IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ROBERT PETERSON, Plaintiff, v. NATIONAL TELECOMMUNICATION 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; NEUSTAR, INC., a Delaware Corporation, Defendants.	)	Civ. Action No.

PLAINTIFF'S BRIEF IN SUPPORT OF TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION

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I.

INTRODUCTION

Through this action, Robert T. Peterson ("Plaintiff") seeks the Court's protection from the Defendants' attempts to deprive him of his First Amendment rights to free and anonymous speech. The National Telecommunications and Information Administration ("NTIA"), acting under authority that is not clear to Plaintiff, administers the use of the .us top level domain (".us-TLD"). A "top-level domain" is the extension in a website's domain name, such as the ".com" in most domain names or ".gov" in government websites. NTIA currently controls the use of the .us-TLD through a contract with a commercial "registry," NeuStar, Inc. of Sterling, Virginia. NeuStar permits "registrars" (such as GoDaddy.com, Inc.) to register domain names using the .us-TLD, opening it as an uninhibited public forum for expressive activity – even inviting the use of the .us-TLD as "America's Internet Address" where Americans can "establish unique American identities online." *See* www.neustar.com.

Plaintiff currently operates a .us-TLD website which he uses to express often controversial social and political views, and he chose the .us-TLD because of its association with American ideals. To protect his privacy, Plaintiff registered his domain name by proxy. As a result, the online public database of website registrants lists his proxy, Domains by Proxy, Inc., as the registrant and lists the proxy's address and telephone number instead of his own. On November 14, 2005, Plaintiff was notified that the NTIA had adopted a new rule to prohibit proxy registrations on the .us-TLD. Effective January 26, 2006, in order to retain his website, Plaintiff must agree to release his personal identifying information to a publicly-accessible online database, or shut down his website and lose the recognition and following he built through over a year of political discourse. The NTIA's rule is both an impermissible restraint on free speech and a violation of Plaintiff's right to speak anonymously. Plaintiff fears retaliation for his political views if Internet users are able to locate his address in seconds. Additionally, in issuing its new rule, the NTIA failed to supply either public notice or opportunity for participation as required by the Administrative Procedure Act, 5 U.S.C. § 551 *et. seq.* Consequently, the

decision to deprive individuals like Plaintiff of their First Amendment rights was made without the opportunity for any public input. Therefore, Plaintiff requests a temporary restraining order to enjoin Defendants from implementing the NTIA's rule and forcing Plaintiff to shut down his website because he refuses to release his personal information.

II.

FACTUAL BACKGROUND

Plaintiff operates a non-commercial internet website entitled "Point-CounterPoint City, US" ("PCP City") on the .us-TLD. (*See* Declaration of Robert Peterson In Support of Motion for Temporary Restraining Order ("Peterson Decl.") at ¶ 2.) Plaintiff designed and operates his website to serve as a resource and forum for the direct exchange of competing points of view on current political and social topics. (*Id.*) He uses his website primarily to discuss controversial topics like the war in Iraq, social policy, capital punishment, and elected officials. (*Id.*) Plaintiff does not have any advertising on this website, and he does not profit in any way from his website. (*Id.*)

The .us domain, where Plaintiff's website is located, is the country code top level domain associated with the United States. (*See also* Declaration of Christine Jones in support of Application for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction at ¶ 3 (hereinafter "Jones Decl.").) The top level domain is an identifier that signals the intended function for a particular portion of the internet. (Declaration of James E. Houpt In Support of Motion for Temporary Restraining Order (hereinafter "Houpt Decl.") at ¶ 11 and Exhibit K attached thereto (DNS Statement of Policy, 1998).) For instance, while the .us domain is associated with the United States, the .com domain is associated with commerce in general. *Id.* Plaintiff's website, which is on the .us domain, is located at www.pcpcity.us. Plaintiff chose the .us top-level domain for his website because it reinforces his belief that he represents American ideals by fostering political debate. (*See* Peterson Decl. at ¶ 3.)

Defendant National Telecommunications and Information Administration ("NTIA"), an agency within the United States Department of Commerce, contracts with a private registry company to make space on the .us domain available to private parties. (*See* Jones Decl.

at ¶ 2).) In October 2001, NTIA entered into an agreement with Defendant NeuStar, Inc. ("NeuStar"), a Virginia based corporation, to manage and coordinate the .us domain registry. (*See* Houpt Decl. at ¶ 12 and Exhibit L attached thereto (Order for Supplies and Services dated October 26, 2001, at p. 4.) A stated objective of the agreement between NTIA and NeuStar was to "promote increased use of the [.us domain] by the Internet community of the United States (including small businesses, consumers, Internet users, not-for-profit organizations, and local governments) . . . ." (*Id.* at p. 5.) To perform its responsibilities, NeuStar entered into agreements with domain registrars, which offer registrations on the .us domain to the general American public. (*Id.* at p. 9.)

