SUPREME COURT, STATE OF COLORADO Colorado State Judicial Building 2 East Fourteenth Avenue, Fourth Floor Denver, Colorado 80203 Colorado Court of Appeals Case No. 09CA0796 Weld County District Court Honorable James A. Hiatt, District Court Judge Civil Action No. 2009-CV-100	
Appellees/Petitioners: **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 v. **Appellants/Respondents:** **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,	**▲COURT USE ONLY▲** Case No. 09SC341
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ANSWER BRIEF OF APPELLEES-PETITIONERS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g). It contains 8,620 words.

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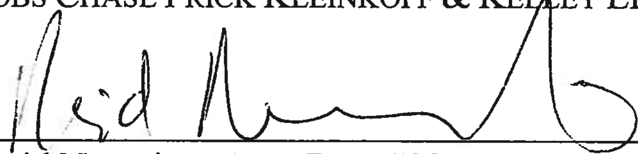

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the search and seizure of records from the office of an unincorporated tax preparation business violated the rights of either the business owner or her clients under the Colorado or United States Constitution?

STATEMENT OF THE CASE

A. Nature of The Case.

This case involves the constitutionality of the seizure and search of 5,000 taxpayer files from a tax preparer's office without any individualized suspicion that the tax preparer or any of her taxpayer clients had committed a crime or that any tax file contained evidence of a crime. Officers only had information that the tax preparer, Amalia Cerrillo, was lawfully assisting some undocumented workers in filing taxes. Nonetheless, the officers sought and obtained a search warrant to enter Cerrillo's office, Amalia's Translation and Tax Services, for the purpose of rummaging through her client files in the hope of finding evidence that one or more of the taxpayer clients had committed some criminal offense related to the improper use of a social security number.

Four district court judges, including the district court in this case, have reviewed the warrant and its supporting affidavit and each found the search and seizure it authorized unconstitutional. In all three criminal cases, the district

courts applied the exclusionary rule, concluding that no reasonable officer could have relied in good faith on the validity of this warrant. One district court judge described the warrant as "breathtaking in its expansiveness."[1] Another likened the warrant to a "writ of assistance" employed in colonial America, decrying the search of the 5,000 taxpayers' files as "nothing more than an exploratory search based upon suspicion that some unknown person or persons had committed an offense."[2]

B. Course of Proceedings and Disposition of The Court Below.

Cerrillo and certain of her taxpayer clients brought a putative class action lawsuit against Weld County District Attorney Ken Buck and Sheriff John Cooke in their official capacities (collectively, "Weld County"). The Complaint alleged that the search and seizure conducted at Amalia's violated Article II, Section 7 of the Colorado Constitution, the Fourth Amendment of the United States Constitution, and the constitutional right of privacy, as articulated in *Martinelli v. District Court*, 612 P.2d 1083 (Colo. 1980) and *Stone v. State Farm Mut. Auto.*

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[1] *People v. Herrera*, Case No. 08CR2150 (Apr. 9, 2009), attached as Addendum A, at 3.

[2] *People v. Gutierrez*, Case No. 08CR2087 (Mar. 7, 2009), attached as Addendum B, at 29.

Ins. Co., 185 P.3d 150 (Colo. 2008). The suit sought declaratory and injunctive relief, including return of the seized materials and all copies.

After a two-day hearing on the plaintiffs' motion for a preliminary injunction, the district court ruled that plaintiffs were likely to succeed on the merits of their constitutional claims against Weld County and granted the injunction, ordering that all materials seized from Amalia's be returned to the court clerk.[3] Like the other district courts to have reviewed the warrant, the district court in this case found the warrant authorized a "barebones general search." At best, ruled the district court,

> what happened here was the affidavit established probable cause to believe that somewhere in Ms. Cerrillo's records, in the records of some customer, or customers – we don't know who and we don't know how many – there would be evidence of some crime by someone. There was not probable cause as to a specific individual, as to specific files, as to a specific crime ....

(Tr. 4/13/09 at 15:21-16:2.)

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[3] The district court also granted the taxpayer plaintiffs' motion to proceed under pseudonyms, concluding that the taxpayer plaintiffs had demonstrated a "reasonable fear of the risk of retaliation and adverse consequences in the community" if their identities were made public. Although the court made findings that plaintiffs satisfied the standards of C.R.C.P. 23(a) and (b)(2), it nevertheless denied the motion for class certification, on the ground that certification of a class was "unnecessary" and "superfluous" where Cerrillo could adequately represent the interests of her taxpayer clients. (Tr. 4/13/09 at 4:16-20; 23:1-6; 24:23-25; 27:3-6.)

Weld County appealed the district court's preliminary injunction order to the court of appeals, then immediately sought a stay of appellate proceedings on the ground that *People v. Gutierrez* (No. 2009SA69) — a government appeal of one of the suppression orders involving the same warrant — was already pending in this Court and would be determinative of the issues raised in Cerrillo and her clients' case. The court of appeals granted the stay. This Court then granted Cerrillo's petition for a writ of certiorari under C.A.R. 50.

STATEMENT OF FACTS

A. Overview of The Search: A Fishing Expedition in Search of Wrongdoers.

On October 17, 2008, four officers with the Weld County Sheriff's Office and an agent from U.S. Immigration and Customs Enforcement appeared at Amalia's Translation and Tax Services ("Amalia's") in Greeley, Colorado. (Trans.No. 25003818, Ex. 17, Police Report, at 002-003.) Officers did not suspect Amalia's owner, Amalia Cerrillo, of any wrongdoing. Indeed, the lead investigating officer, Josh Noonan, had been told by a Department of Revenue ("DOR") tax agent that Cerrillo was complying with all state and federal laws when she assisted her taxpayer clients — some of whom were undocumented workers — in filing their tax returns. (Trans.No. 25003854, Ex. 18, Affidavit, at

004.) Instead, officers were hoping to find evidence within Cerrillo's client files of wrongdoing by the *taxpayers*.

