

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 OF *AMICUS CURIAE* ASSOCIATION OF
CORPORATE COUNSEL AND THE CHAMBER OF
COMMERCE OF THE UNITED STATES OF AMERICA
IN SUPPORT OF APPELLEES' PETITION FOR
REHEARING *EN BANC*

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(FED. R. APP. P. 26.1, FED. R. APP. P. 29(C))**

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**STATEMENT OF *AMICUS CURIAE*'S IDENTITY,
INTEREST, AND AUTHORITY TO FILE BRIEF**

Amicus Curiae Association of Corporate Counsel (“ACC”) was formed in 1982 as the bar association for in-house counsel. With over 25,000 members from over 10,000 private sector organizations in 80 countries, ACC members represent a diverse range of domestic and international public, private, and not-for-profit companies. ACC’s members are employed by both large and small companies, both privately-held and publicly-traded. One of ACC’s primary missions is to act as the voice of the in-house bar on matters that concern corporate legal practice and the ability of its members to fulfill their functions as in-house legal counsel to their companies.

Amicus Curiae Chamber of Commerce of the United States of America (the “Chamber”) is the world’s largest federation of business companies and associations, representing an underlying membership of more than three million businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American businesses.

This appeal concerns matters of great importance to ACC and the Chamber. Consistent with their professional obligations, in-house counsel regularly advise their corporate client and executives about the scope of their Fourth Amendment rights—this is a necessary part of in-house counsel’s professional responsibility and in the best interests of their entity-clients,

such as the organizations that make up the Chamber's membership. In addition, many of ACC's members are corporate officers and executives themselves. As such, those members have a direct interest in the manner in which Fourth Amendment rights are interpreted and applied. If the panel's decision is allowed to stand, it will be more difficult for in-house counsel to advise corporate owner-operators and officers with respect to their rights to challenge governmental intrusions into corporate offices, and it will be harder to assert those rights. It also will be more likely that the interests of companies and their executives will diverge, to the detriment of the overall business.

Since the scope of Fourth Amendment rights of corporate owner-operators and officers impacts important public policy goals, ACC and the Chamber seek to present the Court with their view of the practical ramifications of the panel's decision to the provision of legal advice to American corporations and their highly ranked officers and directors.

ACC and the Chamber file this brief pursuant to the authority of Federal Rule of Appellate Procedure 29, and have filed an accompanying motion for leave to file this brief as required.

SUMMARY OF ARGUMENT

The panel decision in *United States v. SDI Future Health, Inc.*, 553 F.3d 1246 (9th Cir. 2009), represents a significant departure from prior Supreme Court and Ninth Circuit precedent regarding the standing of corporate owner-operators and officers to object to improper searches and seizures of materials from buildings that they own and/or control. The new test articulated by the panel for determining Fourth Amendment standing has no basis in prior rulings of the Supreme Court or this Court, and creates unnecessary confusion for in-house counsel attempting to advise companies and corporate owner-operators and officers regarding their rights and where those rights may be consistent with or divergent from the entity's interests. Moreover, the application of this new test to the facts of this case, as well as the comments of the United States Attorney in Nevada who prosecuted the Petitioners, demonstrate that the panel's decision significantly changes the law and will compromise the ability of corporate leaders to assert Fourth Amendment rights.

The panel decision in *SDI* creates problems in another area of criminal jurisprudence as well. It allows the government to withhold a search warrant (including any affidavit that purports to cure deficiencies in the warrant) from targets of searches before, during, and apparently even well after the search. Without information from the warrant that would provide details regarding the scope of the search or the purported criminal activity under investigation, it is impossible for in-house counsel to advise executives or the

company with respect to whether their Fourth Amendment rights may have been violated or whether the interests of the company and its executives are aligned with respect to those rights.

ACC and the Chamber urge the Court to review the panel's opinion *en banc* to ensure that the Fourth Amendment rights of corporate owner-operators and officers remain protected and that in-house counsel can provide clear advice to companies and their executives regarding those rights.

ARGUMENT

I.

THE PANEL'S DECISION CREATES UNWARRANTED CONFUSION IN THE LAW AND RESTRICTS IMPORTANT FOURTH AMENDMENT STANDING RIGHTS.

A. The Panel's Decision Places In-House Counsel In A Difficult Position Advising Companies And Corporate Owner- Operators And Officers With Respect To Fourth Amendment Standing Rights.

