NOS. 11-17827, 11-17830, 11-17834

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOES,

APPELLANTS - PLAINTIFFS,

V.

SECURITIES AND EXCHANGE COMMISSION,

RESPONDENT - APPELLEE.

On Appeal From The United States District Court
For The Northern District of California
Case Nos. 3:11-mc-81208-CRB, 3:11-mc-80184-CRB, and 3:11-mc-80209-CRB
Honorable Charles R. Breyer, United States District Judge

UNOPPOSED AMICUS BRIEF OF THE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF APPELLANT

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus curiae Electronic Frontier Foundation states that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of the stock of amicus.

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STATEMENT OF INTEREST

The Electronic Frontier Foundation ("EFF") is a nonprofit, member-supported civil liberties organization working to protect rights in the information society. EFF actively encourages and challenges government and the courts to support privacy and safeguard individual autonomy as emerging technologies become more prevalent in society. As part of its mission, EFF has often served as counsel or amicus in privacy cases, such as *U.S. v. Jones*, 132 S. Ct. 945 (2012), *NASA v. Nelson*, 131 S. Ct. 746 (2011), and *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010). EFF has additionally been counsel or amicus in a wide range of cases addressing the scope of online anonymity protections. *See, e.g., USA Technologies v. Doe*, 713 F. Supp. 2d 901 (2010); *Mick Haig Productions, e.K. v. Does*, 3:10-CV-1900-N, 2011 WL 5104095 (N.D. Tex. Sept. 9, 2011); *Ron Paul 2012 Presidential Campaign Committee, Inc. v. Does*, No. 12-cv-00240-MEJ (N.D. Cal. Mar. 3, 2012). EFF believes that its perspective will assist the Court in its evaluation of the important issued raised in this case.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no one, except for undersigned counsel, has authored the brief in whole or in part, or contributed money towards the preparation of this brief.

Amicus curiae has obtained the consent of both the Appellants and Appellees to file its brief.

I. INTRODUCTION

The right to speak anonymously is a right deeply embedded in the political and expressive history of this country. Far from a pernicious or scandalous activity, the ability to express one's opinions unmoored from the context of identity encourages additional participation in the public sphere by those who might otherwise be discouraged from doing so. As the Supreme Court held in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995), "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." Whatever the motivation of an anonymous speaker may be to shield his or her identity, the First Amendment provides a layer of protection to ensure that that expressive exercise is not unduly impinged upon or otherwise chilled.

Anonymous speech can, of course, be used for improper purposes or to otherwise hide undesirable or even unlawful behavior. In circumstances in which unmasking an anonymous speaker is necessary to pursue justice through the legal process, the First Amendment can and does give way. However, to ensure that allegations of misconduct are not used as a pretext to intrude upon constitutionally-protected spaces, the First Amendment requires that attempts to pierce anonymity be based on (among other things) the production of competent evidence. Only by

requiring a person or entity seeking to unmask a speaker to provide some modicum of proof to support the asserted claim on interest can courts assure that the First Amendment interests at stake are properly balanced against the purported need to obtain identity information. The alternative – that identity information be made available upon surmise, conjecture, or hypothetical concerns – runs afoul of core First Amendment principles.

In the immediate case, the Securities and Exchange Commission seeks to obtain the identities of anonymous speakers based not on any evidentiary showing but on its own conclusory assertions that the information is needed to investigate misconduct. The SEC may indeed be justified in seeking this information; however, its evidentiary showing to date is insufficient to satisfy the modest requirements of the First Amendment. *Amicus curiae* the Electronic Frontier Foundation urges the Court to grant Appellants' appeal, to overturn the district court, and to clearly state that any attempt by a federal agency to obtain identity information by means of an administrative subpoena must be supported by an affirmative evidentiary showing before or else that subpoena must be quashed.

II. BACKGROUND

In June of 2011, pursuant to § 20(a) of the Securities Act of 1933 (15 U.S.C. § 77a, *et seq.*) and § 21(a) of Securities Exchange Act of 1934 (15 U.S.C. § 78a, *et seq.*), the Securities and Exchange Commission ("SEC") issued an administrative

subpoena seeking the identity of the pseudonymous user ("John Doe") of the e-mail account marketingacesinc@gmail.com, a free e-mail account provided by Google. ER 58-60.[1]

John Doe filed a motion to quash in the District Court for the Northern District of California on August 18, 2011. On October 4, 2011, Magistrate Judge Nandor Vadas denied the motion. ER 1-9.

