No. 07-10261

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

SDI FUTURE HEALTH, INC., *et al*.,

Defendants-Appellees.

Appeal from the United States District Court for the District of Nevada
Case No. 2:05-cr-0078-PMP-GWF
The Honorable Philip M. Pro

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES' PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

INTERESTS OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a membership of more than 12,000 attorneys and nearly 40,000 affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

NACDL seeks to promote the proper and constitutional administration of justice, and to that end concerns itself with the protection of individual rights and the improvement of the criminal law, practices, and procedures. It submits this brief in the hope that it may aid the Court in its consideration of the fundamental constitutional and societal interests that are implicated when the owner-proprietors of a closely-held corporation are denied standing to object to unreasonable searches and seizures conducted on the business premises over which they exercise daily control.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief, and no counsel or party made a monetary contribution to fund

ARGUMENT

The panel below incorrectly held that an owner of a closely-held corporation – other than a "small, family-run business" – lacks standing under the Fourth Amendment to contest the search, pursuant to a defective warrant, of any corporate premises except his own "internal office" or other, narrowly limited areas with respect to which he has a "personal connection or exclusive use." *United States v. SDI Future Health, Inc., et. al.*, No. 07-10261, slip. op. at 945-46 (9th Cir. Jan. 27, 2009) (hereinafter "Slip Op. at __"). As explained below, the panel's opinion, by tightly circumscribing the Fourth Amendment rights of owners of anything but a "family-run business," has dangerously narrowed the rights previously accorded the owners of other closely-held corporations under the Circuit's prior decision in *United States v. Gonzalez*, 412 F.3d 1102 (9th Cir. 2005). The owners of small closely-held corporations, whether or not "family-run," should have standing to challenge searches conducted anywhere on the corporate premises.

I. THE INTERESTS OF THE OWNERS OF A CLOSELY-HELD CORPORATION MAY COINCIDE WITH THOSE OF THE CORPORATION ITSELF.

The instant matter concerns a search warrant executed on the premises of SDI Future Health, Inc. ("SDI Future Health"), a California corporation. SDI Future Health is a small privately-held medical services corporation that employs

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the preparation of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation.

approximately 40-50 employees at its headquarters. *See* Petition for Rehearing at 2, 5. Defendants Todd Kaplan and Jack Brunk co-founded SDI Future Health and served as the company's president, chief executive officer, executive vice-president and directors. *Id.* at 5. Kaplan and Brunk together own 59% of SDI Future Health's stock and exercise full control over SDI Future Health's facilities and managerial control over SDI Future Health's daily operations. *See id.* Kaplan's brother, Robert Kaplan, is also a corporate officer. *See id.* Both Kaplan and Brunk maintain offices at SDI Future Health's headquarters, and both were present when the government executed the search warrant. *See id.*

A closely-held corporation such as SDI Future Health bears no resemblance to what most laypeople would consider a "corporation." Typically one envisions a corporation as a large entity with thousands of employees, as many if not more shareholders anonymously trading their shares on a public stock exchange, and corporate officers whose employment may last only a few years before they pursue other opportunities. *See*, *e.g.*, *Gonzalez*, 412 F.3d at 1117 (describing, for purposes of distinguishing, "the hands-off executives of a major corporate conglomerate" who "rarely visi[t]" a particular corporate property). In a closely-held corporation, on the other hand, the stock by definition is owned by relatively few shareholders, often the company founders, with those shares rarely if ever exchanging hands. *Estate of Jelke v. C.I.R.*, 507 F.3d 1317, 1322 (11th Cir. 2007). Indeed, the shares

of a closely-held corporation are often held in the hands of only a few families or family members. *Galler v. Galler*, 203 N.E.2d 577, 583 (Ill. 1965). A key attribute of a closely-held corporation is the significant involvement of the owners in the day-to-day operations of the business. Unlike most shareholders in large public corporations, the owners of a closely-held corporation typically participate in the "management, direction and operations" of the company. *Donahue v. Rodd Electrotype Co. of N. Eng., Inc.*, 328 N.E.2d 505, 511. (Mass. 1975). Since owners of a closely-held corporation often know each other personally, decisions may be made on a more informal basis than is typical in the case of a public company. *See* Robert B. Thompson, O'Neal and Thompson's Close Corporations and LLCs: Law and Practice § 1:2 (2008).