Based on earlier interviews with the DOR agent and Cerrillo, Noonan had learned that undocumented immigrants and other wage earners who are ineligible to receive a social security number are assigned an individual taxpayer identification number ("ITIN") by the Internal Revenue Service for the purpose of filing income tax returns. (*Id.* at 004-005.) Noonan also learned that Cerrillo had some taxpayer clients who filed tax returns using an ITIN but whose wage documentation showed a social security number — an inconsistency potentially indicating that the social security number was either fictitious or belonged to someone else. (*Id.*)

But Noonan and his fellow officers had no reason to believe that any particular taxpayer's tax return contained a mismatching ITIN and social security number. That was because the officers had no information at all about any of Cerrillo's taxpayer clients. With the exception of a single taxpayer who was being investigated for identity theft (*see id.* at 003), the officers had no reason to believe that any particular taxpayer client had committed an offense. All the officers knew was that some undocumented workers were among the taxpayers who went

to Amalia's for the quite legal purpose of obtaining assistance with filing their tax returns. (*See generally, id.*)

Undeterred by a lack of individualized suspicion of the tax preparer, the taxpayer clients, or the taxpayers' files, one of the officers prepared an affidavit in support of a search warrant stating he believed that evidence of either identity theft or criminal impersonation would be found somewhere in Cerrillo's client files. (*Id.* at 006.) A district court judge in Weld County issued a search warrant for Amalia's, authorizing the seizure of all 2006 and 2007 tax returns with a name and ITIN that did not match the taxpayer's accompanying wage documents. (Trans.No. 25003751, Ex. 15, Warrant.)

The officers, aided by the ICE agent, carted off 49 boxes of client files, all of Cerrillo's computers and at least 46 floppy disks. (Tr. 3/10/09 at 98:9-12; Trans.No. 25003786, Ex. 16.) In one of the criminal cases, the government conceded that "all that was left in [] Cerrillo's business after the search were a desk and a monitor."[4] Cerrillo offered to produce the relevant taxpayers files if officers provided the taxpayers' identities but, as Noonan explained, that was impossible because "we are not looking at particular individuals, we're looking at particular tax years." (Tr. 3/10/09 at 114:2-7.)

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[4] *People v. Vargas*, Case No. 08CR2008 (Apr 20, 2009), attached as Addendum C, at 2.

For the next five days, eight officers worked 14-16 hours a day to comb through 5,000 taxpayer files for evidence of a crime and to copy those files containing both an ITIN and a social security number. (*Id.* at 100:23-25, 103:3-8; *see also* Tr. 3/9/09 at 130:19-21.) Noonan declined to comply with the warrant's instruction to seize only tax returns from tax years 2006 and 2007 when, in his view, it was "reasonable" to copy tax returns from other years. (Tr. 3/10/09 at 102:3-12.) The officers also copied Cerrillo's computer hard drives, meaning that, in addition to all of her electronic client tax information, officers had unlimited access to Cerrillo's own banking records, tax returns, personal e-mails, even personal photographs. (Tr. 3/9/09 at 133:134:4.) Cerrillo's original files and computers were returned on October 23, 2008, but the Sheriff's Office retained paper copies of 1,338 taxpayer client files and copies of Cerrillo's computer hard drives in their entirety. (Tr. 3/10/09 at 106:11-13, 107:21-108:3.)

B. The Affidavit in Support of The Warrant: No Probable Cause To Believe That Cerrillo Had Committed Any Offense.

On October 16, 2008, deputy Richard Toft prepared an affidavit for a search warrant for Amalia's. (Trans.No. 25003854, Ex. 18.) By that time, he had learned from Colorado DOR agent Stephen Bratten that Cerrillo was complying with federal and state law when she assisted her undocumented worker clients with obtaining ITINs and filing tax returns with non-matching wage

documentation. For that reason, Toft acknowledged in his affidavit that "Amalia's Tax Service is conducting business according to Internal Revenue Service (IRS) guidelines and has not violated any laws." On that point, Toft was certainly correct. (*Id.* at 004.)

1. <u>The Federal ITIN Program.</u>

Every person who earns income in the United States, regardless of immigration status, is required to pay taxes on that income, even if the income is earned under a social security number that does not belong to, or has been created by, the wage earner. (Trans.No. 25008343, Ex. 47.) To file a tax return, a taxpayer needs a unique identifying number for tracking purposes. (Tr. 3/9/09 at 39:16-23.) American citizens and lawful resident aliens use a social security number. Persons who are not eligible for a social security number are assigned a nine-digit ITIN by the IRS. (*Id.*; *see also* Trans.No. 25008589, Ex. 52.)

Because "[t]he goal of the IRS is to collect tax revenue" (Tr. 3/9/09 at 83), the IRS encourages undocumented workers to file tax returns with an ITIN, even if they have been earning wages unlawfully by using a social security number that does not belong to them. Bilingual IRS publications encourage Spanish-speaking wage earners ineligible for social security numbers to apply for ITINs. (Trans.No. 25008589, Ex. 52.) IRS representatives regularly present at "tax forums"

throughout the country, where they instruct professional tax preparers like Cerrillo how to file returns for ITIN holders who have earned wages under a social security number. (Tr. 3/9/09 at 50-51; Trans.No. 25000181, Ex. 9; *see also* Trans.No. 24994472, Ex. 6; Trans.No. 24994540, Ex. 7.)

2. Confidentiality of Tax Return Information.

To further encourage participation in what is essentially a "voluntary self-assessment system" (Tr. 3/9/09 at 27:14-22), the IRS reassures all wage earners — including undocumented workers — that their tax return information will be kept confidential. Indeed, confidentiality is required by federal statutes.

In response to public concern about the widespread use of tax information by government agencies for purposes unrelated to tax administration, Congress revised 26 U.S.C. § 6103, establishing a new statutory scheme "under which tax information was confidential and not subject to disclosure except to the extent explicitly provided by the Code." (Trans.No. 25004965, Ex. 33 at 3.) Under the current version of § 6103, disclosures of tax information for purposes other than tax administration are limited, balancing the "need for a particular item of tax information ... against the taxpayer's reasonable expectation of privacy," as well as "the effect on continued compliance with our voluntary system of self-assessment." (*Id.* at 4; *see also id.* at 34.) As the Treasury Department has

explained, "[t]axpayers who view the IRS as a resource for a variety of other interests will be less inclined to voluntarily turn over sensitive information out of fear of where it ultimately might land." (*Id.* at 34.)

