Nos. 06-1216, 06-1548

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBERT PETERSON,

Plaintiff-Appellant,

v.

NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE APPELLEES

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE APPELLEES

STATEMENT OF JURISDICTION

The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331. In an oral decision issued on February 17, 2006, the district court denied plaintiff's motion for a preliminary injunction. JA 928-38. Plaintiff immediately appealed that ruling. This Court initially had jurisdiction over that appeal pursuant to 28 U.S.C. § 1292(a)(1). However, on April 17, 2006, the district court issued a final judgment in favor of the defendants. JA 954.

A final decision on the merits, either granting or denying an injunction, would have mooted plaintiff's appeal from the denial of preliminary injunctive relief because "a preliminary injunction ordinarily merges into the final injunction." Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 317 (1999). See also University of Texas v. Camenisch, 451 U.S. 390, 393-94 (1981). In this case, however, the court entered a final judgment because plaintiff lacked standing. JA 955-68. On May 8, 2006, plaintiff appealed the final decision, and that appeal was consolidated with the prior appeal. This Court has jurisdiction to review all of the district court's rulings, including the denial of preliminary injunctive relief, pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether, given the voluntary publication of his full name and other identifying information on his web site, plaintiff has standing to assert a claim that the contact information requirement for domain name holders in ".us" violates an asserted First Amendment right to "anonymous" speech.

2. Whether the district court abused its discretion in denying plaintiff's motion for a preliminary injunction seeking to prohibit enforcement of the contact information requirement.

3. Whether the government was required to engage in notice and comment rulemaking under the Administrative Procedure Act ("APA") before clarifying and enforcing the contact information requirement set forth in its contract with NeuStar.

STATEMENT OF THE CASE

This case concerns the enforcement of registration requirements governing the ".us" domain, a small region of the Internet administered by the United States, which is similar to the larger, privately-run ".com" and ".net" domains. In light of treaties requiring the collection of contact information for United States domain names and the compelling governmental interests in preventing fraud and other illegal activities conducted anonymously through the ".us" domain, the National Telecommunications and Information Administration ("NTIA") requires that parties who contract for the use of ".us" domain names provide direct contact information for the domain name. That requirement is enforced through a government contract with a public company – currently, NeuStar, Inc. – which manages registrations in the ".us" domain and maintains a list of registered domain name holders in a publicly-accessible "WHOIS" database. In turn, NeuStar contracts with private registrars to sell new addresses in the ".us" domain.

Plaintiff Robert Peterson was formerly the registrant of a ".us" domain name, www.pcpcity.us, which he operated until recently as a web site discussing current events and hosting debate on current political topics. Although plaintiff disclosed his full name, his city of residence, his membership in the Illinois bar, and other identifying information about himself on his web site, he objected to the requirement that owners of ".us" domain names provide contact information for inclusion in the WHOIS database. Arguing that the contact data requirement violated his First Amendment right to "anonymous" speech, plaintiff filed suit against the NTIA and NeuStar seeking to enjoin enforcement of that requirement.

In an oral ruling on February 17, 2006, the district court denied plaintiff's motion for a preliminary injunction, and in a subsequent written decision on April 17, 2006, the court entered a final judgment in favor of the defendants. Given the undisputed publication of plaintiff's name and other identifying information on his web site, the court concluded that plaintiff lacked standing to challenge the contact data requirement. See JA 964-67. Balancing the equities for purposes of injunctive relief, the court further held that plaintiff would not suffer any injury from the enforcement of that requirement while the government would be harmed if enforcement were enjoined. JA 962. The court also held that, in managing its contract with NeuStar, the NTIA did not violate the APA when it clarified the prohibition on proxy domain name registrations because the APA's notice and comment rulemaking requirements do not apply to agency action related to government contracts or benefits. JA 963.

Plaintiff immediately appealed the district court's oral decision denying a preliminary injunction and he has now also appealed the final judgment entered on April 17, 2006. Those appeals have been consolidated in this Court.

STATEMENT OF FACTS

A. The Internet and the Domain Name System.

The Internet is a world-wide system of connected public and private computer networks. See Island Online, Inc. v. Network Solutions, Inc., 119 F. Supp.2d 289, 292 (E.D.N.Y. 2000). Computers on the Internet are identified by numeric addresses, expressed as a series of numbers containing up to twelve digits, such as "204.146.46.9" (referred to as "Internet Protocol" or "IP" numbers). Because these numbers are difficult to remember, the practice arose of associating letters and words with individual IP addresses, for example "acme.plumbing.com." See Name.Space, Inc. v. Network Solutions, Inc., 202 F.3d 573, 576 (2d Cir. 2000). These word-based Internet addresses are expressed as a descending hierarchy of regions, called "domains," which read from right to left. At the far right end of an Internet address is the "top-level domain," ("TLD"), for example the ".com" in "acme.plumbing.com." To the left of that is the "second-level" domain "plumbing" and to the left of that is the "third-level" domain "acme," and so on. See Island Online, 119 F. Supp. 2d at 292. The domains become more specific as one reads from right to left, until the desired region of the Internet corresponding to the sought-after computer is pinpointed.

The largest TLDs – ".com" and ".net," – between them contain more than 60 million web addresses. In addition to these generic domains, there are top-level domains for each country, such as ".fr" for France or ".uk" for the United Kingdom. See NameSpace, Inc., 202 F.3d at 577. The United States has such a domain, called ".us," which currently has about one million addresses.

B. The Contact Information Requirement In ".us".

The United States initially restricted use of the ".us" domain primarily to state and local governments. JA 315-16 (Lewis Decl.). However, beginning in 1998, the United States began considering whether to make ".us" addresses available to individual United States citizens and companies, and the Department of Commerce ("DOC") solicited comments and encouraged public discussion on this question. JA 317 (citing, inter alia, Request for Comments on the Enhancement of the .us Domain Space, Notice, Request for Public Comment, 63 Fed. Reg. 41547 (Aug. 4, 1998)). Based on public comments DOC published a "statement of work" in June 2001 outlining its requirements for management of an expanded ".us" domain, and soliciting proposals from private companies. JA 318, 477-509.

To ensure that ".us" would be run for the benefit of United States citizens and companies, the statement of work requires that ".us" registrants have specified connections to the United States. JA 320, 481. It also requires that domain name holders agree to binding arbitration in the event of a dispute over the rights to a particular domain name. JA 320, 482. Finally, the statement of work requires the manager of ".us" to maintain an accurate and up-to-date database of contact information for domain name registrants similar to the "WHOIS" databases maintained by other domains such as ".com" and ".net." JA 320, 481. The statement of work requires that this database be searchable and available to the public online and that it include "the name and postal address for the domain name holder" and the contact information – including the name, postal address, telephone number, and e-mail address – for the technical and administrative contacts for the domain name holder. JA 320-21 (Lewis Decl.); JA 485 (statement of work).

The statement of work does not require any information about the identities of speakers featured on a ".us" website, or the source of any content displayed there. See generally JA 477-86. Nor does it impose any restrictions on the messages or content which may be featured on such a site. Although the statement of work requires a contact address for the domain name holder, there is no requirement that this be a residential address; it could be a business address or a post office box. JA 483-84. Moreover, although the statement of work requires a domain name holder to provide a point of contact to the WHOIS database, it does not require a domain name holder to publish his contact information on any website he administers using his domain name.

The contact information requirement serves numerous important goals. It ensures that a responsible party for the website is immediately available in the event that a domain address experiences technical problems or causes technical problems for other users; it assists private parties in protecting themselves against fraud, spam, and identity theft; it helps private parties to police against copyright and trademark infringement, and provides a point of contact for any disputes that arise; it assures a smooth transition of control over a domain address in the event that the registrar goes bankrupt; it assists the United States in enforcing the United States nexus requirement and the arbitration requirement; it assists the government in investigating criminal activity online; and it allows the government to provide a public record of parties using public assets. JA 319.

C. Enforcement of the Contact Information Requirement.

In October 2001, the NTIA, an agency of DOC, awarded a contract to manage registrations in the ".us" domain (the ".us Contract") to a private contractor, NeuStar, Inc. JA 320, 532. The .us Contract incorporates the requirement that domain name registrants provide the name and address of the domain name holder, and the contact information – including the name, postal address, e-mail address, telephone number and fax number – for the technical and administrative contacts for the domain name holder. JA 320, 540-41 (¶¶ B.4.7, B.5.4.e). The .us Contract also specifies terms by which NeuStar may authorize private registrars to sell new addresses in the ".us" domain. JA 321, 541 (¶ B.5.2).

