DISTRICT COURT, NINETEENTH JUDICIAL DISTRICT Court Address: Weld County Courthouse 901 9th Ave. Greeley, CO 80631 **In re Search of Amalia's Translation and Tax Service;** **and** **Amalia Cerrillo,** **Luis Noriega,** on behalf of himself and as class representative, **John Doe,** on behalf of himself and as class representative, **Frank Doe,** on behalf of himself and as class representative, **Robert Doe**, on behalf of himself and as class representative **Plaintiffs** v. **Kenneth R. Buck**, in his official capacity as District Attorney for the Nineteenth Judicial District; **John Cooke**, in his official capacity as Weld County Sheriff **Defendants.**	**▲COURT USE ONLY▲** Case No. _____ Div. _____

Attorneys for Plaintiffs: Mark Silverstein, Atty. Reg. #26979 Taylor S. Pendergrass, Atty. Reg. #36008 AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO 400 Corona Street Denver, CO 80218 Telephone: (303) 777-5482 Fax: (303) 777-1773 Email: msilver2@att.net tpendergrass@aclu-co.org N. Reid Neureiter, Atty. Reg. #29747 Elizabeth Harris, Atty. Reg. #29556 JACOBS CHASE FRICK KLEINKOPF & KELLEY, LLC 1050 17th Street, Suite 1500 Denver, CO 80265 Telephone: (303) 685-4800 Fax: (303) 685-4869 Email: rneureiter@jacobschase.com eharris@jacobschase.com In cooperation with the ACLU Foundation of Colorado Michael Joseph Glade, Atty. Reg. #19515 INMAN FLYNN BIESTERFELD BRENTLINGER & MORITZ PC 1660 Lincoln St. Ste. 1700 Denver, CO 80264-1701 Telephone: (303) 861-5300 Fax: (303) 861-2476 Email: mglade@inmanflynn.com In cooperation with the ACLU Foundation of Colorado Shannon Lyons, Atty. Reg. #26153 COLLINS, LIU & LYONS LLP 812 8th St. Greeley, CO 80631 Telephone: (970) 336-6499 Email: shannon@cotriallaw.com In cooperation with the ACLU Foundation of Colorado	

PLAINTIFFS' MOTION FOR RETURN OF PROPERTY PURSUANT TO COLO.R.CRIM.P. 41(e) and MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

CERTIFICATE OF COMPLIANCE WITH C.R.C.P. 121 § 1-15(8)

There is no duty to confer prior to filing a motion for temporary restraining order. However, promptly upon filing the Complaint and this motion, Plaintiffs' counsel will contact Defendants' counsel to coordinate the scheduling of a hearing and other logistical issues.

INTRODUCTION

1. In this motion, Plaintiffs seek relief under Rule 41(e) of the Colorado Rules of Criminal Procedure, as well as a temporary restraining order and/or preliminary injunction pursuant to Rule 65 of the Colorado Rules of Civil Procedure. Plaintiffs request these remedies as relief for irreparable injury to Plaintiffs' rights, including their right of privacy and right to be free of unreasonable searches. The injuries stem from Defendants' continued retention of constitutionally-protected confidential information taken in an unlawful search and seizure carried out at Amalia's Translation and Tax Services in Greeley, Colorado, on October 17, 2008.

A. Plaintiffs ask the Court to set an accelerated briefing schedule and a prompt date for an evidentiary hearing to hear evidence and argument on the issues Plaintiffs raise here.

B. Plaintiffs further ask this Court to issue an immediate temporary restraining order—to be effective until the Court conducts a hearing—that Defendants provide to the Court, under seal, all materials seized in the search and seizure, including all copies of such materials and all compilations and notes relating to or derived from the confidential information seized during the search and seizure.

C. Plaintiffs further request, after a hearing, a preliminary injunction ordering the same relief until the Court rules on Plaintiffs' request for relief pursuant to Rule 41(e) of the Colorado Rules of Criminal Procedure and/or until final judgment on Plaintiffs' claims for injunctive and declaratory relief.

D. Plaintiffs further ask for any additional relief the Court deems just in order to remedy the continuing invasion of Plaintiffs' rights of privacy and rights protected by C.R.S. § 16-3-304**;** Rule 41 of the Colorado Rules of Criminal Procedure, and Article II, Sections 7 and 25 of the Colorado Constitution; and the Fourth and Fourteenth Amendments.

This motion is based on the exhibits attached to the Complaint, the affidavits submitted by Plaintiffs, and additional facts and argument to be presented at a hearing.[1]

FACTUAL BACKGROUND

2. Plaintiff Amalia Cerrillo owns and operates Amalia's Translation and Tax Service in Greeley, Colorado. Since 2000, Amalia has assisted thousands of her customers and clients with filing income tax returns. *See* Affidavit of Amalia Cerrillo ("Cerrillo Aff."), attached as **Exhibit A**, at ¶ 3.

3. Plaintiffs Luis Noriega, John Doe, Frank Doe and Robert Doe (the "Client Plaintiffs") are clients of Ms. Cerrillo's who have used her tax preparation services for several years.

4. Pursuant to Rule 23(b)(2), the Client Plaintiffs seek, by separate motion to be filed, to represent a class of similarly-situated clients (the "Client Class").

5. In this class action, Plaintiffs seek legal redress for the violation of their own rights and the rights of thousands of Ms. Cerrillo's clients. Their privacy was illegally invaded by an unconstitutional search and seizure carried out at Ms. Cerrillo's business on October 17, 2008.

6. Defendants' continued retention of the illegally-seized confidential information constitutes an ongoing and continuing violation of the Plaintiffs' rights of privacy and the rights of Ms. Cerrillo's customers.

7. On October 16, 2008, a deputy with the Weld County Sheriff's Office presented a six-page document titled Affidavit for Search Warrant (the "Affidavit") and a three-page proposed search warrant to a judge in Weld County District Court. (A copy of the Affidavit is attached to the Complaint as Exhibit A.)