Accordingly, § 7213 established criminal penalties, making it a felony to disclose tax information without authorization and a misdemeanor to inspect tax information without authorization. (*Id.* at 4.) The statute also subjects professional tax preparers like Cerrillo to criminal and civil penalties for the unauthorized disclosure of tax information. *See* 26 U.S.C. §§ 6713, and 7216.

Cerrillo understood the importance to her taxpayer clients of confidentiality of tax information. Cerrillo's clients frequently are concerned that their confidential information, such as medical expenses, bank account information, or immigration status, will be disclosed — whether to ex-wives or the immigration authorities. (Tr. 3/9/09 at 125:2-11.) Cerrillo provides her clients with a copy of her privacy policy pursuant to which she restricts access to, and uses safeguards to protect, clients' personal information. (*Id.* at 123:8-124:5; Trans.No. 25004746, Ex. 28.) Cerrillo is regularly audited by the IRS to ensure that she is retaining appropriate client documents and is maintaining them in a way that protects client confidentiality. (Tr. 3/9/09 at 134:24-135:6, 135:24-136:7.)

The IRS's outreach and assurances of confidentiality have paid off. More than 10.7 million ITINs were assigned by the IRS to taxpayers between 1996 and 2007, with nearly 1.6 million assigned in 2006 alone.[5] (Trans.No. 25000181, Ex. 9 at 11.) Today, the total number of ITINs issued is close to 15 million. (Tr. 3/9/09 at 51:17-20.)

3. The Same Practices Are Followed At Every Major Tax Preparation Firm.

Approximately 60 percent of all tax returns in the United States are filed by paid tax preparers. (Tr. 3/9/09 at 69:19-22.) And, like Amalia's, most national tax preparation organizations prepare and file taxes for workers who are ineligible to receive social security numbers.

H&R Block has more than 13,000 offices nationwide and in 2008 prepared more than 21 million tax returns. (*Id.* at 60:5-6.) It hired a Hispanic advertising agency to promote its ITIN program (Tr. 3/9/09 at 66:16-25), encouraging workers without social security numbers to obtain an ITIN through H&R Block. (*Id.* at 63:17-23; Trans.No. 25008165, Ex. 44.)

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[5] Between 2004 and 2006 there was nearly a 40 percent increase in the number of tax returns filed with ITINs. (Trans.No. 25005425, Ex. 35 at 005.) IRS Commissioner Mark Everson attributed this increase to participation by unauthorized workers who were increasingly confident that "their [tax] information is not going across town to Homeland Security." (*Id.* at 31.)

Jackson Hewitt Tax Service has 6,800 offices and in 2008 prepared approximately 3.5 million tax returns. (Tr. 3/9/09 at 60:8-9.) Jackson Hewitt, too, advertises its ITIN filing services in Spanish. (*Id.* at 64:9-18; Trans.No. 25003957, Ex. 21.)

Liberty Tax Service has approximately 3,000 offices nationwide. (Tr. 3/9/09 at 60:11-12.) At its office on 10th Street in Greeley, 40 percent of total tax returns include an ITIN. (*Id.* at 65:5-12.)

These national offices, with their combined 25 million taxpayer files, are equally vulnerable to the kind of search that occurred at Amalia's. Indeed, shortly after the search of Amalia's and the seizure of her taxpayer files, defendant Ken Buck expressed his intention to raid other tax preparation offices. Chris Casey and Mike Peters, *Weld Cracks Down on 1,300 ID Theft Cases*, Greeley Tribune, November 14, 2008 ("Buck added, however, he believes similar cases occur at other tax preparation offices ... He said Weld authorities will likely investigate other tax preparers ...."

C. The Affidavit in Support of The Warrant: No Probable Cause to Believe That Any Particular Taxpayer Had Committed an Offense or That Evidence of A Crime Would Be Found in Any Particular Taxpayer File.

That Cerrillo was not suspected of any wrongdoing did not put off the officers — what they wanted, after all, was an opportunity to rummage through

Cerrillo's taxpayer files to determine whether any of her *clients* had committed an offense. That is essentially what Toft asked for and what he got.

A district court judge approved the request for a warrant, authorizing the seizure of:

> 1. All tax returns filed with an Individual Tax Identification Number (ITIN) for tax years 2006 and 2007 in which the ITIN name and number do not match the wage earnings documentation.
>
> 2. Proof of identification referred to in paragraph one associated with the ITIN tax returns.
>
> 3. Any and all documents associated with the ITIN tax returns referred to in paragraph one.
>
> * * *
>
> 6. W-7 Forms [ITIN applications]
>
> 7. Wage and tax earning documentation referred to in paragraph one, including but not limited to W-2 forms, and 1099 forms.

(Trans.No. 25003751, Ex. 15.)

In addition, the warrant permitted seizure of any and all computer systems and computer storage media, all computer peripheral devices, and software. The warrant authorized officers to examine the computers and storage devices for all documents or data which "would be material evidence in a subsequent criminal prosecution." (*Id.* at 2-3.)

Authorization for the search and seizure was based on Toft's affidavit, which recounted this information:

- Two months earlier, fellow officer Noonan had interviewed Servando Trejo, the suspect of an identity theft investigation. Trejo told Noonan that Cerrillo filed his tax returns, sometimes electronically, using a social security number Trejo had purchased in Texas and an ITIN obtained for him through Amalia's. Trejo stated that "everyone knows to go to [Amalia's] for their taxes." (Trans.No. 25003854, Ex. 18 at 003-004.)

- Cerrillo confirmed to Bratten that she prepared and filed tax returns for, among others, undocumented workers who used an ITIN for filing because they were ineligible to receive a social security number. Some of those clients nonetheless claimed wages under a social security number. In those cases, Cerrillo crossed out the social security number and filed using the taxpayer's correct information. According to Toft's affidavit, Cerrillo told Bratten that "if people are applying for an ITIN they are illegal aliens."[6] Cerrillo advised that she kept a copy of each client's tax file in her office. (*Id.* at 004-005.)

