


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

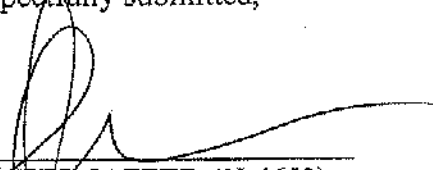
 AMERICAN CIVIL
LIBERTIES UNION; and AMERICAN CIVIL
LIBERTIES UNION FOUNDATION,

Plaintiffs,

**PETITION TO SET ASIDE
DEMAND FOR RECORDS**

04 Civ. 2614 (VM)

Respectfully submitted,



JAMEL JAFFER (JJ-4653)
ANN BEESON (AB-2082)
MELISSA GOODMAN (MG- 7844)
National Legal Department
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

ARTHUR N. EISENBERG (AE-2012)
New York Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004

September 8, 2006

11

AMERICAN CIVIL
LIBERTIES UNION; and AMERICAN CIVIL
LIBERTIES UNION FOUNDATION,

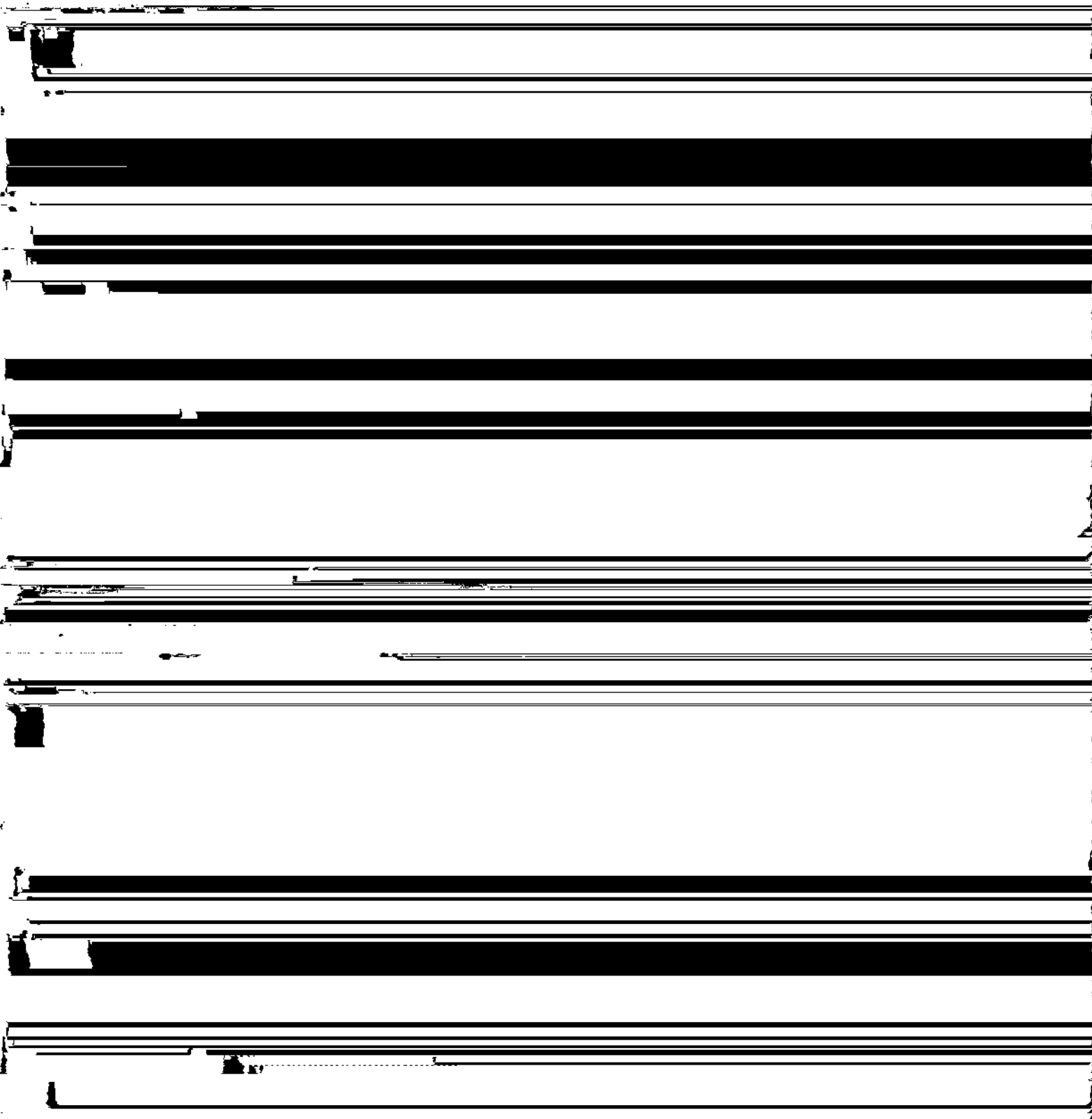
MEMORANDUM IN SUPPORT OF
PLAINTIFFS' PETITION TO SET
ASIDE DEMAND FOR RECORDS

Plaintiffs,

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....i

INTRODUCTION.....1



CASES

Bates v. City of Little Rock, 361 U.S. 516 (1960).....7

Best Western Int'l, Inc. v. Doe, 2006 WL 2091695.....4, 9

Branzburg v. Hayes, 408 U.S. 665 (1972).....7

Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982)7

Buckley v. American Constitutional Law Found., 525 U.S. 182 (1999)3, 4

Columbia Ins. Co. v. Oceanic Indemnity Corp., 195 F.2d 572 (1st Cir. 1954) 1, 2, 10

<i>Reno v. ACLU</i> , 521 U.S. 844 (1997)	4
<i>Rocker Mgmt. LLC v. Does 1-20</i> , No. 03-MC-33, 2003 WL 22149380 (N.D. Cal. 2003)	9
<i>Secretary of State of Maryland v. J.H. Munson Co.</i> , 467 U.S. 947 (1984)	1