Using a standard registrar agreement, JA 596-627, and a standard registrar accreditation agreement, JA 555-94, NeuStar contracted with several registrars to begin selling new addresses in the ".us" domain to United States companies and individuals. The registrar agreement requires registrars to comply with, and to include in their agreements with individual registrants, all the substantive requirements of the .us Contract. JA 321, 602 (¶ 3.10). The agreement further states that "registrars will be required to provide basic registration information to the Registry [NeuStar]." JA 321. As specified in Exhibit E to the registration agreement, "[t]he minimum required information is . . . [t]he name and postal address of the domain name registrant," and the "voice telephone number" for the registered name holder. JA 577.

GoDaddy.com ("Go Daddy") is one of several registrars that signed a registrar agreement and an accreditation agreement with NeuStar to register domain names in the ".us" domain. <u>See</u> JA 628-77, 678-93. Despite having signed these agreements promising to maintain and provide current and accurate contact information for registrants, <u>see</u> JA 660, Go Daddy began marketing and selling anonymous registrations in the ".us" domain beginning in 2002, JA 34 (Jones Decl.). Under its "Domains by Proxy" service, Go Daddy offered "proxy registrations" under which the contact information for the actual ".us" domain name holder is not provided to NeuStar for inclusion in the WHOIS database but instead an address and telephone number for Go Daddy's "Domains by Proxy" service appears where the actual registrant's contact information should be. Id. See also JA 20 (Peterson Decl.) (describing proxy registration); JA 767 (sample proxy registration in WHOIS).[1]

Prior to January, 2005, the NTIA was unaware that registrars were offering proxy or anonymous registrations in the ".us" domain. JA 323. However, after receiving a letter from the Government Accountability Office ("GAO") initiating a study of false contact information in the WHOIS database, JA 695, the NTIA conducted its own investigation and discovered that some registrars, including Go Daddy, were allowing registrants in the ".us" domain to register domain names anonymously. JA 323-24.

In light of the discovery that some registrars were offering anonymous or proxy registration services, the NTIA sent a letter to NeuStar on February 2, 2005, explaining that this practice was inconsistent with registrars' obligations under their existing registrar and accreditation agreements to provide complete and accurate contact information for the WHOIS database. JA 530. In that letter, the NTIA instructed NeuStar to direct all ".us"

[1] In its contracts with domain name registrants, Go Daddy does not assume responsibility for maintaining the registrant's website, and specifically disclaims any liability for injury resulting from the registrant's actions. JA 29-30, 97-98.

registrars to cease offering new anonymous or proxy registrations by February 16, 2005, and to bring existing proxy or anonymous registrations into compliance no later than January 26, 2006. Id. The NTIA also directed NeuStar "to amend section 3.7.7.4 of the Accreditation Agreement to provide a clearer articulation of NTIA's policies with respect to proxy and anonymous domain name registration services," and noted specifically that "[a]mending this provision is in no way intended to convey that 'proxy' or anonymous domain registration services were at any time permissible under the existing Accreditation Agreement." JA 530-31.

NeuStar promptly instructed ".us" registrars to cease offering anonymous or proxy domain name services by February 16, 2006 and ordered them to bring existing proxy registrations into compliance no later than January 26, 2006. JA 325, 697-99 (e-mail from NeuStar to registrars). NeuStar also executed new accreditation agreements with all registrars that clarified the prohibition on proxy registrations. JA 325, 701. The new agreements specifically stated that "neither registrar nor any of its resellers, affiliates, partners and/or contractors shall be permitted to offer anonymous or proxy domain name registration services which prevent the Registry from having and displaying the true and accurate data elements . . . for any Registered Name." JA 707 (¶ 3.7.7.4.2). On February 3, 2005, Go Daddy signed a revised agreement that included this explicit prohibition on proxy registrations. JA 971, 977.

By early March, 2005, all ".us" registrars had stopped offering new anonymous registrations. JA 325. However, Go Daddy and its President, Robert Parsons, initiated a public relations campaign on the radio and the Internet objecting to the January 26, 2006 deadline to terminate existing proxy registrations. JA 326.

D. Plaintiff's Website And This Litigation.

Plaintiff Robert Peterson was formerly the registrant of a ".us" domain name, www.pcpcity.us, which he operated until recently as a web site discussing current events and hosting debate on current political topics. JA 20 (Peterson Decl.). Examples of recent topics featured on plaintiff's website include social security reform and criticisms of Walmart. See JA 745. Plaintiff alleges that he "chose the .us top-level domain for [his] website because it fit well into the concept of my website name of Point-Counter-Point City . . . and because the .us top level domain reinforces my belief that I am representing American ideals by fostering political debate." JA 20.

Plaintiff registered his website through Go Daddy in September 2004 and it become functional in October 2004. JA 20. Plaintiff asserts that he registered his domain name anonymously through Go Daddy because he did not want his personal identifying information to be listed in the WHOIS database and because he fears that such a listing would expose him to retaliation for the controversial opinions he expresses on that site. JA 21. Despite his professed desire to remain anonymous, however, plaintiff disclosed his full name, his city of residence, his membership in the Illinois bar, and other identifying information about himself on his web site. JA 740-41 (Greene Decl.). From the information disclosed on plaintiff's website, it was easily possible to obtain plaintiff's street address and home phone number. JA 741.

On January 25, 2006, plaintiff filed suit against the NTIA and NeuStar seeking a temporary restraining order and a preliminary injunction prohibiting enforcement of the contact information requirement for ".us" domain name holders. See JA 10 (complaint).[2] In his complaint, plaintiff alleged that the contact information requirement violated his First Amendment right "to remain anonymous, or partially anonymous, or to speak without first providing his personal identifying information," and that the NTIA also violated the APA by not first conducting notice and comment rulemaking before instructing NeuStar to end anonymous registrations in the ".us" domain. JA 14. Plaintiff made no allegation that the requirement violated his privacy rights.

Although Go Daddy was not a party to plaintiff's suit, Go Daddy nonetheless ignored the January 26, 2006 deadline and did not provide contact information for any proxy registrants holding ".us"

[2] Although plaintiff acknowledges that he learned about the January 26, 2006 deadline for terminating proxy registrations for ".us" domain name holders at least as early as November 14, 2005, JA 21, he did not file a lawsuit seeking to enjoin enforcement of that requirement until the day before the deadline.

domain names. JA 327. As a result, on January 27, 2006, NeuStar notified Go Daddy that it was in breach of its registrar accreditation agreement and gave Go Daddy 15 days to cure that breach before NeuStar would consider further action, up to and including de-accrediting Go Daddy as a registrar for the ".us" domain. Id. See also JA 735. In the meantime, the parties agreed to treat plaintiff's request for a TRO as a motion for a preliminary injunction, and extended the cure period for compliance with the contact information requirement to one business day after the district court's ruling on that motion. JA 768.

E. Denial Of The Preliminary Injunction.

On February 17, 2006, the district court (Lee, J.) held a hearing on plaintiff's motion for a preliminary injunction and issued an oral ruling denying that motion. JA 885-938. While noting that it "may issue an opinion later," the court explained to the parties that it "wanted to give you a ruling now so you know what your options are." JA 938.

In its oral ruling, the court first expressed grave doubts that plaintiff had standing to challenge the contact information requirement as a violation of any First Amendment right to "anonymous" speech given the voluntary disclosure of plaintiff's name, the city where he lives, and his membership in the Illinois bar on his own web site. JA 931. Among other things, the court noted that the contact information requirement does not require the disclosure of a home address or telephone number but simply requires some form of reliable contact information. JA 932. Because that requirement does not compel the disclosure of any additional information that plaintiff had not already voluntarily disclosed on his own web site, the court questioned whether plaintiff had demonstrated any injury. Id.

In addition, the court rejected plaintiff's reliance on the overbreadth doctrine to salvage his standing to make a claim of protected anonymity on behalf of other individuals who have proxy registrations in the ".us" domain. JA 932-33. Unlike a truly anonymous registrant, the court noted that plaintiff's

> identity on the website is well known and apparently he is easily found by dialing 411 on the telephone or just typing his name in Google on the Internet and you figure out who he is, where he lives.

JA 933. Thus, the court stated, "I'm not sure he has any claim for anonymity concerning his identity with this particular website." Id. However, the court did not dismiss the case on standing grounds at this point because plaintiff had objected to the public disclosure of his home address and phone number, which the court tentatively found "may be some injury if that is protected somehow by the First Amendment." Id. (emphasis added).

Turning to the merits, the district court concluded that the contact information requirement had nothing to do with the content of speech and "is at best a restriction on time and place and manner that is content neutral." JA 933. The court explained that the government had provided an adequate explanation for

> why it wants to and why it requires the domain name registrant to provide this contact data. And their reasons have to do with government interest including protection against technical problems, that is to say if a website is the origin of unsolicited e-mail or spam or other distribution of child pornography or other things and that this would be necessary to regulate that activity on a website.