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[6] Whether or not the remark that all ITIN holders are "illegal aliens" was properly attributed to Cerrillo, it is a patently incorrect statement of the law. Indeed, at the preliminary injunction hearing, Cerrillo herself explained that a person might be in the United States legally (on a visa, for example) but not eligible for a social security number. (Tr. 3/10/09 at 143:12-20.) If that person

Toft stated that, based on this information, he had a "belief that evidence of Identity Theft and Criminal Impersonation exists at the business/residence known as Amalia's Translation and Tax Services …." (*Id.* at 006.)

What Toft did not know (or at least, did not include in the affidavit) was the identity of any taxpayer (other than Servando Trejo) suspected of engaging in any wrongdoing; when any alleged wrongdoing occurred; the social security numbers or ITINs used in the commission of any alleged offense; how many, or what percentage, of Amalia's taxpayer clients were suspected of wrongdoing; in which taxpayer file there was probable cause to believe evidence of a crime was likely to be found; and whether Cerrillo kept taxpayer information in electronic form on her computers.

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earned money (from investments, for example), he or she would be required to file taxes using an ITIN. *See* 26 C.F.R. § 301.6109-1(a)(1)(ii)(B).

SUMMARY OF THE ARGUMENT

The search of Amalia's and of the 5,000 taxpayer files contained within the office constituted a fishing expedition in violation of the Fourth Amendment and Art. II, § 7 of the Colorado Constitution. The purpose of obtaining the warrant was to gain access to the taxpayer files to determine whether a crime had been committed and, if so, by whom.

But the taxpayers had a reasonable expectation of privacy in their tax files; therefore, before Weld County could intrude upon the taxpayers' zones of privacy, officers had to establish probable cause that evidence of a crime would be found in the particular files they sought to search. The supporting affidavit, however, failed to set forth individualized suspicion about any taxpayer (other than Servando Trejo) or taxpayer file.

The search and seizure of the taxpayer files was unreasonable under the totality of the circumstances. Weld County failed to demonstrate probable cause for the search and deliberately ignored a complex federal scheme designed to encourage undocumented workers to file taxes by insuring the confidentiality of their tax information.

The search also violated Cerrillo's and her taxpayer clients' constitutional right to privacy. The government cannot show a compelling need for the

information that was disclosed, and continues to be retained, nor did it obtain the information through the least intrusive means.

ARGUMENT

I. INTRODUCTION

The Fourth Amendment to the United States Constitution and Article II, Section 7 of the Colorado Constitution protect the right of the people to be secure in their persons, papers, homes and effects against unreasonable searches and seizures and require that a warrant to search any place or seize any person be supported by probable cause and describe with particularity the place to be searched and the things to be seized. U.S. Const. amend. IV; Colo. Const. art. II, § 7.

To determine whether a particular search violated the Fourth Amendment, courts examine the totality of the circumstances, balancing the level of intrusion upon the individual's privacy with the governmental interest at stake. *Samson v. California*, 547 U.S. 843, 848 (2006). The determination ultimately turns on the reasonableness of the search. *United States v. Knights*, 534 U.S 112, 112-13 (2001); *see also* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 801, 818 (1994) (asserting that reasonableness is "largely a matter of common sense," and should be determined based on "importance of finding what

the government is looking for, the intrusiveness of the search, the identity of the search target, [and] availability of other means"). When officers are searching for evidence of a crime on fixed premises, reasonableness generally requires, at a minimum, probable cause and a warrant. *Katz v. United States*, 389 U.S. 347, 357 (1967).

The question in this case is whether it was reasonable for Weld County to conduct a search and seizure that intruded upon the legitimate expectation of privacy of the tax preparer as well as her clients' expectations of privacy in their tax information, armed only with a suspicion that unknown taxpayer clients had committed some crime and that evidence of some crime might be found in some unidentified taxpayer files. Weld County cannot point to a single case where any court has allowed the same kind of sweeping, general search and seizure that took place here — where the government intruded on thousands of individuals' zones of privacy in the absence of any individualized suspicion.

Instead, Weld County relies on broad, mostly-uncontroverted generalizations about the Fourth Amendment: that a search warrant need not name an individual; that the particularity requirement is met when the warrant names the things to be seized as specifically as possible; and that search warrants may be directed to third parties. Petitioners have no quibble with these principles.

But they do not legitimate Weld County's entry into Amalia's or its 5,000 separate intrusions into the taxpayers' files.

What Weld County omits from its analysis is the fundamental principle that the Fourth Amendment requires a nexus among the probable cause showing, the place to be searched, and the evidence to be seized. Weld County's error is obvious from its attack on the district court's analysis. Weld County warns that the district court's reasoning would prevent law enforcement from ever obtaining a warrant to search the Fourth Amendment-protected client files in a non-target's office for evidence that a client committed an offense unless law enforcement had some identifying information about the file and probable cause to believe it contained evidence of a crime. But that is the precisely the result compelled by the Fourth Amendment and Article II, Section 7.[7]

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[7] Weld County argues incorrectly that petitioners "did not contend that the analysis under [Art. II, § 7] differed from the Fourth Amendment analysis." (Opening Brief at 2 n.1.) But, as petitioners explained below (Trans.No. 23951730, Reply Re Motion for Return of Property at 6-7), Art. II, § 7 often affords broader protection than the Fourth Amendment. *Compare, e.g., People v. Sporleder,* 666 P.2d 135 (Colo. 1983) (reasonable expectation of privacy in telephone numbers dialed) *with Smith v. Maryland*, 442 U.S. 735 (1979) (no legitimate expectation of privacy in telephone numbers dialed) *and Charnes v. DiGiacomo*, 612 P.2d 1117 (Colo. 1980) (reasonable expectation of privacy in bank records) *with United States v. Miller*, 425 U.S. 435 (1976) (no expectation of privacy in bank records).