8. Ms. Cerrillo was not the target of the Defendants' investigation. Indeed, the Affidavit explained that Ms. Cerrillo "is conducting business according to Internal Revenue Service (IRS) guidelines and has not violated any laws." (Compl., Ex. A at (unnumbered) p. 4.) Instead, Defendants sought evidence that taxpayer clients of Ms. Cerrillo's were engaged in identity theft and/or criminal impersonation. (Id. at (unnumbered) p. 6.)

[1] As noted in paragraph 16 of Plaintiffs' Motion to Proceed Under Pseudonyms, Plaintiffs Frank Doe, John Doe, and Robert Doe are seeking leave to file their affidavits under pseudonym.

9. The judge to whom the Affidavit and proposed search warrant were presented signed the search warrant. (A copy of the search warrant is attached to the Complaint as Exhibit B.)

10. On October 17, 2008, approximately ten law enforcement officers appeared at Ms. Cerrillo's business to execute the warrant. (Cerrillo Aff. at ¶ 14.)

11. Ms. Cerrillo was provided only with the three-page search warrant. The Affidavit was not attached to the warrant. None of the officers and none of the Defendants provided Ms. Cerrillo with a copy of the Affidavit. (*Id*. at ¶¶ 15, 30.)

12. Ms. Cerrillo read paragraph #1 of the warrant. It was her understanding that the hardcopy files the officers were authorized to seize were limited to files related to tax returns for 2006 and 2007 only. She explained that her files were not organized by tax year. Instead, they were organized alphabetically by client name. She further understood that the officers wanted only the 2006 and 2007 hardcopy files of clients who filed their tax returns for those years using an ITIN. (*Id*. at ¶¶ 16-17.)

13. Ms. Cerrillo offered to go through the files herself to locate and separate the files that were described in paragraph #1 of the search warrant. The officer who appeared to be in charge declined Ms. Cerrillo's offer. (*Id*. at ¶ 17.)

14. Instead of taking only the hardcopy files described in the search warrant, the officers seized all the hardcopy files relating to all of Ms. Cerrillo's tax-filing clients. The officers took 49 file boxes filled with the hardcopy files relating to the tax filings of approximately 5000 clients and customers, with tax returns and related information dating back as far as 2000. (*Id*. at ¶ 18.)

15. The officers also seized all four of Ms. Cerrillo's computers, including all the electronic documents and other files stored on the computers' hard drives. They also seized all of the other electronic storage media in Ms. Cerrillo's business, including seven to eight dozen CDs and approximately two dozen floppy disks. (*Id*. at ¶ 19.)

16. The tax-related records the officers seized contained personal and confidential information that revealed intimate details of the lives of Ms. Cerrillo's clients and their spouses and families. The files revealed social security numbers (or ITINs) as well as details of the work history and income of Ms. Cerrillo's clients and their spouses. They revealed information about the clients' children and other dependents, including the children's social security numbers, dates of birth, and, often, copies of birth certificates. Some files contained copies of documentation that clients relied on to support various deductions or exemptions. Many of the files revealed detailed information about specific clients' bank accounts, including the bank routing number and the account number. (*Id*. at ¶ 20.)

17. The officers seized CDs that contained nothing but music. They took CDs that contained nothing but the Ms. Cerrillo's family photographs. (*Id*. at ¶ 21.)

18. The hard drives of the computers that Defendants searched and seized contained numerous personal files and personal documents that had nothing to do with Ms. Cerrillo's clients or the Defendants' investigation. In addition to Ms. Cerrillo's personal family photographs, personal emails, and personal correspondence, the hard drives also contained personal and confidential financial information related to Ms. Cerrillo herself and her family. This included Ms. Cerrillo's personal tax returns and related information dating back to 2000. It also included Ms. Cerrillo's detailed bank statements going back many years; records relating to a restaurant business Ms. Cerrillo formerly operated; and records relating to a bankruptcy Ms. Cerrillo filed several years ago. (*Id*. at ¶ 22.)

19. The electronic storage media Defendants seized also contained additional information—unrelated to Defendants' investigation—that revealed confidential information about customers who used Ms. Cerrillo's translation or bookkeeping services. Thus, the Defendants seized information about companies for whom Ms. Cerrillo had done bookkeeping and payroll work, including W2 forms for the companies' employees. The electronic files included numerous documents generated in the course of Ms. Cerrillo translation services. These include, but are not limited to, translations of birth certificates, death certificates, marriage licenses, rental agreements, other contracts, documents in support of applications for divorces, and filings submitted to immigration authorities. (*Id*. at ¶ 23.)

20. The search warrant did not limit Defendants to searching for particular evidence of particular crimes. Instead, the warrant authorized Defendants to search all of the electronic storage media—every document or file on every hard drive, CD and floppy disk—to look for any evidence of any criminal activity at all that may have been committed by any person, at any time in history, anywhere in the world. (*See generally*, Compl., Ex. B.)

21. Some time after the search and seizure, Defendants returned materials to Ms. Cerrillo. Ms. Cerrillo was informed that the Defendants had made copies of the materials they wanted. At no time did Ms. Cerrillo receive a detailed inventory of the materials seized or the materials returned. At no time did Ms. Cerrillo receive an inventory of the particular files or documents that Defendants copied. (Cerrillo Aff. at ¶¶ 24, 26.)

22. The illegal search and seizure effectively closed Ms. Cerrillo's business for a period of time. Defendants deprived Ms. Cerrillo of her computers, her software, and her files. Although Defendants later returned some or all of the seized materials, the illegal search and seizure caused and continues to cause damage to Ms. Cerrillo, to her business, to her clients' privacy interests, and to Ms. Cerrillo's ability to conduct her lawful business in the future. (*Id*. at ¶¶ 31-33.)

23. Ms. Cerrillo intends to continue providing tax preparation services for customers with valid social security numbers as well as for customers who are required to use ITINs. She intends to continue to assist all her customers in complying with their legal obligation to file tax returns. Thus, Ms. Cerrillo intends to continue business practices that Defendants acknowledge, in their Affidavit, "has not violated any laws" and that is carried out "according to Internal Revenue Service (IRS) guidelines." (*Id*. at ¶ 34; Affidavit at (unnumbered) p. 4.)

