

<p>SUPREME COURT, STATE OF COLORADO Colorado State Judicial Building 2 East 14th Avenue, Denver, Colorado 80203</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>PETITIONERS: Amalia Cerrillo; Luis Noriega, on behalf of himself as a class representative; John Doe, on behalf of himself as a class representative; Frank Doe, on behalf of himself as a class representative; and Robert Doe, on behalf of himself as a class representative</p> <p>RESPONDENTS: Kenneth R. Buck, in his official capacity as District Attorney for the Nineteenth Judicial District; and JOHN COOKE, in his official capacity as Weld County Sheriff</p> <p>AMICUS CURIAE: American GI Forum, League of United Latin American Citizens, Colorado Immigrant Rights Coalition</p>	
<p>ATTORNEY FOR AMICUS: Nina Perales: <i>Pro hac vice application pending</i> Address: MALDEF, 110 Broadway, Suite 300 San Antonio, Texas 78205 Phone Number: (210) 224-5476 FAX Number: (210) 224-5382 Email: nperales@maldef.org Atty. Reg. #: Texas Bar No. 24005046</p> <p>Sponsoring Attorney: Manuel J. Solano Address: Solano Law Offices 12000 North Washington Suite 310 Thornton, Colorado 80602 Phone Number: (303) 457-2000 Att. Reg. #: 007646</p>	<p>Case No. 09SC341</p>
<p style="text-align: center;">AMICUS CURIAE BRIEF OF AMERICAN GI FORUM, LEAGUE OF UNITED LATIN AMERICAN CITIZENS AND COLORADO IMMIGRANT RIGHTS COALITION IN SUPPORT OF PETITIONERS-APPELLEES AMALIA CERILLO, ET AL.</p>	

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICUS CURIAE* 2

The American GI Forum..... 2

The League of United Latin American Citizens..... 3

Colorado Immigrant Rights Coalition 3

SUMMARY OF ARGUMENT 4

ARGUMENT 5

**I. FILING INDIVIDUAL INCOME TAX RETURNS
SERVES A LEGAL, ECONOMIC, AND CIVIC
PURPOSE IN OUR NATION, REGARDLESS OF
THE IMMIGRATION STATUS OF WAGE EARNERS 5**

**A. The Internal Revenue Service places a statutory
Duty upon wage-earners to file individual income
tax returns and pay their fair share of taxes in
order to prevent an underground economy5**

**B. The ITIN System Protects U.S. Citizen and Work-
Authorized Immigrants..... 9**

**C. Filing income tax returns also helps unauthorized
workers who hope to achieve full citizenship..... 12**

**II. TAX PREPARERS PROVIDE A NECESSARY
AND CONFIDENTIAL SERVICE FOR
IMMIGRANT TAX FILERS NAVIGATING
THE COMPLEX U.S. TAX SYSTEM..... 14**

III. IMPROPER USE OF TAX RECORDS OF UNDOCUMENTED IMMIGRANTS WILL FORCE THE CREATION OF AN UNDERGROUND ECONOMY AND THREATENS THE CONFIDENTIALITY OF THE MAJORITY OF CITIZEN TAX RECORDS 16

CONCLUSION..... 18

TABLE OF AUTHORITIES

<i>Beneficial Corp. v. F.T.C.</i> , 542 F.2d 611 (3 rd Cir. 1976).....	17
<i>Chamber of Commerce of the United States, et al. v. Napolitano</i> , No. 8:08-cv-03444-AW (D.Ma. Aug. 25, 2009)	12
<i>Chicanos Por La Causa, Inc. v. Napolitano</i> , 558 F.3d 856 (9 th Cir. 2009) (en banc)	12
<i>EEOC v. Hacienda Hotel</i> , 881 F.2d 1504 (9th Cir. 1989).....	11
<i>Egbuna v. Time Life Libraries, Inc.</i> , 153 F.3d 184 (4th Cir. 1998).....	11
<i>Flores-Figueroa v. United States</i> , 129 S.Ct. 1886 (2009).....	10, 11
<i>Gambino v. Pomeroy</i> , 562 F.Supp. 974 (D.N.J. 1982)	13
<i>In re Reyes</i> , 814 F.2d 168, 170 (5th Cir.1987).....	11
<i>League of United Latin American Citizens v. Perry</i> , 548 U.S. 399 (2006)	2
<i>Losavio v. Robb</i> , 579 P.2d. 1152 (Colo. 1978)	17
<i>Patel v. Quality Inn South</i> , 846 F.2d 700 (11th Cir. 1988)	11
<i>Rios v. Enterprise Ass'n Steamfitters Local Union 638 of U. A.</i> , 860 F.2d 1168, (2d Cir. 1988)	11
<i>Stone v. State Farm Mut. Auto Ins. Co.</i> 185 P.3d 150 (Colo. 2008)	17
8 U.S.C. § 1427(a)(3) (2006)	13
8 C.F.R. § 240.65 (2007).....	13
26 U.S.C. § 1441 (2006)	6
26 U.S.C. § 6713 (1989)	17