The Go Daddy Group, Inc. is one of many such domain registrars that entered into agreements with NeuStar to offer registrations on the .us domain. Plaintiff registered the PCP City website in September 2004 through GoDaddy.com ("Go Daddy"), The Go Daddy Group, Inc.'s flagship company. (Peterson Decl. at ¶ 3.) Go Daddy is a domain name registrar accredited by the Internet Corporation For Assigned Names and Numbers ("ICANN"). (*Id.* at ¶ 3; *see also* Houpt Decl. at ¶ 13 and Exhibit M attached thereto ("About GoDaddy.com").)

When Plaintiff registered his website, he chose to register his website through a proxy using a service of Go Daddy called Domains by Proxy, Inc. (Peterson Decl. ¶ 3.) Generally, the personal information (home address, phone number, email address) of a website registrant, such as Plaintiff, is listed in an online, public database called "WHOIS." (Peterson Decl. ¶ 3; *see also* www.whois.net.) The WHOIS database allows anyone with a computer and access to the Internet to quickly learn the home address and phone number of anyone who operates a particular website. (*Id.*) By registering through a proxy, however, Plaintiff's identifying information does not appear in the WHOIS database as the registrant of the PCP City website. (Peterson Decl. at ¶ 3.) Rather, Plaintiff's appointed proxy, Domains by Proxy, Inc., appears in the WHOIS database as the registrant of the PCP City website. (Peterson Decl. at ¶ 3.) By using a proxy, Plaintiff is able to avoid having his home address and telephone number disclosed publicly in association with his website.

Using a proxy, however, does not impenetrably shield Plaintiff's identity.

Domains by Proxy, Inc. maintains Plaintiff's personal contact information should it be needed, for instance, to answer a subpoena from law enforcement. (*See* Houpt Decl. at ¶ 9 and Exhibit I attached thereto (agreement between Go Daddy and its registrants; *see also* Jones Decl. at ¶ 3.) Plaintiff, however, has the opportunity to contest the disclosure of his personal information. (*See* Houpt Decl. at ¶ 9 and Exhibit I attached thereto.)

Plaintiff registered his website by proxy to keep his home address and telephone number from being disclosed to the public in connection with his website. (Peterson Decl. at ¶ 4.) Plaintiff expresses his opinions on often controversial political and social topics. (Peterson Decl. at ¶ 2.) Because his home address and telephone number are not available through the WHOIS database, Plaintiff can more securely engage in vigorous and direct political and social discourse because he does not have to fear reprisal by readers who might disagree with him. (Peterson Decl. at ¶ 4.) Plaintiff would be less likely to address more controversial topics on his website if his personal information were available through the WHOIS database because he fears that someone might retaliate against him based on the political and social views he expresses on his website. (Peterson Decl. at ¶ 4.)

On February 2, 2005, NTIA issued a letter to NeuStar notifying it that NTIA would no longer allow proxy registrations on the .us-TLD. (*See* Houpt Decl. at ¶ 10 and Exhibit J attached thereto; *see also* Jones Decl. at ¶ 4.) NTIA directed NeuStar to amend its Accreditation Agreement to reflect this new prohibition of proxy registrations. (Houpt Decl. at ¶ 10.) In addition to prohibiting prospective proxy registrations, NTIA also stated in its letter that existing websites registered by proxy must be closed down if the registrants do not allow their personal information to be released into the WHOIS database by January 26, 2006. (*Id.*) NTIA justified its new rule prohibiting proxy registrations by taking the position that "all registrant data is owned by the U.S. Government, and as such must be correct, current, and complete. This requirement provides an assurance of accuracy to the American public and to law enforcement officials who rely on this information. Moreover, it protects the interests of registrants seeking a smooth transition of such data in the event of a registrar's business failure. It is also essential to secure the U.S. Government's right to the data." (*Id.*)

Go Daddy informed Plaintiff on November 14, 2005 that, pursuant to NTIA's new rule, it will close down Plaintiff's website on January 26, 2006, unless Plaintiff consents to having his identifying information appear on the WHOIS database, associated with his website. (Peterson Decl. at ¶ 5.) Because Plaintiff fears reprisal for the views he expresses in the writings he posts on his website, he will not consent to disclosing his personal information in the WHOIS database. That is, if NTIA enforces its new rule, Plaintiff will opt to have his website closed down rather than disclose his identifying information. (Peterson Decl. at ¶ 7.) If forced to close down his website, Plaintiff will lose both his ability to widely, and anonymously, disseminate his opinions on political and social topics, and the search engine ranking and reputation that www.pcpcity.us has achieved since its inception. (Peterson Decl. at ¶ 8.)

III.

ARGUMENT

A. Plaintiff Has Article III Standing To Bring Claims On Behalf Of Himself And Others To Challenge the NTIA Rule Against Proxy Registration.