24. Ms. Cerrillo and the Client Plaintiffs reasonably fear that without intervention from this Court, Ms. Cerrillo will be subjected in the future—during or soon after the 2008 tax return season—to another search and seizure of her office and her customers' records. (Cerrillo Aff. at ¶ 34.)

STANDING

25. Plaintiff Amalia Cerrillo seeks relief for violation of her right of privacy and her right to be free of unreasonable searches and seizures.

26. Ms. Cerrillo also has third-party standing to invoke the privacy rights of her clients. *See, e.g., People v. Rosburg,* 805 P.2d 432, 435-37 (unlicensed midwives had third-party standing to assert their patients' rights of privacy and equal protection); *Tattered Cover v. City of Thornton*, 44 P.3d 1044, 1051 n.9 (Colo. 2002) (in challenge to search warrant, bookstore has standing to assert its customers' rights of privacy and the customers' rights under Article II, section 10); *State Bd. for Community Colleges v. Olson*, 687 P.2d 429, 435 (Colo. 1984) (high school journalism teacher has standing to assert the rights of journalism students); *People v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 355 (Colo. 1985) (adult bookstore has standing to assert privacy rights of its customers); *Augustin v. Barnes*, 626 P.2d 625, 628-30 (Colo. 1981) (invalidating state regulation as violation of right of privacy and holding that sellers of life insurance had third-party standing to assert their customers' privacy rights).

27. Because Ms. Cerrillo's business was searched and her files and her own personal information was searched and seized, she meets the threshold requirement of having suffered sufficient injury to her own rights to guarantee the "concrete adverseness" the cases require. *See, e.g., Rosburg,* 805 P.2d at 435.

28. A party asserting third party standing must satisfy at least one of three additional prudential factors: (1) a substantial relationship between the parties before the court and the third parties; (2) the difficulty or improbability of the third parties in asserting an alleged deprivation of their rights; *or* (3) the need to avoid dilution of third-party rights in the event that standing is not permitted. *Rosburg*, 805 P.2d at 435 (citations omitted).

29. Ms. Cerrillo satisfies *each* of three prudential factors. *First*, she has a substantial relationship with her clients, a relationship even more than the bookstores had in *Tattered Cover* and *Seven Thirty-Five East Colfax*. She maintains files containing her customers' highly

confidential tax return information. Federal law recognizes that relationship by requiring that Ms. Cerrillo maintain that information as confidential. 26 U.S.C. § 6713; 26 U.S.C. § 7216. *Second*, it would be difficult or even impossible for each of Ms. Cerrillo customers to assert their own rights. They have received no formal notice of the seizure and continued retention of their confidential information. Many are undoubtedly unaware of the challenged search and seizure. Moreover, the vast majority of Ms. Cerrillo's customers survive on low incomes, without the financial resources to bring separate individual actions. *See* Exhibit C, para. 4. *Third*, the rights of Ms. Cerrillo's customers will be diluted if they are not asserted in this action.

30. The Client Plaintiffs have a reasonable expectation and constitutionally-protected right of privacy in the confidential information that Defendants illegally seized and continue to retain. The Client Plaintiffs seek a TRO and/or preliminary injunction as an interim remedy for irreparable injury to their rights of privacy. As class representatives, they also seek relief on behalf of the Client Class. In conjunction with the interim relief sought here, the Client Plaintiffs request that this Court provisionally grant their Motion for Class Certification so that the relief the Court orders will apply to the entire class.[2]

THE STANDARD FOR INTERIM INJUNCTIVE RELIEF

31. Interim injunctive relief is necessary in this case to protect fundamental constitutional rights of privacy and the right to be free of unreasonable searches and seizures. Plaintiffs meet the requirements: (1) a reasonable probability of success on the merits; (2) a danger of real, immediate and irreparable injury which may be prevented by injunctive relief; (3) there is no plain, speedy and adequate remedy at law; (4) the granting of a temporary injunction will not disserve the public interest; (5) the balance of equities favors the injunction; and (6) the injunction will preserve the status quo pending trial on the merits. *Rathke v. MacFarlane*, 648 P.2d 648, 653 (Colo. 1982).

[2] A provisional grant of class certification "may be conditional, and may be altered or amended before the decision on the merits." C.R.C.P. 23(c)(1). Provisional certification at this time is necessary only if the Court disagrees that Ms. Cerrillo has third-party standing to seek relief on behalf of her clients.

I. PLAINTIFFS HAVE A SUBSTANTIAL PROBABILITY OF SUCCESS ON THE MERITS

A. The Defendants Intruded Into An Area in Which Society Recognizes A Significantly Heightened Privacy Interest, And Defendants Searched, Seized And Continue to Retain Highly Personal Confidential Information Protected by Article II, Section 7 And The Constitutional Rights of Privacy And of Confidentiality.

32. The Plaintiffs' right to be free of unreasonable searches and seizures is protected by Article II, Section 7 of the Colorado Constitution as well as Section 16-3-304 of the Colorado Revised Statutes and Rule 41 of the Colorado Rules of Criminal Procedure. Plaintiffs' confidential information is further protected by the constitutional right of privacy, which is also called the right of confidentiality, which "protects the individual interest in avoiding disclosure of personal matters." *Stone v. State Farm*, 185 P.3rd 150, 155 (Colo. 2008), quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977); *see Martinelli v. District Court*, 612 P.2d 1083, 1091 (Colo. 1980).

33. The Defendants seized, searched, and retain Ms. Cerrillo's personal tax return information as well as the tax return information of the Client Plaintiffs and the Client Class. The Plaintiffs and all of Ms. Cerrillo's clients have a reasonable expectation that their confidential information will remain private. *See People v. Lamb*, 732 P.2d 1216, 1219, 1220-21 (Colo. 1987) (banking records and records of financial transactions protected by right of privacy and Article II, Sections 7 and 25); *Charnes v. DiGiacomo*, 612 P.2d 1117, 1120-21 (Colo. 1980) (bank customers have a reasonable expectation of privacy, protected by Article II, Section 7, in their banks' records of financial transactions).