26 U.S.C. § 7203 (2006) 6

The American GI Forum, League of United Latin American Citizens and Colorado Immigrant Rights Coalition submit this brief as *amicus curiae* in support of Petitioners-Appellees Amalia Cerillo, Luis Noriega, John Doe, Frank Doe and Robert Doe and respectfully urge the Court to affirm the decision of the trial court below.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American GI Forum

The American GI Forum is a community based, national, non-profit, membership organization established in 1948. The American GI Forum serves the needs and advocates on behalf of Latino military veterans as well as the Latino community at large in the areas of education, youth leadership and motivation, employment, legislation and communications, and civil rights. The organization pursues its mission on a variety of fronts, including litigation. Most recently, the American GI Forum prevailed in a civil rights case before the United States Supreme Court (*League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006)). The American GI Forum has an interest in the outcome of this case because the organization has members in Colorado and is committed to full Latino participation in civic life, including in the area of filing and paying taxes.

The League of United Latin American Citizens

The League of United Latin American Citizens (LULAC) is the largest and oldest Hispanic organization in the United States. LULAC advances the economic condition, educational attainment, political influence, health and civil rights of Hispanics through community-based programs operating at more than 700 LULAC councils nationwide. The organization involves and serves all Hispanic nationality groups. Historically, LULAC has focused heavily on education, employment and civil rights for Hispanics. LULAC views this matter as one involving the civil rights of Hispanics, both as business owners and patrons, and therefore has an interest in the outcome of this case.

Colorado Immigrant Rights Coalition

The Colorado Immigrant Rights Coalition (CIRC) is a statewide membership-based coalition of immigrant, faith, labor, youth, and ally organizations founded in 2002 to build a unified statewide voice to defend and advance justice for all immigrants and refugees in Colorado and the United States. CIRC achieves this mission through capacity building and membership development, non-partisan civic engagement, rapid response to human rights abuses, strategic communications and winning public policies that improve the lives of immigrants. Given CIRC's mission

to promote the fair and just treatment of immigrants, particularly in Colorado, it has an interest in the outcome of this case.

SUMMARY OF ARGUMENT

Amici urge the Court to affirm the decision below. Wage earners are required by the federal government to file tax returns whether they are authorized to work in the U.S. or not. In order to make possible the filing of tax returns by unauthorized workers, the IRS created and promotes a special Taxpayer Identifying Number (“ITIN”) for immigrant workers who are unable to obtain social security numbers. Federal law further provides that the tax information of ITIN filers is confidential and may not be disclosed by federal officials or professional tax preparers. Thus, the federal government not only requires but encourages unauthorized workers to secure ITINs and to file their tax returns along with any wage statements showing the worker’s use of an invalid or inaccurate social security number.

Through the ITIN system created by the IRS, and with the assistance of tax preparers such as Petitioner Cerillo and national tax preparation stores, unauthorized workers fulfill their legal obligation to file tax returns and also establish a record of compliance with tax laws in support of a future application for legal resident status. As a result, in 2005, the IRS reported that 2.5 million tax returns were filed that included an ITIN for at least one person on the return; the IRS also estimated that from

1996 to 2003, the income tax liability for ITIN filers totaled almost \$50 billion.

Maintaining the privacy of tax records is vital to avoiding the creation of an underground economy that would deprive the federal government of critical resources.

If unauthorized workers who abide by federal tax laws face searches of their tax records and prosecution by local or state officials, the workers and their employers will be driven into a netherworld of cash transactions that starves the federal government and denies unauthorized workers a future chance at citizenship.

