NOS. 05-10067, 05-15006 & 05-55354

PANEL MEMBERS: HONORABLE DIARMUID F. O'SCANNLAIN
HONORABLE SIDNEY R. THOMAS
HONORABLE RICHARD C. TALLMAN

DATE OF DECISION: DECEMBER 27, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN RE: GRAND JURY SUBPOENA DATED MAY 6, 2004 ON COMPREHENSIVE DRUG TESTING, INC. AND QUEST DIAGNOSTICS, INC.

UNITED STATES OF AMERICA,

Defendant-Appellant,

v.

COMPREHENSIVE DRUG TESTING, INC., AND MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

Plaintiffs-Appellees.

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# PETITION FOR REHEARING AND REHEARING *EN BANC*

Appeal from the United States District Courts for
The Northern District of California (No. CR Misc. 04-234 SI);
The Central District of California (No. CV 04-2887 FMC (JWJx));
and the District of Nevada (No. CV-S-04-0707 JCM-PAL)

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### FEDERAL STATUTES

## I. FRAP 35(b) Statement

The panel decision conflicts with *United States v. Tamura*[1] and *Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*.[2] Consideration by the full Court is therefore necessary to secure and maintain uniformity of the Court's decisions. Moreover, this appeal involves questions of exceptional importance, as explained in the Introduction below.

## II. Introduction

Over a strong dissent, the panel in this case drastically curtailed the reasonable privacy expectations of anyone whose confidential information is held in a computerized database—which means, in effect, nearly everyone. En route to that result, the panel also discarded the procedural protections that this Court laid out in *United States v. Tamura* for when the government seizes—without probable cause—private information that it finds "intermingled" with the targets of a search. And the panel overruled three district judges from three judicial districts who condemned the government's conduct below as "extremely troubling" and "absolutely staggering," and who each held that the government had callously disregarded hundreds of people's Fourth Amendment rights.

With a search warrant for the records of only ten Major League Baseball players, the government seized drug-testing records for *every* Major League Baseball player (some 1,200 in all), along with thousands of other confidential records for people who had the misfortune to have data about them stored in the

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[1] 694 F.2d 591 (9th Cir. 1982).

[2] 374 F.3d 857 (9th Cir. 2004).

same computer directory. It rejected requests that it seal the records it had seized and use an orderly procedure to separate the few that the warrant covered from the many it did not. It then claimed the right to retain all of these seized records.

If the panel's decision is allowed to stand, the government now will be authorized to seize, retain, and read all private information contained in electronic databases, so long as *any* information responsive to a warrant resides somewhere on the database. Only if an aggrieved party challenges the seizure will the government need to involve a neutral magistrate—and undoubtedly, many law-abiding citizens whose private records are seized will never learn of the seizure or will lack the resources or legal sophistication to challenge it. Even when some do, under the panel's decision, the magistrate must allow the government to keep and use any private data that is commingled with the data it had probable cause to seize. And should the magistrate order any data returned, the panel's decision authorizes the government, having already read the data, to subpoena it right back.

As Judge Thomas noted in dissent, the panel's decision "squarely conflicts with" this Circuit's precedent in *Tamura*, and substantially overrules its teachings regarding the proper treatment of intermingled records.[3] Judge Thomas also emphasized this case's exceptional importance, observing that "[t]he scope of the majority's new holding in the digital age could not be greater; it removes confidential electronic records from the protection of the Fourth Amendment," and warning of "the profound consequences of the majority's opinion on the privacy of

[3] Dissent at 19834.

medical records throughout the United States[.]"[4] *En banc* review is therefore vitally necessary.

In addition, the panel's decision conflicts with established Ninth Circuit law on whether a motion for reconsideration tolls the jurisdictional deadline for filing an appeal. For decades, this Court has applied a consistent rule that a reconsideration motion tolls the deadline *if, and only if, it was filed within 10 days after entry of the judgment.*[5] Until now, the Court held that this 10-day time limit "is jurisdictional and cannot be extended by the court."[6] But the majority ignored existing precedent and created a new rule that allows reconsideration motions that were filed *more than 10 days* after entry of judgment to toll the period for filing an appeal, as long as those motions are timely under the district court's local rules. As Judge Thomas's dissent pointed out, that holding is "contrary to the plain language of [Fed. R. Civ. P.] 83, 28 U.S.C. § 2071(a), and controlling precedent."[7] It likewise merits *en banc* review.

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[4] *Id.*

[5] *Shapiro v. Paradise Valley Unified School District No. 69*, 374 F.3d 857, 863 (9th Cir. 2004). *See also* Dissent at 19858-863.