34. Federal statutes expressly protect the confidentiality of tax return information maintained by tax preparers. Pursuant to 26 U.S.C. § 7216, a tax preparer commits a federal crime by disclosing or using, without legal authorization, information acquired in the process of preparing another person's tax returns. A separate statute makes tax preparers liable for civil penalties for unauthorized disclosures. 26 U.S.C. § 6713.

35. The Colorado Supreme Court recently reaffirmed "Colorado's strong policy in favor of nondisclosure of tax returns." *Stone*, 185 P.3d at 159. The court noted:

> Aside from disclosing income, tax returns typically contain "information about the taxpayer's marital status, dependents, business dealings, investments, religious affiliations, charitable inclinations, property holdings, and debt obligations."

Stone, 185 P.3d at 156, quoting William A. Edmunson, *Discovery of Federal Income Tax Returns and the New 'Qualified' Privileges*, 1984 Duke L.J. 938, 938 (hereafter "Edmunson"). Because of the wealth of personal detail, the court explained that "a tax return reveals 'the

skeletal outline of [a taxpayer's] personal and financial life.'" *Id.*, quoting Edmunson at 938 n.2.

36. As explained in more detail below, a claim invoking the constitutional right of privacy requires a three-step analysis. *Martinelli*, 612 P.2d at 1091. The first prong analyzes whether the information is sufficiently intimate, private and personal such that the right of privacy applies. *Id.* With regard to tax return information, case-by-case analysis is unnecessary. The Colorado Supreme Court held that a request for tax return information *always* satisfies the first *Martinelli* prong. *Stone*, 185 P.2d at 158 n.5.

B. The Warrant And The Subsequent Search Failed To Meet The Standards of Article II, Section 7; C.R.S. § 16-3-304; And Rule 41 of The Rules of Criminal Procedure.

37. The search violated Plaintiffs' constitutional and statutory rights in four distinct ways. *First*, the warrant failed to meet the particularity requirement. *Second*, the warrant failed the requirement that searches and seizures be reasonable. *Third*, the officers seized materials and information that they were not authorized to seize under the already-overbroad warrant. Fourth, the warrant failed to comply with the additional requirements—not based on the state or federal constitutions but nevertheless mandatory—of C.R.S. § 16-3-304 and Rule 41 of the Colorado Rules of Criminal Procedure.

i. The Search Warrant Failed to Meet The Particularity Requirement.

38. "A warrant authorizing a search for a person's papers poses significant risks to privacy." *People v. Hearty*, 644 P.2d 302, 312 (Colo. 1982). "Consequently, it is incumbent that 'responsible officials, including judicial officials . . . take care to assure that [such searches] are conducted in a manner that minimizes unwarranted intrusions upon privacy.'" *Id.*, at 312-13, quoting *Andresen v. Maryland*, 427 U.S. 463, 482, n.11 (1976). Instead of minimizing unwarranted intrusions, the 3-page search warrant in this case authorized unwarranted and disproportionate intrusions into privacy.

39. In *United States v. Leary*, 846 F.2d 592 (10th Cir. 1988), the court held that a warrant authorizing a search of a business for documents violated the particularity requirement in three distinct ways:

(a) First, the warrant "contained no limitation on the scope of the search." *Id.* at 606.
(b) Second, the warrant was "not as particular as the circumstances would allow or require." *Id.*
(c) Third, the warrant "extends far beyond the scope of the supporting affidavit." *Id.* 606.

The three-page search warrant in this case suffers from each of the flaws identified in *Leary*.

40. *First*, the warrant "contain[ed] no limitation on the scope of the search." 846 F.2d at 606. The warrant authorized defendants to search and seize all computers, all hard drives, all CDs, all floppy disks, and all data stored in electronic form in Ms. Cerillo's business. In paragraph 16, the warrant authorized the Defendants to search the computers and electronic storage media "for any and all data, correspondence, electronic mail, voice messages, letters, notes, ledgers, spreadsheets, documents, memorandum, image, or graphic files."

41. In authorizing this unlimited search of all electronically-stored information, the warrant did not specify or limit what defendants were to look *for*, other than anything that "would be material evidence in a subsequent criminal prosecution." The 3-page warrant failed to identify any specific statute that may have been violated, nor did the warrant identify the nature of the allegations or the nature of the criminal investigation. Numerous courts have held that a warrant flunks the particularity requirement when it authorizes seizing all files without reference to a particular crime. *See, e.g., Voss v. Bergsgaard*, 774 F.2d 402, 406 (10th Cir. 1985) ("[A] warrant that simply authorizes the seizure of all files, whether or not relevant to a specified crime, is insufficiently particular."). Similarly, even a reference to a broad or general criminal statute, without more, is insufficient. *See Leary*, 846 F.2d at 601-02 (10th Cir. 1988) (relying on "a series of decisions from other circuits [that] have held that reference to a broad federal statute is not a sufficient limitation on a search warrant"). In this case, the warrant authorized seizing all electronic storage media in the office and searching every file for any evidence of any crime at all. The warrant failed the particularity requirement. Instead, it was a "general warrant" that renders the entire search invalid. *Leary*, 846 F.2d at 601.

42. *Second*, the warrant manifested the second flaw identified in *Leary*: the warrant was "not as particular as the circumstances would allow or require." *Leary*, 846 F.2d at 606. For example, the warrant could have limited the search of the electronic storage media to evidence of the specific crimes Defendants were investigating, but it did not. The warrant could easily have limited the search of hard drives and other electronic storage media to electronic files that were connected to or related to the hardcopy files identified in paragraph #1 of the warrant, but it did not. Moreover, the warrant had no temporal limitation on the search of electronic storage media. It did not limit the search to files saved after a particular date. The warrant authorized searching each and every file of any kind that was stored in electronic form, no matter when it was created or saved.