JA 934. The court further noted that "the interest in maintaining the treaties with the foreign nations concerning the use of the top level U.S. domain name is a significant governmental purpose that is narrowly tailored here." JA 934-35. Thus, reiterating that the regulation is not directed at the content of speech, but instead furthers valid "regulatory purposes," including compliance with treaty obligations, the prevention of online fraud, and enhancing capabilities to quickly resolve technical problems, the district court held that the contact information requirement was "narrowly tailored sufficiently to meet the governmental needs without unduly restricting protected speech." JA 935.

Finally, applying the four factor test applicable to requests for preliminary injunctive relief, the court concluded that plaintiff had not shown irreparable harm from enforcement of the contact data requirement, that the government would be harmed if that requirement were enjoined, that plaintiff had very little likelihood of success on the merits of his claims and that the public interest would be served by allowing enforcement of that requirement. JA 936-37. In addition, the court held that the APA's notice and comment rulemaking requirements were not applicable because 5 U.S.C. § 553(a)(2) exempts enforcement actions pursuant to government contracts, such as the contracts between the NTIA and NeuStar and NeuStar and Go Daddy. JA 937-38.

F. Go Daddy Complies With The Contact Information Requirement.

On February 21, 2006, the date of the revised deadline for Go Daddy to comply with the contact information requirement, plaintiff appealed the district court's ruling and filed an emergency motion for an injunction pending appeal in both the district court and this Court. JA 834. In those motions, plaintiff argued that he would be irreparably harmed by the disclosure of his identifying information in the WHOIS database and would "shut down his website to remove his information from the public database." JA 838. Although the district court did not rule on plaintiff's motion, this Court summarily denied plaintiff's motion on the day it was filed. JA 862.

On that same day, Go Daddy came into compliance with the contact information requirement by cancelling its proxy registration services and providing registrant information for ".us" domain name holders. JA 876 (Neuman Decl.). As a result, plaintiff's name, a United States address, a telephone number and an email address were listed and displayed in the WHOIS database. Id. See also JA 864-66 (plaintiff's listing in WHOIS). Although plaintiff alleges that he attempted to cancel his website following the publication of this information in the WHOIS database, JA 880 (Peterson Decl.), plaintiff's website remained operational for some period of time thereafter. See JA 832, 868-70 (stating that site was operating as of February 22, 2006). Furthermore, plaintiff's identifying information remained available in the WHOIS database for some period of time after he terminated his domain name registration.

G. The District Court's Final Decision.

On April 17, 2006, the district court issued a decision reiterating its rationale for denying preliminary injunctive relief and also entered a final judgment in favor of the defendants. JA 954. While basically reaffirming the legal analysis in its earlier ruling, the court held for the first time that plaintiff lacked standing to challenge the contact information requirement because he "explicitly posts his full name, city of residence, membership in the Illinois Bar Association, filings in this lawsuit, and other identifying information on his website," and that his "street address is easily available from this information." JA 960. "By making so much personal information so easily available to members of the public, the Court finds that Plaintiff will not suffer any injury by complying with the NTIA's contact information requirement." Id.[3]

In the alternative, the court again held that "the contact information requirement does not restrict the content that may be posted on a website, does not prohibit anonymous submissions, and is, at most, a content-neutral restriction on the time, place or manner of speech." JA 960. The court explained that this requirement easily satisfies the test for content-neutral restrictions on speech because it

> [1] seeks the minimum information necessary to directly and rapidly contact the domain holder – it does not ask for residential information or seek any information about the authors of the content of [a] website; (2) the government has significant interests in preventing fraud and other on-line crime, protecting copyright and trademark infringement, avoiding technical mishaps on the Internet and complying with treaties that require a database of registrants of the ".us" domain; and (3) Plaintiff is free to publish his website on other domains which allow anonymity.

JA 961. Because "the contact information requirement serves significant governmental interests, is narrowly tailored, and leaves ample room for alternative communications," the district court held that "it does not violate Plaintiff's First Amendment right to anonymity." JA 962.

[3] In a separate section at the end of its opinion, the court reiterated its conclusion that plaintiff lacked standing because "he has already made [identifying] information available on his website," JA 966, and because "requiring Plaintiff's information is not a *per se* harm" under the First Amendment, JA 965.

Balancing the equities for purposes of injunctive relief, the court further held that plaintiff would not suffer any injury from the enforcement of that requirement while the government would be harmed if enforcement were enjoined,

> because an injunction will harm the United States' ability to abide by its treaties, prevent the government from preserving the ".us" domain as a space for U.S. citizens and companies, and would leave the government and the public without protection or easy redress against technical problems, fraud, and trademark and copyright infringement on web sites within the domain.

JA 962. Accordingly, the court denied plaintiff's motion for a preliminary injunction. Moreover, the court again held that the NTIA did not violate the APA by clarifying the prohibition on anonymous domain name registrations because, under 5 U.S.C. § 553(a)(2), the APA's notice and comment rulemaking requirements do not apply to agency action related to government contracts or benefits. JA 963.

SUMMARY OF ARGUMENT

1. Given plaintiff's voluntary publication of his name and other personal identifying information on his website, the district court properly concluded that plaintiff lacked standing to challenge the contact information requirement for domain name holders in the ".us" domain as a violation of his First Amendment right to "anonymous" speech. As the court recognized, plaintiff would suffer no injury-in-fact from the disclosure of his address and phone number in the WHOIS database because this same

information was readily available through a Google search or a telephone call to directory assistance using information provided on plaintiff's website. And, although plaintiff has now elected to shut down his website rather than comply with the contact data requirement, this voluntary decision by plaintiff does not create a new or different form of injury sufficient to confer standing.

Plaintiff does not challenge the district court's factual finding that his home address and phone number could readily be obtained from the information posted on his own website. Instead, he argues primarily that the First Amendment protects a right to "partial anonymity" which he has not forfeited by disclosing his name and other identifying information on his website. However, plaintiff nowhere explains how the publication of his address and phone number in the WHOIS database would impair his ability to communicate anonymously when the same information could easily be obtained from the material available on his own website. Put simply, plaintiff's alleged fear of retaliation from compliance with the contact data requirement is unreasonable because there is no basis for believing that hypothetical harassers who know about the WHOIS database (and its compilation of information regarding ".us" domain name holders) would not also know how to perform a Google search, or use directory assistance, to obtain plaintiff's address and phone number based on the identifying information plaintiff voluntarily disclosed on his own website. In short, the possibility of retaliation plaintiff claims to fear is not fairly traceable to the contact information requirement.

Plaintiff’s attempt to cure the deficiencies in his own standing by asserting an overbreadth claim relying on speculative injuries to third parties is similarly unavailing. While an overbreadth claim under the First Amendment permits consideration of a regulation’s allegedly speech-inhibiting effects on parties not before the court, it does not confer standing where the party actually before the court has suffered no injury in fact. See Gilles v. Torgerson, 71 F.3d 497, 501 (4th Cir. 1995).

2. Because the district court correctly held that plaintiff lacked standing to challenge the contact information requirement, this Court need not address the merits of plaintiff’s First Amendment and APA claims. In the event the Court reaches these issues, however, it should affirm.

With respect to plaintiff’s First Amendment claim, the district court properly concluded that the contact information requirement does not regulate the content of speech on “.us” web sites, nor does it preclude (or even burden) “anonymous” speech. To the contrary, that requirement simply compels “.us” top level domain name holders (not all speakers in “.us”) to provide a point of contact for inclusion in the publicly-accessible WHOIS database. That requirement is reasonable and narrowly tailored because it furthers significant governmental interests such as: preventing fraud and other unlawful online activities, facilitating the timely resolution of technical problems, ensuring compliance with treaties that require a database of ".us" registrants, and enhancing enforcement of the requirement that registrants have an adequate nexus with the United States. Balancing these interests against the complete absence of injury to plaintiff from compliance with the contact information requirement, the district court acted well within its discretion in denying plaintiff's request to enjoin enforcement of that requirement.

3. The district court also correctly held that the NTIA was entitled to enforce the contact information requirement through directives pursuant to its contract with NeuStar without first engaging in notice and comment rulemaking. As the court recognized, the APA's rulemaking requirements do not apply to agency action related to government contracts or benefits, and even if those requirements were applicable the NTIA fully satisfied them in promulgating the initial prerequisites for the management and administration of the ".us" domain.

STANDARD OF REVIEW

The question whether a party has standing to sue is an issue of law that is reviewed de novo. Frank Krasner Enterprises, Ltd. v. Montgomery County, Maryland, 401 F.3d 230, 234 (4th Cir. 2005). The grant or denial of a preliminary injunction is reviewed solely for abuse of discretion, "recognizing that 'preliminary injunctions are extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances.'" MicroStrategy, Inc. v. Motorola, Inc., 245 F.3d 335, 339 (4th Cir. 2001) (quoting Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 816 (4th Cir. 1991)).

