Officer's Technical Representative, her *testimony* must be competent before a court can consider it as evidence. Because Lewis fails to state the facts upon which she bases her conclusions, her testimony is incompetent . The District Court should have sustained Peterson's evidentiary objections.

a technical problem was ever resolved as a result of the information in WHOIS, or even how the information in WHOIS would be used to avoid or resolve a technical mishap. The District Court erroneously accepted NTIA's conclusory assertions without critical analysis. *See Watchtower Bible*, 536 U.S. at 170 (Breyer, J., concurring) ("'[W]e have never accepted mere conjecture as adequate to carry a First Amendment burden.'").

Similarly, NTIA contends that publicly disclosing website registrants' information is necessary to facilitate third-party identification of "problems and issues in a way that is *critical* to the government's enforcement efforts, including the enforcement of the United States nexus requirement." (Opp'n at 51 (emphasis added).) Though "*critical*," NTIA never introduced evidence showing that a third-party has used WHOIS to assist the government, or more importantly, when a proxy registration has frustrated any of those efforts. Nor has NTIA shown why a name, specific street address, and telephone number are "critical" to enforcing the *United States* nexus requirement.

Equally unsupportable is the District Court's conclusion that NTIA's rule will help private parties avoid becoming victims of fraud or assist NTIA in preventing fraud. It is unrealistic to assume that WHOIS could assist the public in verifying the legitimacy of a website, and thereby avoid fraud,

when a website registrant can simply hide behind a generic post office box address. (*See* Opp'n at 39-40.) And it defies logic to assume that a fraudster, intellectual property pirate, or Internet hacker would disclose accurate contact information.

At its core, the effectiveness of NTIA's rule presupposes that a website registrant will disclose accurate information in WHOIS and then answer his or her phone and respond to his or her mail. Yet, NTIA has no way of ensuring this will occur. And to the extent NTIA claims it could locate a website registrant who provided false contact information, it simply proves that publicly disclosing private contact information is unnecessary to the government's enforcement efforts.[8]

In sum, NTIA's failure to provide any convincing rationale, let alone evidence, demonstrating that the *public* disclosure of website registrants' contact information is narrowly tailored to achieve any of NTIA's asserted interests, compels the conclusion that the District Court erred in concluding that NTIA's rule is a permissible content-neutral regulation of speech.

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[8] NTIA's rule also is under inclusive. Though NTIA purports to prohibit all proxy registrations, its rule addresses only proxy registrations by registrars or their affiliates. (JA707, ¶3.7.7.4.2.) Peterson is not aware of any third-party not affiliated with a registrar that offers proxy registrations, nor is there evidence a non-affiliated party could economically offer proxy registrations.

c. Just Like The Ordinance In Watchtower Bible, NTIA's Rule Is An Overbroad Restriction Of Speech.

The District Court also erred in implicitly concluding that Peterson would not succeed on the merits of his claim that NTIA's rule is an overbroad restriction on speech. Given the direct similarity between the overbroad restriction in *Watchtower Bible* and NTIA's rule, the District Court clearly erred in denying Peterson's motion for a preliminary injunction on the basis the rule was not an overbroad restriction on speech. (*See* Superseding Br. at 47-49.)

d. Peterson Established A Likelihood Of Success On His APA Claim Because NTIA Never Properly Noticed Its Decision To Ban Proxy Registrations.

(1) NTIA's Decision To Ban Proxy Registrations Falls Outside The Public Contracts Exception.

NTIA contends its rule banning proxy registrations is exempt from the APA. However, NTIA simply ignores 5 U.S.C. § 552, which contains no public contracts exception. Under this section of the APA, an agency must publish in the Federal Register its substantive rules or interpretations of general applicability and statements of general policy without exception. NTIA simply failed to meet its obligations under § 557.