As a result of these characteristics, the interests of the owners of a closely-held corporation are associated with those of the corporation itself in a manner not seen with other, more widely-held companies. This has been recognized by the courts, which routinely have held that "[w]hen the corporation is closely-held, interests of the corporation's management and stockholders and the corporation itself generally *fully coincide*." *Aetna Casualty and Surety Co. of Hartford, Conn. v. Kerr-McGee Chemical Corp*., 875 F.2d 1252, 1259 (7th Cir. 1989) (emphasis added). As stated by California's Court of Appeal, "there is no good reason why a

closely-held corporation and its owners should be ordinarily regarded as legally distinct." *Gottlieb v. Kest*, 46 Cal. Rptr. 3d 7, 36 (Cal. App. 4th 2006).

The identification of a closely-held corporation with its owners has been afforded legal significance. For example, when contemplating whether a lawsuit in which a shareholder is a party collaterally estops the corporation from asserting the identical claim in a future action, courts frequently hold "that one opportunity to litigate issues that concern them in common should sufficiently protect both." Restatement (Second) of Judgments § 59 cmt. e (1982); *see also Aetna Casualty*, 875 F.2d at 1259 (*quoting* Restatement); *Joe's Pizza, Inc. v. Aetna Life and Cas. Co.*, 675 A.2d 441, 445 (Conn. 1996) (*quoting* Restatement).

II. OWNERS OF A CLOSELY-HELD CORPORATION MAY HAVE FOURTH AMENDMENT RIGHTS IN THE ENTIRE CORPORATE PREMISES.

In light of the close practical and legal identification between a closely-held corporation and its owners – particularly those owners who are also corporate officers – the panel was wrong to hold that Kaplan and Brunk lack standing to generally challenge the execution of a defective search warrant on the premises of their company.

From its very inception, the Fourth Amendment has been concerned with protecting the rights of businessmen in their establishments. Indeed, the Fourth Amendment largely grew "out of the colonists' experience with the writs of assistance…[that] granted sweeping power to customs officials and other agents of

the King to search at large for smuggled goods." *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977). These writs of assistance or "general warrants" were particularly offensive "to merchants and businessmen whose premises and products were inspected" without evidence of wrongdoing. *Marshall v. Barlow's Inc.*, 436 U.S. 307, 310-11 (1978); *see also* Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 Geo. L.J. 19, 56 (1988) ("The searches [pursuant to general warrants] that sparked the greatest opposition were not of private houses or papers and, unlike the searches that triggered similar opposition in England, were not designed to discover the authorship of political tracts. They were searches of warehouses and merchant ships"); *but see generally* David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 Fla. L. Rev. 1051 (2004).[2]

There is no contention here that SDI Future Health lacks standing to challenge the improper warrant in its entirety. *See* Slip Op. at 947. And while it is a truism that, as stated by the panel in a footnote, "[w]hen a man chooses to avail

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[2] The practice of issuing general warrants empowered colonial revenue officers with nearly unbridled discretion to search for the smuggled goods, which James Otis pronounced in Boston in February 1761 as 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book, since they placed the liberty of every man in the hands of every petty officer." *Boyd v. United States*, 116 U.S. 616, 625 (1886) (internal citations omitted). The colonial debate over the propriety of these writs "was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country." *Id.*

himself of the privilege of doing business as a corporation, even though he is its sole shareholder, he may not vicariously take on the privilege of the corporation under the Fourth Amendment," *id*. at 942 n.5 (citation omitted), that observation simply does not resolve the scope of the owner's rights. In other words, while an owner may not "vicariously take on the privilege of the corporation," that hardly means that an owner's Fourth Amendment rights cannot be *coextensive* with those of the corporation in some circumstances.