ARGUMENT

I. PLAINTIFF LACKS STANDING TO CHALLENGE THE CONTACT INFORMATION REQUIREMENT BECAUSE THE VOLUNTARY DISCLOSURE OF HIS NAME AND OTHER IDENTIFYING INFORMATION ON HIS OWN WEBSITE PRECLUDES ANY CLAIM OF "ANONYMOUS" SPEECH.

Standing is a constitutional limitation on the jurisdiction of the federal courts, see Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102 (1998), and the party seeking to invoke the court's jurisdiction bears the burden of demonstrating standing, see Friends for Ferrell Parkway, LLC v. Stasko, 282 F.3d 315, 320 (4th Cir. 2002). As this Court has explained, "[t]he standing requirement is designed to guarantee that 'the plaintiff has a sufficient personal stake in the outcome of a dispute to render judicial resolution of it appropriate.'" Emery v. Roanoke City School Board, 432 F.3d 294, 298 (4th Cir. 2005) (quoting Friends for Ferrell, 282 F.3d at 319)). Thus, in order to satisfy Article III's "case or controversy" requirement, a plaintiff must show that: (1) he has suffered a "concrete and particularized" injury to a legally protected interest; (2) the injury is "fairly traceable" to the defendant's actions; and (3) it is likely, as opposed to "merely speculative," that the injury will be redressed by a favorable decision. Lujan v. Defenders of the Wildlife, 504 U.S. 555, 560-61 (1992). See Friends for Ferrell, 282 F.3d at 320.

A. No Injury from the Contact Information Requirement.

Plaintiff lacks standing to assert a claim that the contact information requirement for domain name holders in ".us" violates any First Amendment right to "anonymous" speech because he voluntarily disclosed his full name and other identifying information – from which his home address and telephone number could readily be obtained – on his web site. As the district court observed, "Plaintiff explicitly posts his full name, city of residence, membership in the Illinois Bar Association, filings in this lawsuit, and other identifying information on his website" and his "street address is easily available from this information." JA 960. See also JA 740-41 (Greene Decl.) (explaining that a street address and phone number could be obtained simply by using the information on plaintiff's web site). "By making so much personal information so easily available to members of the public," the court concluded, "Plaintiff will not suffer any injury by complying with the NTIA's contact information requirement." JA 960.

The district court's holding that plaintiff would suffer no injury to a legally protected interest from enforcement of the contact information requirement is correct, and plaintiff does not dispute the major factual premises of that ruling on appeal. For example, plaintiff does not dispute the court's finding that he voluntarily disclosed his name and other personal identifying information on his website. Nor does he contest the court's additional finding that his address is "easily available" from this information. JA 960. Instead, plaintiff argues primarily that the disclosure of his name and other identifying information does not deprive him of standing to assert a First Amendment right to "anonymous" speech because "this partial disclosure of identity does not strip him of all anonymity." Pl. Br. 20. This argument fails for two independent but overlapping reasons: (1) the First Amendment does not protect a right to "partial anonymity," and (2) plaintiff would suffer no injury fairly traceable to the contact information requirement because the additional information he seeks to withhold is readily obtainable from the material he voluntary disclosed on his web site.

1. <u>No First Amendment Right To "Partial Anonymity"</u>.

As the cases recognizing a right to "anonymous" speech under the First Amendment make clear, the legally protected interest at stake in this context is the right not to reveal one's <u>identity</u> when communicating what may be an unpopular message. <u>See</u>, <u>e.g.</u>, <u>McIntyre</u> v. <u>Ohio Elections Comm'n</u>, 514 U.S. 334, 341-43 (1995) (collecting examples of anonymous and pseudonymous literary and political publications); <u>Talley</u> v. <u>California</u>, 362 U.S. 60, 64-65 (1960). The primary rationale for protecting a speaker's identity is that revealing an individual's name could subject him to retaliation, which in turn could chill controversial or unpopular speech. As the Supreme Court has noted, this chilling effect is most powerful if the speaker is forced to disclose his identity at the same time he is speaking. Thus, in Buckley v. American Const'l Law Foundation, 525 U.S. 182 (1999), the Supreme Court invalidated a Colorado statute requiring petition circulators to wear a badge displaying their names because "the badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest." Id. at 199. See also Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002) (invalidating a village ordinance requiring door-to-door canvassers to obtain permits and display them on demand).

Contrary to plaintiff's argument (Pl. Br. 19-21), these cases do not establish a First Amendment right to "partial anonymity" protecting an individual who has voluntarily disclosed his identity but nonetheless seeks to withhold certain additional information such as his address and phone number. Indeed, in such circumstances, the anti-retaliation rationale for recognizing a First Amendment right to "anonymous" speech is entirely absent because the voluntary disclosure of the speaker's identity makes it unreasonable to presume any chilling effect from the prospect of retaliation. In short, where (as here) an individual is willing to disclose his identity on the very web site where he is speaking, no First Amendment interests are implicated by a registration requirement compelling the disclosure of additional contact information in a separate database. See Buckley, 525 U.S. at 199 (distinguishing between anonymity interests harmed by badge requirement compelling the disclosure of speakers' identity at the time of speech and requirement that petition circulators file affidavit identifying themselves).

Nowhere does plaintiff articulate a coherent basis for recognizing a First Amendment right to "partial anonymity" where a speaker has voluntarily disclosed his identity and thus eliminated the anti-retaliation rationale for protecting anonymous speech. Plaintiff suggests that the Supreme Court's decisions in McIntyre and Watchtower Bible implicitly recognize such a right, Pl. Br. 19-21, but neither case supports his argument. For example, plaintiff observes that the petitioner in McIntyre "did not protect her anonymity flawlessly," because some of the handbills she distributed identified her by name. Pl. Br. 19. But the Court did not address whether McIntyre had a right to disclose her name but not other identifying information on her handbills; it simply upheld her right to distribute anonymous leaflets. Thus, McIntyre does not suggest that the First Amendment protects against the disclosure of any information other than one's identity.

Plaintiff's reliance on Watchtower Bible as support for a right to "partial anonymity" is similarly misplaced. In that case, a group of Jehovah's Witnesses challenged a village ordinance requiring door-to-door canvassers to obtain permits and display them on demand. The Court held that the ordinance violated the First Amendment because it was not narrowly tailored to serve the government's stated interests, and offered three examples of "the pernicious effect of such a permit requirement." 536 U.S. at 166. Although the first example the Court cited was the ordinance's effect on anonymous speech, the Court did not recognize any right to "partial anonymity." Instead, the Court stressed that it was the identification of canvassers in their applications for permits that "necessarily results in a surrender of that anonymity." Id. at 166. The Court observed that "[t]he fact that circulators revealed their physical identities did not foreclose our consideration of the circulators' interest in maintaining their anonymity." Id. at 167 (emphasis added). However, this statement provides no support for a First Amendment right to "partial anonymity" in circumstances where one's actual identity – the sine qua non of that right – has voluntarily been disclosed. Contrary to plaintiff's argument, Pl. Br. 20, the Court's observation in Watchtower Bible confirms that an individual who reveals his actual identity, rather than merely his physical identity, does forfeit any First Amendment right to anonymity.[4]

2. Any Injury Is Caused By Voluntary Disclosures.

Even assuming the First Amendment protects a right to "partial anonymity," plaintiff lacks standing to assert such a right in this case because it is undisputed that the only additional identifying information he seeks to withhold (e.g., his home address and phone number) is readily available from the material disclosed on his web site. See JA 740-41, 960. As a result, the district court properly concluded that plaintiff would suffer no injury fairly traceable to the contact information requirement. See Friends for Ferrell, 282 F.3d at 323 (emphasizing that the claimed injury must be "fairly traceable" to the defendant's actions rather than independent sources).

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[4] Plaintiff also argues that Watchtower Bible "recognizes that absolute anonymity is impossible," and further claims that the Supreme Court has recognized "an interest in selective disclosure." Pl. Br. 20. However, these arguments are highly misleading because the quote regarding "selective disclosure" comes from United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 n.14 (1989), not from Watchtower Bible, and concerns a right to privacy – a right which plaintiff has never asserted in this case. Although the Electronic Privacy Information Center ("EPIC"), amicus curiae in support of plaintiff on appeal, also attacks the contact information requirement on privacy grounds, see EPIC Br. 3-14 (arguing that the requirement is inconsistent with the views of "international organizations expert in communications privacy" and the privacy practices of certain other countries), it is well-established that this Court will not address arguments raised by the Appellant for the first time on appeal or arguments raised solely by amici. See United States v. Buculei, 262 F.3d 322, 333 n.11 (4th Cir. 2001).