43. *Third*, the warrant suffers from the third flaw identified in *Leary*: the warrant "extends far beyond the scope of the supporting affidavit." 846 F.2d at 606. The supporting Affidavit indicated that some tax return files in Ms. Cerillo's business would contain evidence that some clients earned wages attributed to a social security number that was not theirs. *See* Exhibit A to Complaint. According to the Affidavit, this constituted evidence of identify theft or

criminal impersonation.[3] The warrant, however, authorizes Defendants to seize and search for any kind of file stored in electronic form, not just the tax return files to which the supporting affidavit points. In addition, the warrant authorizes defendants to search for any evidence of any kind of crime, a search that is far broader than a search for evidence of the specific activity described in the supporting affidavit. Thus, the warrant extended "far beyond the scope of the supporting affidavit," *Leary*, 846 F.2d at 605, thus violating the particularity requirement.

ii. The Warrant Violated The Reasonableness Requirement of Article II Section 7.

44. A search warrant must not only satisfy the probable cause and the particularity requirements; it must also meet the "overriding test" of the constitutional requirement: the search it authorizes must be reasonable. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 559-60 (1978). "Reasonableness is an independent requirement of the Fourth Amendment, over and above the Warrant Clause requirements of probable cause and particularity." *United States v. Koyomejian*, 970 F.2d 536, 550 (9th Cir. 1992 (Kozinski, J., concurring). The warrant in this case authorized an unreasonable search and seizure.

45. When the government carries out a search and seizure to enforce its criminal statutes, as it did in this case, individualized suspicion remains the bedrock fundamental requirement of Article II, Section 7 as well as the Fourth Amendment. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37, 44 (2000) (holding that suspicionless "narcotics checkpoints" violate Fourth Amendment). In this case, the Affidavit provided *individualized* probable cause with regard to only one solitary file among thousands: the file of Servando Trejo. The Affidavit did not provide *individualized* probable cause with regard to any other taxpayer's file. While the Affidavit provided reason to believe that additional cases of mismatches between ITIN information and wage documentation could be found in Ms. Cerrillo's business, the Affidavit did not provide *individualized* grounds for breaching the reasonable and significantly-heightened expectation of privacy that protects the each additional taxpayer's file. Nevertheless, the warrant authorized breaching the privacy of *every* client's file as the means of finding the subset the Defendants targeted.

46. This unreasonable and disproportionate invasion of the privacy of *every* client's file is authorized even in paragraph #1 of the warrant, the paragraph that describes—with better specificity than other portions or the warrant—a set of hardcopy files that Defendants sought to seize and search. To implement the directive of paragraph #1, however, the warrant authorized officers to inspect *every* client's tax return information for the 2006 and 2007 tax years to determine whether the taxpayer used an ITIN. In doing so, the warrant authorized officers to

[3] The Affidavit also failed to explain *how* the files would demonstrate violations of Colorado statutes. It did not cite the statutes, nor did it describe the necessary mens rea or any of the elements of the crimes of criminal impersonation or identity theft.

inspect the confidential information and invade the reasonable expectation of privacy of *all* the taxpayers, whether they used an ITIN or not. The portions of the warrant authorizing the search of the electronic storage media were even broader and far more unreasonable.

47. The constitutional command that searches be "reasonable" requires that "when the State seeks to intrude upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required to make the search 'reasonable.'" *Winston v. Lee*, 470 U.S. 753, 763 (1985); *see Doe v. Bagan*, 41 F.3d 571, 576 (10th Cir. 1994). As Judge Kozinski has explained, this means that "even where the government shows probable cause, describes the scope of the search with particularity and complies with every other procedural requirement for issuance of a warrant, the court still must inquire into the 'extent of the intrusion on [the individual's] privacy interests and on the State's need for the evidence.'" *Koyomejian*, 970 F.2d at 550, quoting *Winston*, 470 U.S. at 763.

48. The warrant in this case did not simply intrude into *one* "area in which our society recognizes a significantly heightened privacy interest." *Winston*, 470 U.S. at 763. The warrant intruded into approximately 4900 *separate* areas in which 4900 *separate* individuals had a heightened privacy interest, without any grounds for believing that any particular one of those constitutionally-shielded areas (except for Servando Trejo's) harbored evidence of crime. "[A] search could be unreasonable, though conducted pursuant to an otherwise valid warrant, by intruding on personal privacy to an extent disproportionate to the likely benefits from obtaining fuller compliance with the law." *United States v. Torres*, 751 F.2d 875, 883 (7th Cir. 1984). The unreasonable search in this case intruded disproportionately on the personal privacy of thousands of Ms. Cerrillo's clients.

49. The unreasonable search is illustrated by an analogy. Assume police have probable cause to believe that a particular multi-unit apartment building houses persons who are illegally cultivating marijuana, but the occupants of other apartments have nothing to do with any illegal activity. Police know that illegal activity is occurring in that particular building, but they don't know which specific apartments contain the evidence. Can police obtain a warrant to enter each apartment to separate the culpable from the innocent? Of course not. *See People v. Arnold*, 509 P.2d 1248, 1249-50 (Colo. 1973).

50. Another analogy. Assume that police have probable cause to believe that smugglers regularly ship their marijuana by slipping a package into the suitcases of passengers who ride a particular train route. Assume further that police saw the smugglers insert the contraband into one particular suitcase and police know that there are others, but they don't know which of the remaining hundreds of suitcases also contain contraband. Can police obtain a warrant to search the luggage of *every* passenger on the train? Of course not. Although such a search would undoubtedly uncover the additional contraband, the absence of individualized suspicion and the disproportionate intrusion into privacy makes such a search unreasonable.