1. Plaintiff has Article III standing to challenge the NTIA rule against proxy registration.

To satisfy the requirements of Article III standing, as articulated by the Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), a plaintiff must provide evidence to support the conclusion that "(1) the plaintiff . . . suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) there [is] a causal connection between the injury and the conduct complained of; and (3) it [is] likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (citations omitted.) *See also White Tail Park, Inc.* v. *Strouble*, 413 F.3d 451, 458 (4th Cir. 2005) (emphasizing that standing does not turn on whether plaintiff will be successful on the merits, but on whether plaintiff is the proper person to bring the claim, and applying *Lujan* factors to find that an organization had standing to challenge a statute that impinged on the First Amendment rights of the organization and its members).

Plaintiff has suffered an injury in fact. NTIA's threatened enforcement of its new

rule prohibiting proxy registration places Plaintiff's First Amendment rights in imminent danger of being violated: either he sacrifices his anonymity or he is forced to close down his website. Additionally, NTIA is attempting to enforce this First Amendment violation with no hearing or notice, thus violating the APA. This constitutional injury is both concrete and particularized as well as actual and imminent. *See Lujan*, 504 U.S. at 561, n.1 (clarifying that "[b]y particularized, we mean that the injury must affect the plaintiff in a personal and individual way"). On January 26, 2006, GoDaddy will make public to anyone with a computer and an Internet connection the names and addresses of all proxy website registrants, including Plaintiff, who believed and expected that their personal information would remain private. (*See* Jones Decl. at ¶ 3.) Those who refuse will be denied access to the .us-TLD. (*Id.* at ¶¶ 6 and 7.) The instant GoDaddy publicizes Plaintiff's information or shuts down his website, Plaintiff's First Amendment rights will be violated.

The NTIA's regulation will directly cause the violation of Plaintiff's First Amendment rights. There is a direct causal connection between Plaintiff's complaint and the NTIA's forcing all .us-TLD domain registrants to list their names and addresses in a public registry. *See Lujan*, 504 U.S. at 562. Defendants have placed Plaintiff in the untenable situation of being forced to make public his private information, or to shut down his website.

Finally, a favorable decision for Plaintiff will allow him to continue operating his website anonymously. Thus, an injunction against the government's action will redress the harm the action created. Plaintiff satisfies all three prongs of the standing test as discussed in *Lujan* and applied in the Fourth Circuit.

2. <u>Plaintiff has third-party standing to challenge the NTIA's action.</u>

First Amendment rights hold a unique place in the Supreme Court's jurisprudence. Specifically, the Court has held that the traditional rules of standing ought to be altered to allow a litigant to challenge a restriction on First Amendment rights when that restriction's existence "may cause others not before the court to refrain from constitutionally protected speech or expression." *See Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973) (finding that where a plaintiff challenges a statute as being overbroad, the traditional rules of standing do

not apply, and plaintiff can sue on behalf of those affected by the law); *see also Newsom* v. *Albemarle County Sch. Bd.*, 354 F.3d 249, 257 (4th Cir. 2003) (reversing the denial of a preliminary injunction to student who challenged his school's dress code as a violation of the First Amendment rights of himself and other students who did not come forward); *Giovani Carandola, Ltd.* v. *Bason*, 303 F.3d 507, 512 (4th Cir. 2002) (upholding a preliminary injunction where the plaintiff asserted a facial challenge to a statute that threatened others not before the court who also desired to engage in legally protected expression but refrained from appearing in court).

The situation presented here epitomizes the rationale for the Court's third-party standing in First Amendment cases. Other proxy registrants, who are not parties to this lawsuit, but who will be affected by the impending restriction, would sacrifice the very anonymity they seek to protect by joining the litigation. These individuals registered their websites through a proxy server precisely because they wished to remain anonymous and avoid being easy prey for those who disagree with their message. There are many reasons why people would create a web presence for themselves, but not wish to have identifying information such as their names and addresses, available on a public registry. For example, operators of websites that serve as forums for victims of domestic abuse, physical abuse, stalking, and other threats are inherently safer if the public does not know their identities and addresses. (*See* Houpt Decl. at ¶¶ 4 and 5 and Exhibits C and E attached thereto; see also Jones Decl. at ¶ 3.) Through this litigation, Plaintiff represents those proxy registrants who wish to remain anonymous, and therefore do not come before this Court. Under Supreme Court precedent, he has standing to assert these third-party rights.