The only injury to an interest protected under the First Amendment that plaintiff has asserted in this case is a fear of retaliation for the controversial opinions expressed on his web site, see JA 21 (Peterson Decl.), which he contends will chill his speech, see JA 12 (complaint). But plaintiff's claimed injury is entirely conjectural; he has not identified a single instance of "retaliation" from speech on his web site. More importantly, plaintiff has willingly exposed himself to any chill he might suffer because his own voluntary disclosures – not the contact information requirement – make such retaliation possible.

Now that he has shut down his web site rather than comply with the contact information requirement, plaintiff also appears to be claiming that he is suffering a different injury – not merely a "chilling effect" but the elimination of his speech in the ".us" domain altogether. See Pl. Br. 17 (stating that plaintiff "had to terminate his website"). Here again, however, the contact information requirement cannot plausibly be viewed as the cause of this injury because plaintiff silenced himself. Further, that choice does not create a new or different form of injury. As Justice Scalia noted in Watchtower Bible, with regard to the "fairytale category of 'patriotic citizens' who would rather be silenced than licensed in a manner that the Constitution (but for their 'patriotic' objection) would permit: If our free-speech jurisprudence is to be determined by the predicted behavior of such crackpots, we are in a sorry state indeed." 536 U.S. at 171 (Scalia, J., concurring) (internal citation omitted).

Plaintiff suggests that the contact information requirement enhances the possibility of retaliation because "the personal information in WHOIS is conveniently compiled in a searchable database." Pl. Br. 18. However, given the disclosure of his name and other identifying information on his web site, plaintiff's claim of likely increased retaliation from the publication of additional information in the WHOIS database is implausible. Because the information plaintiff sought to withhold was readily obtainable from the material freely disclosed on his own web site, JA 740-41, 960, the district court was under no obligation to accept such an objectively unreasonable allegation of injury. See White Tail Park, Inc. v. Stroube, 413 F.3d 451, 459 (4th Cir. 2005) (noting that district court may consider evidence outside the pleadings where defendant moves to dismiss for lack of standing).[5]

Indeed, the information actually required for publication in the WHOIS database is not materially greater than what plaintiff voluntary elected to disclose on his own web site. Contrary to plaintiff's argument, Pl. Br. 18, the NTIA does not require domain

[5] Plaintiff cites White Tail to support an argument that the district court "erroneously relied on the merits" in holding that he lacked standing. See Pl. Br. 15-16. But the court did no such thing. It simply analyzed whether plaintiff had identified any injury to a legally protected interest that could fairly be traced to the contact information requirement.

name holders to provide their home address and telephone number. All that is required is the "name and postal address of the domain name holder," JA 484, which could be a post office box or a business address, so long as the listing provides a direct means of communicating with him. Likewise, the phone number and address need not be personal or home numbers; they must simply provide points of contact for the domain name holder. JA 484 (requiring address, phone number, e-mail, and fax numbers for "technical" and "administrative" contacts). And, to the extent plaintiff now complains about the disclosure of his e-mail address in the WHOIS database, Pl. Br. 18, his own statements indicate that his e-mail was already disclosed on his website. JA 21.

In sum, there is simply no basis for presuming that a hypothetical harasser sophisticated enough to know about the WHOIS database (and how to use it) would not already know how to perform a Google search, or use directory assistance, to obtain plaintiff's address and phone number based on the identifying information available on plaintiff's web site. See JA 740-41 (describing relatively simple steps taken to obtain plaintiff's address and phone number). Thus, plaintiff has not carried his burden of establishing any non-conjectural injury that can fairly be traced to the contact information requirement, and the district court properly dismissed his claims for lack of standing.[6]

B. No Standing Based On Overbreadth Claim.

Plaintiff's attempt to cure the deficiencies in his standing by invoking the overbreadth doctrine, see Pl. Br. 21-26, is also without merit. As this Court explained in Gilles v. Torgerson, 71 F.3d 497 (4th Cir. 1995), a party's "inability to establish injury" from the challenged actions of the defendant "is not rescued by the First Amendment overbreadth doctrine." Id. at 501. In Gilles, this Court held that an itinerant preacher lacked standing to challenge Virginia Tech's requirement that speakers secure a sponsor before speaking on campus because he was not injured by that requirement once he obtained a sponsor. While recognizing that an overbreadth claim allows a court to consider a regulation's allegedly speech-inhibiting effects on parties not before the court, this Court explained that "[t]his doctrine only assists plaintiffs who have suffered some injury from application of the contested provision to begin with." Ibid. See also Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 958 (1984).

[6] The district court's conclusion that plaintiff has not suffered any Article III injury for purposes of his First Amendment "anonymous speech" claim applies equally to his APA challenge to the contact information requirement. As explained in Section III, that claim is also outside the "zone of interests" protected by the APA because the APA's notice and comment rulemaking requirement does not apply to actions taken pursuant to government contracts.

Having failed to establish any cognizable First Amendment injury traceable to the contact information requirement, plaintiff cannot rely upon hypothetical injuries to third parties from that requirement to establish his standing. Indeed, in his efforts to distinguish Gilles, plaintiff appears to recognize as much, arguing that the "crucial distinction" between Gilles and his own case is "that the NTIA rule he challenges caused [his] injury," because it "required him to terminate his proxy registration or disclose his personal information on the WHOIS database." Pl. Br. 25. But this is simply an argument that the contact information requirement injured plaintiff directly; it is not an assertion of standing based on injuries to third parties – because the latter argument is squarely foreclosed by decisions in both the Supreme Court and this Court. See Munson, 467 U.S. at 958; Gilles, 71 F.3d at 501.[7]

As explained above, plaintiff forfeited any First Amendment interest in anonymity when he voluntarily disclosed his name and other identifying information on his web site, and he cannot manufacture a First Amendment injury by shutting down his web site on the implausible grounds that the disclosure of some additional identifying information in the WHOIS database (e.g., his address

[7] Plaintiff's reliance on Munson, Pl. Br. 22-24, is wholly misplaced because the plaintiff in that case – a professional fundraiser who was attempting to challenge a state law which prohibited charitable organizations from paying more than 25% of the amount raised for their expenses – had been threatened with prosecution and therefore had suffered an injury sufficient to confer Article III standing in his own right. 467 U.S. at 954.

and phone number) might increase the possibility of retaliation. Indeed, if plaintiff could establish an injury simply by silencing his own speech, then the plaintiff in Gilles arguably could have gained standing to challenge the campus sponsorship requirement by refusing to accept the offer of sponsorship from the University. Accord Watchtower Bible, 536 U.S. at 171 (Scalia, J., concurring). No matter how much plaintiff may dislike the contact information requirement, the prerequisites for Article III standing may not be so easily be manipulated. See Burke v. City of Charleston, 139 F.3d 401, 405-06 (4th Cir. 1998) (holding that artist whose mural on wall of building was ordered removed by city's architectural board lacked standing to challenge city's historic preservation ordinance).

In sum, plaintiff's speculation regarding possible injuries to "a victim of domestic violence" or a "family website publisher" who "may not want to provide potential stalkers with his home address," Pl. Br. 25-26, is irrelevant. As Gilles and Munson make clear, and plaintiff essentially concedes, such injuries to third parties do not provide standing for a plaintiff who has not himself been injured by the defendant's actions, even where an overbreadth claim has properly been asserted. Thus, plaintiff's reliance on the overbreadth doctrine adds nothing to the standing analysis, and the district court properly concluded that he lacked standing to assert a First Amendment "anonymous speech" claim.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION SEEKING TO PROHIBIT ENFORCEMENT OF THE CONTACT INFORMATION REQUIREMENT.

Because the district court correctly held that plaintiff lacked standing to challenge the contact information requirement, this Court need not address the merits of plaintiff's First Amendment and APA claims. In the event the Court reaches these issues, however, it should affirm for the reasons set forth below.[8]

As this Court has frequently recognized, a preliminary injunction is "an extraordinary remedy involving the exercise of very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it." Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 816 (4th Cir. 1991). See also MicroStrategy, 245 F.3d at 339. In deciding whether to issue such an order, a district court considers: (1) whether the plaintiff will suffer irreparable harm if the injunctive relief is not granted; (2) the injury to the defendant should injunctive relief be granted; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest. See Hughes Network Sys., Inc.

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[8] As noted above, a final judgment on the merits ordinarily moots any further inquiry into the propriety of a preliminary injunction because the preliminary injunction merges into the final injunction. See Grupo Mexicano, 527 U.S. at 317. In this case, however, the court entered a final judgment because plaintiff lacked standing, JA 955-68, and the denial of preliminary injunctive relief thus remains an independent interlocutory ruling subject to review if (and only if) this Court concludes that the district court erred in dismissing the case for lack of standing.

v. InterDigital Comm. Corp., 17 F.3d 691, 693 (4th Cir. 1994); Blackwelder Furniture Co. v. Seileg Mfg. Co., 550 F.2d 189, 195-96 (4th Cir. 1977).