Upon request for *de novo* determination, District Judge Charles Breyer affirmed Vadas's denial of the motion to quash on November 17, 2011. ER 10-18. While he overturned Magistrate Judge Vadas and found that John Doe had indeed identified a First Amendment interest implicated by the SEC's investigation – John Doe's ability to speak anonymously – Judge Breyer nevertheless found that the SEC had made a sufficient showing to overcome that interest. ER 14-15.

On November 21, 2011, Appellant-Plaintiff filed his notice of appeal. ER 95.

[1] Similar to the Appellants in their combined opening brief, *Amicus* here discusses the specific facts of John Doe Appellant-Plaintiff in the lead case *Doe v. SEC*, 3:11-mc-80208-CRB (N.D. Cal. Nov. 17, 2011), ECF No. 28, *appeal docketed*, No. 11-17827 (9th Cir. Nov. 23, 2011). The facts regarding the John Doe Appellants-Plaintiffs in case numbers 11-17830 and 11-17834 are substantively identical, and arguments made herein are similar to those regarding the Appellants-Plaintiffs there.

III. ARGUMENT

A. The Right to Engage in Anonymous Speech is Protected By the First Amendment.

Under the broad protections of the First Amendment, speakers have not only a right to speak but also the right to do so anonymously. Accordingly, the First Amendment requires that those who seek to unmask anonymous speakers – online or otherwise – demonstrate a compelling need for such identity-related information before obtaining such discovery. While the SEC may (or may not) be able to meet that standard, it has not demonstrated *with evidence* that it can meet it here. Absent any relevant evidentiary showing demonstrating its asserted need for the information, and therefore absent any basis on which the Court can evaluate the appropriateness of the agency's exercise of its subpoena power, the SEC's attempt to compel the production of First Amendment protected material must fail.

1. The Right to Speak Anonymously Is Constitutionally Protected Against the Improper Exercise of Government Authority.

The United States Supreme Court has consistently defended the right to anonymous speech in a variety of contexts, noting that "[a]nonymity is a shield from the tyranny of the majority . . . [that] exemplifies the purpose [of the First Amendment] to protect unpopular individuals from retaliation . . . at the hand of an intolerant society." *McIntyre,* 514 U.S. at 357. *See also*, *id*. at 342 ("[A]n author's decision to remain anonymous, like other decisions concerning omissions

or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."); *Talley v. California*, 362 U.S. 60, 64 (1960) (Finding a municipal ordinance requiring identification on hand-bills unconstitutional, noting that "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind."). Anonymity receives the same constitutional protection whether the means of communication is a political leaflet or an Internet message board. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) (There is "no basis for qualifying the level of First Amendment protection that should be applied to" the Internet). *See also*, *Doe v. 2theMart.com, Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) ("The right to speak anonymously extends to speech via the Internet. Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas."). And as discussed below, these fundamental rights protect anonymous speakers from forced identification without properly demonstrated justification, be they from overbroad statutes, unwarranted discovery requests, or improper exercises of agency power.

2. Anonymous Speakers Enjoy a Qualified Privilege Under the First Amendment.

Because the First Amendment protects anonymous speech and association, efforts by the government to compel the production of identity information to pierce anonymity are subject to a qualified privilege. Courts must "be vigilant . . . [and] guard against undue hindrances to . . . the exchange of ideas." *Buckley v.*

Am. Constitutional Law Found., 525 U.S. 182, 192 (1999). This vigilant review "must be undertaken and analyzed on a case-by-case basis" where the court's "guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue." *Dendrite Int'l v. Doe No. 3*, 775 A.2d 756, 761 (N.J. App. 2001).

The application and scope of First Amendment protections for anonymous speech have been most frequently adjudicated in the civil discovery context. Just as in other cases in which litigants seek information that may be privileged, courts have repeatedly held that they must consider the First Amendment privilege before authorizing discovery. *See, e.g., Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987) (*citing Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977)) ("[W]hen the subject of a discovery order claims a First Amendment privilege not to disclose certain information, the trial court must conduct a balancing test before ordering disclosure."). The rationale for such pre-disclosure evaluation of the sufficiency of the showing by a party seeking disclosure is clear: given the potential for abuse, the chilling effect on other speakers, and the inability to compensate for the loss of protected First Amendment rights post-disclosure, courts must determine if the exercise of power is justified based on the facts of the given case. As the District Court for the Northern District of California described in an early Internet anonymity case, "[p]eople who have committed no wrong

should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity." *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

The constitutional privilege to remain anonymous is not absolute. The disclosure of identity information may, for example, be compelled to pursue meritorious litigation. *See id*. at 578 (First Amendment does not protect anonymous Internet users from liability for tortious acts such as defamation); *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005) ("Certain classes of speech, including defamatory and libelous speech, are entitled to no constitutional protection."). However, First Amendment rights to speak anonymously cannot be trumped for frivolous reasons – such as to uncover the identities of people who have merely made statements the litigants dislike – or justifications based solely on speculation. Accordingly, courts asked to unmask anonymous speakers must balance one person's right to speak anonymously with the purported need for the information.