[6] *Scott v. Younger*, 739 F.2d 1464, 1467 (9th Cir. 1984); *see also* Fed. R. App. P. 6(b).

[7] Dissent at 19861.

## III. Factual Background

Unlike the majority opinion, Judge Thomas's dissent sets forth an accurate and comprehensive summary of the facts.[8] Briefly, in 2002, the Major League Baseball Players Association (the "Players Association") and Major League Baseball agreed to conduct suspicionless drug tests of every player during the 2003 season. The purpose of the tests was to gauge the magnitude of apparent steroid use in baseball, which would determine what type of testing would occur in subsequent years.[9] The collective-bargaining agreement assured the players that the 2003 testing would be anonymous and confidential, and that the samples and individual test data would be destroyed once the results were tabulated.

Also in 2003, the government began investigating the Bay Area Lab Co-Operative ("Balco"), a business that the government suspected of supplying illegal steroids to athletes, including several baseball players. As part of that investigation, on January 16, 2004, the government served a grand jury subpoena on Comprehensive Drug Testing, Inc. ("CDT"), which had administered the testing of Major League Baseball players. Although the government suspected only ten baseball players of receiving steroids from Balco, it subpoenaed the drug-test results of *every* Major League Baseball player.

The Players Association and CDT were gravely concerned that the subpoena invaded players' privacy rights, and they tried to work with the government to

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[8] *See* Dissent at 19834-19857.

[9] As the Dissent acknowledged, a "positive" test result would not necessarily indicate steroid use, since it could also be caused by legal over-the-counter supplements. *See* Dissent at 19835.

resolve those concerns. While they did so, they assured the government in writing that CDT would preserve all of the subpoenaed records until their disputes were resolved by negotiation or litigation. The Chief of the Criminal Division wrote a letter to CDT's counsel accepting those assurances. At the government's request, the Players Association and CDT then prepared and presented a detailed "white paper" explaining the serious constitutional privacy concerns that the subpoenas raised.[10]

On March 3, the government served a second subpoena on CDT seeking the records of only eleven named baseball players. However, it refused to withdraw the first subpoena. On April 7, with no resolution reached, the Players Association and CDT filed a motion to quash the subpoenas in the Northern District of California.

Upon learning that a motion to quash was about to be filed, the government applied for a warrant to search CDT's offices and seize the records of ten specifically named baseball players (the same players named in the March 3 subpoena, with one omitted). It applied for the warrant in the Central District of California without notice to the Players Association, CDT, or the court in the Northern District.

In the warrant application, the government failed to apprise the magistrate judge that it had previously subpoenaed, and still hoped to obtain from CDT, drug-testing records for every Major League Baseball player, not just the ten that it

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[10] The Majority asserts that the Players Association and CDT threatened to "fight production of even a single drug test all the way to the Supreme Court." (Majority at 19791-92). That assertion is inaccurate and finds no support in the record.

named in the warrant application. And it failed to apprise the magistrate judge that it had accepted written assurances that CDT would preserve the subpoenaed records until the parties resolved their disputes. To the contrary, the application justified the removal of computer data from CDT's premises by warning that users may delete, alter, or destroy such data.

Once the government obtained the warrant for records of the ten named players, it entered CDT and seized all of the records that it had desired all along, and much more. It copied and seized an entire computer directory (referred to as the "Tracey directory") containing confidential records of Major League Baseball players along with thousands of other confidential records.

The agents did not use keyword searches or other means to identify and segregate the electronic information that was responsive to the warrant, although they easily could have. They made no effort to segregate what was authorized for seizure from what was not. Instead, agents copied and seized the entire Tracey directory, including subdirectories that plainly held large quantities of private data outside the scope of the warrant. As the government was in the process of seizing these and other materials, CDT's counsel asked to have a magistrate or special master review them and redact private information outside the scope of the warrant. The government refused.

Over the ensuing days and weeks, the government obtained and executed additional warrants in the Northern District of California, the Central District of California, and the District of Nevada to secure every "positive" test result and sample from the 2003 Major League Baseball testing program. It obtained the

asserted probable cause for these warrants by having a case agent comb through Major League Baseball players' confidential records that agents had seized when they executed the first warrant, looking for every "positive" test result. As one district court found, "[o]nce the items were seized, the requirement of the search warrant that any seized items not covered by the warrant be first screened and segregated by computer personnel was completely ignored."[11] In addition to executing these new search warrants, the government issued new subpoenas for over 100 baseball players' test results and urine samples—players it had identified by reading their private information seized without probable cause or any valid authority.