Furthermore, because more than sixty percent of all taxpayers use professional tax preparers, the seizure of records from tax preparers who assist ITIN filers, including large tax preparation companies such as H&R Block and Liberty Tax Service, exposes most U.S. citizens to seizure of their tax records. The threat that local law enforcement can search any U.S. citizen's tax return at a tax preparer's office creates the risk of widespread non-compliance with federal tax laws.

ARGUMENT

I. FILING INDIVIDUAL INCOME TAX RETURNS SERVES A LEGAL, ECONOMIC, AND CIVIC PURPOSE IN OUR NATION, REGARDLESS OF THE IMMIGRATION STATUS OF WAGE EARNERS

- A. The Internal Revenue Service places a statutory duty upon wage-earners to file individual income tax returns and pay their fair share of taxes in order to prevent an underground economy.**

All individuals working in the U.S. are required to pay the proper amount of income taxes, without regard to whether the income is earned with authorization to work in the United States — and notwithstanding the federal government's other interests in enforcing immigration laws.¹

Even a worker who has earned income in the United States using a Social Security Number (“SSN”) that is either invalid (has been made up) or does not belong to him must still file a tax return if his earnings exceed a minimum threshold.²

Special procedures exist to allow for such filing. The Internal Revenue Service (“IRS”) issues numerous publications, both for taxpayers and for tax professionals, explaining the ITIN system and the importance of filing tax returns using an ITIN, even if the taxpayer (inappropriately) has been earning wages under a SSN.³ The procedure for such an individual is to file a tax return using an ITIN, and to attach to

1 See 26 U.S.C. § 7203 (2006) and 26 U.S.C. § 1441 (2006) (taxation of non-resident aliens who meet a certain earning threshold is required); see also *Hearing on Impacts of Border Security and Immigration on Ways and Means Programs: Hearing Before the H. Comm. on Ways and Means*, 109th Cong. (2006) (statement of Hon. Mark W. Everson, Comm’r, Internal Revenue Service), available at <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=5171> (“Our job is to make sure that everyone who earns income within our borders pays the proper amount of taxes, whether that income is legally obtained and whether the individual is working here legally[.] If someone is working without authorization in this country, he/she is not absolved of tax liability. Instead of an SSN to file a tax return, that person frequently uses an Individual Taxpayer Identification Number (ITIN).”).

2 Pl. Ex. 47 (IRS Publication titled “Q&A for Software Providers and Tax Preparers”) [Trans. No. 25008343] (“[T]he IRS does not distinguish between legal and illegal income. Regardless of how the income was earned, if it was taxable income, the person who received the income is required to file a federal tax return and report the income.”).

3 See, e.g., Pl. Ex. 6 (“Internal Revenue Service Document: ITIN Reminders for Tax Professionals”) [Trans. No. 24994472]; Pl. Ex. 7 (IRS Pub. No. 1915: “*Understanding Your IRS: Individual Tax Identification Number ITIN*”) [Trans. No. 24994540]; Pl. Ex. 52 (IRS Pub. No. 4327 “*ITIN Individual Taxpayer Identification Number – Facilitating Participation in the Tax System*” – bilingual pamphlet) [Trans. No. 25008589]; Pl. Ex. 14 (IRS Pub. No. 4244 “*IRS Individual Taxpayer Identification Number (ITIN) Application Requirements Have*

that return any and all employer-issued W-2 forms. The W-2 forms will include the SSN under which the wages were earned.⁴ For a worker without a valid SSN, this process will necessarily reflect an ITIN/SSN “mismatch” on the return.⁵

IRS representatives have appeared on television outreach programs to the undocumented immigrant community, encouraging unauthorized workers to file tax returns.⁶ Furthermore, the IRS gives tax preparers using electronic filing specific instructions on how ITIN holders who have earned wages under a SSN should file their returns:

Tax returns filed with an Individual Tax Identification Number reporting wages are required to show the Social Security Number under which the wages were earned. This creates an identification number (ITIN/SSN) mismatch. In the past, returns with this mismatch could only be filed on paper. Due to programming changes the IRS e-file system can now accept these returns. The taxpayer’s correct ITIN should be used as the identifying number at the top of Form 1040. When inputting the W-2 information, the SSN should be entered on the form W-2 issued by the employer. It is now possible to e-file a return with an ITIN/SSN mismatch.