II. THE SEARCH AND SEIZURE OF THE 5,000 TAXPAYER CLIENT FILES VIOLATED THE FOURTH AMENDMENT AND ART. II, SECTION 7.

A. Cerrillo Has A Reasonable Expectation of Privacy in Her Business Premises And Her Taxpayer Clients Have A Reasonable Expectation of Privacy in Their Tax Information.

The starting point for any analysis under the Fourth Amendment or Article II, Section 7 of the Colorado Constitution is an inquiry into whether an individual had a reasonable expectation of privacy in the place searched. Fourth Amendment rights, like those under Section 7, are implicated only if the government's conduct infringed "an expectation of privacy that society is prepared to consider reasonable." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *People v. Sporleder*, 666 P.2d 135, 139 (Colo. 1983). A person has a reasonable expectation of privacy when he or she reasonably can expect "freedom from governmental intrusion" into the place being searched. *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968).

That Cerrillo enjoyed an expectation of privacy in Amalia's premises is not — and could not reasonably be — disputed. The Supreme Court has long recognized that an owner or operator of a business has an expectation of privacy in commercial property, which society is prepared to consider reasonable.

In any event, petitioners raised claims under both the Fourth Amendment and Art. II, § 7 and, to the extent the protections are not co-extensive, the claims must be analyzed under both standards.

Marshall v. Barlow's, Inc., 436 U.S. 307, 312-313 (1978); *See v. City of Seattle*, 387 U.S. 541, 543 (1967).

The taxpayer clients likewise had a reasonable expectation of privacy in their tax information. A tax return and related information reveal the "skeletal outline of a taxpayer's personal and financial life." *Stone v. State Farm Mutual Automobile Ins. Co.*, 185 P.3d 150, 156 (Colo. 2008); *see also United States v. Richey*, 924 F.2d 857, 861 (9th Cir. 1991). While not privileged, "tax returns are confidential." *Alcon v. Spicer*, 113 P.3d 735, 737 (Colo. 2005); *see also Stone*, 185 P.2d at 157 (recognizing "strong policy in favor of protecting the confidentiality of tax returns").

Cerrillo's taxpayer clients expect the information they provide to Amalia's in connection with the preparation and filing of their tax returns will remain private and confidential. Cerrillo reinforces her clients' expectations by assuring them that she will not disclose any tax information.

This expectation of privacy is one that society accepts as reasonable. Both federal and state law prohibits disclosure of a taxpayer's tax information. *See* 26 U.S.C. § 6103 (general confidentiality provision); 26 U.S.C. § 7213A (criminal penalties for unauthorized disclosure or inspection of tax information); 26 U.S.C. § 7216 (penalties for tax preparer's unauthorized disclosure of tax information);

C.R.S. § 39-21-113(4)(a) (prohibition on disclosure of tax information by DOR). These statutes are a "fitting indication" that society is willing to recognize the taxpayer clients' expectations of privacy as objectively reasonable. *Doe v. Broderick*, 225 F.3d 440, 450 (4th Cir. 2000) (analyzing plaintiff's expectations of privacy by reference to statutory protections); *see also Florida v. Riley*, 488 U.S. 445, 451 (1989) (analyzing defendant's expectation of privacy by looking to FAA regulations). Tax returns are also not subject to discovery in litigation absent compelling circumstances. *Stone*, 185 P.3d at 159; *Alcon*, 113 P.3d at 743.

These statutory prohibitions against disclosure reflect the general public policy in favor of preserving the confidentiality of tax information. "Unless taxpayers are assured that the personal information contained in their tax returns will be kept confidential, they likely will be discouraged from reporting all of their taxable income to the detriment of the government." *Payne v. Howard*, 75 F.R.D. 465, 469 (D.D.C. 1977); *accord Stone*, 185 P.2d at 156.

B. Officers Lacked The Requisite Probable Cause To Intrude On Cerrillo's Premises or The 5,000 Constitutionally-Protected Taxpayer Files.

1. <u>The Nexus Requirement: Probable Cause Regarding Criminal Activity, Items to Be Seized and Place to Be Searched.</u>

The right afforded under the Fourth Amendment and Art. II, § 7 to be free from unreasonable governmental intrusions is safeguarded by the probable cause

standard which protects citizens from "rash and unreasonable interferences with privacy" yet gives "fair leeway for enforcing the law in the community's protection." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). In assessing the sufficiency of probable cause in a supporting affidavit, courts apply a totality-of-the-circumstances analysis. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Courts should "use logic to determine whether or not probable cause is established." *People v. Gall*, 30 P.3d 145, 158 (Colo. 2001) (citing *United States v. Ventresca*, 380 U.S. 102, 109 (1965)).

A search warrant must also particularly describe the things to be seized, *People v. Hearty*, 644 P.2d 302, 312 (Colo. 1982), and the place to be searched. *People v. Alameno*, 193 P.3d 830, 834 (Colo. 2008). The particularity requirement prevents a general search, curtails the issuance of search warrants on loose and vaguely stated bases in fact, and prevents the seizure of one thing under a warrant describing another. *Hearty*, 644 P.2d at 312.

But the probable cause and particularity requirements cannot be analyzed in isolation. Authorization to search requires probable cause to connect the sought-after items to a specific crime *and* probable cause to believe those items will be located at the specific place to be searched. *Gall*, 30 P.3d at 150; *see also People v. Randolph*, 4 P.3d 477, 482 (Colo. 2000) (insufficient nexus between criminal activity and place to be searched when affidavit listed five different places to be searched without connecting criminal activity to any particular place); *Warden v. Hayden*, 387 U.S. 294, 307 (1967) (requiring "nexus" between item to be seized and criminal behavior: probable cause must establish that "evidence sought will aid in a *particular apprehension or conviction*") (emphasis added). The nexus requirement protects individuals from "the harmful effects of general warrants, the abolition of which was one of the primary motivations behind the passage of the Fourth Amendment. *People v. King*, 16 P.3d 807, 813 (Colo. 2001).