The three district judges each held that the government had callously disregarded the Fourth Amendment rights of the people whose records it had seized and read even though they were not named in the initial warrant. Each judge ordered the government to return or destroy all materials relating to those people, while permitting it to keep records for the ten baseball players that the initial warrant named. The Northern District court also quashed the later subpoenas for the records of persons whom the government had identified by reading the information it had improperly seized.

As discussed below, however, the majority reversed all three district judges' findings. In the process, it wrote new rules for the seizure of computerized records that, if allowed to stand, will drastically curtail privacy rights in the 21st century.

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[11] ER 38. The majority disregards this limitation in the warrant. *Compare* Majority at 19815-16 and n.36 *with* ER 2748-49.

## IV. Petition for Rehearing and Rehearing *En Banc*

### A. The majority's opinion directly conflicts with the need for magisterial oversight that this Court set forth in *United States v. Tamura.*

In *Tamura*, this Court required as an "essential safeguard" that any wholesale removal of intermingled documents "be monitored by the judgment of a neutral, detached magistrate."[12] Of critical importance, this judicial monitoring does not depend upon an aggrieved party's making any motion.[13]

These protections have become more necessary than ever in this day and age, and in this type of case. Since *Tamura* was decided, virtually every business of any size has switched to computerized record-keeping, where a single "document" may contain records relating to thousands of people and transactions. Moreover, *Tamura* involved the seizure of ordinary business records; it did not involve the heightened privacy interest in confidential records of a personal nature, nor did it involve the complexities of a computer search. In this case, where those factors *were* present, one might have expected the panel to embrace *Tamura*'s teachings all the more firmly.

Remarkably, the majority did just the opposite: it denigrated those teachings as mere *dicta* and then promulgated a new set of procedures that utterly fail to protect the privacy rights of people whose confidential records are contained in computerized databases. As Judge Thomas noted in dissent, the majority opinion "squarely conflicts with" *Tamura* and substantially overrules its teachings

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[12] *Tamura*, 694 F.2d at 596.

[13] *Id.*

regarding the proper treatment of intermingled records.[14]

The new procedures endorsed by the majority permit the government to seize an entire computer database containing thousands of files—the vast majority of which, on their face, are not authorized for seizure—search them, and then freely use the fruits of that search before any court has adjudicated the government's entitlement to seize or retain that material. The government may thus seize and use without restriction items to which it had no constitutional entitlement in the first instance, just because those items are stored electronically in the same database that contains an item authorized for seizure.

Although the majority authorizes subsequent review by a magistrate, that review is triggered *only* if some affected party is sufficiently wealthy, knowledgeable, and legally sophisticated to learn of the seizure and then file a motion seeking the review. The thousands of ordinary people potentially affected by a search of this type will have no notice of what is being done with their records and will be afforded no opportunity to intervene.

Moreover, even if a magistrate does become involved, she will be hamstrung by an anachronistic test that likens the seized computer records to the paper bank ledgers discussed in *United States v. Beusch*.[15] That test injects archaic and irrelevant considerations into the analysis, such as "whether the file, if printed, would fill more than a typical paper ledger (of the sort in *Beusch*)," and whether excising the unrelated portions of the document would "distort the character of the

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[14] Dissent at 19834.

[15] 596 F.2d 871 (9th Cir. 1979).

original document."[16]

The majority's flawed analogy to paper bank ledgers also fails because the computerized records at issue here are drug-test results that implicate significant privacy interests under a long line of United States Supreme Court and Ninth Circuit precedent. In his dissent, Judge Thomas recognizes the significance of the privacy interests at stake, noting the exceptional importance of this case in the context of records stored on a computer in any hospital, drug-treatment center, or testing laboratory.[17]

Judge Thomas's dissent thoroughly dissects the new rules and shows that they undermine nearly every conceivable Fourth Amendment protection for computerized records. Judge Thomas observes that the majority "endorses the warrantless seizure and search of confidential medical information pertaining to individuals not under any criminal suspicion, reasoning that the existence of a handful of relevant records justifies the seizure and subsequent search of thousands of irrelevant records."[18] Instead of interposing a neutral and detached magistrate between the searching officer and the citizen's rights *before* privacy is invaded, the new rules provide for a magistrate only *after* the invasion has occurred—and only in the rare instance that the affected citizen obtains notice that his records have been seized and brings the necessary Rule 41(g) motion.[19] As Judge Thomas warns,

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[16] Majority at 19826 n.45.

[17] Dissent at 19885-890.

[18] *Id.* at 19871.

[19] *Id.* at 19893.