The filing of a tax return by an unauthorized wage earner eliminates for the IRS (and innocent SSN holders) at least one problem associated with misuse of SSNs. Instead of the wages being associated (incorrectly) with a SSN not belonging to the wage earner, the IRS can ensure that the wages are properly attributed to the wage-

Changed”) [Trans. No. 25003709].

4 Pl. Ex. A, 3/9/09 Hearing Tr. at 40:23-41:7.

5 See Pl. Ex. 6 [Trans. No. 24994472].

earning ITIN holder.⁷

According to the IRS, more than 10.7 million ITINs were assigned between 1996 and 2007, with nearly 1.6 million assigned in 2006 alone.⁸ Today, the total number of ITIN's assigned is close to 15 million.⁹

In 2005, the IRS reported that 2.5 million tax returns were filed that included an ITIN for at least one person on the return; the IRS also estimated that from 1996 to 2003, the income tax liability for ITIN filers totaled almost \$50 billion.¹⁰ In 2003 the Social Security Administration reported unposted earnings of \$421 billion, due to mismatches of Social Security numbers and names, likely from undocumented workers, as well as some clerical errors, representing \$64.4 billion of employee and employer contributions to Social Security and Medicare trust funds.¹¹

ITIN filers pay billions of dollars into government coffers and subsidize government programs, such as social security and Medicare, for which they are not eligible. Those unauthorized workers who instead receive their earnings in cash (also known as being paid "under the table") do not pay any income tax to the IRS or

6 See Pl. Ex. A, 3/9/09 Hearing Tr. at 24:11-25:1.

7 Transcript 41:16-42-16; see also Pl. Ex. 47 (IRS publication noting that the shift to e-filing for ITIN holders with ITIN/SSN mismatches "will make it easier for IRS systems to associate the wages with the ITIN holder. This will stop the IRS from sending a notice to the person whose SSN is being used and eliminates the need for that person to prove that they did not earn the wages.") [Trans. No. 25008343].

8 Pl. Ex. 9 at p. 11 [Trans. No. 25000181].

9 Pl. Ex. A, 3/9/09 Hearing Tr. at 51:13-20.

10 Pl. Ex. 9 at p. 11 [Trans. No. 25000181].

11 See Paula N. Singer & Linda Dodd-Major, Identification Numbers and U.S. Government Compliance Initiatives, 104 Tax Notes 1429, 1433 (Sept. 20, 2004)

contribute to the Social Security Administration.¹² Similarly, employers who pay wages “under the table” send no information about their employees’ earnings to the government and pay no contributions to the Social Security Administration. The effect of non-payment of taxes on the earnings of unauthorized workers results in billions of dollars lost annually to the federal government and the development of an underground cash economy.¹³

By taxing ITIN individuals, the federal government recognizes a reality that co-exists with immigration enforcement. Instead of allowing billions of dollars to be squandered and risk the development of a shadow economy, the government purposefully created a system which registers these individuals and obligates them to pay their proportional share of taxes.

B. The ITIN System Protects U.S. Citizen and Work-Authorized Immigrants

The federal government relies on the billions of dollars paid by ITIN filers in income taxes to support programs that benefit U.S. citizens and authorized immigrant workers.¹⁴ Furthermore, because it ensures that the earnings of unauthorized workers

12 Francine J. Lipman, *Taxing Undocumented Immigrants: Separate, Unequal and Without Representation*, 59 Tax. Law. 813, 838 n.179(2006) (citing Paula N. Singer & Linda Dodd-Major, *Identification Numbers and U.S. Government Compliance Initiatives*, 104 Tax. Notes 1429, 1432 (2004)).

13 *Id.* at 838 (arguing that if undocumented taxpayers, who make up an estimated one percent of the tax base, forgo paying income taxes, the U.S. government may face annual revenue losses of more than \$20 billion).

14 Singer at 1429, *supra* note 11, at 1429 (“Concerns about the U.S. economy, as well as the huge costs of anti-terrorism efforts, have made it more important than ever to encourage compliance with U.S. tax laws that generate revenue necessary to support the U.S. military as well as the infrastructure of civil society.”).

are attributed to the individuals who earn the income, the ITIN system protects U.S. citizens and work-authorized immigrants from facing tax liability for wages earned by someone else. In the event an unauthorized worker has used a social security number that belongs to a living person, those earnings (and the associated tax liability) are not attributed to the legitimate holder of the social security number.