Additionally, NTIA provides no authority for expanding the public contracts exception to give an agency the ability to ignore the APA when it makes prescriptive changes to an agreement that amount to a significant

policy change. While the public contracts exception does cut a wide swath, it cannot be as limitless as NTIA contends. *See See Nat'l Ass'n of Psychiatric Treatment Ctrs. for Children v. Weinberger*, 658 F. Supp. 48, 54 (D. Colo. 1987). The exception does not apply when, as here, an agency makes prescriptive changes to an agreement that amount to a significant policy change. *Id.* Even the cases NTIA relies on demonstrate this point.

Unlike this case, each case NTIA cites in defense of its non-compliance with the APA involved changes already expressly authorized under a statute or public contract that cannot be categorized as policy decisions, let alone policy decisions of significant enough importance to warrant compliance with the APA. *See, e.g., Thomas v. Network Solutions, Inc.*, 2 F. Supp. 2d 22, 25, 27, 37 (D.D.C. 1998) (holding that non-governmental entity imposing fee expressly allowed in contract fell under public contracts exception); *Humana of South Carolina, Inc. v. Califano*, 590 F.2d 1070, 1073, 1081 n.98 (D.D.C. 1978) (holding that regulation issued by Secretary of Health, Education and Welfare pursuant to his authority to promulgate regulations governing payment of reasonable costs fell under public benefits exception); *Rainbow Valley Citrus Corp. v. Fed. Crop Ins. Corp.*, 506 F.2d 467, 469 (9th Cir. 1974) (holding that decision to

reclassify area as uninsurable, under express statutory authorization to do so, fell under public contracts exception).

Meanwhile, NTIA fails to distinguish Peterson's authorities. NTIA did not attempt to distinguish *National Ass'n of Psychiatric Treatment Centers for Children v. Weinberger* other than to argue that the holding was incorrect. (*See* Opp'n at 55 n.11.) But, this case is consistent with the cases cited by NTIA.

Vigil v. Andrus also is indistinguishable from the circumstances presented here. The Tenth Circuit did not limit its holding to the circumstances of the case. *Vigil v. Andrus*, 667 F.2d 931, 936 (10th Cir. 1982). Indeed, while the court noted that the almost guardian-ward relationship the government has with Native Americans warranted special consideration, *id.*, the First Amendment cannot be so insignificant in comparison as to make *Vigil* distinguishable from the instant case. More universally, the court in *Vigil* stated that the public contracts exception should be narrowly construed. *Id.* at 937. The Tenth Circuit also noted that *Morton v. Ruiz*, 415 U.S. 199 (1974), prohibits the government from using unpublished regulations and policies to adversely affect substantive rights of individuals. *Vigil*, 667 F.2d at 937. Thus, NTIA cannot hide behind the

contracts exception when it uses a contract to effect of a significant policy change upon third parties to the contract.

(2) NTIA Failed To Comply With The APA's Notice And Comment Provision.

Prior to February 2, 2005, NTIA never attempted to prohibit, nor even mentioned, proxy registrations. (*See* JA113-14; JA34-35, ¶ 4; JA55, ¶ 10.) NTIA's citations to its initial and only proposed rule and notice in the Federal Register only serve to demonstrate that NTIA did not notice this policy change.

The proposed rule cited by NTIA states that a registrant could supply "the applicant's name and sufficient contact information to locate the applicant or its *representative*," clearly contemplating proxy registrations. Improvement of Technical Management of Internet Names and Addresses, Proposed Rule, 63 Fed. Reg. 8825, 8829 (Feb. 20, 1998) (emphasis added). NTIA now claims, without support, that proxy registrations contradict that proposed rule because the rule discusses the need for contacting a "legally responsible" individual in the event of a trademark dispute. (Opp'n at 57.) Yet, the proposed rule says nothing of the sort. Instead, it states that policing domain names would be easier if domain name registrants maintain up-to-date contact information, 63 Fed. Reg. 8825, 8830. The proposed rule addresses the problem of out-of-date registrations, not who is "legally

responsible" for a website; it does not, even implicitly, prohibit proxy registrations.

