Case No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

IN RE: KYLE GOODWIN

Petitioner.

Petition for Writ of Mandamus to the
United States District Court for the Eastern District of Virginia in
United States of America v. Kim Dotcom, et al., No. 1:12-cr-00003-LO

PETITION FOR WRIT OF MANDAMUS ON BEHALF OF KYLE GOODWIN

John S. Davis
WILLIAMS MULLEN
200 So. 10th St.
Richmond, VA 23218
(804) 420-6296
jsdavis@williamsmullen.com

Mitchell L. Stoltz
Counsel of Record
Corynne McSherry
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
(415) 436-9333
mitch@eff.org

Abraham D. Sofaer
THE HOOVER INSTITUTION
Stanford University
434 Galvez Mall
Stanford, CA 94305-6010
(650) 723-1754
asofaer@stanford.edu

Attorneys for Petitioner Kyle Goodwin

STATEMENT REGARDING ORAL ARGUMENT

Petitioner Kyle Goodwin requests oral argument on this Petition.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure Rule 26.1 and Local Rule 26.1, Petitioner submits the following disclosures:

Kyle Goodwin is a natural person. His business, OhioSportsNet, has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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RELIEF SOUGHT

Petitioner Kyle Goodwin, by his attorneys, petitions this Court for a writ of mandamus under 28 U.S.C. § 1651(a) and Federal Rule of Appellate Procedure 21, directing the District Court for the Eastern District of Virginia to rule on Mr. Goodwin's May 25, 2012 Motion for Return of Property.

ISSUES PRESENTED

1. Whether the U.S. government, in the course of executing a search warrant, can deny innocent third parties access to their valuable digital property for almost five years (and counting) without creating a process for the return of that property.

2. Whether the district court must rule on Mr. Goodwin's 41(g) motion for return of property without further delay, when delay risks the permanent loss of that property.

STATEMENT OF FACTS

I. OHIOSPORTSNET AND MEGAUPLOAD

Until January 19, 2012, Megaupload was an online service that allowed users to store, retrieve, and share digital data.

Petitioner Kyle Goodwin owns and operates OhioSportsNet, a videography business he founded in 2011 that covers local high school sporting events. Exhibit A, Declaration of Kyle Goodwin ("Goodwin Decl.") ¶ 1. As part of the business, Mr. Goodwin and his producers travel all over the state and film various high

school sports games. *Id.* at ¶ 2.

In order for Mr. Goodwin and his producers to share tape of the games—to prepare that tape for streaming and to create related promotional and news packages—they must exchange the large video files electronically. *Id.* at ¶ 3. For example, in November 2011, OhioSportsNet was the only outfit to cover, via video, the state high school soccer finals. *Id.* at ¶ 4. During the early rounds of those playoffs, multiple games occurred on the same night, which meant OhioSportsNet had to dispatch crews to film each game. *Id*. The logistics behind sharing these and other recordings in short order were challenging, and required a technical means for exchanging large files over the Internet. *Id.* at ¶ 5. Megaupload's cloud storage service seemed to offer an ideal solution. Mr. Goodwin registered a premium account there, allowing him to upload and store files of unlimited size. *Id.* Mr. Goodwin paid 79.99 euros for his two-year premium Megaupload membership. *Id.*

II. OHIOSPORTSNET'S BACKUP POLICIES AND MEGAUPLOAD'S CRASH

Mr. Goodwin backed up all the raw footage of the sporting events, player and coach interviews, and promotional packages on a personal hard drive. *Id.* at ¶ 8. Mr. Goodwin believed that between his own hard drive backups and Megaupload's cloud storage service, he was protecting the files he needed to continue to grow his business. However, as luck would have it, in mid-January of

2012, his hard drive crashed. *Id.* Upon learning that the files on his hard drive could not be recovered, Mr. Goodwin logged into Megaupload to pull his files off the server and save backup copies to replace those he had lost. To his surprise, he could not get past the welcome screen. *Id* at ¶ 9. Unbeknownst to Mr. Goodwin, federal agents had shut down Megaupload's service and seized the servers that housed Mr. Goodwin's files.