In that regard, this Court previously recognized that the owners of a small business may have Fourth Amendment rights in the entire corporate premises. In *Gonzalez*, this Court concluded that the owners of a small business with approximately 25 employees had a reasonable expectation of privacy over telephone calls made on the company's premises and therefore had standing to move to suppress evidence collected by means of a wiretap even if they themselves did not participate in the conversation. *See* 412 F.3d at 1116-17. In doing so, the Court also recognized that the standing analysis for challenging illegal wiretaps mirrors the analysis for challenging physical searches and seizures. *Id.* The outcome, therefore, must be the same, *i.e.* if an owner of a small business has standing to contest the legality of a wiretap, so too must the owner of a small business have standing to contest the legality of an unreasonable search and seizure conducted on the business' premises.

The panel sought to distinguish *Gonzalez* as a case involving a "family-run" business, and to limit the earlier case's holding to such entities. *See* Slip Op. at 943 ("the business in question was a small, family-run business"); *id*. at 945 (limiting standing to owners of "a small, family-run business over which an individual exercises daily management and control"). The *Gonzalez* opinion, however, was not limited to family-run businesses. This Court stated:

> [W]e simply hold that because the Gonzalezes were corporate officers and directors who not only had ownership of the Blake Office but also exercised full access to the building as well as managerial control over its day-to-day operations, they had a reasonable expectation of privacy over calls made on the premises.

412 F.3d at 1117. This Court's holding did not include the fact that the company was a family-run business. Rather, this Court considered the totality of the circumstances and concluded that because the Gonzalezes exercised substantial control over the company's operations, they had standing to contest the constitutionality of the wiretap. *Id.*

The panel's new requirement that the owners of a business be "family" has no basis in precedent or logic and should be rejected. A court's inquiry under the Fourth Amendment examines whether, under the totality of the circumstances, a search or seizure violated the defendant's reasonable expectation of privacy. *See United States v. Sarkisian*, 197 F.3d 966, 986 (9th Cir. 1999). While an individual may have a heightened expectation of privacy in a family-run business of 25

employees such as the Gonzalezes', there is no reason to summarily exclude a similarly heightened expectation of privacy in a closely-held corporation of similar size. Indeed, an individual may very well have a *greater* expectation of privacy in a small establishment run with business partners of decades' acquaintance than one in which second cousins and other distant relatives are employed.

The panel's opinion also greatly elevates corporate form over Fourth Amendment substance. Individuals elect to incorporate their small businesses for any one of a number of reasons. Incorporating a business offers several advantages, including limited liability, the ability to sue, perpetual life, the ability to contract, centralized management, and tax advantages. *See, e.g.*, *Falwell v. Miller*, 203 F. Supp. 2d 624, 631 n.7 (W.D.Va. 2002); *Manley v. AmBase Corp.*, 121 F. Supp. 2d 758, 770 n.11 (S.D.N.Y. 2000); Mitchell F. Crusto, *Green Business: Should We Revoke Corporate Charters for Environmental Violations?*, 63 LA. L. REV. 175, 186 (2003). It seems unlikely that anyone's decision to incorporate a business is made with an eye on the Fourth Amendment, or with any expectation that the business is suddenly less private than it was prior to incorporation. Yet this is precisely the calculus the panel's decision has thrust into what otherwise would, and properly should, be a purely business decision.

In summary, an owner of a small closely-held corporation, whether "family-run" or not, has standing to contest the constitutionality of an unreasonable search

of the corporate premises when he establishes that, under the totality of the circumstances, he had a reasonable expectation of privacy throughout. This flows from the close identification of such a corporation with its owners, which in other contexts has been held to have legal significant. An expectation of privacy for a particular owner could be demonstrated by facts such as, *e.g.*, the owner's exercise of substantial responsibilities within the corporation such as taking a position as an officer or director, his holding of a significant stake in the closely-held corporation, his involvement in the day-to-day operations of the business, his responsibility for setting policy, and/or his authority to exclude individuals from the premises.

CONCLUSION

For the foregoing reasons, the defendants-appellees' petition for rehearing *en banc* should be granted.

Respectfully submitted,

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February 27, 2009

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,327 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point, Times New Roman font.

Dated: February 27, 2009

/s/ Kevin P. Martin
Kevin P. Martin
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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