> under the majority's holding, the inversion of the Fourth Amendment is thus rendered complete. The government is entitled to warrantless searches and seizures without probable cause or particularized suspicion, and the honest citizen bears the cost and the burden of showing that the government should have demonstrated probable cause before seizing and searching the law-abiding citizen's personal property.[20]

Judge Thomas minces no words when summarizing the impact that this "inversion of the Fourth Amendment" will have on our society: "The scope of the majority's new holding in the digital age could not be greater; it removes confidential electronic records from the protections of the Fourth Amendment."[21]

The majority's flawed holding emerged from an equally flawed methodology that exhibited a surprising disregard for the district courts' role as finder of fact. Instead of deciding whether the district courts had abused their discretion,[22] the majority stepped into the lower courts' shoes and acted as the fact finder.[23] The majority thus permitted itself to brush aside many district-court findings of government duplicity and overreaching, recounted at length in Judge Thomas's carefully framed dissent.[24]

Thus, at a particularly inopportune juncture in history, and in an especially inappropriate factual context, the majority turned its back on *Tamura*'s teaching that "the wholesale seizure . . . of records not described in a warrant . . .

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[20] *Id.* at 19894.

[21] Dissent at 19834.

[22] *See United States v. Washington*, 394 F.3d 1152, 1157 (9th Cir. 2005).

[23] *See, e.g.*, Majority at 19796 n. 16, 19808-12.

[24] *See* Dissent at 19864-74.

[constitutes] the kind of investigatory dragnet that the Fourth Amendment was designed to prevent."[25] *En banc* review is therefore necessary to rectify Ninth Circuit law and make it once again capable of safeguarding the privacy of computerized records in the 21st century.

### B. The majority erroneously restricted district courts' discretion to quash unreasonable and abusive subpoenas based on the totality of the circumstances.

As set forth above, the majority paved the way for the government to seize and read computerized records without any meaningful judicial review. But it did not stop there. It also blessed a procedural end run that will enable the government to keep any seized records that it wants—even in the rare instances when a magistrate orders records returned.

The majority reversed, as an abuse of discretion, the Northern District's order quashing two subpoenas for over 100 baseball players' test results and samples, which the government issued at the end of its barrage of search warrants.[26] It is undisputed that the government identified the players named in the subpoenas by reading confidential information about them that it seized from CDT.

The majority dismissed the district court's finding that these subpoenas were unreasonable and abusive as being directed merely to the issuance of "contemporaneous search warrants and subpoenas."[27] But the district court objected to much more than that. It condemned the entire course of conduct by

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[25] *Tamura*, 694 F.2d at 595 (internal quotation and citation omitted).

[26] Majority at 19827-30.

[27] Majority at 19828.

which the government connived to obtain Major League Baseball drug-testing records without probable cause. It chastised the government for "the way that the case was taken from one judge to another judge to another judge, [and] the way that as soon as it was challenged in one court it was immediately litigated in a different court without full information being shared among the courts."[28] And it raised grave concerns that the government's tactics and arguments in this case threatened to gut the Fourth Amendment's protection of computerized data.

If the majority's opinion is allowed to stand, it will create Circuit law giving the government *carte blanche* to (1) use a warrant for some piece of data on a computer as the pretext for seizing the entire computer and perusing its contents, and then (2) subpoena any computerized records that it identifies in the first step. Thus, even if an aggrieved party challenges an overbroad seizure and manages to prevail before a magistrate, the government will know that party's private information and will have free reign to "subpoena it back." District judges will be powerless to stand in the government's way.

If that were not enough, in affirming the subpoenas, the majority ignored the sensitive and private nature of the records that they sought. The Players Association and CDT argued below that these heightened privacy interests created an independent basis to quash the subpoenas—an issue that the district court never reached. Yet, by declaring the subpoenas valid, the majority seemingly rejected that argument without considering it.

*En banc* review is therefore also required to restore the district court's

[28] ER 2456-57.

discretion to quash abusive and unreasonable subpoenas.[29]

### C. The majority's finding that the government timely appealed from the Central District's order rewrites this Court's jurisprudence.

Besides redefining privacy rights in the digital age, the majority opinion overturned decades of precedent on appellate jurisdiction. The government filed its notice of appeal from the Central District order requiring it to return seized records well over 60 days after the Court entered that order.[30] Its appeal is therefore untimely—and this Court lacks jurisdiction to hear it—*unless* the time for filing an appeal was tolled.[31] The government argued, and the majority held, that the period was tolled because the government filed a "Motion for Reconsideration" in the district court.