The shutdown of Megaupload's service and seizure of its assets on January 19, 2012 on charges of copyright infringement, money laundering, and racketeering was widely publicized. Indeed, it made international news. On that date, the U.S. District Court for the Eastern District of Virginia unsealed an indictment dated January 5, 2012. Exhibit B. With much fanfare, the government, with representatives of foreign law enforcement agencies, raided the homes of several people associated with Megaupload and seized bank accounts, jewelry, cars, and other valuable goods. In addition to the seizures, the government executed search warrants for two groups of computer servers which Megaupload had leased and on which it stored Mr. Goodwin's—and its other customers'—data. One group of more than 1,000 servers was owned by Carpathia Hosting. Exhibit C, Carpathia Hosting, Inc.'s Memorandum of Law in Support of its Motion for Protective Order at 2 ("Carpathia Mot."); Exhibit D, January 27, 2012 Letter from Jay V. Prabhu ("Prabhu Letter"). The other is owned by Cogent Corporation.

Exhibit E, Brief in Support of Plaintiffs' Motion for Entry of Preservation Order at 1, *Twentieth Century Fox Film Corp. v. Megaupload Limited*, No. 1:14-cv-00362-LO-IDD (E.D. Va. March 9, 2017). Based on representations of Megaupload's counsel, Mr. Goodwin's data is most likely to be stored on the drives in possession of Carpathia Hosting.

During the execution of that warrant, the government had control of Mr. Goodwin's data. Exhibit D. But on January 27, 2012, nine days after the shutdown, Assistant U.S. Attorney Jay V. Prabhu indicated to the district court that the government believed it no longer exercised control over the data. *Id.* AUSA Prabhu advised the court that the government had completed its execution of the search warrants and that it no longer had any need for the Carpathia and Cogent servers. More troubling, Mr. Prabhu said that "the hosting companies may begin deleting the contents of the servers beginning as early as February 2, 2012." *Id.*

To the best of Mr. Goodwin's knowledge, the contents of the servers have not been deleted. *See* Exhibit F, Memorandum of Law in Support of Renewed Motion for Protective Order (Aug. 11, 2015) (describing the "continued storage of 1,103 computer servers containing 25 petabytes (25 million gigabytes) of data."). Rather, the data stored by former Megaupload users, including Mr. Goodwin, remains on hard drives that are powered down and maintained in storage by QTS Realty Trust, Inc. ("QTS"), which acquired Carpathia Hosting in 2015. *Id.*

The Carpathia/QTS hard drives are stored under reasonably protective conditions. Exhibit G, Memorandum of Law in Support of Emergency Motion for Protective Order by Non-Party Carpathia Hosting, Inc., at 6 (stating that the drives were moved to a "climate-controlled datacenter"). However, the passage of time creates a risk that the hard drives will degrade and the data on them will be lost. In a statement to the district court in November 2015, QTS expressed its opinion that "there is a high likelihood that the disk drives, on which the data presumably reside, will experience high failure rates" and that "such failures may substantially impact the recoverability of the data." Exhibit H, QTS's Response to the October 29, 2015 order; *see also* Exhibit I, Defendant Megaupload Limited's Responses to the Court's October 29, 2015 Questions, at 3 (Nov. 12, 2015) ("There are reasonable grounds to believe that a substantial amount of data can still be restored and recovered, although risks of degradation and data loss increase with time.").

It is unclear when Megaupload's legal issues will be resolved. The criminal prosecution of Megaupload and its principals awaits the outcome of extradition proceedings in New Zealand that have continued for years.[1] Related U.S. civil litigation against Megaupload has been stayed pending the outcome of the criminal

[1] *NZ Court Rules Megaupload Founder Kim Dotcom Can Be Extradited to U.S. for Alleged Fraud*, Reuters (Feb. 19, 2017), http://www.reuters.com/article/us-newzealand-internet-dotcom-idUSKBN15Z07C (noting that Mr. Dotcom, the founder of Megaupload and one of the defendants in the U.S. criminal case, intends to appeal his extradition to New Zealand's Court of Appeal).

prosecution. *See* Exhibit J, Order Granting Motion to Stay (Apr. 6, 2017), *Fox v. Megaupload*. In the meantime, Mr. Goodwin and other innocent users of Megaupload await access to their valuable data.

III. MOTION PRACTICE CONCERNING USERS' DATA

For the past five years, Mr. Goodwin has repeatedly and consistently requested relief from the district court to secure the return of his files, beginning just two months after the raid on Megaupload. On March 30, 2012, Mr. Goodwin filed a memorandum in support of Carpathia Hosting's motion for a protective order, stressing that the court should also provide for the return of Mr. Goodwin's property pursuant to its equitable power:

> [T]his Court has equitable power to fashion a remedy to make Mr. Goodwin—an innocent third party—whole again . . . any such remedy will set an important precedent, because it is unlikely that this will be the last time an innocent third party will have his or her files or other property seized as part of a federal copyright case. . . . Therefore, Mr. Goodwin . . . requests that the Court implement a procedure to expedite the return of his rightful property, as well as the property of others similarly situated, stored on Megaupload's servers.