The ITIN system makes tax records more accurate and creates safeguards in a labor setting that includes millions of unauthorized workers and their employers. Often, an unauthorized worker is not aware and cannot determine whether the social security number she is using belongs to a real person. In May of this year, the U.S. Supreme Court noted the distinction between an unauthorized worker using,

a real ID belonging to another person [and], say, a fake ID (i.e., a group of numbers that does not correspond to any real Social Security number). . . One could, for example, verbally provide a seller or an employer with a made-up Social Security number, [] and the number verbally transmitted to the seller or employer might, or might not, turnout to belong to another person.

Flores-Figueroa v. United States, 129 S.Ct. 1886, 1889, 1892 (2009). In recognition of the fact that unauthorized workers may not be aware that the social security numbers they use belong to real individuals, the Court in *Flores-Figueroa* concluded that the unauthorized worker in that case could only be convicted of aggravated identity theft if he knew he was using the social security number of a real

person.¹⁵

The federal government frequently weighs its interest in immigration enforcement against the goal of promoting safety and efficiency in the workplace. In 2004 testimony before Congress, the IRS Commissioner explained that “what may be beneficial from the perspective of immigration law or policy may not be beneficial from the perspective of tax law and tax administration.”¹⁶ The resulting federal policy strikes a delicate balance that seeks to reduce undocumented immigration and unauthorized employment while at the same time protecting workers from exploitation and ensuring that the government receives taxes on all income earned.

For example, Congress has ensured that unauthorized workers are protected by federal minimum wage, labor and anti-discrimination laws.¹⁷ At the same time,

¹⁵ See *Flores-Figueroa*, 129 S.Ct. at 1893 note 1 (The Court further explained the distinction between using a made up social security number and intentionally stealing a person’s identity as follows: “For example, where a defendant has used another person’s identification information to get access to that person’s bank account, the Government can prove knowledge with little difficulty. The same is true when the defendant has gone through someone else’s trash to find discarded credit card and bank statements, or pretends to be from the victim’s bank and requests personal identifying information. Indeed, the examples of identity theft in the legislative history (dumpster diving, computer hacking, and the like) are all examples of the types of classic identity theft where intent should be relatively easy to prove, and there will be no practical enforcement problem.”).

¹⁶ Hearing on Impacts of Border Security and Immigration, *supra* note 1.

¹⁷ See, e.g., *Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988) “[N]othing in IRCA or its legislative history suggests that Congress intended to limit the rights of undocumented . . . [workers] under the FLSA”, *cert. denied*, 489 U.S. 1011 (1989); see also *In re Reyes*, 814 F.2d 168, 170 (5th Cir.1987), *cert. denied* 487 U.S. 1235, 108 S.Ct. 2901, 101 L.Ed.2d 934 (1988) (“It is well established that the protections of the Fair Labor Standards Act are applicable to citizens and aliens alike and whether the alien is documented or undocumented is irrelevant.”); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517 (9th Cir. 1989) (plaintiffs were subject to Title VII’s protections notwithstanding their status as undocumented workers); *Rios v. Enterprise Ass’n Steamfitters Local Union 638 of U. A.*, 860 F.2d 1168, 1173 (2d Cir. 1988) (same); but see *Egbuna v. Time Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 1034 (1999); see also “Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens After *Hoffman Plastic Compounds, Inc.*” GC 02-06 (July 19, 2002), available at http://www.nlr.gov/shared_files/GC%20Memo/2002/gc02-06.html (citing *County Window Cleaning Co.*, 328 NLRB 190 n.2 (1999)) (“it is unassailable that all statutory employees, including undocumented workers, enjoy protections

Congress has developed and in some cases mandated the use of E-Verify, a DHS program that seeks to confirm the work authorization of employees before they are hired.¹⁸

The ITIN system, and its promotion by the federal government as a means for paying taxes, is consistent with other federal rules that both protect employees regardless of their work authorization while at the same time promoting the federal goal of immigration enforcement.

C. Filing income tax returns also helps unauthorized workers who hope to achieve full citizenship.

Unauthorized workers have a variety of reasons for filing tax returns. One common reason is that typically, any path toward legalization or American citizenship would require that an applicant have paid taxes for some period of time.¹⁹ In addition, there are a number of educational institutions serving the U.S. citizen children of undocumented immigrants. As part of the financial aid process, the educational institution may require parents to submit tax returns.²⁰ An American citizen who may be married to an unauthorized worker but desires to file a tax return will file a joint

from unfair labor practices and the right to vote in NLRB elections without regard to their immigration status.”).