3. Attempts to Compel the Disclosure of a Speaker's Identity Must Be Based on the Production of Competent Evidence Supporting the Purported Need for the Information.

Courts around the country, including this one,[2] have overwhelmingly endorsed or otherwise approved of tests demanding the production of at least some

[2] *See In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011).

evidentiary basis to support the underlying legal theories prior to the piercing of online anonymity. The seminal case for this proposition is *Dendrite Int'l, Inc. v. Doe No. 3*, in which the New Jersey Appellate Division adopted the following frequently-cited test[3] for protecting anonymous speakers: (1) make reasonable efforts to notify the accused Internet user of the pendency of the identification proceeding and explain how to present a defense; (2) set forth the exact statements that Plaintiff alleges constitutes actionable speech; (3) allege all elements of the cause of action and introduce prima facie evidence within the litigant's control sufficient to survive a motion for summary judgment; and, (4) "[f]inally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to

[3] For examples of court opinions in which courts have required an evidentiary showing prior to the compelled disclosure of online identity information, *see*, *e.g.*, *Mobilisa, Inc. v. Doe*, 170 P.3d 712 (Ariz. Ct. App. 2007); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008); *Indep. Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009), *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009); *Mortgage Specialists v. Implode-Explode Heavy Indust.*, 999 A.2d 184 (N.H. 2010); *Highfields Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005); *Doe I and Doe II v. Individuals*, 561 F. Supp. 2d 249 (D. Conn. 2008); *Best Western Int'l v Doe*, No. CV-06-1537-PHX-DGC, 2006 WL 2091695 (D. Ariz. Jul. 25, 2006); *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128 (D.D.C. 2009); and *Salehoo Grp., Ltd. v. ABC Co.*, 722 F. Supp. 2d 1210 (W.D. Wash. 2010).

properly proceed." *Dendrite*, 775 A.2d at 760-61. Critically, merely articulating the *plausible* existence of a valid claim was insufficient to support such compelled disclosure. Rather, in order to give practical effect to First Amendment interests in anonymity, as well as to guard against abuse, the *Dendrite* court and its progeny held that the First Amendment required evidence rather than conjecture before its protections would give way.

B. The SEC Cannot Unmask Anonymous Online Speakers Absent an Evidentiary Showing Supporting a Compelling State Interest.

The SEC has "broad authority" to investigate violations of federal securities laws. *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 741, 743, 745 (1984). Indeed, that authority extends to the investigation of possible future violations as well as violations that have already occurred. 15 U.S.C. §§ 78u(a), (b) (The Commission may "make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate" any SEC rules or regulations, and may demand to inspect any documents "the Commission deems relevant or material to the inquiry."). However, just as it protects anonymous speakers from unsupported civil discovery requests, so too does the First Amendment protect such speakers against speculative agency investigations. Where "an investigation … intrudes into the area of constitutionally protected rights of speech, press, association and petition," the government must "convincingly show a substantial relation between the information sought and a

subject of overriding and compelling state interest." *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963). *See also id.* at 546 ("this case hinges entirely on the question of whether the evidence before the Committee (was) … sufficient to show" the requisite nexus with the asserted need for the information); *In re Grand Jury Subpoenas Duces Tecum.*, 78 F.3d 1307, 1312 (8th Cir. 1996) ("A grand jury subpoena will be enforced despite a First Amendment challenge if the government can demonstrate a compelling interest in and a sufficient nexus between the information sought and the subject matter of its investigation."). An agency's attempted use of power, even under broad authority, must fail absent a proper evidentiary basis that a court can evaluate. Here, the SEC cannot support its attempt to compel the disclosure of identity information with specific, competent evidence. Accordingly, the District Court's decision should be overturned and the subpoena quashed.

1. The SEC Cannot Satisfy the Evidentiary Requirements Set Forth In *Brock v. Local 375 Plumbers Int'l Union of Am., AFL-CIO*.