Balancing these factors, the district court properly denied plaintiff's motion for a preliminary injunction prohibiting enforcement of the contact information requirement. Among other things, the court found that plaintiff would not suffer any injury from compliance with that requirement while the government would be harmed if enforcement were enjoined

> because an injunction will harm the United States' ability to abide by its treaties, prevent the government from preserving the ".us" domain as a space for U.S. citizens and companies, and would leave the government and the public without protection or easy redress against technical problems, fraud, and trademark and copyright infringement on web sites within the domain.

JA 962. The court also concluded that plaintiff had no likelihood of success on the merits of his First Amendment claim because the contact information requirement is a content-neutral restriction on speech that "serves significant governmental interests, is narrowly tailored, and leaves ample room for alternative communications." Ibid. On appeal, plaintiff has not identified any way in which the district court abused its discretion in evaluating these issues. See Microstrategy, 245 F.3d at 339 (affirming denial of preliminary injunction on abuse of discretion standard).

A. The Balance of Harms Favors The Government.

For all the same reasons plaintiff failed to establish any injury-in-fact sufficient to confer Article III standing, he also failed to demonstrate irreparable injury warranting preliminary injunctive relief. As the district court found, by disclosing his full name, his city of residence, and other identifying details on his own web site, plaintiff forfeited any claim to anonymity protected under the First Amendment. JA 960. He was not injured by the contact information requirement – much less irreparably injured – because even the identifying information he seeks to withhold (e.g., his home address and phone number) is readily available using the material he voluntarily revealed on his web site. See JA 740-41 (describing relatively simple steps taken to obtain plaintiff's address and phone number).[9]

Moreover, even if plaintiff had some residual anonymity to protect, enforcement of the contact information requirement would not preclude this. As noted above, in order to comply with the WHOIS database requirement, plaintiff could provide contact information other than his home address and telephone number – for example, a post office box, a business address, or a cell phone

[9] Plaintiff contends that the "scattered autobiographical references on his website" do not preclude him from asserting a First Amendment right to anonymous speech, Pl. Br. 29, but he nowhere challenges the district court's finding that this material allowed anyone to obtain his street address and phone number by performing a Google search and calling directory assistance.

number – so long as the listing provided a direct means of communicating with him. See JA 484 (requiring the "name and postal address of the domain name holder," and a phone number, e-mail, and fax number for "technical" and "administrative" contacts). Thus, the contact information requirement does not deprive plaintiff of his right to speak anonymously in the ".us" domain; it simply requires him to register and provide basic contact information in order to operate a ".us" domain name.

In addition, plaintiff could preserve his ability to speak anonymously on the Internet by using the web hosting services of other entities that are the legally responsible domain name holders. See www.tripod.com. As the district court found, "Plaintiff is free to publish his website on other domains which allow anonymity." JA 961.

Without any showing of injury to plaintiff from enforcement of the contact information requirement, the district court had no difficulty concluding that the balance of harms in this case weighed heavily in the government's favor. As the court recognized, JA 962, the United States has entered into treaties with several foreign governments in which it has agreed to maintain an accurate, searchable database of personal contact information for registrants in the respective countries. See, e.g., United States-Morocco Free Trade Agreement, 118 Stat. 1102 (June 15, 2004); United States-Australia Free Trade Agreement, 118 Stat. 919

(May 18, 2004); United States-Chile Free Trade Agreement, 117 Stat. 909 (June 6, 2003); United States-Singapore Free Trade Agreement, 117 Stat. 948 (May 6, 2003). Requiring that domain name holders in ".us" provide basic contact information is a valid way to implement these treaties, and the district court properly concluded that "[a] preliminary injunction would prevent the United States from complying with these treaties." JA 962.

Plaintiff contends that proxy registration is "completely consistent" with these treaties, Pl. Br. 31, but the agency responsible for implementing these requirements properly concluded otherwise. The NTIA reasonably interpreted the mandate to "provide online public access to a reliable and accurate database of contact information for domain-name registrants," 118 Stat. 919 (Art. 17.3) (Pl. Add. 17-6), to require, at a minimum, the inclusion of an address and phone number for the actual registrant rather than simply a listing for a proxy registration service. Although plaintiff claims that Australia interprets its treaty obligations differently, <u>see</u> Pl. Br. 31 (arguing that Australia does not require addresses or telephone numbers), this assertion, even if true, does not make the NTIA's interpretation of those treaties unreasonable, and it does not diminish the United States' interests in requiring basic contact information. Moreover, because plaintiff made no argument regarding Australian practices before the district court, this evidence provides no basis for overturning the court's denial of preliminary injunctive relief.[10]

Further, the district court properly found that enjoining enforcement of the contact information requirement would impair the United States' ability to determine whether registrants in the ".us" domain are in fact United States citizens or corporations. JA 962-63. Plaintiff does not dispute the government's interest in enforcing the United States nexus requirement – which is plainly a prerequisite for holding a ".us" domain name, JA 320, 481 – but he nonetheless characterizes this governmental interest as "spurious because registrars currently check registrants' compliance with this requirement as a condition of their registration." Pl. Br. 32 (citing JA 802, declaration of Go Daddy's counsel, asserting that Go Daddy enforces United States nexus requirement). However, plaintiff nowhere explains why the government should be forced to rely solely on proxy registrars' self-serving claims that they will adequately enforce the United States nexus requirement. And, while plaintiff contends that the "NTIA failed to introduce any evidence, aside from speculation, that proxy registrations interfere with the

[10] Plaintiff's argument that the district court erred in considering the declaration of Maureen Lewis, JA 311-27, as evidence of the governmental interests served by the contact information requirement, Pl. Br. 30 n.5, is similarly flawed. As an NTIA official charged with implementing the contract governing the ".us" domain, Ms. Lewis could properly testify concerning the purposes served by the contact information requirement, JA 319, and the district court did not err in relying on this evidence.

government's ability to enforce the nexus requirements," Pl. Br. 32, nothing more than common sense is required to understand that compiling accurate contact information in the WHOIS database enhances the government's ability to enforce the nexus requirement, because (1) the government is more likely to obtain accurate information by relying on direct input from registrants than indirect input from proxies, and (2) this requirement facilitates "third-party challenges for enforcement." JA 319.

Finally, the district court properly found that enjoining enforcement of the contact information requirement would "leave the government without protection or easy redress against technical problems, fraud, and trademark and copyright infringement on web sites within the domain." JA 962. Plaintiff contends that "no record evidence supports this conclusion," Pl. Br. 32, but the testimony of Maureen Lewis, JA 319, fully supports these findings, and plaintiff – who had the burden of establishing his entitlement to a preliminary injunction – offered no evidence to the contrary. Although plaintiff contends that law enforcement interests would not be hampered because "registrars such as Go Daddy routinely disclose contact information for proxy registrants in response to law enforcement requests or subpoenas," Pl. Br. 33, this argument suffers from the same fatal flaw identified above: the government should not be forced to rely on voluntary cooperation from proxy registrars to enforce prohibitions on child pornography, trademark or copyright infringement, or fraud, in managing the ".us" domain.

Moreover, despite Go Daddy's self-serving assurances that it "provides contact information voluntarily to law enforcement when they make a legitimate request for information," JA 802 (declaration of Go Daddy's general counsel), the Go Daddy proxy registration agreements suggest that government enforcement efforts could be delayed or hindered by having to work through an intermediary. See JA 29 (stating that Go Daddy will first attempt to notify the registrant of legal notices or disputes and will only reveal the registrant's identity "[i]f you do not respond"). And, as with enforcement of the United States nexus requirement, public disclosure of contact information in the WHOIS database plainly facilitates third-party reporting and enforcement of these governmental interests. JA 319.

In sum, the district court acted well within its discretion in concluding that plaintiff would not be harmed by enforcement of the contact information requirement and that substantial government interests would be impaired if that requirement were enjoined.

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

With the balance of hardships tipped clearly in the government's favor, plaintiff had to make an especially strong showing of likely success on the merits of his First Amendment claim in order to obtain a preliminary injunction. See

MicroStrategy, 245 F.3d at 340. As the district court found, plaintiff failed to make such a showing "because the contact information requirement does not restrict the content that may be posted on a website, does not prohibit anonymous submissions, and is at most a content-neutral restriction on the time, place or manner of speech." JA 963.

"A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). As explained above, the contact information requirement does not in any way restrict the content that may be posted on a website, and it does not prohibit any opinion or other content from being submitted anonymously or under a pseudonym. Indeed, that requirement does not directly regulate speech at all; it simply compels individuals who want to register a domain name in ".us" to provide basic identifying information for inclusion in a publicly accessible database. This is no different from requiring certain identifying information in order to obtain a driver's license or requiring the public disclosure of certain information regarding political campaigns. See Adventure Communications, Inc. v. Kentucky Registry of Elections, 191 F.3d 429, 440 (4th Cir. 1999) (First Amendment not implicated by state statute imposing reporting requirements on broadcasters that sell advertising time to political candidates); McConnell v. F.E.C., 540

U.S. 93, 195 (2003) (upholding public disclosure of names of persons contributing $1,000 or more toward electioneering communications).