B. A Temporary Restraining Order is Necessary to Prevent Serious and Irreparable Deprivation of the First Amendment Rights of Plaintiff and Other Proxy Registrants

1. Standard for temporary restraining order.

A temporary restraining order (hereinafter "TRO") preserves the status quo and prevents irreparable harm until a hearing can be held. *See Granny Goose Foods, Inc. v. Bd. of Teamsters*, 415 U.S. 423, 439 (1974). In considering whether to grant preliminary injunctive

relief, the court evaluates the following factors: "(1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; (2) the likelihood of harm to the defendant if the requested relief is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest." *L.J. v. Massinga*, 838 F.2d 118, 120 (4th Cir. 1988) (citing *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 194-95 (4th Cir. 1977)). As discussed below, Plaintiff satisfies the requirements for the issuance of a TRO.

2. **The balance of hardships tips decidedly in favor of Plaintiff.**

The first step in the court's inquiry is "for the court to balance the 'likelihood' of irreparable harm to the plaintiff against the 'likelihood' of harm to the defendant." *Blackwelder*, 550 F.2d at 195. If the balance of hardships tips decidedly in plaintiff's favor, then "[i]t will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation." *Id.* (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740, 743 (2d Cir. 1953)). On the other hand, as the showing of irreparable injury diminishes, the "the importance of probability of success increases." *Blackwelder*, 550 F.2d at 195.

Plaintiff seeks injunctive relief to prevent a violation of his and other proxy registrants' First Amendment rights to speak anonymously on websites registered in the .us-TLD. The loss of First Amendment freedoms, for even a minimal a period of time, has been uniformly and unequivocally held to constitute irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (opinion of Brennan, J.) (concluding that the threatened dismissal of Republican employees by the incoming Democratic sheriff violated the First Amendment and constituted irreparable harm); *Quaker Action Group v. Hickel*, 421 F.2d 1111, 1116 (D.C. Cir. 1969) (upholding the district court's finding of irreparable injury on the ground that "any delay in the exercise of First Amendment rights constitutes an irreparable injury to those seeking such exercise"); *Doe v. Shenandoah County Sch. Bd.*, 737 F. Supp. 913, 916 (W.D. Va. 1990) (stating that "[i]t is well established that even the most fleeting of infringements upon a citizen's First Amendment rights constitutes irreparable injury that he should not be required to endure") (quoting *Joyner v. Lancaster*, 553 F. Supp. 809, 815 (M.D.N.C. 1982)).

If the NTIA can enforce its rule against proxy registration on and after January 26, 2006, Plaintiff and other proxy registrants who refuse to make public their identities, physical addresses and e-mail addresses will be forced to shut down their websites on the .us-TLD. As discussed in greater detail below, this constitutes a clear violation of Plaintiff's and other proxy registrants' First Amendment rights to engage in anonymous speech.

In contrast to the irreparable harm to Plaintiff and other proxy registrants, NTIA will suffer no harm if its new rule is delayed temporarily until the court can hold a preliminary injunction hearing. Plaintiff's website has been located on the .us-TLD since November 2004 and other .us TLD websites have been registered by proxy since approximately 2002 under a proxy registration. (Compl. at ¶ 13.) Its continued operation will cause the NTIA no financial or other harm pending a full hearing.[1]

In light of the irreparable harm to Plaintiff's and other proxy registrants' First Amendment rights if the TRO is denied, and the absence of harm to Defendants if such relief is granted, the balance of harms tips decidedly and overwhelmingly in Plaintiff's favor. Consequently, under the Fourth Circuit's harm-balancing framework, Plaintiff can satisfy the merits prong by raising serious questions going to the merits of his claims that NTIA's rule abridges his First Amendment rights. *Massinga*, 838 F.2d at 120.

3. Plaintiff has raised serious questions going to the merits.

a. The NTIA rule requiring all proxy registrants to divulge their identities is a clear violation of the first amendment's free speech protection.

The First Amendment provides that "Congress shall make no law . . . abridging

[1] Defendants may contend that Plaintiff delayed in bringing the present motion for Temporary Restraining Order. *See e.g., Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 79-80 (concluding the plaintiff environmental group's delay of six to nine months in filing suit supported district court's finding of no irreparable harm). To the contrary, however, Plaintiff moved expeditiously to enforce his rights after he received notice of the NTIA's new rule against proxy registrations on the .us-TLD. Plaintiff was first notified of the NTIA's rule change on November 24, 2005 through an e-mail he received from GoDaddy. (Peterson Decl. ¶ 5.) Upon receiving this notice, Plaintiff sent letters to the NTIA and to his Senators and Representative seeking to overturn the new rule. (*Id.* at ¶ 6.) When he received no favorable response, Plaintiff commenced a search for pro bono counsel to represent him. (*Id.*) Plaintiff was referred to his present counsel who accepted representation on January 23, 2006. (*Id.*)

the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. Plaintiff uses his website, www.pcpcity.us, as a vehicle to express his social and political views on such subjects as the war in Iraq, Social Security, and capital punishment. The NTIA rule against proxy registration violates Plaintiff's First Amendment right to express his views on his website because it: (1) regulates content without adequate justification; (2) violates Plaintiff's and other proxy registrants' constitutional right to anonymity; and (3) is overbroad.