18 *Chamber of Commerce of the United States, et al. v. Napolitano*, No. 8:08-cv-03444-AW (D.Ma. Aug. 25, 2009) States have also adopted rules mandating the use of the federal E-Verify program by employers. *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.32 856 (9th Cir. 2009) (en banc).

19 See Pl. Ex. A, 3/9/09 Hearing Tr. at 49:10-15; Ex. A, 3/9/09 Hcaring Tr., at 127:15-128:1.

20 See Pl. Ex. A, 3/9/09 Hearing Tr. at.49:10-21.

return, with the unauthorized worker applying for and filing with an ITIN.²¹

An incentive for many ITIN individuals to pay taxes is the promise that it will help them in the future to achieve their goal of legal permanent resident (“LPR”) status and eventual citizenship. For an immigrant seeking LPR status, relief from deportation or even an immigrant seeking to naturalize, a showing of tax filings is necessary.²² Also, by filing taxes, immigrants prove to the U.S. government elements of self-sufficiency and income, two requirements for being granted LPR status. In all of the aforementioned situations, including an application for U.S. citizenship, one of an immigrant's many burdens of persuasion before the U.S. government is that she is a person of “good moral character.”²³ The question whether an individual possesses good moral character remains a question of fact, and at least one court has held that a failure to fulfill one's statutory duty of filing federal income taxes, years prior to his or her application for citizenship, demonstrated a lack of moral character.²⁴

Armed with this knowledge, “many undocumented immigrants go out of their

²¹ See Pl. Ex. A, 3/9/09 Hearing Tr. at 49:22-50:6.

²² See Department of Homeland Security, U.S.C.I.S. I-864 Form (Under § 213(A) of the Immigration and Naturalization Act, submission of an I-864 (Affidavit of Support) form is required when an immigrant seeks lawful permanent residence in the United States. The purpose of the I-864 is to show the government that he or she will have “adequate means of financial support” and “not likely to become a public charge.” To make this showing, an immigrant must show that his or her income is at least 125 percent above the current Federal poverty guideline for his or her household size. Under Part 6, Section 25 of the I-864 form instructions, an applicant must provide “either an IRS transcript or a photocopy” of his or her own Federal individual income tax return for the most recent year) *see also* 8 C.F.R. § 240.65 (2007) (provides Attorney General with guidelines for suspending deportation proceedings for an alien who can show physical presence in the United States for seven or 10 years. One method of showing physical presence is through tax filings).

²³ See 8 U.S.C. § 1427(a)(3) (2006).

²⁴ See *Gambino v. Pomeroy*, 562 F.Supp. 974, 987 (D.N.J. 1982).

way to pay taxes, often without receiving a refund to which they are entitled because some payments are made under false Social Security numbers.”²⁵ In the instant case, if the decision below is reversed, immigrants, who have otherwise complied with federal tax filing laws and are working towards citizenship, are penalized by the seizure and search of their tax records by local law enforcement officials while the immigrants themselves attempt to contribute their fair share to the public coffers.

II. TAX PREPARERS PROVIDE A NECESSARY AND CONFIDENTIAL SERVICE FOR IMMIGRANT TAX FILERS NAVIGATING THE COMPLEX U.S. TAX SYSTEM

Despite the continued growth and advertisement of the do-it-yourself tax preparer computer software, today most tax filers rely on the help of professional tax preparers; the use of paid tax preparers has increased since 1992 to alleviate the “complexity...of the return filing process.”²⁶ The growing reliance on paid preparers illustrates that now, more than ever, paid tax preparers fulfill a vital role among U.S. taxpayers.

ITIN taxpayers, who may also face language barriers and unfamiliarity with the U.S. tax laws when trying to prepare their tax returns, rely heavily on the assistance of

25 Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 Law & Ineq. 271, 296 (2000) (citing Ron Hayduk, *Immigration, Race and Community Revitalization* (1998) (draft report for the Aspen Institute Comprehensive Community Initiates Project on Race and Community Revitalization)(on file with the author)(containing a thorough treatment of trends in immigrant demographics)).