<i>Shelton v. Tucker</i> , 364 U.S. 479 (1960)	7
<i>Sony Music Entm't Inc v Does 1-40</i> 326 F Supp 2d 556 (S.D.N.Y. 2004)	9

<i>Talley v. California</i> , 362 U.S. 60 (1960)	3, 4
<i>United States v. Morton Salt Co.</i> , 338 U.S. 632 (1950)	11
<i>United States v. Powell</i> , 379 U.S. 48 (1964)	11
<i>Virginia v. American Booksellers Ass'n, Inc.</i> , 484 U.S. 383 (1988)	1
<i>Watchtower Bible and Tract Soc. of New York v. Village of Stratton</i> , 536 U.S. 150 (2002)	3, 7

STATUTES

18 U.S.C. § 2709	1, 9
18 U.S.C. § 3511	1, 2

INTRODUCTION

As detailed in Plaintiffs' Second Amended Complaint ("SAC"), filed July 24th, 2006, an

[REDACTED]

form of a national security letter ("NSL") under 18 U.S.C. § 2709, on plaintiff [REDACTED]

[REDACTED] via its President and [REDACTED], in [REDACTED]

The NSL directed [REDACTED] to disclose the name, [REDACTED] addresses, [REDACTED]

[REDACTED] and other sensitive information relating to one of [REDACTED] clients. See Second

addresses, lengths of service and electronic communication transactional records, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

a. The First Amendment protects anonymous speech and association on the Internet.

The First Amendment protects against the compelled identification of an anonymous speaker. See *Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 164-65 (2002) (striking down ordinance requiring individuals to obtain permit prior to engaging