Exhibit K, Brief of Interested Party Kyle Goodwin in Support of Emergency Motion for Protective Order.

Implicitly recognizing Mr. Goodwin's concerns, on April 13, 2012, the district court instructed all parties to negotiate in good faith on preservation of Megaupload users' data *and* on a plan to allow innocent Megaupload users to retrieve their data. Exhibit L. Mr. Goodwin's attorneys participated in negotiations

over the next two months with all of the parties. During that time, the government made a proposal for preservation of the data but ignored the problem of third parties' access to their own data. *See* Exhibit M, Brief of Kyle Goodwin In Support of His Motion For Return of Property, at 4. As further negotiation appeared futile, Mr. Goodwin filed his own Motion for Return of Property, on the grounds of 18 U.S.C. § 1963 (the RICO Act) and Federal Rule of Criminal Procedure 41(g). Exhibit N (May 25, 2012). The government opposed this request, disclaiming any obligation to ensure that Megaupload customers could recover the data that they lost access to as a direct result of the government's actions, and asking the court to decide the issue without further hearing. *See* Exhibit O, Response of the United States (June 8, 2012).

Five months later, the district court held that "18 U.S.C. § 1963 [RICO] does not pertain to the present set of facts and circumstances" and requested further briefing on how it might conduct an evidentiary hearing on the Rule 41(g) claim. Exhibit P, Order at 5 (October 2, 2012). Mr. Goodwin proposed a hearing to cover (1) Mr. Goodwin's ownership of the data and the business harm he suffered as a result of the shutdown; (2) the government's consideration of third-party rights during the shutdown (or the lack of such consideration); and (3) limited third-party evidence concerning the means and cost of restoring user access to their data. Exhibit Q, Third Party Kyle Goodwin's Proposal Re: Return of Property Under

Fed. R. Crim. P. 41(g) (Oct. 30, 2012). The government proposed that the hearing be limited to discussing the nature of Mr. Goodwin's ownership interest in his video files. Exhibit R.

To date, the district court has not held the evidentiary hearing that was deemed necessary, nor ruled on Mr. Goodwin's 41(g) motion. But Mr. Goodwin has not given up: he reiterated his request for relief in an additional brief filed on January 29, 2013, and in letters to the district court filed on July 9, 2013, and December 9, 2013. Exhibit S, Exhibit T, Exhibit U.

Mr. Goodwin requested access to his files yet again in August 2015, in response to a renewed motion for protective order filed by QTS, the successor-in-interest to Carpathia Hosting. Exhibit V, Exhibit W. At that time, QTS notified the district court that it continued to keep the drives containing Megaupload user data in its climate-controlled warehouse, at its own expense, and it sought relief from that expense by requiring the parties to the criminal case to take possession of the drives, compensating QTS, or allowing QTS to delete and re-use the drives. Exhibit F, at 2 (Aug. 11, 2015).

Proceedings at the district court in 2015 and 2016 proved to be a repeat of 2012. The district court requested and received written statements from the parties, and ordered a meet and confer before the magistrate judge. Exhibit X, Order (Oct. 29, 2015); Exhibit Y, Order (June 2, 2016), *Fox v. Megaupload*. At these

opportunities, Mr. Goodwin's attorneys reiterated his request to set up a process for the return of users' data. Exhibit W, Response of Kyle Goodwin to QTS Realty Trust's Renewed Motion for Protective Order (Aug. 21, 2015). The government again denied any responsibility to do so. Exhibit Z, Response of the United States (Aug. 25, 2015). Carpathia/QTS again requested relief from the continuing expense of storing the data. Exhibit F, Memorandum in Support (Aug. 11, 2015).

Mr. Goodwin made a final request for relief from the district court in October 2016. Exhibit AA, Motion for Ruling on Pending Motion (Oct. 18, 2016). To date, the district court has not yet ruled on either Mr. Goodwin's or QTS's motions.