26 Lawrence Zelenak, *Justice Holmes, Ralph Kramden, and the Civic Virtues of a Tax Return Filing Requirement*, 61 Tax. L. Rev. 53, 69-70 (2007) (attributing growth of paid tax preparer services to the complex U.S. tax structure. Zelenak writes that in the 1950s, “fewer than 20 percent of taxpayers used paid preparers,” but by

tax preparers like Petitioner Cerrillo.²⁷ ITIN taxpayers require the assistance of tax preparation services in order to gain a basic understanding of their tax obligations and the tax filing process.²⁸ The fear by many unauthorized workers that disclosing their immigration status to government agencies will lead to deportation only increases their need to rely on a professional tax-preparer who can guarantee confidentiality in compliance with federal non-disclosure rules.²⁹ The improper seizure by local law enforcement of undocumented immigrants' tax records will compromise unauthorized workers' trust in tax preparation agencies and inevitably lead to a decrease in tax compliance by this population. The IRS warned in its 2003 report to Congress that a reduction in tax compliance of even one percent would result in an annual loss of over \$20 billion in revenue to the federal government.³⁰

In recognition of the fact that unauthorized workers will not file tax returns if the information is shared with DHS, the federal government only permits limited

1993, "paid preparers were responsible for 51% of all individual returns, while 8% of taxpayers did their own returns," and by 2003, "the market share of paid preparers had grown to 62%.")

27 See, e.g., URBAN INST., WHO KNOWS ABOUT THE EARNED INCOME TAX CREDIT? 5 (2001) (documenting that Latinos who took the National Survey of America's Families in Spanish were far less likely to have heard of the Earned Income Tax Credit when compared to Latinos who took the survey in English).

28 See Sheila Mammen et.al., Univ. of Mass. Dept. of Resource Econ., *The Earned Income Tax Credit and Rural Families: Differences between Participants and Non-participants* (2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1345086 (Evaluating rural low-income mothers' participation in the Earned Income Tax Credit and finding a correlation between less participation in the EITC when the mother was of Hispanic ethnicity, has less formal education, has lower income, is not of U.S. origin, and lacked information regarding tax preparation).

29 See Sonya Schwartz, Food Research & Action Ctr., *Immigrant Access to Food Stamps: Overcoming Barriers to Participation*, Clearinghouse Rev. September – October 2001, at 260, 270-273, available at www.frac.org/text%20documents/sonya.pdf (Discusses eligible immigrant's hesitance in applying for food stamps due to a fear of disclosing immigration status, coupled with their fear that the state agency will report their

disclosure of tax information to DHS, for example to combat terrorist threats.³¹ To protect the privacy of all tax return filers, the federal government established sanctions for any paid preparer who discloses information provided to him or her during the course of preparing a tax return, unauthorized workers turn to tax preparers .³²

III. IMPROPER USE OF TAX RECORDS OF UNDOCUMENTED IMMIGRANTS WILL FORCE THE CREATION OF AN UNDERGROUND ECONOMY AND THREATENS THE CONFIDENTIALITY OF THE MAJORITY OF CITIZEN TAX RECORDS.

Individuals, regardless of citizenship status, retain a reasonable expectation of privacy, when their tax documents are at issue. The contents of these documents carry unquestionably private pieces of information and data, ranging from (as the trial court noted): tax information, identification, marriage records, medical records, charitable activities and immigration materials.

Just as someone expects their medical charts or legal documents to remain confidential from third-party intrusion or infringement, the same level of expected privacy extends to personal tax information, which contains so much more than financial records. This position has been recognized by the Colorado courts, which have noted that public policy strongly favors the protection and confidentiality of this

status to immigration authorities).

30 *Singer*, *supra* note 11, at 1432-33.

31 *See Singer*, *supra* note 11, at 1432 (citing the Victims of Terrorism Tax Act of 2002); *see also id.* (“Although the potentially most useful information about undocumented workers is in IRS tax records, privacy constraints bind

type of information, absent a compelling reason provided for by the government.³³

Furthermore, the U.S. Court of Appeals for the Second Circuit recognized that a confidential relationship exists between a tax preparer and his/her tax filer, thus protecting the filer from unauthorized release or use of confidential data within the preparer's possession.³⁴

Maintaining the privacy of tax records is vital to avoiding the creation of an underground economy. If unauthorized workers who comply with federal law and rely on federal government's assurances of confidentiality are subject to prosecution based on search of their tax records by state officials, they will cease to comply with federal tax laws and be driven into an underground cash economy that will have the two-fold effect of depriving the federal government of much-needed taxes and depriving the workers of the opportunity to demonstrate good moral character.