51. The reasonableness inquiry requires not only analyzing the disproportionate intrusion into privacy. It also requires considering the government's need to conduct the particular search and seizure the warrant authorized. In this case, the Defendants could have sought the evidence they wanted without trampling so egregiously on personal privacy.

a. For example, the government could have sought the taxpayer files described in paragraph #1 of the warrant by proceeding under C.R.S. § 16-3-301.1., which authorizes court orders for production of records. Such an order could have targeted a particular category of documents in a described set of files without intruding disproportionately on the privacy of the thousands of clients who did not use an ITIN. *Cf. Tattered Cover,* 44 P.3d at 1060 n.27 (noting that investigators could have sought the requested records while protecting the privacy of nonsuspects by using a trial subpoena instead of a search warrant).[4]

b. The reasonableness inquiry also requires a balancing of interests regarding the scope of the government's search of the files of those clients who used an ITIN. The Defendants sought evidence indicating that a particular individual received income attributed to a fictitious or appropriated social security number. The Defendants' need would be satisfied by W2 forms, 1099 forms, information indicating the true identity and ITIN number of the taxpayer, and perhaps additional information documenting the mismatch. The Defendants did not need, however, the additional confidential information contained in tax return files such as the specific identification information regarding a client's spouse, children, other dependents, their dates of birth and social security numbers, additional bank account information, and the additional varieties of highly confidential information found in tax return files that the Colorado Supreme Court described in *Stone,* 185 P.3d at 156.

iii. The Defendants Seized Numerous Files And Materials That Were Not Authorized by The Already Overbroad Warrant.

52. The search further violated the rights of the Plaintiffs because the officers seized numerous files and other materials that were not authorized by the already overbroad warrant.

53. Instead of limiting their search to the paper files identified in paragraph #1 of the warrant, the Defendants seized all paper files of all of the clients who used Ms. Cerrillo's tax return preparation services.

54. In addition, although the warrant limited the seizure of hardcopy files to those

[4] The procedures of C.R.S. § 16-3-101.1 did not become part of Colorado law until 2003, after the Colorado Supreme Court decided the *Tattered Cover* case.

corresponding to the 2006 and 2007 tax years, the Defendants seized *all* the files related to tax returns for *all* years, some dating back as far as 2000.

55. The warrant authorized, and the officers conducted, exactly what Article II, Section 7 forbids: a "general search." *Leary*, 846 F.2d at 601.

iv. The Search Warrant Was Invalid And Illegal Because It Failed To State The Probable Cause Upon Which It Was Purportedly Based.

56. In *People v. McKinstry*, 843 P.2d 18, 20 (Colo. 1993), the court explained that a search warrant is invalid when it fails to comply with the statutory requirements set out in C.R.S. § 16-3-304 and Rule 41 of the Rules of Criminal Procedure. The statute requires that a search warrant shall "[s]tate the grounds or probable cause for its issuance." C.R.S. § 16-3-304 (1)(c). Rule 41 contains an identical requirement.

57. In this case, the search warrant did *not* state the grounds or probable cause for its issuance. Because the warrant failed to comply with the statutory requirements, it was invalid, and the search was therefore unlawful. As the Colorado Supreme Court explained, "[A] search made pursuant to an invalid warrant is also unlawful." *McKinstry*, 843 P.2d at 20.

58. *McKinstry* was a criminal case, and the defendant argued that the exclusionary rule should apply. In denying relief, the court noted that the search violated statutory requirements that are not necessarily required by the state or federal constitutions. Although the court agreed that the search was unlawful, it reserved the exclusionary rule as a remedy for constitutional violations.

59. In this case, Plaintiffs do not rely on the exclusionary rule. *McKinstry's* denial of relief does not apply. *McKinstry* demonstrates that Plaintiffs were subjected to an unlawful search. Defendants' continued retention of illegally-seized confidential information represents ongoing injury. Plaintiffs are entitled to an appropriate remedy.

C. The Warrant And Subsequent Search And Continued Retention of Confidential Information Violates The Constitutional Right of Privacy And Confidentiality of The Plaintiffs And The Client Class.

60. In *Martinelli v. District Court*, 612 P.2d 1083 (Colo. 1980), the court set out a three-part test for analyzing whether a forced disclosure or acquisition of information violates the constitutionally-protected right of privacy, which the court also called a "right to confidentiality." *Id.* at 1091.

61. Regarding the first prong, the claimant must demonstrate an actual or subjective expectation of privacy and must also show that the information is "highly personal and sensitive"

such that disclosure "would be offensive and objectionable to a reasonable person of ordinary sensibilities." *Id.* Defendants seized and retain copies of Ms. Cerrillo's personal tax returns as well as the tax return files of the Client Class. When tax return information is at issue, case-by-case analysis is unnecessary. The Colorado Supreme Court holds that a request for tax return information *always* satisfies the first *Martinelli* prong. *Stone*, 185 P.2d at 158 n.5.

62. The second prong inquires whether disclosure is required to serve a compelling government interest. *Martinelli*, 612 P.2d at 1091. The compelling state interest "must consist in disclosure of the very materials or information which would otherwise be protected." *Id.* at 1092. Thus, the second *Martinelli* prong is not satisfied by a general statement of the universally-accepted proposition that enforcing criminal statutes is a compelling interest. The government's interest must be analyzed at a much more specific level: whether the government has a compelling interest in obtaining the specific personal confidential it seeks in a given case.[5]

63. The Defendants had no interest in seizing Amalia's personal tax returns, nor did they have a compelling interest in breaching the confidentiality of the tax return files of the thousands of customers who did not use an ITIN and thus were not suspected of earning income using fictitious or appropriated social security numbers. Moreover, even for those files described in paragraph #1 of the warrant, the government did not have a compelling interest in obtaining *all* of the confidential information in the taxpayer's files. The government's interest could have been satisfied with a less intrusive acquisition while preserving the confidentiality of other information—including confidential information about the taxpayers' spouses and children—that did not further the government's investigation of identity theft and/or criminal impersonation. Thus, the Defendants fail the second Martinelli prong, because they did not have a compelling interest in acquiring the information described in the overbroad warrant.