Often, the object-place nexus issue turns on the nature of the place to be searched. Not only must the place be described in definite and certain terms, but it must "'match up' with the probable cause showing." 2 W. LaFave, *Search and Seizure* § 3.7 (4th ed. updated 2008). Here, Cerrillo and her taxpayer clients have never disputed that the items to be seized were described with sufficient particularity to allow the officers to "ascertain and identify the things authorized

to be searched." *People v. Roccaforte*, 919 P.2d 799, 803 (Colo. 1996). The problem was not a vague description of what the officers wanted to seize; it was that the search and seizure of all 5,000 taxpayer files "outran" the officers' probable cause showing. LaFave, *supra*, at § 4.5; *see also, e.g., United States v. Hinton*, 219 F.2d 324, 325-26 (7th Cir. 1955) ("command to search can never include more than is covered by the showing of probable cause").

2. Officers Had No Probable Cause To Believe That Evidence of Criminal Activity Would Be Found in The Place to Be Searched — The 5,000 Taxpayer Files.

(a) Because Cerrillo Was Not Suspected of Wrongdoing, The Affidavit Had to Establish Probable Cause That Evidence of A Crime Would Be Found in Each of The 5,000 Seized Taxpayer Files.

Weld County insists that the absence of probable cause to suspect Cerrillo of wrongdoing is irrelevant. Citing *Zurcher v. Stanford Daily*, 436 U.S. 347 (1978), Weld County notes that a search warrant may be directed at the premises of an innocent third party. (Opening Brief at 25-27.) That is true, but it advances Weld County's argument not at all.

Because each taxpayer had a reasonable expectation of privacy in the tax information stored in his or her file, the officers had only two legitimate means to intrude into those constitutionally-protected spaces: either the officers needed probable cause to believe Cerrillo had committed a crime, the evidence of which

would be in her client files, or they needed independent probable cause to seize and search each file, meaning they had reason to believe that each of the 5,000 taxpayer files contained evidence of a crime. Here, they had neither.

Weld County misses the significance of the officers' lack of suspicion that Cerrillo was engaged in wrongdoing. The district court did not apply an erroneous "heightened specificity standard" based on Cerrillo's status. The district court understood that if Cerrillo's wrongdoing was not part of the requisite nexus that allowed officers into Amalia's and into the client files, the affidavit had to demonstrate a separate nexus between crime, object, and place. That is, the affidavit had to state probable cause not that Cerrillo's office contained evidence of a crime, but that each of the 5,000 taxpayer files (in which each taxpayer had a separate expectation of privacy) contained evidence of a crime.

When the owner of the described premises is the target of an investigation, the probable cause nexus between the object of the search and the place to be searched is more easily established. If, for example, a doctor is suspected of committing Medicaid fraud by charging for medically-unnecessary tests, there almost certainly will be probable cause to believe that evidence of that particular crime will be found in the doctor's office. In that case, the doctor's office is the Fourth-Amendment-protected "place" to be searched.

And, it would follow logically that evidence of the doctor's Medicaid fraud would be found in the Medicaid patient files. There is no requirement that the officers know the identity of the Medicaid patients or secure a warrant to search the individual files. The right to search the individual files is based on the probable cause to believe the doctor committed fraud and that evidence of that crime will be found in the files.

At least, that is how numerous appellate courts have seen it. In cases involving the search and seizure of an office owner's papers, including client files, the office owner is invariably the target of the investigation. The office is the Fourth Amendment-protected "place" to be searched and the owner's suspected wrongdoing establishes the necessary probable cause. *See, e.g., Andresen v. Maryland*, 427 U.S. 463 (1976) (search of suspect attorney's office); *Williams v. Kunze*, 806 F.2d 594 (5th Cir. 1986) (search of suspect tax consultant's client files); *United States v. Hayes*, 794 F.2d 1348 (9th Cir. 1986) (search of suspect doctor's patient files); *United States v. Hershenow*, 680 F.2d 847 (1st Cir. 1982) (same).[8]

[8] Having lawfully gained access to the relevant "place" to be searched, officers may conduct a cursory examination of papers to determine whether those papers fall within the scope of the warrant. *Andresen*, 427 U.S. at 482 n.11; *cf. People v. Martinez*, 165 P.3d 907 (Colo. App. 2007) (warrant encompasses authority to search entire house if person who is target of search has access to or control over

This is not to say that the requisite probable cause-item-place nexus can never be shown where the premises to be searched are occupied by an innocent third party. That is *Zurcher*'s point. In *Zurcher*, officers had probable cause to believe that photographs showing students involved in criminal activity were located in the offices of the student newspaper but did not suspect the newspapers' staff of any wrongdoing. 436 U.S. at 450-51. The Supreme Court reaffirmed prior decisions allowing a search warrant to be directed at a non-suspect's premises so long as officers have probable cause that "items sought are ... connected with criminal activity, and that the items will be found in the place to be searched." *Id.* at 557-58. Officers in *Zurcher* established the requisite probable cause that evidence of a particular crime (photographs of a violent student protest taken by a newspaper staff member) would be found in the specific place to be searched (the newspaper's office).

Neither the searches of office owners' papers in the above-cited cases nor the search in *Zurcher* were fishing expeditions. But that is the fundamental problem with the search of the taxpayer files in this case.

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entire premises). But that rule cannot justify the initial intrusion, as Weld County argues. (Opening Brief at 30-32.) Rather, the rule presupposes that officers are conducting a lawful search supported by probable cause.

(b) The Affidavit Did Not Establish Probable Cause That Any Particular Taxpayer File Contained Evidence of Any Particular Crime.

Because the "target[s] of the warrant" were Cerrillo's clients (Tr. 4/13/09 at 12:3-7), and officers were "invad[ing] *their* rights of privacy," probable cause had to be established, "not just generally that something happened and there would be some evidence of it [in the office], but probable cause" that a particular person's "records would substantiate the claim and would be in violation of the law." (*Id.* at 16:5-15 (emphasis added).)