(1) The NTIA Rule is unconstitutional because it regulates the content of speech on the Internet, a public forum, without adequate justification

Content-based restrictions on political speech in public fora "must be subjected to the most exacting scrutiny." *Boos v. Barry*, 485 U.S. 312, 321 (1988). Such restrictions are presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S 377, 382 (1992). The NTIA's rule compelling disclosure of personal identifying information by .us-TLD users is a content-based restriction on speech in a public forum, and thus violates the First Amendment.

The Internet is a quintessential public forum. Over the past decade, the Internet has developed into a primary source of news, discussion, and political opinion in today's society. It has become a place uniquely "associated with the free exercise of expressive activity," and is thus a "public forum." *See, e.g., United States v. Grace*, 461 U.S. 171, 177 (1983).

Moreover, the NTIA's rule prohibiting proxy registration at the .us-TLD constitutes content-based regulation because it forces website owners to reveal personal identifying information. Forcing a speaker to make a certain statement, such as disclosing his or her identity, is a content-based regulation. *McIntyre v. Ohio Elec. Comm'n,* 514 U.S. 334, 348 (1995) (prohibition on anonymous handbill distribution constitutes content-based regulation because the "identity of the speaker is no different from components of the document's content that the author is free to include or exclude"); *see also Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 20 (1986) (requirement that utility company make "extra space" on its billing statements available to a consumer organization was **not** a content-neutral regulation).

Furthermore, a law should be considered content-based if its intent is to restrict

controversial speech. *See* Laurence H. Tribe, *American Constitutional Law* 794 (2d ed. 1988). Plaintiff registered for his .us-TLD through a proxy service because he intended to engage in provocative political speech and feared retaliation from those who do not share his point of view. (Peterson Decl. at ¶¶ 2 and 3.) By revealing Plaintiff's and other proxy registrants' identities, the NTIA rule will chill the expression of controversial and potentially unpopular ideas by speakers such as Plaintiff. Consequently, the rule restricts the content of the registrant's speech.

As a content-based regulation on speech in a public forum, the NTIA's rule must be subjected to "the most exacting scrutiny." *Boos*, 485 U.S. at 321. Such regulations survive only if they are "narrowly tailored to serve an overriding state interest." *McIntyre*, 514 U.S. at 347. The NTIA rule, which is not narrowly tailored nor justified by a compelling state interest, fails this rigorous constitutional test.

The NTIA's stated objective for prohibiting proxy registrations is to make the WHOIS database "searchable, accurate and current." (*See* Houpt Decl. at ¶ 6 and Exhibit F attached thereto.) This "provides an assurance of accuracy to the American public and to law enforcement officials who rely on this information." *Id.* In addition, the rule facilitates registrants' smooth transition to a different registrar "in the event of a registrar's business failure." *Id.* Finally, it secures "the U.S. Government's right to the data." *Id.*

However, the NTIA's mandate is not narrowly tailored to accomplish the NTIA's stated objectives. First, law enforcement and the Government currently have the power to obtain accurate information regarding the identity of domain registrants by contacting the proxy registrar, who maintains such data. (Jones Decl. at ¶ 3.) Moreover, to the extent a member of the public needs the specific identity of a proxy registrant, for purposes of a defamation or trademark action, for example, that information is available through legal process. As the search warrant and subpoena are already in place to protect the interests of those legally harmed by an anonymous proxy registrant's speech, the NTIA rule is superfluous. Thus, these interests are afforded no additional protection by the rule, and cannot justify this "extremely broad prohibition." *See McIntyre*, 514 U.S. at 351.

To the extent that NTIA justifies its rule based on the public's general interest in

knowing the identity of the speaker, that justification must fail. In an analogous case involving unsigned leaflets, the Supreme Court held that the reader's "informational interest" in the speaker's identity was "plainly insufficient" to justify a disclosure requirement. *Id.* at 348-49. When political speech is undertaken by "a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message." *Id.* In *McIntyre*, the State of Ohio also argued that the disclosure requirement was necessary to prevent fraudulent and libelous statements by anonymous persons. The Court held this interest was also insufficient, because a "prohibition of anonymous leaflets plainly is not [Ohio's] principal weapon against fraud." *Id.* at 350. Any effect this law had on fraudulent or libelous speech was merely an "ancillary" benefit and was not enough to "justify [the law's] extremely broad prohibition." *Id.* at 351. The Court invalidated the Ohio statute, stating that Ohio "may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented." *Id.* at 357. Under *McIntyre*, neither the public's informational interest in knowing the identity of web site registrants nor the prevention of fraud, libel and intellectual property violations are sufficiently compelling interests to justify requiring disclosure of personal identifying information by Plaintiff and other proxy registrants.