NTIA also quotes a notice stating the WHOIS database shall include the name of the domain name holder, technical contact, and administrative contact as evidence that the domain name holder must be included in WHOIS in addition to any technical or administrative contact. (Opp'n at 58.) Yet contrary to NTIA's contention, the fact that the notice also requires the inclusion of the name of the registrar does not inherently preclude the registrar from being a domain name holder, technical contact, or administrative contact any more than asking for the name of the technical contact and administrative contact preludes them from being the same individual.[9] Instead, these requests recognize that, in the operation of a website, multiple responsibilities are not always held by one person or entity.

As NTIA concedes, "[n]o mention of proxy registration is made in this notice." (Opp'n at 58.) Without specifically mentioning a prohibition against proxy registration, the notice cited by NTIA is inadequate under the

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[9] Indeed, Peterson is aware of nothing that would preclude this. *See* http://gnso.icann.org/policies/terms-of-reference.html (referencing Internet Corporation for Assigned Names and Numbers definitions of administrative and technical contacts).

APA. *See Nat'l Ass'n of Psychiatric Treatment Ctrs.*, 658 F. Supp. at 55 (holding that notice of generalities is insufficient).

Highlighting the complete lack of a prohibition against proxy registrations on the .us-TLD is the fact that NTIA's Registrar Accredidation Agreement expressly permitted proxy registrations. (*See* JA707, ¶3.7.7.4.1.) Prior to NTIA's new rule, its Accredidation Agreement permitted a registrant to license the use of its domain name without requiring that the licensee's information be disclosed, and without requiring that the registrant be the legally responsible party. (*Id.*) It defies all reason for NTIA to now claim that it always has prohibited proxy registrations.

(3) The Proper Remedy For NTIA's APA Violation Is To Reverse The District Court.

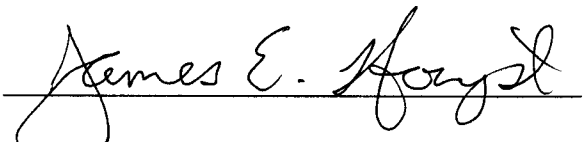
As a general rule, when an agency action, such as this one, clearly violates the APA, courts will vacate the agency action and remand for the agency to start the rulemaking process over. *Sugar Cane Growers Coop. of Florida v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002). NTIA contends that, because courts on occasion remand agency actions in violation of the APA without vacating the action itself, this Court has no basis for overturning the District Court's denial of injunctive relief. (Opp'n at 60.) This argument defies both logic and the procedural history of the case.

The District Court did not fashion any remedy because it held that NTIA's action did not violate the APA. (JA963-64.) Moreover, the District Court entered judgment against Peterson, thereby dismissing both his First Amendment and APA claims. (JA954; *see* Fed. R. Civ. P. 54(b).) The District Court's dismissal of Peterson's Complaint is a legal ruling this Court reviews de novo. *White Tail Park, Inc.*, 413 F.3d at 459; *see also Piney Run Pres. Ass'n v. County Comm'rs*, 268 F.3d 255, 262 (4th Cir. 2001). Therefore, not only does this Court have ample bases for reversing the District Court's ruling, but given NTIA's failure to comply with the APA, no choice remains but to reverse.

III.

CONCLUSION

Peterson has standing to maintain his claims against NTIA for violating his and others' First Amendment rights, and the District Court erred in dismissing his case without leave to amend. The District Court also erred in denying Peterson's motion for a preliminary injunction given NTIA's clear violation of Peterson's and others' First Amendment rights and NTIA's patent violation of the APA. Peterson respectfully requests that the Court reverse the judgment of the District Court and enter a preliminary injunction in his favor.

Dated: August 4, 2006. By: 

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CERTIFICATE OF COMPLIANCE

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