IV. LOSSES TO MR. GOODWIN

Loss of access to the video files has affected OhioSportsNet's business in many ways. Mr. Goodwin has been unable to give parents a record of their children's sports achievements. Exhibit A, at ¶ 10. He was unable to complete a documentary of the Strongsville girls soccer team's 2011-2012 season. *Id.* at ¶ 11. In addition to raw footage of sporting events and player and coach interviews, OhioSportsNet has lost the original files of all of its promotional videos and other news packages, leaving Mr. Goodwin and his producers unable to extract the video to make more packages to use as promotional material for their website. *Id.* at ¶ 12.

In short, the seizure of Megaupload's assets continues to cause harm to Mr. Goodwin.

REASONS WHY THE WRIT SHOULD ISSUE

Mr. Goodwin has amply demonstrated that he is entitled to equitable relief to secure the return of his files. His request for that relief has been pending for nearly five years. But despite extensive formal and informal proceedings before the district court, that court has not ruled on Mr. Goodwin's motion.

At this point, Mr. Goodwin has little choice but to seek a writ of mandamus. A "traditional use" of mandamus is to "compel [a district court] to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943). The Court of Appeals can issue a writ of mandamus "where a district court persistently and without reason refuses to adjudicate a case properly before it." *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661-62 (1978); *see also In re Wright*, 590 F. App'x 292, 293 (4th Cir. 2015) ("Unreasonable delay" is one basis for granting a mandamus petition.).

In addition, mandamus is the proper procedural vehicle to compel the return of property which was seized from a defendant, after it is no longer needed as evidence in a case. *Helmy v. Swigert*, 662 So. 2d 395, 396 (Fla. Dist. Ct. App. 1995). The writ can be requested by non-defendants with an interest in the property. *Minsky v. City of Los Angeles*, 11 Cal. 3d 113, 123, 520 P.2d 726, 734

(Cal. 1974).

This Court grants mandamus based upon a showing of five elements:

> (1) [The petitioner] has a clear and indisputable right to the relief sought; (2) the responding party has a clear duty to do the specific act requested; (3) the act requested is an official act or duty; (4) there are no other adequate means to attain the relief [the petitioner] desires; and (5) the issuance of the writ will effect right and justice in the circumstances.

U.S. ex rel. Rahman v. Oncology Assocs., P.C., 198 F.3d 502, 511 (4th Cir. 1999). Mr. Goodwin's request satisfies each of these elements.

I. MR. GOODWIN IS ENTITLED TO THE RELIEF SOUGHT: PROMPT ACCESS TO HIS VALUABLE DIGITAL FILES.

It is undisputed that Mr. Goodwin is an innocent bystander to the criminal prosecution that deprived him of access to his digital video files. It is undisputed that Mr. Goodwin is the owner of those files. Exhibit A, ¶ 6. Both Congress and the federal rules drafters have established that a seizure or forfeiture should not harm innocent third parties' rights, and that courts have the power to fashion remedies for those third parties.

Federal Rule of Criminal Procedure 41(g) provides that a "person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return." Fed. R. Crim. P. 41(g).

Likewise, the Racketeer Influenced and Corrupt Organizations Act (RICO) provides that "[a]ny person, other than the defendant, asserting a legal interest in

property which has been ordered forfeited to the United States" under the law may "petition the court for a hearing to adjudicate the validity of his alleged interest in the property." 18 U.S.C. § 1963(l)(2); *see also* 21 U.S.C. § 853 (using identical language for property subject to criminal forfeiture).[2] Even where, as here, the property in question has not yet been forfeited, the court has equitable jurisdiction to effect the return of third party property. *U.S. v. Wu*, 814 F. Supp. 491, 494-95 (E.D. Va. 1993); *U.S. v. Siegal*, 974 F. Supp. 55, 58 (D. Mass. 1997).[3]

Not only do the statutory framework and case law surrounding forfeiture establish third parties' rights in a criminal proceeding, so does the Constitution. "The Court does not believe that Congress intended that the criminal forfeiture statute would be applied in such a manner as would cause such great hardship to innocent persons in violation of their constitutional rights." *U.S. v. Reckmeyer,* 628 F. Supp. 621 (E.D. Va. 1986); see also *Wu*, 814 F. Supp. at 494-95. In *Wu*, for instance, the court found that a statute allowing forfeiture should be read to "avoid[] overinclusiveness; the statutes sanction neither forfeiture nor, presumably,

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[2] Similarly, the Comprehensive Drug Abuse Prevention and Control Act provides district courts with tools to return forfeited property to innocent third parties. "This statute [21 U.S.C. § 853] is, in nearly all respects, identical to the RICO criminal forfeiture statute [18 U.S.C. § 1963]." *U.S. v. Wu*, 814 F. Supp. 491, 493 (E.D. Va. 1993) (citing S. Rep. No. 225, 98th Cong., 2d Sess. 209 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3392).