64. Finally, the search and seizure clearly fails the third *Martinelli* prong, which requires that "[d]isclosure must only be made in a manner, consistent with the state interest to be served, which will intrude least on the claimant's right to confidentiality." *Id.*

65. In every way that the warrant fails the particularity requirement, as explained above, it also fails *Martinelli's* third prong. Moreover, Defendants could have pursued their investigation through the less-intrusive means of a court order for production of records. *See* C.R.S. § 16-3-301.1. Defendants could also have further limited the intrusion by limiting their demand to specific categories of documents from a specified subset of tax return files, rather than demanding the entire file and thereby forcing disclosure of confidential information irrelevant to

[5] The Colorado Supreme Court requires that this "compelling need" analysis be conducted at a similar level of detailed specificity when a search warrant would intrude into the privacy of the reading habits of bookstore customers. *See Tattered Cover*, 44 P.3d at 1058 ("We hold that law enforcement officials must demonstrate a sufficiently compelling need for the specific customer purchase record sought from the innocent, third-party bookstore.").

Defendants' investigation and confidential information regarding the spouses, children and other dependents of the suspects.

II. PLAINTIFFS SATISFY THE ADDITIONAL THRESHOLD REQUIREMENTS FOR INTERIM INJUNCTIVE RELIEF

A. Plaintiffs Are Suffering Real, Immediate And Irreparable Injury That Can Be Remedied by Injunctive Relief.

66. Injury is irreparable when it cannot adequately be compensated in damages or when damages would be difficult to ascertain. *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001). In this case, monetary damages would be difficult to ascertain and could not compensate adequately for the ongoing violations and threatened violations of Plaintiffs' right of privacy and their right to be free of unreasonable searches and seizures. Moreover, the Colorado Governmental Immunity Act, the absence of a damages remedy for violations of the Colorado Constitution, *see Bd. of County Comm'rs v. Sundheim*, 926 P.2d 545, 552 (Colo. 1996), and the substantial hurdles of other immunity doctrines further demonstrate that Plaintiffs' injuries are irreparable. *See Blum v. Schlegel*, 830 F. Supp. 712, 728 (W.D.N.Y. 1993) (noting that irreparable injury is established if immunity doctrines insulate defendants from damages), aff'd, 18 F.3d 1005 (2d Cir. 1994).

67. As the leading treatise on civil procedure recognizes, "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." Wright, Miller and Kane, 11A *Fed. Prac. & Proc.Civ. 2d* § 2948.1 (2008).

68. Plaintiffs face a threat of additional illegal searches and seizures in the future. Ms. Cerrillo intends to continue providing tax preparation services. The Defendants acknowledge, in the Affidavit, that she follows the law and IRS procedures. Nevertheless, Defendants contend that continuing the business practices described in the Afffidavit provides probable cause for another search and seizure without individualized suspicion regarding any particular clients. Plaintiffs fear another search and seizure for tax records connected with filings for the 2008 tax year. Ms. Cerrillo also fears that the illegal search and continued retention of confidential information will deter clients from returning to prepare and file their 2008 tax returns and that, without intervention from this Court, she will continue to lose business as a result of the Defendants' illegal search and seizure and disproportionate intrusion into her clients' privacy.

69. Courts have recognized that unreasonable searches and seizures constitute irreparable injury that warrants preliminary injunctive relief. *E.g.*, *NORML v. Mullen*, 608 F. Supp. 945, 963 (N.D. Cal. 1985) (granting preliminary injunction); *Pratt v. Chicago Hous. Auth.*, 848 F. Supp. 792, 796 (N.D. Ill. 1994) (granting preliminary injunction). Granting the interim

relief requested here will deter Defendants from conducting another similar search and will help to assure customers that their confidential records will remain confidential.

70. Similarly, there is no doubt that threatened violations of the right of privacy or confidentiality constitute irreparable injury that warrants preliminary injunctive relief. *E.g.*, *Hawaii Psychiatric Society v. Ariyoshi*, 481 F.Supp. 1028, 1052 (D. Haw. 1979) (granting preliminary injunction and noting that "disclosure of the highly personal information . . . to government personnel is itself a harm that is both substantial and irreversible").

71. In addition, the government's continued retention of illegally-obtained confidential information also constitutes irreparable injury that can be remedied by injunctive relief. In *Church of Scientology of California v. United States*, 506 U.S. 9 (1992), the Court considered a case in which an IRS subpoena sought confidential records of the Church. The Church moved to quash, and the district court upheld the subpoena. *Id.* at 11. The Church appealed, but failed to obtain a stay pending appeal. *Id.* The Church then complied with the subpoena, and the Ninth Circuit dismissed the Church's appeal as moot. *Id.* at 11-12. The Supreme Court reversed, explaining that the case was not moot, because the Church suffered a continuing injury and threat of future injury for which a court could provide an injunctive remedy:

> Taxpayers have an obvious possessory interest in their records. When the Government has obtained such materials as a result of an unlawful summons, that interest is violated and a court can effectuate relief by ordering the Government to return the records. Moreover, even if the Government retains only copies of the disputed materials, *a taxpayer still suffers injury by the Government's continued possession of the materials, namely, the affront to the taxpayer's privacy*. . . . Even though it is not too late to prevent, or to provide a fully satisfactory remedy for, the invasion of privacy that occurred . . . a court does have power to effectuate a partial remedy by ordering the Government to destroy or return any and all copies it may have in its possession.

Church of Scientology, 506 U.S. at 13 (emphasis added). Thus, the Court held that if the summons were "improperly issued or enforced," the injury to the taxpayers' privacy rights could be remedied by destruction of all the illegally seized information in the government's possession. *Id.* at 15.

72. Courts ruling both before and after *Church of Scientology* have recognized that return of originals is not an adequate remedy when the government has illegally obtained confidential information. They have affirmed their equitable power to grant remedies that will ensure more complete relief, including requiring the government to surrender any copies made of illegally-obtained information. *See, e.g.*, *Doe v. U.S. Air Force*, 812 F.2d 738, 740-41 (D.C. Cir. 1987) (appropriate relief includes the government's surrender of retained copies and information

obtained by an unreasonable search and seizure); *ADAPT of Phila. v. Phila. Hous. Auth.*, 417 F.3d 390, 393-94 (3rd Cir. 2005) (finding "return or destruction" of compilations made from confidential information would "alleviate, at least in part, any affront to the privacy rights of the individuals"); *Reich v. Nat'l Eng'g. Contracting. Co.*, 13 F.3d 93, 98 (4th Cir. 1993) (in challenge to collection of confidential information by the Occupational Safety and Health Administration, court found that the "privacy interest . . . in the delivered copies . . . plainly would be benefited by an order requiring OSHA to return or destroy these copies").