Notwithstanding the explicitly broad grant of authority to the SEC, the Ninth Circuit correctly requires that administrative subpoenas comply with the limitations imposed by the First Amendment. If the party whose rights are implicated by the administrative subpoena makes a prima facie showing of First Amendment infringement, "the evidentiary burden will then shift to the

government" to show that the "enforcement of the subpoenas is rationally related to a compelling governmental interest." *Brock v. Local 375 Plumbers Int'l Union of Am., AFL-CIO*, 860 F.2d 346, 350 (9th Cir. 1988). To establish a prima facie showing, a party must "demonstrate that enforcement of the subpoenas will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or "chilling" of, the members' associational rights." *Id*. (citing *O'Neal v. United States*, 601 F. Supp. 874, 878 (N.D. Ind. 1985)). Once the prima facie showing has been made, "the evidentiary burden will then shift to the government" to show that (1) the information sought through the subpoenas is rationally related to a compelling governmental interest, and (2) that the government's disclosure requirements are the "least restrictive means" of obtaining the desired information. *Brock*, 860 F.2d at 350.

The government cannot satisfy the *Brock* standard here.

As an initial matter, the Doe Appellants have plainly identified a First Amendment interest that would be infringed by compliance with the SEC's subpoena: their right to anonymous speech. As Judge Breyer noted in his opinion, citing to the declaration provided by the Appellant, "Here, Doe has chosen not to use his real name or publish his identifying information in connection with the email address, in order to protect his privacy. … This suffices as a First

Amendment interest." ER 13. Indeed, the entire body of case law regarding the appropriate level of protection to afford anonymous online speakers in the civil discovery context is premised on the correct finding that anonymous speech is a protectable First Amendment interest. *See*, *e.g.*, *supra* note 3. Accordingly, under *Brock*, the "evidentiary burden" then shifts back to the government.

The government offers four observations in an unsuccessful attempt to meet that burden. First, the SEC notes that the share price for Jammin' Java, Inc. stock rose from $0.17 to $6.35 in a five month span and then "plummeted to less than a dollar per share." ER 64. Second, the SEC notes that Jammin' Java is a "shell company," one that has not generated any revenue since its inception. ER 64. Third, "the rapid increase in Jammin' Java's share price coincided with the wide dissemination of online newsletters touting Jammin' Java's stock." *Id.* Finally, as part of an investigation into "whether the newsletters contained materially misleading information about Jammin' Java and its stock and/or failed to accurately disclose the disseminators' financial interests," the SEC is "seeking information about who sent and is responsible for the newsletters that touted Jammin' Java's stock and has obtained information indicating that the email address [of Doe] potentially belongs to a touter in a 'pump and dump' scheme." *Id.*

While the SEC's investigation may (or may not) eventually prove fruitful and its theories prove correct (or not), none of the information provided by the SEC meets the required First Amendment evidentiary threshold. What little information it does provide instead amounts to unsupported speculation. *See, e.g., Gibson*, 372 U.S. at 557 ("Of course, a legislative investigation – as any investigation – must proceed 'step by step,' … but step by step or in totality, an adequate foundation for inquiry must be laid before proceeding in such a manner as will substantially intrude upon and severely curtail or inhibit constitutionally protected activities or seriously interfere with similarly protected associational rights.") (internal citations removed). The government declines, for example, not only to include the "online newsletters touting Jammin' Java's stock" on which the investigation appears to be based for the Court to review, but also to identify when they were published, or what the specific allegedly suspicious contents were. Similarly, it fails to explain with any specificity what John Doe has to do with the matter, whether the SEC believes that Doe was somehow connected with authoring the newsletters, and what information leads the SEC to the conclusion that Doe's e-mail address "potentially belongs to a touter in a 'pump and dump' scheme." The SEC has identified a series of disparate facts and has, without explanation or detail, added its unsupported conclusions. Such naked conclusions hardly amount to *evidence* indicating a rational relationship to a compelling governmental interest.

See id. at 555-56 ("The respondent Committee has laid no adequate foundation" for obtaining protected membership as it provided minimal support to support its theories. "The strong associational interest in maintaining the privacy of membership lists of groups engaged in the constitutionally protected free trade in ideas and beliefs may not be substantially infringed upon such a slender showing as here made by the respondent.").

2. The Requirement to Provide an Evidentiary Basis for the Use of Administrative Subpoenas is Not Burdensome and Does Not Require that the Agency Prove Its Case Before Investigating.