[3] While the district court found "that 18 U.S.C. § 1963 [RICO] does not pertain to the present set of facts and circumstances," Exhibit P, the statute evidences Congress's policy that the property of innocent third parties is to be safeguarded in a criminal proceeding.

restraints on the alienability, of property with respect to which a third party can establish, by a preponderance of the evidence, a right, title or interest exclusive of or superior to the criminal defendant's right, title, or interest." 814 F. Supp. at 494-95 (citing 18 U.S.C. § 1963(l)(6); 21 U.S.C. § 853(n)(6)).

In addressing third-party losses in post-indictment, pre-conviction instances under Rule 41(g), courts consider four factors: "(1) whether the Government displayed a callous disregard for the constitutional rights of the movant; (2) whether the movant has an individual interest in and need for the property he wants returned; (3) whether the movant would be irreparably injured by denying return of the property; and (4) whether the movant has an adequate remedy at law for the redress of his grievances." *Chaim v. U.S.*, 692 F. Supp. 2d 461, 469 (D.N.J. 2010) (citing caselaw from seven different federal circuits).

Each of those factors favors Mr. Goodwin's right to relief. First, the government's actions showed a clear disregard for the rights of innocent Megaupload customers like Mr. Goodwin. The government knew Megaupload operated a data storage business, and thus held the property of a large number of third parties. The government knew its search and seizure of Megaupload's assets would deprive third parties of the ability to access and retrieve their property. In seizing domain names and executing the search warrant at Carpathia, the government took constructive possession of third parties' data, then abandoned the

data under circumstances that rendered it inaccessible and potentially subject to destruction.

The seizure and continued denial of access also violates Mr. Goodwin's constitutional rights. Under the Fourth and Fifth Amendments, the government was obligated to execute the searches and seizures in a manner that reasonably protected the rights of third parties to access and retrieval. Reasonable protection would consist in either (1) notice and opportunity to retrieve; or (2) the government's securing and preserving the data (either directly or via arrangements with data storage businesses) and provision of means for prompt retrieval by third parties. By failing to take those necessary steps, and then refusing to work with Mr. Goodwin to effectuate the return of his property, the government deprived him of his right to that property under both the Fourth and Fifth Amendments.

Moreover, the seizure and shutdown of Megaupload's systems by the government implicate Mr. Goodwin's First Amendment rights in his expressive work. One direct result of the government's actions has been to cut off access to the speech of Mr. Goodwin and millions of other Megaupload customers. The Supreme Court has made clear that seizures that amount to little more than prior restraints should be discouraged. *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 50-51 (1989). In *Fort Wayne*, the Court found a pretrial seizure order of a bookstore unconstitutional, stating that "mere probable cause to believe a legal

violation has transpired is not adequate to remove books or films from circulation." *Id.* at 66. As in *Fort Wayne*, in seizing Megaupload, the government here has seized an entire business devoted to publishing, and effectively suppressed all of the expressive content hosted on it, including Mr. Goodwin's expressive works, without proving that any of that content was in fact illegal. *See id.*

Mr. Goodwin's inability to access months of footage that formed a core part of his business has caused him irreparable harm. Losing access to the footage has caused Mr. Goodwin to lose opportunities to market his business, showcase his work, and give student athletes and their parents a record of their accomplishments, many of which are recorded for posterity *only* in the footage that now resides on the Carpathia/QTS hard drives. Exhibit A ¶¶ 6-12. Losses of goodwill and marketing opportunities are difficult if not impossible to value, and constitute irreparable harm. *PBM Prod., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 127 (4th Cir. 2011).

Finally, without resolution of his Motion, Mr. Goodwin is left without any adequate remedy at law. Each of the parties that could potentially allow Mr. Goodwin access to his property—the government, Megaupload, and Carpathia/QTS—claims that it does not control that property. Carpathia/QTS has made clear that it does not care what happens with the data on the servers; so long as it is justly compensated, it presumably will not object to innocent third parties'

gaining access. Exhibit F, at 2 ("[QTS] has no interest whatsoever in the data contained on the servers."). Megaupload has likewise not raised objections to third-party access, but lacks funds to operate the servers for the benefit of those third parties. Exhibit I, at 1-2 ("Megaupload now has no unrestrained assets, and so would need to have seized assets unfrozen, liquidated, and used to secure, restore, and recover the data."). Only the government can release the necessary assets to facilitate that access, but it has refused. Exhibit Z, at 2.