For decades, this Court has applied a consistent rule to determine whether a motion for reconsideration tolls the jurisdictional deadline for filing an appeal. A reconsideration motion tolled the deadline *if, and only if, it was filed within 10 days after entry of the judgment.*[32] This rule flows directly from Federal Rule of Appellate Procedure 4, which permits tolling if "[a] party *timely* files" a motion "to alter or amend under Rule 59" or a motion "for relief under Rule 60 if the motion

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[29] *See* Dissent at 19897-98.

[30] *See* Majority at 19801-02.

[31] Fed. R. App. P. 4(a)(1)(B); *Browder v. Director Dept. of Corr. of Ill.*, 434 U.S. 257, 264 (1978); *see also Fiester v. Turner*, 783 F.2d 1474, 1475 (9th Cir. 1986) ("A timely appeal is required to vest this court with jurisdiction.").

[32] *Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*, 374 F.3d 857, 863 (9th Cir. 2004). *See also* Dissent at 19858-863.

is filed no more than 10 days after the judgment has been entered."[33] Both of these alternatives require that the motion be filed within 10 days.[34] Thus, this Court had consistently held that "a 'motion for reconsideration' is treated as a motion to alter or amend judgment under Federal Rule of Civil Procedure Rule 59(e) *if it is filed within ten days of entry of judgment*[.]"[35] Until now, the Court held that this 10-day time limit "is jurisdictional and cannot be extended by the court."[36]

The majority ignored this precedent, however, and created a new rule that allows motions for reconsideration that are filed *more than 10 days* after entry of judgment to toll the period for filing an appeal, as long as those motions are timely under the district court's local rules. In this case, the government filed its motion some 50 days after the Central District entered its order.[37] But the majority held that it tolled the period for filing an appeal nonetheless, because it was timely under Central District Local Rule 7-18.[38] That holding conflicts with the express language of Rule 4 and more than twenty years of settled precedent. That alone warrants *en banc* review.

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[33] Fed. R. App. P. 4(a)(4)(A)(iv) and (vi) (emphasis added).

[34] For a motion to be "timely filed" under Rule 59, it must be "filed no more than 10 days after the entry of the judgment." Fed. R. Civ. P. 59(e).

[35] *American Ironworks & Erectors, Inc. v. N. Am. Constr. Corp.*, 248 F.3d 892, 898-99 (9th Cir. 2001) (emphasis added).

[36] *Scott v. Younger*, 739 F.2d 1464, 1467 (9th Cir. 1984); *see also* Fed. R. App. P. 6(b).

[37] Majority at 19801-802.

[38] Id. at 19802.

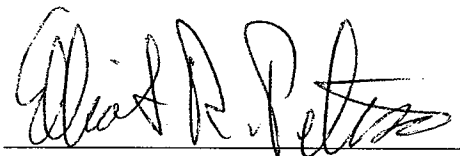
## V. CONCLUSION

The majority's opinion conflicts with established Ninth Circuit precedent and raises questions of exceptional importance regarding searches and seizures of computerized data. The Players Association and CDT therefore respectfully request that the Court grant this petition and permit an *en banc* panel to fully consider the significant issues that this appeal presents.

Respectfully submitted,

Dated: February 12, 2007

KEKER & VAN NEST, LLP

By: 

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**Form 11. Certificate of Compliance Pursuant to Circuit Rules 35-4 and 40-1**

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I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

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NOS. 05-10067, 05-15006 & 05-55354



PANEL MEMBERS: HONORABLE DIARMUID F. O'SCANNLAIN
HONORABLE SIDNEY R. THOMAS
HONORABLE RICHARD C. TALLMAN
DATE OF DECISION: DECEMBER 27, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN RE: GRAND JURY SUBPOENA DATED MAY 6, 2004 ON COMPREHENSIVE DRUG TESTING, INC. AND QUEST DIAGNOSTICS, INC.

UNITED STATES OF AMERICA,

Defendant-Appellant,

v.



COMPREHENSIVE DRUG TESTING, INC., AND MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

Plaintiffs-Appellees.

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

Appeal from the United States District Courts for the Northern District of California (No. CR Misc. 04-234 SI); the Central District of California (No. CV 04-2887 FMC (JWJx)); and the District of Nevada (No. CV-S-04-0707 JCM-PAL)

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## RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America has no parent corporation and no publicly held company owns 10% or more of its stock.

Respectfully submitted,


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### Cases

The Chamber of Commerce of the United States of America (the "Chamber") submits this brief as *amicus curiae* in support of Appellees' petition for rehearing and rehearing *en banc*. The parties have consented to the filing of this brief.