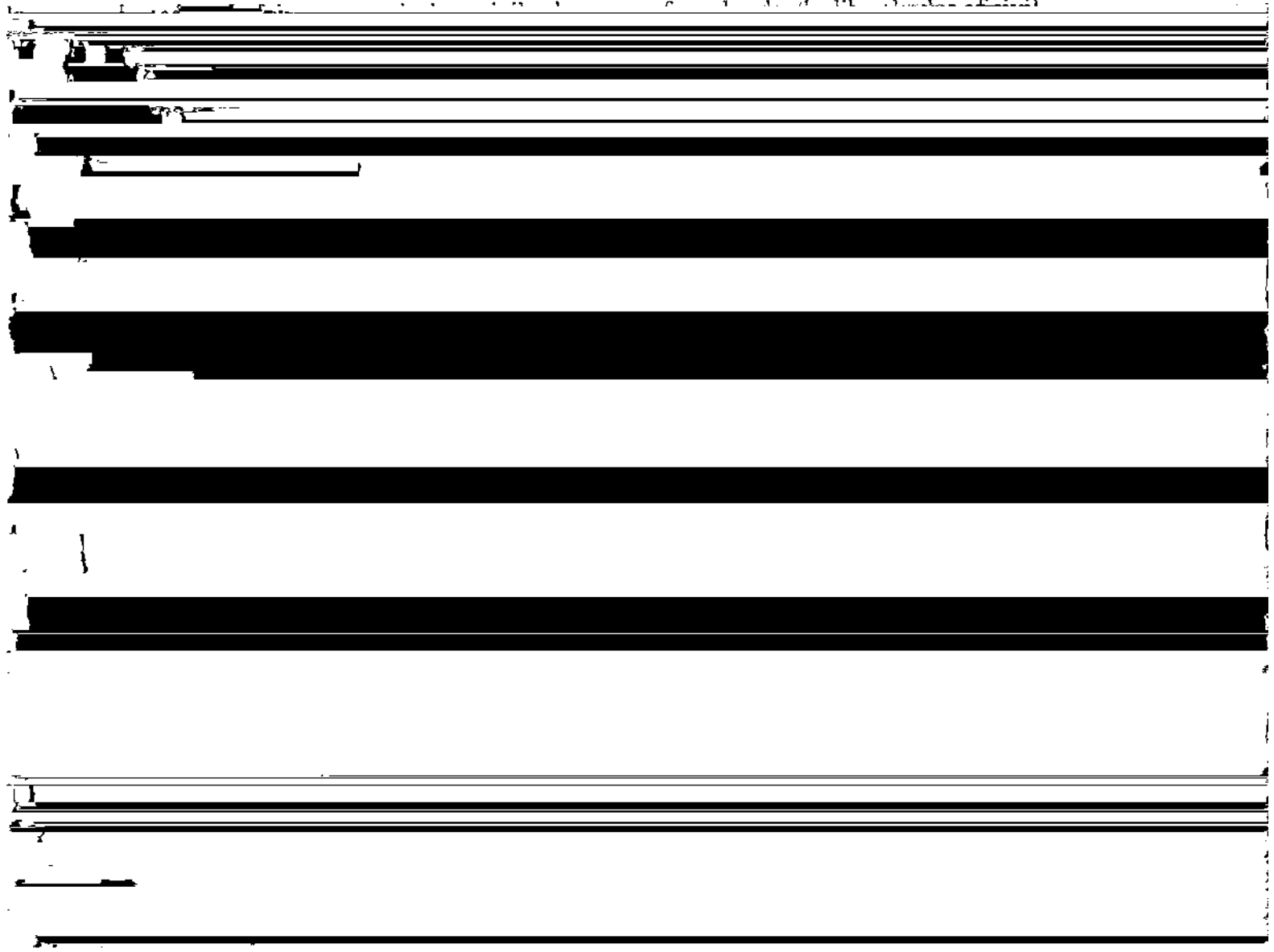
See also *Id.*, 536 U.S. 150, 160-161 (2002) (striking down ordinance requiring individuals to obtain permit prior to engaging

200 (1999) (striking down statute requiring petition circulators to wear identification badge

pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.”); *id.* (“Anonymity is a shield from the tyranny of the majority. . . . It thus

that speech over the internet is entitled to First Amendment protection. Anonymous internet speech in blogs or chat rooms in some instances can become the modern equivalent of political pamphleteering.” (footnotes omitted)); *see also, e.g., Doe v. 2theMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001); *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756, 765 (N.J. Super. Ct. App. Div. 2001); *Polito v. AOL Time Warner, Inc.*, 2004 WL 3768897, at *3 (Pa. Com. Pl. Jan. 28, 2004).

As one court cogently explained, the right to speak anonymously is particularly important in the unique context of the Internet. “The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously. If Internet users could