Although the government now disclaims any responsibility to restore Mr. Goodwin's property (even while blocking the release of funds necessary to accomplish it), it was the government's own actions that left Mr. Goodwin and others in this situation. It is therefore the government's responsibility to facilitate the return of third parties' data, whether or not it has physical control of the data. Indeed, a "motion for return of property does not become moot merely because the government no longer retains the seized property." *U.S. v. Chambers*, 192 F.3d 374, 375 (3d Cir. 1999). Moreover, "the government can not defeat a properly filed motion for return of property merely by stating that it has destroyed the property or given the property to third parties." *Id.* at 377.

Mr. Goodwin, an innocent party accused of no wrongdoing, has proven that property that was his was lost on January 19, 2012. He has likewise shown that he will suffer irreparable injury until that property is returned. Thus, Mr. Goodwin has

established a right to relief.

II. THE DISTRICT COURT HAS A CLEAR AND OFFICIAL DUTY TO RULE ON MR. GOODWIN'S MOTION.

The second and third mandamus elements are easily satisfied. Mr. Goodwin has filed a procedurally proper motion, and waited patiently for a ruling. This issue is fully briefed before the district court. The court has ordered and received additional written statements in this matter, including submissions made in 2015.

It is past time for a ruling on this motion. Courts have found six months to be an unacceptable length of time for innocent third parties to be left in limbo when it comes to their rightful property:

> Here, because of the complexity of this case involving twelve defendants and thousands of pages of documents, by agreement of all defendants, the case will not be tried until October 1997. That means that the third parties cannot raise a statutory challenge to the restraint on property which they claim derived from "clean sources" for another six months. I conclude that the due process clause requires me to afford these third parties a timely pretrial opportunity to challenge the restraining order as "clearly improper" on the ground the property was not available for forfeiture.

Siegal, 974 F. Supp. at 58 (concerning the seizure of funds from joint bank accounts). Mr. Goodwin has already been deprived of his property for *five years*.

Moreover, there is little prospect that the issue will resolve itself, thereby mooting Mr. Goodwin's motion. The underlying criminal case is stayed awaiting an extradition proceeding in the courts of New Zealand which has continued for most of that period, and is not yet concluded. *See supra* n.1. And even the

conclusion of extradition proceedings may mean the *beginning* of criminal prosecution and appeals in this jurisdiction. In short, resolution of the underlying case may take many more years.

Further delay is unwarranted, and the district court has a duty to act on Mr. Goodwin's request.

III. MR. GOODWIN HAS NO ALTERNATIVE MEANS OF RETRIEVING HIS PROPERTY.

As to the fourth mandamus element, it is clear that Mr. Goodwin has no feasible alternative means of retrieving his video files without the Court's intervention. Each of the other parties involved has disclaimed the right or ability to access the files. The government has claimed it no longer is in possession of the data belonging to Mr. Goodwin, OhioSportsNet, or others similarly situated. *See* Exhibit D ("The Mega Servers are not in the actual or constructive custody or control of the United States, but remain at the premises controlled by, and currently under the control of, Carpathia and Cogent."). Carpathia/QTS has stated that it "does not own and cannot access the data." Exhibit C, at 2 (emphasis added). Since Megaupload's funds have been seized, and the government has refused to release funds to allow Megaupload to give Mr. Goodwin access, Megauplouad has no ability to turn the servers back on or devise another avenue for its customers to access their legal data.

The cost of restoring access exceeds Mr. Goodwin's means, and likely those of any individual Megaupload customer. Exhibit H, at 2-3. Given the district court's inaction, no direct appeal is possible. Finally, waiting until the conclusion of criminal proceedings risks the partial or complete loss of the data. *Id.* at 1-2. Without prompt action by the district court, mandamus is the only alternative.

IV. ISSUING THE WRIT WILL PROMOTE JUSTICE BY PROTECTING MR. GOODWIN'S RIGHTS AND THAT OF OTHER OWNERS OF DIGITAL PROPERTY.