To the extent the contact information requirement has any incidental effect on speech, it imposes, at most, a content-neutral restriction on the time, place, or manner of speech. See Ward, 491 U.S. at 797. That requirement is valid if: (1) it is narrowly tailored to serve (2) a significant governmental interest, and (3) leaves open ample alternatives for communication. Id. at 791. In order to demonstrate "narrow tailoring," the government has no obligation to show that the requirement is "the least intrusive means," and a requirement is not invalid "simply because there is some imaginable alternative that might be less burdensome on speech." Id. at 797. Rather, the government must only show that the requirement "promotes a substantial government interest that would be achieved less effectively absent the regulation," and does not "burden substantially more speech than is necessary" to achieve the government's ends. Id. at 799.

As the district court held, "[t]he contact information requirement easily satisfies this test," JA 961, because it directly furthers a variety of significant governmental interests. Among other things, that requirement enhances the government's ability to identify and prosecute unlawful activities in the ".us" domain, ranging from copyright infringement to child pornography;

it enhances the government's ability to enforce the requirement that ".us" domain name holders have an adequate nexus to the United States; and it ensures that the United States is in compliance with treaty obligations to maintain an "accurate and searchable" database of contact information for ".us" domain name holders. JA 319, 961-63. Moreover, that requirement is narrowly tailored to serve these interests. It seeks only that information needed to reach and obtain a rapid response from the domain name holder, and does not ask for residential information or seek any information about persons involved in posting content on the domain. JA 961. Thus, the contact information requirement does not "burden substantially more speech than is necessary" to achieve the government's ends. Ward, 791 U.S. at 799. Finally, as discussed above, the contact information requirement leaves open ample alternative opportunities for anonymous speech both within the ".us" domain and in "other domains which allow anonymity." JA 961.

In arguing that the district court abused its discretion in finding that he failed to demonstrate a likelihood of success on the merits, plaintiff contends first that the court erred in concluding that the content information requirement was content neutral, Pl. Br. 34-40, and next that the court erred in concluding that the contact information requirement was narrowly tailored to achieve significant governmental interests, id. at 40-47. Both contentions are without merit.

1. The Contact Information Requirement Is Content-Neutral.

The contact information requirement is not in any way targeted at speech, much less at the content of any ideas expressed in the ".us" domain. As the Supreme Court has explained, the critical inquiry in determining content-neutrality "is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Ward, 491 U.S. at 791. Applying this test, the district court noted that "the contact information requirement does not prevent anonymous advocacy and dissent, but rather, like the permit cases, regulates the manner and use of a public forum." JA 961. Thus, the court properly held that the contact information requirement was more like the content-neutral park permitting scheme upheld on intermediate scrutiny in Thomas v. Chicago Park District, 534 U.S. 316 (2002), than the prohibition on anonymous pamphleteering struck down under strict scrutiny in McIntyre.

In Thomas, petitioners challenged an ordinance which required a permit – and thus the identification of the applicant – for any use of a public park involving more than 50 people. See 534 U.S. at 324 (noting that permit could be denied if, among other things, "the applicant has damaged Park District property on prior occasions and has not paid for the damage"). Rejecting arguments that the permit requirement was facially unconstitutional under the First Amendment, the Supreme Court held that the ordinance was "not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum." Id. at 322. The Court explained that the ordinance applied equally to all activities conducted at the park, id. at 322 ("The picnicker and soccer player, no less than the political activist . . . must apply for a permit"), and upheld the ordinance because "the object of the permit system" was "not to exclude communication of a particular content," but to "coordinate multiple uses of limited space," to "assure preservation of" public facilities, to "prevent uses that are dangerous, unlawful, or impermissible," and to "assure financial accountability for damage caused" by the use of public property, id.

Plaintiff's efforts to distinguish Thomas, Pl. Br. 37-40, are unavailing. He argues primarily that "[t]he justifications for the permit system in Thomas are inapplicable to the Internet." Pl. Br. 38. But differences in the government interests underlying the two schemes do not demonstrate that the contact information requirement is content-based. In any event, the same basic rationale that justified the permit system in Thomas – ensuring the preservation of public assets and "prevent[ing] uses that are dangerous, unlawful, or impermissible," 534 U.S. at 322 – likewise justifies the contact information requirement. As the district court found, that requirement assures the preservation and uninterrupted operation of the ".us" domain, helps the public resolve disputes arising from multiple users, and ensures that domain name holders are accountable to each other and the government for damage caused by the misuse of public assets.

2. The Contact Information Requirement Is Narrowly Tailored.

Plaintiff's contention that the district court erred in concluding that the contact information requirement is narrowly tailored to achieve significant governmental interests, Pl. Br. 40-47, lacks merit for essentially the same reasons that undermine his challenge to the court's evaluation of the government interests that would be harmed from an injunction.

For example, plaintiff again challenges the district court's finding that the contact information requirement enhances the United States' compliance with treaties requiring a database of registrants in the ".us" domain. JA 961-62. Plaintiff argues that "proxy registrations do not violate this provision [requiring an accurate database of contact information] because the proxy registrar – who has the ability to enable or disable the website – is the 'registrant.'" Pl. Br. 41. However, Go Daddy's proxy registration agreements demonstrate that a proxy registrar is not the true registrant. Among other things, the Go Daddy agreements expressly state that the actual domain name holder retains full rights to sell, transfer, or cancel the domain name unilaterally at any time, see JA 26 (Section 2), and that the proxy (Go Daddy) will not be liable for anything connected with use of the domain name, JA 29 (Section 6). Because the actual registrant must be the legally responsible party for a domain name, the limitations on liability for proxy registrars foreclose plaintiff's argument that they could properly be considered the domain name registrant for purposes of inclusion in the WHOIS database.

Likewise, plaintiff again challenges the district court's findings the contact information requirement enhances the government's ability to identify and solve technical problems and to prevent fraud, copyright and trademark infringement, and other unlawful activity in the ".us" domain. Pl. Br. 41-43. Ignoring the testimony of Maureen Lewis regarding these interests, JA 319, plaintiff argues that these findings are "unsupported by the record," and asserts that there is no need for <u>public</u> disclosure of this information because these interests can adequately be served in other ways. Pl. Br. 41-43. As explained above, however, the public disclosure of basic contact information in the WHOIS database facilitates third-party identification of problems and issues in a way that is critical to the government's enforcement efforts, including its enforcement of the United States nexus requirement. <u>See</u> JA 319 (Lewis Decl.). Moreover, plaintiff again fails to explain why the government should be forced to rely on proxy registrars' promises of voluntary compliance with enforcement efforts rather than directly obtaining the necessary information to enforce prohibitions on child pornography, trademark or copyright infringement, and fraud in managing the ".us" domain.

In sum, plaintiff provides no basis for overturning the district court's conclusion that he failed to demonstrate a substantial likelihood of success on the merits and thus has not shown that the court abused its discretion in denying his motion to enjoin enforcement of the contact information requirement.

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE NTIA WAS NOT REQUIRED TO ENGAGE IN NOTICE AND COMMENT RULEMAKING BEFORE ENFORCING THE CONTACT INFORMATION REQUIREMENT.

The district court also rejected plaintiff's contention that the NTIA violated the APA "by failing to provide public notice and comment before acting pursuant to its contract with NeuStar and the DoC statement of work to clarify the prohibition on anonymous registrations." JA 963. Citing 5 U.S.C. § 553(a)(2), the court held that the APA's notice and comment rulemaking requirements do not apply to agency action related to government contracts or benefits, ibid., and that even if these requirements did apply, the "NTIA complied with the APA's requirements when it promulgated the rule in its statement of work," JA 964. The court's decision is correct, and plaintiff provides no basis for concluding that the NTIA violated the notice and comment rulemaking requirements of the APA when it took action pursuant to its contract with NeuStar to enforce the contact information requirement.