The government may claim that the .us-TLD is its own creation and, thus, the government has plenary power to regulate it. However, the NTIA still has gone beyond the scope of its regulatory authority under the Constitution. The Internet, a place "associated with the free exercise of expressive activity," is a public forum. *See Grace*, 461 U.S. at 177. Though the government may not have had an obligation to create the .us-TLD in the first instance, once it affirmatively opened these domains to speech, it "assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms." *Widmar v. Vincent*, 454 U.S. 263, 267 (1981). The simple fact that the government authorizes the use of the .us-TLD does not change the analysis: "So long as the place is open to speech, all of the rules for public forums . . . apply." Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 929 (1st

ed. 1997). Once the government opens a public forum, like the .us-TLD, its power to control speech is restrained by the full force of the First Amendment. In this case, the government has exceeded its authority.

The NTIA's rule against proxy registration is a content-based regulation on speech in a public forum. It cannot survive strict scrutiny because it requires far broader disclosure than necessary to achieve its stated objectives, and is not justified by a sufficient overriding state interest. The rule thus violates the First Amendment.

(2) The NTIA's Rule Is Unconstitutional Because It Violates Plaintiff's and Other Proxy Registrants' Right to Anonymity.

The Supreme Court has repeatedly held that the right to anonymous speech is one protected by the First Amendment. Many speakers who wish to engage in political discourse must choose between anonymous speech and silence. Fear of public harassment or government retaliation leads speakers with unpopular political views to seek anonymous methods of communication. *See, e.g., Talley v. California*, 362 U.S. 60, 64 (1960) ("Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all"); *NAACP v. Alabama*, 357 U.S. 449 (1958). Government-mandated identification of speakers has an oppressive and chilling effect on expression, decreasing both the number and character of speakers engaged in public discourse.

The Supreme Court has rejected government regulations requiring the disclosure of personal identification. In *Talley v. California*, the petitioner challenged a Los Angeles ordinance that prohibited the distribution of any handbill that did not disclose "the name and address of . . . the person who printed, wrote, compiled or manufactured" it. *Talley*, 362 U.S. at 60-61. The ordinance also required that "in the case of a fictitious person or club, in addition to such fictitious name, the true names and addresses of the owners, managers or agents of the person sponsoring" the handbill had to be disclosed. *Id.* The handbills proposed a boycott of specified businesses that were allegedly selling goods manufactured by companies that discriminated against ethnic minorities. *Id.* at 61. The only identifying markings on the handbills named "National Consumer Mobilization" at a Los Angeles post office box as

responsible for the material.

The Supreme Court found the ordinance unconstitutional: "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." *Id.* at 64. The Court noted that anonymous publications "have played an important role in the progress of mankind." *Id.* Such works included those written by colonial patriots who wished to support the American Revolution without subjecting themselves to punishment at the hands of English-controlled courts as well as the three Founding Fathers who penned *The Federalist Papers*. *Id.* at 65.

Similarly, in *McIntyre*, 514 U.S. at 347, the defendant distributed leaflets at a public meeting at her local middle school. The superintendent of the school district had called the meeting to speak about an upcoming referendum on a proposed school tax levy. Mrs. McIntyre's leaflets expressed her opposition to the levy on behalf of "Concerned Parents and Tax Payers." *Id.* at 337. She was fined by the Ohio Elections Commission for illegally distributing unsigned leaflets. The law burdened core political speech, so the court applied "exacting scrutiny," under which a law can be validated "only if it is *narrowly tailored to serve an overriding state interest*." *Id.* at 347 (emphasis added).

The State of Ohio argued that the disclosure requirement was necessary to prevent fraudulent and libelous statements by anonymous persons and to provide the public with relevant information. The Court stated that the "informational interest" was "plainly insufficient" to justify the disclosure requirement because when political speech is undertaken by "a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message." *Id.* at 348-49. The Court found that the state interest in preventing fraud and libel was also insufficient, because a "prohibition of anonymous leaflets plainly is not [Ohio's] principal weapon against fraud." *Id.* at 350. Any effect this law had on fraudulent or libelous speech was merely an "ancillary" benefit and was not enough to "justify [the law's] extremely broad prohibition." *Id.* at 351. The Court invalidated the Ohio statute, stating that Ohio "may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based

on its content, with no necessary relationship to the danger sought to be prevented." *Id.* at 357.

Like the plaintiffs in *Talley* and *McIntyre*, Plaintiff is engaged in core political speech but elects not to disclose certain personal identifying information. (Peterson Decl. at ¶¶ 4 and 6.) The NTIA rule places analogous restrictions on Plaintiff's freedom of expression: it forces Plaintiff either to reveal his personal identifying information or shut down his .us-TLD website. Such a restriction on Plaintiff's freedom of expression suffers from the same constitutional infirmity as the regulations in *Talley* and *McIntyre*. *See NAACP v. Alabama,* 357 U.S. at 462-63 ("compelled disclosure of" the identities of all NAACP members in Alabama "is likely to affect adversely the ability of the [members] to pursue their collective effort to foster beliefs which they admittedly have the right to advocate"). Such limitations on political expression are subject to "exacting scrutiny," *Meyer v. Grant*, 486 U.S. 414, 420 (1988), and are invalid unless "narrowly tailored to serve an overriding state interest." *McIntyre*, 514 U.S. at 347. The rule does not meet this exacting standard, as discussed above, and is therefore unconstitutional.