73. Once the government has already obtained a person's confidential information, the threat of future disclosure or dissemination also constitutes irreparable injury that merits injunctive relief. The Defendants have already disclosed confidential information they obtained in the challenged search and seizure, and the Defendants plan additional disclosures as they review, investigate, and act on the information they illegally obtained.

74. Plaintiffs also face a threat of unplanned disclosures stemming from the absence of adequate safeguards to limit the dissemination and disclosure of the confidential information Defendants possess.

75. Plaintiffs also face a potential threat that their confidential information will be disclosed in response to requests from the media or the public pursuant to the Colorado Criminal Justice Records Act ("CCJRA"). *See Harris v. Denver Post Corp*., 123 P.3d 1166, 1173 (2005) (holding that documents obtained pursuant to a search warrant that has not been ruled invalid are criminal justice records potentially subject to public disclosure under the terms of the CCJRA).

76. For Ms. Cerrillo in particular, the illegal search and seizure and Defendant's retention of illegally-seized information has caused and threatens to continue causing irreparable injury to the reputation, goodwill, and client relationships of her business. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. District Court of Denver*, 672 P.2d 1015, 1018 (Colo. 1983) (harm and injury to company business, its reputation and its good will constituted irreparable injury). "Injury to reputation or goodwill is not easily measurable in monetary terms, and so if often is viewed as irreparable." Wright, Miller and Kane, 11A *Fed. Prac. & Proc.Civ. 2d* § 2948.1.

B. Plaintiff Has No Plain, Speedy, or Adequate Remedy At Law.

77. As mentioned earlier, when discussing irreparable injury, a damages remedy is inadequate and may be unavailable. "[W]hen injury cannot be rectified by award of damages, an action at law is an inadequate remedy." *Herstam v. Silvercreek Water and Sanitation Dist*., 895 P.2d 1131, 1139 (Colo. App. 1995), citing *MacLeod v. Miller*, 612 P.2d 1158, 1160 (Colo. App. 1980). Even if damages were available, it is not a "speedy" remedy.

C. The Public Interest Will Not Be Disserved by Granting Preliminary Injunctive Relief.

78. It is the *denial* of interim relief that would disserve the public interest. Protection of constitutional rights advances the public interest. *See, e.g., Washington v. Reno,* 35 F.3d 1093, 1103 (6th Cir. 1994) (court explained that injunction furthered the public interest in having government officials follow federal law); *Zepeda* v. *United States INS*, 753 F.2d 719, 727 (9th Cir. 1984) ("the INS cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations").

D. The Balance of Equities Favors A Grant of Interim Relief.

79. The balance of equities surely favors the Plaintiffs. The vast majority of the information Defendants seized is irrelevant to the investigation that prompted the illegal search. With regard to information the Defendants believe is relevant to their investigation, the balance of equities nevertheless favors the Plaintiffs. The Defendants should not be allowed to profit from their illegal acquisition of confidential information. In this request for interim relief, Plaintiffs ask that the Defendants be denied access to the illegally-seized confidential information until this Court has the opportunity to rule. Any prejudice to the Defendants is certainly outweighed by Plaintiffs' rights of privacy and the interest in assuring that Defendants respect constitutional rights.

E. Interim Injunctive Relief Will Preserve The Status Quo Pending Trial

80. In analyzing a request for injunctive relief, the status quo is "the last uncontested status between the parties which preceded the controversy." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 269 F.3d 1149, 1155 (10th Cir. 2001). In this case, the requested interim injunctive relief will preserve the status quo that existed before the challenged search and seizure.

CONCLUSION

81. For the foregoing reasons, Plaintiffs respectfully ask that this Court grant the following relief:

A. Set an accelerated briefing schedule and a prompt date for an evidentiary hearing to hear evidence and argument on the issues Plaintiffs raise here;

B. Issue an immediate temporary restraining order—to be effective until the Court conducts a hearing—that Defendants provide to the Court, under seal, all materials seized in the search and seizure, including all copies of such materials and all compilations and notes relating to or derived from the confidential information seized during the search

and seizure.

C. Plaintiffs further request, after a hearing, a preliminary injunction ordering the same relief until the Court rules on Plaintiffs' request for relief pursuant to Rule 41(e) of the Colorado Rules of Criminal Procedure and/or until final judgment on Plaintiffs' claims for injunctive and declaratory relief.

D. Plaintiffs further ask for any additional interim relief the Court deems just in order to remedy the invasion of Plaintiffs' rights of privacy and rights protected by C.R.S. § 16-3-304**;** Rule 41 of the Colorado Rules of Criminal Procedure, Article II, Sections 7 and 25 of the Colorado Constitution, and the Fourth and Fourteenth Amendments.

Respectfully submitted on January 26, 2009.

This document has been filed via Lexis/Nexis File & Serve in accordance with C.R.C.P. 121 and the original document and signature are maintained on file.

s/Elizabeth L. Harris
N. Reid Neureiter, #29747
Elizabeth L. Harris, #29556
ATTORNEYS FOR PLAINTIFFS IN COOPERATION WITH THE ACLU FOUNDATION OF COLORADO

Mark Silverstein, #26979
Taylor Pendergrass, #36008
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO
ATTORNEYS FOR PLAINTIFFS

Michael Joseph Glade, #19515
INMAN FLYNN BIESTERFELD BRENTLINGER & MORITZ PC
1660 Lincoln St. Ste. 1700
Denver, CO 80264-1701
ATTORNEYS FOR PLAINTIFFS IN COOPERATION WITH THE ACLU FOUNDATION OF COLORADO

Shannon Lyons, #26153
COLLINS, LIU & LYONS LLP
812 8th Street
Greeley, CO 80631
ATTORNEYS FOR PLAINTIFFS IN COOPERATION WITH THE ACLU FOUNDATION OF COLORADO