## I. IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members as *amicus curiae* in cases involving issues of widespread concern to the American business community. The Chamber has participated as *amicus curiae* in many cases before this Court. *See, e.g., Equal Employment Opportunity Comm'n v. Federal Express Corp.*, No. 06-16864; *Sepulveda v. Wal-Mart Stores, Inc.*, No. 06-56090.

In this case, the panel's decision presents two major concerns for the national business community. The first is that it disrupts a collectively bargained arrangement dealing with the difficult issue of employee drug use in the workplace. The Chamber, of course, does not dispute the government's legitimate interest in conducting a criminal investigation of illegal drug use in the workplace. Indeed, it is the Chamber's understanding that the government's seizure of drug testing records pertaining to the ten Major League Baseball players implicated in

the Bay Area Lab Cooperative ("Balco") investigation is not at issue in this appeal. The issue is the government's seizure of thousands of drug testing records pertaining to every other Major League Baseball player as well as athletes in many other sports, none of whom were identified in the search warrant or implicated in the Balco investigation.

The Major League Baseball Players' Association, the union that represents the players, agreed to player drug tests under a promise of confidentiality and anonymity. Panel Dec. at 19835 (Thomas, J., dissenting). This promise of confidentiality and anonymity was a key term of the deal reached in collective bargaining. As Judge Thomas explained, the sole purpose of the drug tests was "to determine the approximate magnitude of apparent steroid use with the goal of fashioning appropriate policies to address it." *Id* Thus, the drug tests were an evaluative tool, not a tool for punishment of individual players.

By permitting the government to seize all of these drug testing records, even though the search warrant only authorized the seizure of records for ten players, the panel's decision upset the delicate arrangement negotiated by Major League Baseball and the Players' Association. The promise of confidentiality and anonymity has been undermined. As a result, if it is allowed to stand, the panel's decision will jeopardize the ability of employers in many industries to negotiate similar drug testing arrangements in the future. The decision thus will have adverse effects extending far beyond professional sports.

The second concern presented by the panel's decision is even broader, transcending the issue of drug testing altogether. That concern is the potential for

the government to search and seize, without probable cause, vast amounts of electronic information maintained by a business that is not the subject of a criminal investigation. The panel's decision permits such vastly overbroad searches and seizures of electronic data with no guarantee of judicial oversight. Given that electronic records are commonly used by businesses today, the specter of overbroad searches and seizures of electronic data, unsupported by probable cause and unchecked by the involvement of a neutral judicial officer, is deeply troubling to the business community.

## II. ARGUMENT

### A. The Panel's Decision Will Jeopardize Employers' Ability to Negotiate Drug Testing Arrangements with a Union.

The panel's decision, if allowed to stand, will have a detrimental impact on employers who seek to implement a drug testing program for a union-represented workforce. Under federal labor law, an employer *must* engage in collective bargaining over a drug testing program that will affect employees who are represented by a union. Drug testing is, in the lexicon of labor law, a mandatory subject of bargaining. *See Johnson-Bateman Co.*, 295 NLRB 180 (1989).

Even in industries in which the federal government requires drug testing, employers still *must* engage in collective bargaining over those aspects of a drug testing program that are not addressed by federal regulations. For instance, in *United Food & Commercial Workers v. Foster Poultry Farms*, 74 F.3d 169 (9th Cir. 1995), this Court affirmed a labor arbitrator's ruling that an employer's unilateral implementation of a drug testing program, as required by U.S. Department of Transportation ("DOT") regulations, violated a collective

bargaining agreement covering its truck drivers. As this Court held, although the employer was subject to various penalties for failing to implement a drug testing program in accordance with DOT regulations, there was no indication that the regulations "were intended to preempt already existing collective bargaining agreements or to eliminate an employer's duty to bargain under federal labor laws." *Id.* at 174.

Thus, employers cannot implement a drug testing program for union-represented employees without first negotiating with the union. Assurances of confidentiality may be, and often are, essential to reaching agreement with the union, as in this case. If, however, the employer's ability to make that key promise is undercut by the potential for overbroad searches and seizures by the government, the union justifiably may be unwilling to rely on the employer's promise. As one of the district court judges observed in this case, "I can't imagine there's going to be any voluntary agreement to do this kind of testing" in the future. Decision of Judge Illston, quoted in Panel Dec. at 19850 (Thomas, J., dissenting).

The issue here is not whether the government may conduct criminal investigations regarding illegal drug use. Nor is it whether the government, in the course of such investigations, may seek information from innocent third parties by subpoena or even by search warrant. The issue is whether the government should have the right to seize and retain drug testing records where that seizure is (a) not supported by probable cause; (b) not authorized by a neutral judicial officer; and (c) wholly outside the scope of the government's investigation. The Chamber submits that the panel majority in this case, in permitting such an overbroad

seizure, failed to consider the adverse effect its decision can be expected to have on the collective bargaining process and future voluntary drug testing in the workplace.[2] Therefore, the Chamber urges the Court to grant Appellees' petition for rehearing.