(3) The NTIA rule is unconstitutionally overbroad.

The "overbreadth" doctrine invalidates government actions that regulate substantially more speech than the Constitution allows to be regulated. When an appellant brings an overbreadth claim that is "rooted in the First Amendment, [he] is entitled to rely on the impact of the ordinance on the expressive activities of others as well as [his] own." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981). In *Schad*, the Borough of Mount Ephraim outlawed all "live entertainment" within its city limits. *Id.* at 65. The Court did not reach the question of whether nude dancing was protected by the Constitution because the zoning law prohibited all live entertainment, including protected expression such as "plays, concerts, musicals, dance" and the like.[2] *Schad*, 452 U.S. at 66. The Court stated: "Here, the Borough totally excludes all live entertainment, including non-obscene nude dancing that is otherwise protected by the First Amendment." *Id.* at 76. This is the essence of an overbreadth problem.

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[2] *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (holding that nude dancing is only "marginally" within "outer parameters of the First Amendment").

Overbreadth also plagues the NTIA rule. There is no doubt that the government has a vital interest in combating such unprotected speech as libel, fraud, and violations of intellectual property laws. This interest does **not**, however, allow the government to silence all speakers who might commit one of these violations. Such unprotected content will appear on a small percentage of .us-TLD websites. The NTIA rule, however, broadly abridges the expression of all speakers in order to regulate the small percentage of speech that it can constitutionally regulate. Thus, the rule is unconstitutional because it is overbroad.

b. The NTIA violated the Administrative Procedure Act when it ruled that proxy registrations are prohibited because it failed to give the public notice of the rulemaking and an opportunity to comment on the rulemaking.

The Administrative Procedure Act, 5 U.S.C. § 551 *et. seq.* ("APA"), requires an agency to issue notice of proposed rulemaking and offer interested persons an opportunity to participate through submission of written data, views, or arguments.[3] 5 U.S.C. § 553. The APA defines "rule making" as the "agency process [of] formulating, amending, or repealing a rule." § 551(5). A "rule" is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . .." § 553(4).

Before developing the .us-TLD registrant database in 2001, NTIA allegedly solicited public input. (*See* Houpt Decl. at ¶ 10 and Exhibit J attached thereto.) Pursuant to those comments, the U.S. Department of Commerce executed management, registrar, and accreditation agreements for the .us-TLD with NeuStar. (*Id.*) Under these agreements, NeuStar accredited registrars to sell .us-TLD domain names. (Jones Decl. at ¶¶ 2 and 3.) In turn, these domain registrars allowed individuals to register websites anonymously through proxy registration.

On February 2, 2005, NTIA issued a letter to NeuStar disallowing these proxy

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[3] The National Telecommunications and Information Administration (NTIA) and the U.S. Department of Commerce are agencies under the Administrative Procedure Act ("APA"). 5 U.S.C. § 551(a).

registrations for the first time. (*See* Houpt Decl. at ¶ 10 and Exhibit J attached thereto.) Implementation of such a future policy requires compliance with the APA. 5 U.S.C. §§ 551, 553. Yet, prior to issuing the letter, NTIA did not provide Plaintiff or other proxy registrants notice or an opportunity to participate. (*See* Jones Decl. at ¶ 5 and Peterson Decl. at ¶ 7 and 8.) NTIA claims that proxy registration was never permissible under their agreements with NeuStar and that their letter only clarifies their intent to new resellers. (*See* Houpt Decl. at ¶ 10 and Exhibit J attached thereto.) The letter likely includes this claim because the APA's requirements do not apply to interpretive rules. 5 U.S.C. § 553(b)(3).

The letter, however, belies the fact that NTIA is not interpreting an old rule, but creating a new one. Interpretive rules do not have prospective effects. *Energy Consumers & Producers Ass'n, Inc. v. Dep't. of Energy*, 632 F.2d 129, 139 (Temp. Emer. Ct. App. 1980); *see United States v. An Article of Drug*, 540 F. Supp. 363, 373 (N.D. Tex. 1982) (holding that if effect of changed interpretation of rule was to delete water soluble products from provision retroactive to date when provision was first effective, no hearing would be required because there would be no prospective effect). In contrast, NTIA's letter directs future conduct. NTIA ordered NeuStar to amend the Accreditation Agreement. (*See* Houpt Decl. at ¶ 10 and Exhibit J attached thereto.) Moreover, the fact that NTIA required NeuStar to amend the Accreditation Agreement indicates that the original agreement never prohibited proxy agreements. Otherwise, no amendment would be needed. Thus, the NTIA's new rule is not interpretive. Consequently, in disallowing proxy registrations without public notice or opportunity to participate, NTIA violated the APA.