Furthermore, more than sixty percent of taxpayers in the U.S. use professional tax preparers³⁵ and the largest tax preparation companies, such as H&R Block and

release or sharing of information by the IRS, even though they might support other federal enforcement efforts.”).
32 See 26 U.S.C. § 6713 (1989).

33 See *Stone v. State Farm Mut. Auto Ins. Co.*, 185 P.3d 150 (Colo. 2008); (holding that a court engaging in an analysis of whether the government has met its burden of showing a compelling interest for investigating private tax records should “keep in mind Colorado's strong policy in favor of nondisclosure of tax returns.”); see also *Losavio v. Robb*, 579 P.2d 1152, 1156 (Colo. 1978) (holding that a grand jury did not demonstrate the requisite compelling need to discover and investigate state income tax records, and therefore, the district court judge did not abuse his discretion when quashing the subpoena decum tecum).

34 See *Beneficial Corp. v. F.T.C.*, 542 F.2d 611, 615 (3rd Cir. 1976)(holding that a tax preparer's use of a client's tax information for loan solicitations was an abuse of a confidential relationship between the preparer and the tax filer).

35 *Manmen*, *supra* note 28, at 9

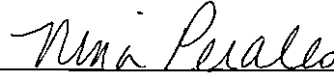
Liberty Tax, advertise to unauthorized workers the availability of their services and the opportunity to file tax returns with ITINs.³⁶ ITIN filers, as well as the majority of citizen taxpayers, have tax records in the offices of professional tax preparers. Thus, the threat of seizure of records from tax preparers who assist ITIN filers exposes most U.S. citizens to seizure of their tax records and creates the risk of widespread opposition and non-compliance with federal tax laws.

CONCLUSION

The federal government has purposefully designed a system of income tax collection for unauthorized workers. Allowing local or state officials to seize confidential tax records and search them in aid of criminal prosecutions undermines the federal tax collection system and drives taxpayers and their employers into the underground economy. Such searches, despite their purported goal of identifying unauthorized workers, have no inherent limitation; instead they open the door to searches of the majority of U.S. citizen tax returns that are prepared by professional tax preparers and invite widespread non-compliance with federal tax laws that will ultimately deprive the government of critical resources.

³⁶ See Pl. Ex. 27-001 (Jackson Hewitt); Pl. Ex.44-001 (H&R Block); Pl. Ex. 30-003 and Pl. Ex. 49 (Liberty Tax).

Respectfully submitted on the 28th day of August, 2009.



Nina Perales
Texas Bar No.: 24005046
MALDEF
110 Broadway, Suite 300
San Antonio, Texas 78205
(210) 224-5476

and



Manuel J. Solano
Att. Reg. #: 007646
Solano Law Offices
12000 N. Washington,
Suite 310
Thornton, Colorado 80602
(303) 457-2000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 28th day of August, 2009, sent by United States Mail, first class postage prepaid, true and complete copies of *Amicus Curiae* Brief of American GI Forum, League of United Latin American Citizens and Colorado Immigrant Rights Coalition in Support of Petitioners-Appellees Amalia Cerillo to:

Lisa Hogan
Richard P. Barkley
BROWNSTEIN HYATT FARER
SCHRCK, LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202-4437

David R. Brougham
Thomas J. Lyons
HALL & EVANS, L.L.C.
1125 Seventeenth Street, Suite 600
Denver, CO 80202-2052

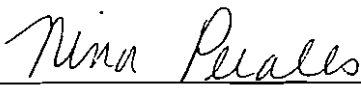
N. Reid Neureiter
Elizabeth L. Harris
Jacobs Chase Frick Kleinkopf & Kelley, LLC
1050 17th Street, Suite 1500
Denver, Colorado 80265

Mark Silverstein
Taylor S. Prendergrass
American Civil Liberties Union Foundation of Colorado
400 Corona Street
Denver, Colorado 80218

Michael Joseph Glade
Inman Flynn Biesterfeld Brentlinger & Moritz PC

1660 Lincoln Street, Suite 1700
Denver, Colorado 80264-1701

Shannon Lyons
Collins, Liu & Lyons LLP
812 8th Street
Greeley, Colorado 80631
Jennifer Chang Newell
Staff Attorney
ACLU Immigrants' Rights Project
39 Drumm Street
San Francisco, CA 94111



Nina Perales