The panel's decision in *SDI* represents a significant departure from the Supreme Court and Ninth Circuit precedent that ACC's in-house counsel members have relied upon to advise corporate owner-operators and executives with respect to their rights to challenge improper searches and seizures of materials from buildings that they own and/or control. The Ninth Circuit squarely addressed this issue in *United States v. Gonzalez*, holding that corporate officers and directors had standing to assert Fourth

Amendment violations based upon a reasonable expectation of privacy where they “exercised full access to the building as well as managerial control over its day to day operations.” 412 F.3d 1102, 1117 (9th Cir. 2005), *amended on denial of reh’g*, 437 F.3d 854 (2006).¹

Gonzalez is consistent with *Mancusi v. DeForte*, 392 U.S. 364 (1968), and *United States v. Lefkowitz*, 618 F.2d 1313 (9th Cir. 1980). *Mancusi* and *Lefkowitz* each held that a corporate officer had standing to assert Fourth Amendment rights because restricted public access to the locations searched created a reasonable expectation that only co-workers and authorized guests would be able to enter the premises. *Mancusi*, 392 U.S. at 365, 368-69; *Lefkowitz*, 618 F.2d at 1316 n.2; *see United States v. Lefkowitz*, 464 F. Supp. 227, 231 (C.D. Cal. 1979).

The panel did not substantively discuss the rulings in *Mancusi* or *Lefkowitz*, and limited *Gonzalez* to “family-owned” businesses. *United States v. SDI Future Health, Inc*, 553 F.3d 1246, 1256 (9th Cir. 2009).²

¹*Gonzalez* also noted that the corporate officers in that case owned the building that was the subject of the search. 412 F.3d at 1116, 17. However, there is no indication that the corporate officers found to have standing in the *Mancusi* and *Lefkowitz* cases discussed below had ownership interests in the office locations at issue, and ownership of the premises searched is not a prerequisite for the assertion of Fourth Amendment rights in any event. *See United States v. Johns*, 851 F.2d 1131, 1136 (9th Cir. 1988).

² The panel concluded that *Gonzalez* did not control because “no one contends that [the Petitioners] operated SDI on a daily basis as a family-owned business like the defendants in *Gonzalez*.” *SDI*, 553 F.3d at 1256. However, the Petitioners, citing to the record, assert that they operated SDI on a daily basis. *See* Petition for Rehearing En Banc of Appellees SDI
(continued . . .)

Rather than following these controlling cases, the panel claimed that “we are left with little case law directly on point” and repeatedly referred to the purported “novel issue” before it. *Id.* at 1254, 1256, 1257. The panel then created an entirely new standard for analyzing Fourth Amendment standing in the corporate context: “[E]xcept in the case of a small, family-run business over which an individual exercises daily management and control, an individual challenging a search of workplace areas beyond his own internal office must generally show some personal connection to the places searched and materials seized.” *Id.* at 1257. The panel’s decision creates a number of unwarranted consequences and complications for in-house counsel attempting to advise companies and corporate owner-operators and officers with respect to their Fourth Amendment rights to challenge governmental intrusion into corporate offices.

First, under the panel’s ruling, evidence that is not admissible against a company can be introduced against the top executives of the company (precisely the result in this case). This situation will create tensions for in-house counsel advising various constituents on how to respond to unlawful searches. It will also create a situation where the same evidence that is

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Future Health Inc., Todd S. Kaplan, and Jack Brunk (“Petition”) at 5 (Petitioners “exercised full control over access to SDI’s facilities, and complete managerial control over the company’s day-to-day operations. (SER-88, 93; ER-229-30.)”). Therefore, the panel’s distinction of *Gonzalez* necessarily must be based on the fact that SDI was not a family-owned business like the business in *Gonzalez*.

inadmissible against the company in the criminal case nevertheless could be used against the company in civil cases by plaintiffs' lawyers who would have access to that evidence due to its admissibility as to the company's executives in the criminal case.

A similar tension has arisen in recent years when prosecutors have threatened corporations with the death knell of indictment in order to extract waivers of corporate rights so that prosecutors could more easily target corporate officers and executives. *See, e.g., United States v. Stein*, 495 F. Supp. 2d 390 (S.D.N.Y. 2007); *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006). The panel decision will embolden prosecutors to continue deputizing corporate counsel and place them in the untenable position of balancing the rights of the company against the rights of valued employees.

Second, the panel's decision replaces the straightforward approach previously used to determine the Fourth Amendment standing of corporate owner-operators or officers with a new, amorphous "personal connection to the places searched and materials seized" test. *SDI*, 553 F.3d at 1257. The inherent ambiguity of this test makes it difficult to predict when a corporate owner-operator or officer will have standing. This problem is illustrated by the facts of this case, which would have led many in-house lawyers to believe that the corporate officers would be able to challenge an improper search and seizure of SDI headquarters. *See infra*, pp 9-11.