### B. The Panel's Decision Sets a Troubling Standard for Searches and Seizures of Electronic Data.

In addition to the Chamber's concern about the effect of the panel's decision on collective bargaining over the issue of drug testing, the Chamber objects to the panel majority's authorization of sweeping searches and seizures of electronic information that is allegedly "intermingled" with certain information specified in a search warrant. The majority declared that drug testing records for the ten players named in the warrant were "intermingled" with records for all other Major League Baseball players and many other athletes, simply because the records were stored in the same computer directory. Panel Dec. at 19818. But, as Judge Thomas noted, this directory was divided into a number of clearly named sub-directories and files that "were not connected with Major League Baseball player drug testing at all." *Id.* at 19872 (Thomas, J., dissenting). Thus, "it was clear to the investigating officers that they were seizing a sizable amount of data that was not responsive to the warrant." *Id*

The notion that data is "intermingled," and therefore may be seized by the government, simply because it resides on the same database or computer as the

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[2] The majority opinion barely mentions the collective bargaining agreement that gave rise to the drug tests at issue in this case, acknowledging the agreement only in a footnote. Panel Dec. at 19792 n.8.

information sought in a search warrant is troubling to the Chamber and the more than three million businesses it represents. Under the panel majority's definition of "intermingled," the government's ability to seize electronic information is virtually limitless. As Judge Thomas aptly noted, "[a]ll of the files in one directory on one computer in today's world could very well constitute the equivalent of all the files in an entire office in yesterday's paper era." *Id.* at 19872 n.9.

Given that businesses today typically rely on computers to store information, the standard set by the Court in this case will have a wide impact, reaching far beyond drug testing companies and professional sports leagues. Many businesses, such as banks, telephone companies, and internet service providers, possess electronic information that is routinely sought by the government in criminal investigations, even though these businesses are not suspected of any wrongdoing. Normally, according to the government's own procedural guidelines, the government obtains information from such innocent third parties only by subpoena, not by search warrant. Under the panel's majority decision, however, the government is given a perverse incentive to depart from its own voluntary rules and to proceed by search warrant even against business entities not suspected of wrongdoing. By proceeding in this way, the government would obtain for itself the right to seize banking, telephone, or e-mail records not only for those persons under investigation, but also for anyone else whose records just happened to reside on the same computer or database.

Furthermore, under the standard established by the panel majority, thousands of innocent persons whose information is seized in this way would have no notice

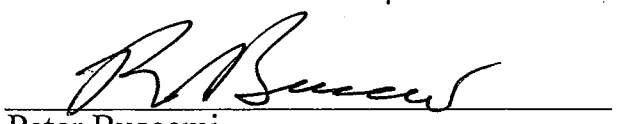
of the seizure unless the business informed them after the fact. And even then, the government would be under no obligation to return the information unless the individual or the business incurred the expense of hiring a lawyer to undertake the necessary legal proceedings. Panel Dec. at 19834 ("Under the majority's holding, a magistrate would be required to review the seized data for probable cause after seizure only if an aggrieved party made a motion." (Thomas, J., dissenting)).

The Chamber objects to this standard. To begin with, the definition of "intermingled" should be limited so that, even when a search warrant is used, the government is authorized to seize only those data that truly cannot be separated from the subject data described with specificity in the search warrant. *See United States v. Tamura*, 694 F.2d 591, 595 (9th Cir. 1982) ("[T]he wholesale *seizure* for later detailed examination of records not described in a warrant is significantly more intrusive, and has been characterized as 'the kind of investigatory dragnet that the fourth amendment was designed to prevent.'"). The Chamber also believes that the government should have an affirmative obligation to seal and submit the ostensibly "intermingled" data to a magistrate for review, with the goal of separating and returning the irrelevant data. *Id.* at 596 ("The essential safeguard required is that wholesale removal must be monitored by the judgment of a neutral, detached magistrate."). The onus should not be placed on innocent businesses or their customers to seek judicial review after the fact.

## III. CONCLUSION

For all of these reasons, the Chamber urges the Court to grant Appellees' petition for rehearing and rehearing *en banc*.

Respectfully submitted,



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Dated: February 20, 2007

## CERTIFICATE OF COMPLIANCE
## PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Fed. R. App. P. 29 and Circuit Rule 35-4 or 40-1, the attached Brief of the U.S. Chamber of Commerce as amicus curiae in support of the rehearing/petition for rehearing en banc is

√ Proportionately spaced, has a typeface of 14 points or more, and contains **1841** words.