The "place" to be searched — the object of the warrant — was each client file. That is just what Noonan told Cerrillo when he arrived to execute the warrant: we are not looking at individuals, he explained, we are looking at tax returns. To satisfy the object-place nexus requirement, then, officers had to establish probable cause to believe that each of the taxpayer files they sought to seize and search contained evidence of a crime. But officers had no individualized suspicion about the taxpayers or the taxpayer files — and Weld County has never claimed that they did. Officers, for example, did not know the identity of any taxpayer, what crime any particular taxpayer might have committed, which taxpayer files contained evidence of a crime, which taxpayer file contained a tax return with an ITIN or mismatched social security number,

what percentage of the taxpayers' files were likely to contain mismatched identification numbers, or even what relevance the particular items sought to be seized — tax returns for the years *2006* and *2007* — had to the criminal activity being investigated. There was no identifiable nexus between the items to be seized and the criminal activity being investigated or between the items to be seized and the place to be searched.

As far as counsel can tell, no court has sanctioned this kind of sweeping exploratory search. Instead, in three cases presenting similar facts, courts have invalidated the governmental action. In *United States v. Comprehensive Drug Testing, Inc.*, Case No. 05-10067 et al., 2009 WL 2605378 (9th Cir. August 26, 2009) (en banc), the court of appeals affirmed orders granting motions for the return of property under Fed.R.Crim.P. 41(g). Officers in that case obtained a warrant to seize the drug testing results of ten baseball players who were suspected of using steroids, but during the search officers collected data on hundreds of other athletes. Of critical significance here, those records were unlawfully seized, the court ruled, because officers had no probable cause as to those athletes' records. *Id.* at *8 ("This was an obvious case of deliberate overreaching by the government in an effort to seize data as to which it lacked probable cause.").

In that case, the officers at least had probable cause with respect to ten players' records. Under Defendants' theory, however, even that much is unnecessary — a fishing expedition through all records of the drug testing company would have been justified based merely on knowledge that the company files included records of some "positive" test results.

The court in *United States v. Theodore*, 479 F. 749 (4th Cir. 1973), refused to enforce an IRS summons seeking from an accountant all of the 1500 tax returns prepared by him for three years. *Id.* at 751, 754. "The Government cannot go on a fishing expedition through [the accountant's] records," the Fourth Circuit admonished, "and where it appears that the purpose of the summons is a rambling exploration of a third party's files, it will not be enforced." *Id.* at 754. Remarking on the "unprecedented breadth" of the government's request, the court emphasized that a summons could not be used to obtain from accounting firms the "complete records of all clients so that the IRS might determine if there is an error in the return of some unknown taxpayer." *Id.*

And in *Doe v. Broderick*, 225 F.3d 440 (4th Cir. 2000), the court of appeals concluded that the plaintiff patient's Fourth Amendment rights were violated when an officer obtained a warrant and searched through the patient files at a methadone clinic without probable cause to link any patient to the robbery being

investigated. The effect of issuing the warrant absent the requisite nexus between the item to be seized and the criminal activity being investigated was to "sanction an exploratory search through clinic records based on a hunch, which is impermissible." *Id.* at 451.

Weld County's reasoning cannot be squared with these rulings. Under Weld County's logic, an officer who has information that "every drug dealer knows to stay at the Blue Rose Hotel," and obtains confirmation from the Blue Rose Hotel manager that some of his guests appeared to be drug dealers, can obtain a warrant to search the Blue Rose Hotel. Armed with the warrant, the officer may enter each of the hotel rooms to look for drugs or other evidence of drug dealing. He also may enter the non-suspect hotel manager's office, seize his computer, and copy all of the hotel guests' payment information. That result, of course, is foreclosed by cases like *People v. Arnold*, 509 P.2d 1248, 1249 (1973) (where affidavit did not indicate in which unit of multiple-occupancy building drugs would be found, no probable cause to issue warrant authorizing search of defendant's apartment) and *People v. Randolph*, 4 P.3d 477, 482 (Colo. 2000) (warrant to search defendant's property invalid where officers had no probable cause to believe evidence in any particular building on property).

(c) The Seizure And Search of Cerrillo's Computers Was Likewise Unsupported by Probable Cause.

Weld County's arguments that the warrant did not authorize an overly broad search of Cerrillo's computers and electronic equipment (Opening Brief at 27-29) and that officers could sort the seized property off-site (*id.* at 33-38) miss the mark. As Weld County readily acknowledges, the warrant drew no distinction between paper and electronic files: the purpose of the search was to collect the taxpayers' information in whatever form it was stored. The problem, then, is not overbreadth; the problem is that the officers had no more probable cause to seize and search the computer files than they did to seize and search the "analogous" paper files. (*Id.* at 28.) Likewise, the problem with the officers' conduct was not that they examined files and computers off-site; the problem was that officers seized files and computers in the first place without the requisite probable cause.[9]

C. The Search of The 5,000 Taxpayer Files Was Unreasonable.

The overriding test of compliance with the Fourth Amendment is reasonableness. *Zurcher*, 436 U.S. at 559. "Reasonableness is an independent requirement … over and above the Warrant Clause requirements of probable cause and particularity." *United States v. Koyomejian*, 970 F.2d 536, 550 (9th Cir.

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[9] Weld County's proposed remedies are equally incongruous. The rules cited by Weld County apply when part of a warrant is valid and can be "severed" from the invalid portion of the warrant, or when officers seize items both within and outside the scope of the warrant. But here, no part of the warrant was valid and no items were seized lawfully.

1992) (Kozinski, J., concurring).

Where the government seeks to intrude into an area in which society recognizes a heightened privacy interest, a substantial justification is required to make a search reasonable. *Winston v. Lee,* 470 U.S. 753, 767 (1985). 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). In other words, in every case, the court must balance those competing interests to determine whether, under the totality of the circumstances, the search or seizure is reasonable. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

Individualized suspicion remains the bedrock of reasonableness under the Fourth Amendment and Art. II, § 7. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 37, 44 (2000) (holding that suspicionless "narcotics checkpoints" violate Fourth Amendment). Individualized suspicion prevents arbitrary and general searches and seizures and mandates specific justification for each intrusion. The principle of individualized suspicion limits the circumstances under which the government may initiate actions and the scope and details of the search by

ensuring that the actual intrusion is reasonably related to the circumstances that justified the initial interference. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

The affidavit in this case was devoid of individualized suspicion with respect to the taxpayers or their files. As the district court determined, "[t]here was not probable cause as to a specific individual, as to specific files, as to a specific crime ...." (Tr. 4/13/09 at 16:1-3.) Despite this lack of individualized suspicion, the warrant purported to authorize the search of 5,000 separate, constitutionally-protected places. See *People v. Gutierrez*, Case No. 08CR2087 (Mar. 7, 2009) (because each taxpayer had a separate privacy interest, "there were 5,000 separate searches ... none of which were supported by probable cause").

