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1156 15th St. NW, Suite 1020
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(202) 795-9300
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Bruce D. Brown
Executive Director
bbrown@rcfp.org
(202) 795-9301

May 5, 2021

Sara J. Schroeder
The Sotos Law Firm, P.C.
141 W. Jackson Blvd., Suite 1240A
Chicago, IL 60604
630-735-3305
sschroeder@jsotoslaw.com

VIA EMAIL

Re: Subpoena to Fenit Nirappil in *Gomez v. Guevara*, No. 18-CV-3335 (N.D. Ill.)

Dear Ms. Schroeder:

Thank you for speaking with me today. As discussed, I represent Fenit Nirappil, a journalist, in connection with your subpoena for documents, dated April 22, 2021 and returnable May 6, 2021, in the above-referenced matter. I write to object to this subpoena, pursuant to Federal Rule of Civil Procedure 45(d)(2)(B). The subpoena has several defects, rendering it invalid. Accordingly, Mr. Nirappil will not produce the requested records.

As an initial matter, the subpoena is procedurally defective. First, it was sent via mail and not personally served on Mr. Nirappil as required by Rule 45(b)(1). Wright & Miller, 9A Fed. Prac. & Proc. Civ. § 2454 (3d ed.) ("The longstanding interpretation of Rule 45 has been that personal service of subpoenas is required."); *see also F.T.C. v. Compagnie De Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1312–13 (D.C. Cir. 1980) (explaining that Rule 45 "does not permit any form of mail service, nor does it allow service of the subpoena merely by delivery to a witness' dwellingplace"); *In re LeFande*, 919 F.3d 554, 562 (D.C. Cir. 2019) ("Compulsory process—in contrast to a civil complaint—generally 'may be served upon an unwilling witness only in person,' because, should a witness fail to comply with a properly served subpoena, 'the full enforcement power of the federal courts may immediately be brought to bear upon him' in the form of contempt proceedings.") (quoting *F.T.C.*, 636 F.2d at 1313).

Second, the subpoena is invalid under Rule 45(c)(2)(A) because it requires Mr. Nirappil to produce documents at your office in Chicago, Illinois, which is well over 100 miles from his home in Virginia. *See, e.g.*, *Miller v. Holzmann*, 471 F. Supp. 2d 119, 121 (D.D.C. 2007) (holding that Rule 45 cannot be used to require production of documents more than 100 miles from place of residence); *see also Koenig v. Johnson*, No. 2:18-cv-3599, 2020 WL 635772, at *1 (D.S.C. Feb. 11, 2020) (same); *Thomas v. DeLong*, No. 3:18-

CV-033, 2018 WL 10689466, at *2 (W.D.N.C. Sept. 6, 2018) (same, collecting cases).

Third, the subpoena provided insufficient time to comply. Fed. R. Civ. P. 45(d)(3)(A)(i) (requiring, on timely motion, the court to quash or modify a subpoena that "fails to allow a reasonable time to comply"). Mr. Nirappil received the subpoena on Saturday, May 1, 2021, giving him a mere four days—three business days—to respond. The subpoena seeks, among other things, documents and records related to 49 named individuals in connection with Mr. Nirappil's time as a student nine years ago. Given the breadth and burdensomeness of the requests, less than a week's notice is plainly insufficient. *See, e.g.*, *Jones v. Campbell Univ., Inc.*, No. 5:20-CV-29, 2020 WL 4451173, at *3 (E.D.N.C. Aug. 3, 2020) (six days to comply held not reasonable); *Fidelity & Guaranty Life Ins. Co. v. United Advisory Grp.*, No. JFM-13-40, 2016 WL 632025, at *11 (D. Md. Feb. 17, 2016) (seven days to comply held not reasonable); *Tri Invs., Inc. v. Aiken Cost Consultants, Inc.*, No. 2:11cv4, 2011 WL 5330295, at *2 (W.D.N.C. Nov. 7, 2011) (six total days and four business days to comply held not reasonable).

The subpoena is also substantively improper, as it seeks discovery of privileged information regarding journalistic sources and records that are protected from compelled disclosure under the First Amendment, as well as other constitutional, statutory, and common law authority. Fed. R. Civ. P. 45(d)(3)(A)(iii) (requiring, on timely motion, a court to quash or modify a subpoena that "requires disclosure of privileged or other protected matter"); Fed. R. Civ. P. 26(b)(1) (limiting scope of discovery to "nonprivileged" matters); *LaRouche v. Nat'l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986) (recognizing qualified privilege in civil proceedings for information about journalist's confidential sources); *Church of Scientology Int'l v. Daniels*, 992 F.2d 1329, 1335 (4th Cir. 1993) (applying privilege recognized in *LaRouche* to non-confidential information from journalist in civil proceeding). "If reporters were routinely required to divulge the identities of their sources, the free flow of newsworthy information would be restrained and the public's understanding of important issues and events would be hampered in ways inconsistent with a healthy republic." *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000).

To overcome this privilege, the subpoenaing party would have to demonstrate that there is a "compelling interest" in the information sought and that it is "relevant" and cannot be obtained by "alternative means." *LaRouche*, 780 F.2d at 1139. You cannot satisfy those requirements here. I understand much of the information subpoenaed can be—and already has been—obtained from other sources, such as Northwestern University, which has produced thousands of the requested records. The subpoena also seeks numerous public records—such as "police reports," "investigative reports," and court records in the related criminal case against the plaintiff—that are readily available from the appropriate government entities.

Finally, the subpoena is invalid because it is overly broad and imposes undue burden and expense on Mr. Nirappil as a non-party to this litigation, requiring him to search for and produce a vast number of records from nine years ago. Fed. R. Civ. P. 45(d)(1), (3)(iv) (explaining that a subpoenaing party "must take reasonable steps to avoid imposing

undue burden or expense on a person subject to the subpoena" and requiring a court to quash or modify a subpoena, on timely motion, if it "subjects a person to undue burden"); *Va. Dep't of Corr. v. Jordan*, No. 3:17mc02, 2017 WL 5075252, at *4–5 (E.D. Va. Nov. 3, 2017) (explaining that "overbreadth necessarily establishes undue burden") (citation omitted).

The scope of the subpoena is staggeringly broad, seeking discovery that is not relevant to any party's claims or defenses. It requires, for example, production of all records pertaining to Mr. Nirappil's entire undergraduate education at Northwestern University. Subpoena at 1, ¶ 1. And even if the subpoena were limited to Mr. Nirappil's reporting on the prosecution of the plaintiff, it would still be overbroad, as it requests "any and all" records relating to 49 individuals as well as numerous other large categories of records. Subpoena at 1, ¶ 1(a).

Please be advised that the foregoing does not waive any rights, remedies, defenses, or privileges of Mr. Nirappil. Please direct any further correspondence on this matter to me.

Sincerely,

Sarah Matthews

Sarah Matthews
Senior Staff Attorney
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, D.C. 20005
smatthews@rcfp.org
202.795.9318