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

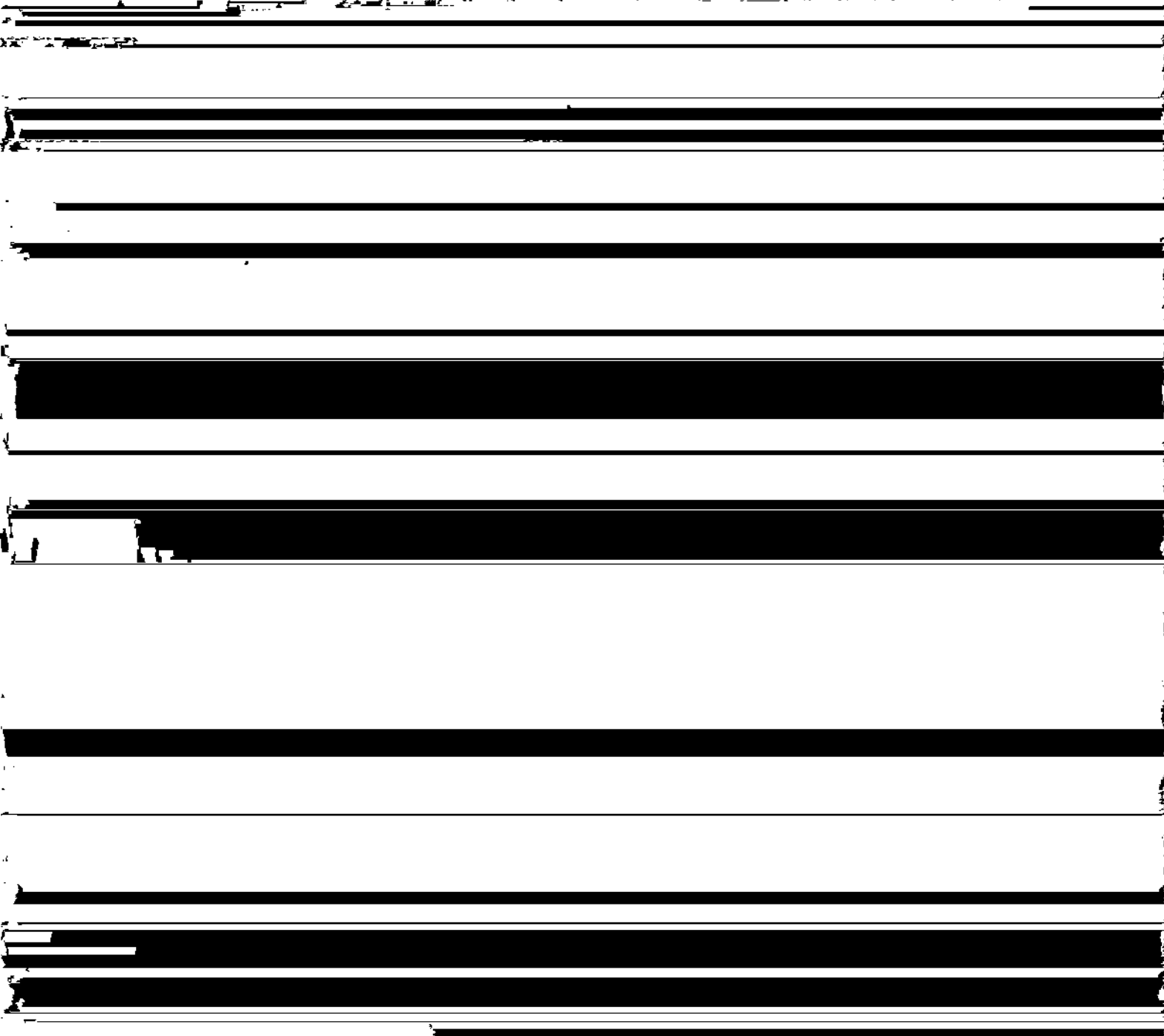
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

entered against the NAACP for its refusal to disclose the identities of its Alabama members to the state Attorney General, as required by a state statute. The Court overturned the judgment, finding that the state had not demonstrated a compelling need for the membership list. See 357 U.S. 449, 464-66 (1958). In *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963) the Supreme Court considered the constitutionality of a contempt judgment entered against the president of the NAACP's Miami branch for refusing to comply with a legislative



As there is “no basis for qualifying the level of First Amendment scrutiny that should be applied” to the Internet, *Reno v. ACLU*, 521 U.S. at 870, it stands to reason that the same level of scrutiny applicable generally to intrusions on the First Amendment rights to speak and to associate anonymously is equally applicable when those rights are exercised over the Internet.

Indeed, *as the courts have held*. For example, the court in *Doan v. TheMart.com* admonished

that “discovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts,” 140 F. Supp. 2d at 1093, and concluded more specifically that disclosure of an anonymous speaker’s identity “is only appropriate in the exceptional case where the compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker,” *id.* at 1095. “[M]indful that it [was] imposing a high burden,” *id.* at 1095,

to justify discovery of Internet user's identity); *Cahill*, 884 A.2d at 460 (requiring defamation plaintiff to satisfy summary judgment standard to justify discovery of Internet user's identity); *see also, e.g., Best Western*, 2006 WL 2091695, at *4 (following *Cahill*); *Highfields Capital*

Mgmt. LLC v. Does 1-20, No. 03-MC-33, 2003 WL 22149380, at *1 (N.D. Cal. 2003) (following *seescandy.com*); *cf. Sony Music Entm't, Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 564-65

(S.D.N.Y. 2004) (applying heightened scrutiny using hybrid of other courts' factors, even though expression at issue "qualifie[d] as speech, but only to a degree" and therefore was entitled to only "limited" First Amendment protection).

§ 87(2)(b) cannot stand unless the

relevance. The government has not met its burden here.⁴

II. THE [REDACTED] NSL VIOLATES THE FOURTH AMENDMENT

[REDACTED]

■

[REDACTED]

Applying these standards, the [REDACTED] NSL fails the reasonableness test because

[REDACTED] [REDACTED] to obtain is likely no longer relevant to the FBI's investigation. The

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

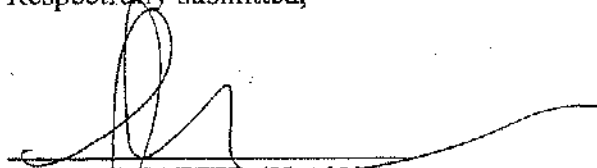
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Respectfully submitted,



JAMEEL JAFFER (JJ-4653)

ANN BEESON (AB-2082)

MELISSA GOODMAN (MG- 7844)

National Legal Department

American Civil Liberties Union Foundation

125 Broad Street, 18th Floor