A. Plaintiff does not dispute that the NTIA's enforcement of the contact information requirement falls within the plain language of Section 553(a)(2), which broadly exempts agencies from notice-and-comment rulemaking obligations "to the extent there is involved . . . a matter relating to agency management or personnel or to public property, loans, grants, benefits, or <u>contracts</u>." 5 U.S.C. § 553(a)(2) (emphasis added). Plaintiff contends that this exemption "does not apply to prescriptive changes that constitute a significant rule change." Pl. Br. 53. As the courts have long recognized, however, "Section 553(a)(2) cuts a wide swath through the safeguards generally imposed on agency action." <u>Humana of South Carolina, Inc.</u> v. <u>Califano</u>, 590 F.2d 1070, 1082 (D.C. Cir. 1978). <u>See</u> <u>also</u> <u>Rainbow Valley Citrus Corp.</u> v. <u>Federal Crop Ins. Co.</u>, 506 F.2d 467, 469 (9th Cir. 1974) (holding that decision to discontinue citrus insurance in certain area was exempted from notice and comment rulemaking requirements because it "relates directly to crop insurance contracts"). Indeed, in an analogous case rejecting an APA challenge to fees imposed in connection with the licensing of domain names, a district court observed that Section 553(a)(2) "is intended to grant agencies latitude to engage in contracts," and "the potential public impact of a contract does not divest the exception of its force." <u>Thomas</u> v. <u>Network Solutions, Inc.</u>, 2 F. Supp.2d 23, 36-37 (D.D.C. 1998) (citing <u>Humana</u>, 590 F.2d at 1083-

84), vacated on other grounds, 1998 WL 1738189, judgment aff'd, 176 F.3d 500 (D.C. Cir. 1999).

Ignoring the breadth of the public contracts exemption recognized in Humana, Rainbow Valley, and Thomas, plaintiff suggests that these cases all involved agency conduct "that did not amount to a policy decision." Pl. Br. 55. But none of these cases turned on any distinction between "policy decisions" and other kinds of decisions, and each involved agency action that could properly be characterized as a "policy" decision. See Humana, 590 F.2d at 1082-84 (regulation limiting reimbursement under Medicare); Rainbow Valley, 506 F.2d at 469 (regulation ending citrus insurance in certain areas); Thomas, 2 F. Supp. 2d at 36-37 (amount of fees paid for managing domain name). Contrary to plaintiff's arguments, these cases confirm that the applicability of Section 553(a)(2) depends on whether the challenged action falls within the plain language of that provision and not on the significance of the agency's action for third parties (and the public), or whether that action could conceivably be characterized as a "policy" decision. See Humana, 590 F.2d at 1083 (explaining that "neither the impact of the reimbursement regulation on Humana nor the public interest more generally distinguishes the present regulation from others concededly encompassed by Section 553(a)(2)").

In support of his contention that Section 553(a)(2) does not apply in this case, Pl. Br. 53-56, plaintiff relies almost exclusively on Vigil v. Andrus, 667 F.2d 931 (10th Cir. 1982).[11] In that case, the Tenth Circuit held that the public contracts exception was inapplicable to a challenge to a decision by the Bureau of Indian Affairs to transfer its free school lunch program to the Department of Agriculture (whose program would only cover "needy" children). While the court recognized that "[a]nalogous changes" to grant or benefit programs had been held to fall within the scope of Section 553(a)(2), the court held that this exception was inapplicable based on the unique circumstances in that case. Id. at 936. Citing three reasons for this conclusion, the court stressed: (1) "that the withdrawal of benefits from Indians merits special consideration" because "the government has assumed almost a guardian-ward relationship with the Indians," (2) that the special responsibilities towards Indians "require the BIA to follow rulemaking procedures whenever it cuts back congressionally created and funded programs," and (3) that the Department of the Interior had voluntarily agreed to follow rulemaking procedures even if the subject matter fell within the scope of Section 553(a)(2). Id. at 936-37.

[11] Plaintiff also cites a district court decision, Nat'l Ass'n of Psychiatric Treatment Ctrs. for Children v. Weinberger, 658 F. Supp. 48 (D. Colo. 1987), but the court in that case simply refused to apply Section 553(a)(2) because it believed that provision was inapplicable to "policy" decisions. As explained above, there is no basis for ignoring the plain language of that provision and its broad application to agency action "relating to" contracts.

None of the unique considerations present in Vigil is present in this case. The NTIA did not abolish a congressionally-mandated benefits program; it did not have any special fiduciary obligations to the plaintiff even remotely akin to those owed to Indians; and, given the large number of government contracts administered by the NTIA and DOC, these agencies (unlike Interior) never voluntarily agreed to follow rulemaking procedures where the subject matter falls within Section 553(a)(2). Accordingly, the district court correctly held that the agency was not required to engage in notice and comment rulemaking before taking action pursuant to its contract with NeuStar to enforce the contact information requirement.

B. Even assuming the public contracts exception does not apply, the district court correctly concluded that the NTIA satisfied any notice-and-comment obligations it might have had when it initially promulgated the requirements for management of the ".us" domain. JA 964. Plaintiff contends that this rulemaking was inadequate because it "did not suggest any prohibition on proxy registration," and argues further that "the notices implicitly *allowed* proxy registration." Pl. Br. 50 (emphasis in the original). However, a close examination of the initial rulemaking demonstrates that the NTIA consistently emphasized the importance of compiling accurate and detailed contact information for ".us" registrants and never authorized proxy registrations in any form.

To support his contention that the NTIA implicitly allowed proxy registration, plaintiff cites a sentence in the proposed rule which states that "registrants could supply basic information – including the applicant's name and sufficient contact information to be able to locate the applicant or its representative." 63 Fed. Reg. 8825, 8829 (Feb. 20, 1998) (cited at Pl. Br. 51). But this reference to a "representative" of the registrant did not authorize proxy registration; to the contrary, that statement confirms that the agency was concerned from the very beginning with obtaining (and maintaining) direct contact information for registrants of ".us" domain names. Moreover, the context in which this statement was made – in a section discussing the need to protect trademarks – shows that the agency intended to compile a searchable database of contact information for the entity that was <u>legally responsible</u> for the domain. Indeed, just a few sentences after the statement quoted by plaintiff, the NTIA explained that "[t]he job of policing trademarks could be considerably easier if domain name databases were readily searchable through a common interface to determine who holds those domain names, and how to contact a domain name holder." 63 Fed. Reg. at 8829. Likewise the agency stated that "databases also could be kept up to date by a requirement that domain name registrants maintain up-to-date contact information." <u>Id</u>. at 8830.

If there could be any doubt that the NTIA provided adequate notice concerning the contact information requirement in its initial proposals, a later notice contains an even more explicit recitation of the information required for inclusion in the WHOIS database. Explaining the requirements that it intended to include in a later statement of work for managing the ".us" domain, JA 481-85, the NTIA published an August 22, 2000 notice in the Federal Register noting that the WHOIS database must contain, among other things, "[t]he name and postal address of the usTLD domain name holder," and "[t]he name, postal address, e-mail address, voice telephone number and (where available) fax number" of both a "technical" and "administrative contact for the usTLD domain name." 65 Fed. Reg. 50964, 50967 (Aug. 22, 2000). No mention of proxy registration is made in this notice; to the contrary, the notice plainly requires the domain name holder himself to provide the contact information. Moreover, by requiring this information in addition to "[t]he identity of the usTLD registrar under which the name is registered," ibid., the clear implication of the notice is that a registrar cannot act as a proxy for the actual domain name holder.

Plaintiff largely ignores these and other statements in the initial rulemaking which made clear that registrants of ".us" domain names would be required to provide direct contact information for inclusion in the WHOIS database. Instead, plaintiff insists that, because the agency did not initially anticipate that some registrants might attempt to circumvent the contact information requirement by using "proxy" registrations, the agency was powerless to address that issue when it arose. But the NTIA was not required to address every conceivable enforcement issue in its initial rulemaking; it was sufficient for the agency to provide notice of the contact information requirement and enforce it as needed.

Likewise, plaintiff's contention that "NTIA's agent, NeuStar, was aware of proxy registrations" and allowed them, Pl. Br. 52, provides no basis for cabining the agency's enforcement authority. Contrary to plaintiff's characterization, NeuStar is not an "agent" of the government. NeuStar is simply a government contractor charged with fulfilling the obligations set forth in its contract for managing the ".us" domain, see JA 320, and it properly complied with the NTIA's directives to prohibit proxy registrations once the issue arose.

C. Finally, even if the public contracts exemption from notice-and-comment rulemaking were inapplicable, and even if this Court concludes that the NTIA was not entitled to enforce the contact information requirement without first undertaking an entirely new rulemaking, the district court could properly have declined to enjoin enforcement of the contact information requirement pending a remand to the NTIA for additional rulemaking. See Sugar Cane Growers Cooperative v. Veneman, 289 F.3d 89, 97-98 (D.C. Cir. 2002) (noting that courts have wide discretion in deciding whether to vacate procedurally invalid rule pending remand to agency). Thus, even if plaintiff's APA claim had merit – which it does not – that claim would provide no basis for overturning the court's judgment that injunctive relief was not warranted in this case.

CONCLUSION

For the foregoing reasons, the judgment of the district should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2006, I caused copies of the foregoing Brief for the Federal Appellees to be sent by Federal Express next-day delivery to:

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