Balanced against this sweeping intrusion into the privacy of 5,000 taxpayers is the government's stated interest in fighting identity theft and/or criminal impersonation. That interest cannot justify the search and seizure here for two reasons. As a general matter, the government's interest in enforcing its criminal laws does not justify a suspicionless intrusion. *See Ferguson v. City of Charleston*, 532 U.S. 67 (2001). Additionally, there was no evidence establishing the unavailability of other means of obtaining evidence in identity theft investigations. The "mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey v.*

Arizona, 437 U.S. 385, 393 (1978).

There is another factor that must be considered in balancing the interests to determine reasonableness of the search: the governmental interest in promoting compliance with the tax laws and its encouragement of undocumented workers to voluntarily participate in the tax system. To that end, the federal government created and continues to promote the wildly-successful ITIN program, encouraging undocumented workers to obtain a special identification number for tax filing purposes. Although the mismatched ITIN and social security number might be evidence that a wage earner is not authorized to work in the United States, the IRS is broadly restricted under 26 U.S.C. § 6103 from disclosing taxpayer information to third parties, including other government agencies.

Congress enacted the strict confidentiality requirements of § 6103 based on a recognition that taxpayers reasonably expected their tax information to be kept private and that "if the IRS abused that reasonable expectation of privacy, the loss of public confidence could seriously impair the tax system." (Trans.No. 25004965, Ex. 33 at 21.) *See also United States v. Richey*, 924 F.2d 857, 861 (9th Cir. 1991) (government's interest in preserving confidentiality of tax information two-fold: to ensure compliance with tax laws and to ensure each individual taxpayer's right to privacy).

In considering the scope of the confidentiality provision, Congress was particularly sensitive to the issue of sharing information for purposes of prosecuting non-tax crimes. (Trans.No. 25004965, Ex. 33 at 64.) Under questioning from Congress in 2004, the Commissioner Mark Everson explained the IRS's position:

> [The] Service believes at this time that any sharing of confidential taxpayer information directly or indirectly with immigration authorities would have a chilling effect on efforts to bring ITIN holders and potential ITIN holders into the U.S. tax system. Such an initiative would deprive the federal government of tax revenue by discouraging illegal workers in the U.S. from participating in the tax system when the code requires them to pay taxes on their U.S. earnings.

(Trans.No. 25005563, Ex. 37 at 2.) The Commissioner confirmed that "taxpayer information includes the possibility that the applicant is not working legally in the United States or is using an SSN that does not belong to him or her." (*Id.*)

Between 2004 and 2006 there was nearly a 40 percent increase in the number of tax returns filed with ITINs. (Trans.No. 25005425, Ex. 35 at 005.) When Commissioner Everson again testified before Congress on the subject of ITINs in 2006, he attributed the increase to participation by unauthorized workers who were increasingly confident that "their [tax] information is not going across town to Homeland Security." (*Id.* at 31.)

In the end, Congress struck the balance in favor of encouraging compliance with the voluntary tax system by broadly protecting from disclosure the information contained in a taxpayer's files, even if that means compromising law enforcement interests. (*Id.* at 22.) *See also Church of Scientology of California v. IRS*, 484 U.S. 9, 16 (1987) (one of major purposes of revising § 6103 was to tighten restrictions on use of return information by entities other than IRS). Accordingly, Weld County's interest in prosecuting identity theft does not constitute a compelling interest justifying a suspicionless search of confidential tax files. *See Losavio v. Robb*, 579 P.2d 1152, 1157 (Colo. 1978) (quashing grand jury subpoena for production of tax returns in context of criminal tax investigation because government could not show compelling interest in the confidential information).

II. THE SEARCH AND SEIZURE VIOLATED THE CONSTITUTIONAL RIGHT TO PRIVACY

The constitutional right to privacy, referred to by this Court as a "right to confidentiality," protects the individual interest in avoiding disclosure of personal matters. *Whalen v. Roe*, 429 U.S. 589, 599 (1977); *Martinelli v. District Court*, 612 P.2d 1083, 1091 (Colo. 1980). The right to confidentiality encompasses the power to control "what we shall reveal about our intimate selves, to whom, and

for what purpose." *Stone v. State Farm Mutual Automobile Ins. Co.*, 185 P.3d 150, 155 (Colo. 2008). A determination of whether the right has been violated requires application of a "tri-partite balancing inquiry." *Martinelli*, 612 P.2d at 1091.

First, the court must determine that the claimant has a legitimate expectation that the materials at issue will remain private. *Id.* Tax returns, "by their very nature," satisfy the first *Martinelli* factor. *Stone*, 185 P.3d at 158.

Second, the court inquires whether disclosure is required to serve a compelling government interest. The compelling state interest "must consist in disclosure of the very materials or information which would otherwise be protected." *Martinelli*, 612 P.2d at 1092. An interest in "facilitating the ascertainment of [the] truth" of a suspicion of criminal activity does not necessarily trump the individual's privacy interest. *Id.* Thus, reliance on a generic state interest in law enforcement is insufficient.

Third, assuming the state interest is compelling, the court must ensure that disclosure occurs in the least intrusive manner. *Id.* A search that invades 5,000 separate zones of privacy could hardly be characterized as the least intrusive means of obtaining the information sought by the government.

CONCLUSION

The search and seizure in this case violated Cerrillo's and her taxpayer clients' rights under the Fourth Amendment and Art. II, § 7 and their constitutional right to privacy.

DATED: August 28, 2009.

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