Finally, a writ of mandamus is just under the circumstances. Indeed, a clear ruling from the district court will serve the interest of justice in general by helping to clarify the rights of the public. The practice of seizing the domain names and other assets of websites accused of various legal violations has become, for better or worse, commonplace. For example, U.S. Immigration and Customs Enforcement has seized thousands of websites since 2010.[4] Such seizures affect an increasing number of Americans as we move our information and communications online. Innocent third parties deserve clear rules regarding the consequences they must suffer as a result of those seizures.

[4] "Federal agencies seize more than $21.6 million in fake NFL merchandise during 'Operation Team Player,'" Press Release (Jan. 30, 2014), https://www.ice.gov/news/releases/federal-agencies-seize-more-216-million-fake-nfl-merchandise-during-operation-team; Alan Dunn, "A pharma company woke up to find its domain name Vicodin.com seized by ICE," Business Insider (Mar. 17, 2017), http://www.businessinsider.com/ice-seizes-vicodincom-2017-3.

Indeed, the Ninth Circuit Court of Appeals recognized the problems such seizures can cause in *U.S. v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1177 (9th Cir. 2010) (en banc). Weighing competing interests of law enforcement and the Fourth Amendment privacy rights of those innocent third parties whose information was caught up in a larger dragnet, the Ninth Circuit upheld the quashing of subpoenas and search warrants where the government failed to protect those rights. *Id.* In so doing, the en banc panel recognized "the reality that over-seizing is an inherent part of the electronic search process" and proceeded "on the assumption that, when it comes to the seizure of electronic records, this will be far more common than in the days of paper records." *Id.* But the panel did not find that shift from the analog to the digital world relieved the government of its obligations to protect third parties who have perfectly lawful reasons to store data electronically. As the court also observed:

> [T]here are very important benefits to storing data electronically. Being able to back up the data and avoid the loss by fire, flood or earthquake is one of them. Ease of access from remote locations while traveling is another. The ability to swiftly share the data among professionals, such as sending MRIs for examination by a cancer specialist half-way around the world, can mean the difference between death and a full recovery. Electronic storage and transmission of data is no longer a peculiarity or a luxury of the very rich; it's a way of life. Government intrusions into large private databases thus have the potential to expose exceedingly sensitive information about countless individuals not implicated in any criminal activity, who might not even know that the information about them has been seized and thus can do nothing to protect their privacy.

Id. Courts should take the same care when the risk is to property rights in the data itself, rather than the privacy rights of those whose information is contained in the records. The district court should assist Mr. Goodwin in regaining his property since the government has refused to do so, and it should set out clear standards and procedures for the government to follow in the future. Mandamus relief, and a process for the return of valuable digital property to Mr. Goodwin and other former Megaupload customers, will promote justice by encouraging the government to more carefully consider the rights of third parties when seizing the assets of data storage services.

CONCLUSION

Mr. Goodwin and other former Megaupload customers have waited long enough. Mr. Goodwin has shown his right to have his valuable property returned, and has exhausted every avenue of redress at the district court, which has held hearings, taken written evidence, and overseen negotiations, but has not ruled on Mr. Goodwin's Rule 41(g) motion. The district court's inaction, and the important property and constitutional issues at stake, make mandamus relief necessary and appropriate.

Dated: April 24, 2017

Respectfully submitted,

By: /s/ Mitchell L. Stoltz

Mitchell L. Stoltz
Counsel of Record
Corynne McSherry
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94114
Telephone: (415) 436-9333
Fax: (415) 436-9993
mitch@eff.org

John S. Davis
WILLIAMS MULLEN
200 So. 10th St.
Richmond, VA 23218
Telephone: (804) 420-6296
Facsimile: (804) 420-6507
Email: jsdavis@williamsmullen.com

Abraham D. Sofaer
THE HOOVER INSTITUTION
Stanford University
434 Galvez Mall
Stanford, CA 94305-6010
Telephone: (650) 723-1754
Email: asofaer@stanford.edu

Counsel for Petitioner Kyle Goodwin

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS PURSUANT TO FED. R. APP. P. 32(A)(7)(C)

Pursuant to Fed. R. App. P. 32(c)(2) and 21(d)(1), I certify as follows:

1. This Petition for Writ of Mandamus complies with the type-volume limitation of Fed. R. App. P. 21(d)(1) because this brief contains 5,217 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.

Dated: April 24, 2017

/s/ Mitchell L. Stoltz
Mitchell L. Stoltz