Third, the "family-run business" exception to the new "personal connection" test has no discernable basis in prior case law and is not

adequately explained. The unique status afforded by the panel to family-run businesses is not applied in *Gonzalez*, *Mancusi*, *Lefkowitz*, or any other case cited by the panel. While *Gonzalez* refers in passing to the fact that the office at issue was a family-run business (412 F.3d at 1116), *Gonzalez* does not ascribe any particular importance to this characteristic or mention it in the holding of the case.³ The facts of *Gonzalez* also demonstrate that the case could not possibly have turned on the familial nature of the location searched, because “only one of the 25 people with offices at [the location of the search] was a member of the Gonzalez family . . .”*id.* at 1108 (emphasis added).

The panel’s attempt to dramatically narrow *Gonzalez* without expressly overruling it produced an unfortunate result. Under the panel’s ruling, “family-run” businesses are the only businesses entitled to the Fourth Amendment standing analysis previously articulated by the Supreme Court and Ninth Circuit. All other businesses are now subject to the stricter “personal connection” test created by the panel. In-house counsel are left to try to explain the “family-run business” exception to this new test with no

³*Gonzalez* expressed its holding as follows: “We simply hold that because the Gonzalezes were corporate officers and directors who not only had ownership of the Blake Avenue 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; *see also id.* at 1116 (“We hold that the district court correctly determined that [the defendants] had a reasonable expectation of privacy at the Blake Avenue office that they owned and in which they had substantial control of the day-to-day operations”).

guidance from the panel about why it should matter whether a business is family-run or how broadly or narrowly to interpret the exception. For example, do the officers and managers of a business need to be siblings or spouses in order to trigger Fourth Amendment standing, or are second cousins sufficient?⁴ The panel does not provide any indication of how to answer such questions.

At the very least, the panel's decision has inserted uncertainty and confusion into an important Constitutional area that requires clarity, and *en banc* review is required to address these problems.

B. The Panel's Decision Dramatically Limits The Fourth Amendment Standing Rights Of Corporate Owner-Operators And Executives.

If the panel's ruling is allowed to stand, ACC members who themselves are corporate officers and directors will no longer have standing to assert their own constitutional privacy rights in anything other than their personal possessions in the workplace. The significant narrowing of Fourth Amendment standing resulting from the panel's newly formulated "personal connection" test is confirmed by the panel's conclusion that the facts developed in the trial court were insufficient to confer standing in this case.

⁴The panel applied the new "personal connection" test in this case, despite the fact that Petitioner Kaplan's brother was also an officer of SDI. *United States v. SDI Future Health, Inc.*, No. 2:05-cr-00078-PMP-GWF, 2006 WL 4457335 at *1, 42 (D. Nev. June 26, 2006). Therefore, it appears that even a sibling relationship is not enough to trigger the panel's "family-run business" exception.

Those facts, as recited in the panel opinion and the district court opinion below, are at least as compelling with respect to Fourth Amendment standing as those presented in *Gonzalez*, *Mancusi* and *Lefkowitz*.

As in *Gonzalez*, the Petitioners here were “corporate officers and directors” of the small corporation whose office was searched and “exercised full access to the building as well as managerial control over its day to day operations.” 412 F.3d at 1117; *SDI*, 553 F.3d at 1251, 1253 (describing the trial court’s factual findings that Petitioners’ maintained offices at the building, had “significant ownership interests in SDI,” and had a “high level of authority over the operations of the company”).⁵ Moreover, the access restrictions in place at the SDI offices appear to be at least as robust as the “large room” shared with other union officials in *Mancusi* and the office suite that “was apparently not open to the general public” in *Lefkowitz*. *Mancusi*, 392 U.S. at 368; *Lefkowitz*, 464 F. Supp. at 231; *SDI*, 553 F.3d at 1253 (SDI maintained a level of security and confidentially [sic] practices regarding its premises and records that one would reasonably expect of a health care provider).⁶ There is no apparent reason why the Petitioners

⁵*Gonzalez* noted that “we do not rule out the possibility that the *hands-off executives* of a *major corporate conglomerate* might lack standing to challenge all intercepted conversations at a commercial property that they owned but *rarely visited*.” *Gonzalez*, 412 F.3d at 1117 (emphasis added). It does not appear that anyone contends that such circumstances existed in this case.

⁶The district court provided more detail with respect to SDI’s security measures, citing testimony that “[t]he public is generally not allowed into the
(continued . . .)

would have a lower expectation of privacy than the officers in *Gonzalez, Mancusi* and *Lefkowitz*.