The First Amendment requirement that the government support with evidence its stated need to subpoena information is not arduous. As courts have explained in cases addressing attempts to obtain online identity information through the use of discovery subpoenas, such a requirement is designed to provide a modicum of protection to a speaker whose First Amendment right to anonymity would be irrevocably lost once his or her identity was disclosed. This requirement merely mandates the disclosure of evidence within the issuing party's control in order to demonstrate that a material issue of fact exists and to preclude efforts to intrude into constitutionally-protected spaces based wholly on speculation. *See*, *e.g.*, *Doe v. Cahill*, 884 A.2d at 463.

In rejecting the Plaintiffs-Appellants' motions to quash, and permitting the agency to simply posit arguments in support of its investigation, the District Court

effectively endorsed a standard by which the SEC can pierce the anonymity of online speakers based entirely on the speculation of the agency. This standard fails the requirements of the First Amendment. *See*, *e.g.*, *Gibson*, 372 U.S. at 546 (requiring the government to "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.").

Moreover, the District Court flatly misstated the minimal requirements imposed under the "summary judgment" standard used by courts evaluating anonymity rights in other online speech contexts. Applying this standard would not in any way "cut off the investigative legs of federal crime enforcement agencies," nor would it "force the SEC to prove that a person committed securities fraud before the agency could even seek the identify of that person."[4] ER 17-18.

[4] The District Court's citation to *In re § 2703(d) Order*, 787 F. Supp. 2d 430 (E.D. Va. 2011) for the proposition that government entities may obtain identity information under a standard less taxing that the "summary judgment" standard discussed above is inapposite and again expresses a mistaken understanding of the competing standards. 18 U.S.C. § 2703(d), a provision of the Stored Communications Act, explicitly *requires* that evidentiary support be provided to justify the compelled disclosure of subscriber information of customers of telecommunications providers. Under section 2703(d), the government must offer "*specific and articulable facts* showing that there are reasonable grounds to believe that … the records or other information sought … are relevant and material to an *ongoing criminal investigation*." (emphasis added). Whether an order compelling the disclosure of identity information under section 2703(d) is granted hinges, then, on the sufficiency of the evidentiary showing and the existence of an ongoing criminal investigation. Appellant correct argues, in addition to any statutory requirements, that the First Amendment itself at minimum requires an evidentiary showing to support the compelled production of identity information pursuant to an

Rather, the standard would require the issuing party to make a sufficient showing allowing it to "withstand" a motion for summary judgment – that is, at minimum, to demonstrate a genuine issue of material fact – so that the court could be satisfied that a claim had a basis in reality. *See*, *e.g.*, *Cahill*, 884 A.2d at 463. The District Court's interpretation of the standard, apparently one in which the issuing party would have to provide evidence sufficient to prevail upon an *affirmative* summary judgment motion, is simply incorrect and sets the investigatory bar far higher than the standards suggested by either Appellants or prior case law. The First Amendment protection at issue amounts to a check to ensure that there is a nexus between the agency's broad exercise of discretion and the facts of the matter, not a bar that would inhibit legitimate investigations.

IV. CONCLUSION

"An administrative subpoena … may not be so broad so as to be in the nature of a 'fishing expedition.'" *Peters v. United States*, 853 F.2d 692, 700 (9th Cir. 1988). While the information sought in the subpoena at issue in this case is certainly specific, the evidentiary justification for the subpoenas is anything but. The government may not simply unilaterally assert that its motivations are proper and justified without the Court reviewing the basis for its claims. *See*, *e.g.*, *United*

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administrative subpoena. Whatever the alleged government interest at stake, it cannot merely be posited but instead must be supported by evidence.

States v. Morton Salt Co., 338 U.S. 632, 652 (1950) ("Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power . . ."") (citing *FTC v. Am. Tobacco Co.*, 264 U.S. 298 (1924)). Here, the Court has no evidentiary basis upon which to evaluate the agency's exercise of authority. Absent a sufficient (non-speculative) evidentiary justification for violating the First Amendment anonymity interests of the John Doe Appellants, the District Court's decision should be overturned. As the Supreme Court has cautioned, "justifiable governmental goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press, or association." *Branzburg v. Hayes*, 408 U.S. 665, 680-81 (1972). Absent a relevant evidentiary showing, the compelled identification of the targets of the subpoenas would result in just such an unnecessary impact.

Dated: March 21, 2012

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**CERTIFICATE OF COMPLIANCE
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PURSUANT TO FED. R. APP. P. 32(a)(7)(C)**

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Unopposed Amicus Brief of the Electronic Frontier Foundation in Support of Appellant complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,252 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 21, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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