4. Issuing an injunction to protect plaintiff's First Amendment rights serves the public interest.

Finally, the public interest clearly is served by preventing Defendants from violating the First Amendment rights of Plaintiff and other proxy registrants who refuse to publicly disclose their personal identifying information on the Internet. *See Nader 2000 Primary Comm., Inc.* v. *Hechler*, 112 F. Supp. 2d 575, 580 (S. D. W. Va. 2000) (holding that "the public interest is best served by unrelenting protection of the First Amendment rights of all its

citizens"). If enforced, the NTIA's rule will stifle the open exchange of ideas. Adherents to controversial viewpoints reasonably anticipate hostile reaction from those with different beliefs. If required to disclose their identities, these individuals may refrain from open expression to avoid retaliation or stigma. Such a chill in open discourse on the Internet clearly contravenes the public interest.

C. The Court Should Waive the Bond Requirement or Set a Nominal Bond Because Defendants Will Suffer No arm as a Result of the Injunction.

Plaintiff requests that the court set the bond amount at zero. Federal Rule of Civil Procedure 65(c) provides in relevant part:

> "Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."

The District Court has the discretion to set the bond amount "in such sum as the court deems proper." Fed. R. Civ. P. 65(c). Consequently, the district court may set the bond amount at zero or a nominal amount "[w]here [it] determines that the risk of harm is remote, or that the circumstances otherwise warrant it . . .." *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421, n.3 (4th Cir. 1999) (remanding case to district court for determination of appropriate bond amount).

Courts have set a nominal bond or waived the requirement altogether where, for example:

(1) the risk of harm to the defendant is remote or nonexistent, *SEC v. Dowdell*, Civil No. 3:01CV00116, 2002 U.S. Dist. LEXIS 19980 at *12 (W.D. Va., Oct. 11, 2002) (setting nominal $100.00 bond after concluding that the risk of harm to the defendants was minimal);

(2) the plaintiff has made a strong showing of likelihood of success on the merits, *Ark. Best Corp. v. Carolina Freight Corp.*, 60 F. Supp. 2d 517, 518 (W.D.N.C. 1999) (requiring nominal $100.00 security bond where plaintiffs made a strong showing of likelihood of success on the merits);

(3) the balance of hardships weighs overwhelmingly in favor of the plaintiff, *Temple Univ. v. White*, 941 F.2d 201 (3d Cir. 1991), *cert. denied*, 502 U.S. 1032 (1992) (requiring no bond in non-commercial case where the balance of hardships that each party would suffer as the result of a preliminary injunction weighs overwhelmingly in favor of the party seeking the injunction); and

(4) the case involves enforcement of a public interest, *Pharm. Soc. of the State of N.Y., Inc. v. N.Y. State Dep't of Soc. Servs.*, 50 F.3d 1168, 1174 (2d Cir. 1995) (concluding that "an exception to the bond requirement has been crafted for cases involving the enforcement of 'public interests' arising out of 'comprehensive federal health and welfare statutes'"); *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 128, 129 (D. Mass. 2003) (waiving bond requirement where plaintiffs submitted affidavits indicating their financial inability to post a security bond and where plaintiffs were seeking to preserve their rights to free expression and free exercise of religion).

Plaintiff requests that the court set the bond requirement at zero because defendants cannot demonstrate that they will suffer any harm if the temporary restraining order is granted. By contrast, plaintiff has demonstrated he will suffer irreparable harm if relief is not granted. If the court were to require posting of a sizeable security bond, plaintiff would effectively be denied relief because he lacks the financial ability to post a security bond. (*See* Peterson Decl. at ¶ 11.) Additionally, the bond requirement should be waived because Plaintiff's enforcement of important constitutional rights serves the public interest. *See Westfield High Sch. L.I.F.E. Club*, 249 F. Supp. 2d at 129 (waiving bond requirement after concluding that plaintiffs' suit to enforce their right to freedom of expression and free exercise of religion served the public interest). For the aforementioned reasons, Plaintiff respectfully requests that the court set the bond amount at zero.

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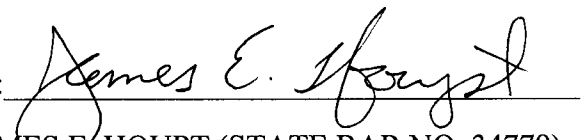
IV.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court issue a TRO restraining NTIA from implementing its rule mandating disclosure of proxy registrants' personal information.

Dated: January 25, 2006.

By: 

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