The U.S. Attorney for the District of Nevada immediately recognized the impact of the panel opinion on Fourth Amendment standing rights, reportedly stating that “[w]hat the opinion makes clear is that, going forward, when individual officers go to court to seek to suppress document, they are not going to be able to do so. It is going to be difficult to show that they have standing, as opposed to the corporation.” Pamela A. MacLean, *9th Circuit: Execs Lack Standing in Searches*, Nat’l L. J., Feb. 9, 2009, at 4.

ACC and the Chamber object to the panel’s unwarranted departure from prior precedent and the evisceration of the Fourth Amendment rights of corporate officers and directors. The Court should reconsider the panel’s decision *en banc* in order to restore the ability of these members to challenge unwarranted and improper searches and seizures in corporate offices.

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office beyond the reception-lobby area” of the SDI corporate headquarters. Moreover, “if a non-employee had business at the SDI headquarters, he or she generally had a prearranged appointment and would be met by the company employee or officer, or escorted to the proper office upon arrival. The SDI offices were locked and alarmed at night.” *United States v. SDI Future Health, Inc.*, No. 2:05-cr-00078-PMP-GWF, 2006 WL 4457335 at *16 (D. Nev. June 26, 2006).

II.

**ALLOWING THE GOVERNMENT TO CONCEAL AN
AFFIDAVIT CONTAINING THE DETAILS OF THE
SCOPE OF THE SEARCH AND INVESTIGATION UNTIL
WELL AFTER THE SEARCH HAS BEEN COMPLETED
WILL PREVENT IN-HOUSE COUNSEL FROM
DETERMINING WHETHER FOURTH AMENDMENT
RIGHTS WERE VIOLATED.**

The panel's ruling that an affidavit used to secure a search warrant may be utilized to cure deficiencies in the warrant even if the affidavit is not given to the defendant raises serious concerns for ACC and the Chamber. *SDI*, 553 F.3d at 1259-60. If this ruling is allowed to stand, the government does not need to provide the subjects of illegal searches with details regarding the scope of the search or the alleged criminal activity under investigation before, during, or apparently even well after the search. *See id.* (noting the government's concession that the search team did not give a copy of the affidavit to the Petitioners).⁷ Thus, the government could simply maintain the supporting affidavit, which contains all the details of the scope of the search and investigation, under seal and not show it to the subjects of the search until after an indictment is returned months or years later. This scenario makes it all but impossible for in-house counsel to advise executives or the company with respect to whether their Fourth Amendment rights may

⁷According to the Petitioners, "[t]he affidavit, having been sealed, was not shown to any of the defendants until years after the search's completion." *See* Petition at 4.

have been violated or whether the interests of the company and its executives are aligned with respect to those rights.

The panel ruling is also inconsistent with the settled rule that the warrant (including any curative affidavit) must be served on the property owner by the time the search concluded, or shortly thereafter. *See* Fed. R. Crim. P. 41(f)(3).⁸ This rule furthers one of the primary purposes of the Fourth Amendment's particularity requirement, which is to "assure[] the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *See Groh v. Ramirez*, 540 U.S. 551, 562 (2004).

The panel claimed that its ruling was compelled by *United States v. Grubbs*, 547 U.S. 90 (2006). *SDI*, 553 F.3d at 1260. However, *Grubbs* simply rejected the proposition that the officer must present the warrant to the property owner *before conducting his search* in order to allow the property owner to police the officers' conduct and engage the officers in a debate about the basis for the warrant. *Grubbs*, 547 U.S. at 98-99.⁹ It did

⁸Rule 41(f)(3) provides that "[t]he officer executing the warrant must: (A) give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or (b) leave a copy of the warrant and receipt at the place where the officer took the property."

⁹The Supreme Court previously recognized that that the requirement of service of the warrant on the property owner did not require the executing officer to serve the warrant on the owner before commencing the search. *See Groh v. Ramirez*, 540 U.S. 551, 562 n.5 (2004) (citing Fed. R. Crim. P. 41(f)(3)); *see Grubbs*, 547 U.S. at 99 (citing *Groh* for that principle).

**CERTIFICATE OF COMPLIANCE PURSUANT TO
FED. R. APP. P. 32(a)(7)(C) AND NINTH CIRCUIT RULE
29-2(C) FOR CASE NUMBER 07-10261.**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 29(c), I certify that the attached Brief *Amicus Curiae* is proportionally spaced, in a typeface of 14 points or more and contains 3,366 words, exclusive of those materials not required to be counted under Rule 32(a)(7)(B)(iii).

DATED: February 27, 2009.

/s/ Jason M. Skaggs
JASON M. SKAGGS

**CERTIFICATE OF SERVICE
FOR DOCUMENTS FILED USING CM/ECF**

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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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