Peter Buscemi

## PROOF OF SERVICE BY HAND

I am a resident of the State of California and over the age of eighteen years and not a party to the within-entitled action; my business address is One Market, Spear Street Tower, San Francisco, California 94105-1126. I served the following documents on February 20, 2007:

**PETITION FOR REHEARING AND REHEARING *EN BANC***

√ by causing the document(s) listed above to be personally delivered at to the person(s) at the address(es) set forth below by **Courier, and dispatching a messenger from Specialized Legal Services, whose address is 1112 Bryant Street, Suite 200, San Francisco, California 94103,** with instructions to hand-carry the above and make delivery to the following during normal business hours, by leaving the package with the person whose name is shown or the person(s) authorized to accept courier deliveries on behalf of the addressee.

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I declare under penalty of perjury that I am employed in the office of a member of the bar of this court at whose direction the service was made, and that the foregoing is true and correct.

Linda Buda

LINDA BUDA

NOS. 05-10067, 05-15006 & 05-55354

PANEL MEMBERS: HONORABLE DIARMUID F. O'SCANNLAIN
HONORABLE SIDNEY R. THOMAS
HONORABLE RICHARD C. TALLMAN

DATE OF DECISION: DECEMBER 27, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE: GRAND JURY SUBPOENA DATED MAY 6, 2004 ON COMPREHENSIVE DRUG TESTING, INC. AND QUEST DIAGNOSTICS, INC.

UNITED STATES OF AMERICA,

Defendant-Appellant,

v.

COMPREHENSIVE DRUG TESTING, INC., AND MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

Plaintiffs-Appellees.

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# RESPONSE TO GOVERNMENT'S PETITION FOR REHEARING

Appeal from the United States District Courts for
The Northern District of California (No. CR Misc. 04-234 SI);
The Central District of California (No. CV 04-2887 FMC (JWJx));
and the District of Nevada (No. CV-S-04-0707 JCM-PAL)

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## TABLE OF AUTHORITIES

### FEDERAL CASES

## I. Introduction

The parties' respective petitions for rehearing reveal that they agree on one point: the panel's decision in this case disrupts Circuit law and must be reconsidered.

But that is where the similarities end, for the government's petition asks this Court to further diminish *Tamura* by holding that the government can avoid post-seizure magistrate review of intermingled records by obtaining a warrant setting forth a "detailed protocol" for how to conduct the search. According to the government, the presence of this "protocol" is talismanic: Just *having* a protocol in the warrant is enough to preclude the magistrate from any role in post-seizure review—even if the protocol does not constrain the government in any significant way, and even if the government flouts the few restrictions that a protocol may impose.

The government again asks this Court to inaugurate a new era in which the government has unlimited power to seize, search and use intermingled computerized records that goes far beyond the scope of the warrant, and the disclosure of those records would compromise the medical privacy of hundreds or thousands of innocent third persons. All this is said to be necessary even when the entity that created and possessed the records was not implicated in any crime and had offered to segregate and produce the records pertaining to the few individuals to which the warrant was expressly limited.

The government's position takes aim at a panel decision that ruled in its favor in almost every significant respect. As it stands, the panel decision relegates

*Tamura*'s protections to those rare instances in which an affected party has the notice, sophistication, and resources to file a motion requesting post-seizure magistrate review. And an aggrieved party must somehow take all of those actions before the government has reviewed the seized records that were not authorized by the warrant (once the government has read the materials, the damage is done). Yet the government's response is: Give us more. Its insatiable desire for unfettered search authority, with no magistrate review at all, even post-seizure, demonstrates why the *Tamura* safeguards are more necessary than ever.

## II. Response to Government's Petition

### A. The government asks this Court to eliminate the judicial oversight provided under *United States v. Tamura.*

In *Tamura*, this Court required as an "essential safeguard" that any wholesale removal of intermingled documents "be monitored by the judgment of a neutral, detached magistrate."[1] But the government argues that judicial oversight is unnecessary upon any remand because the warrant at issue here "specified a detailed procedure" that satisfies this requirement.[2] The government urges that this procedure or protocol satisfied *Tamura* because it was "blessed" in advance by the magistrate.

This is wrong. *Tamura* states that such protocols may legitimize an overbroad initial seizure *if* the government demonstrated to the magistrate before the search that "on-site sorting is infeasible and *no other practical alternative*

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[1] *Tamura*, 694 F.2d at 596.

[2] Gov. Pet. at 6.

*exists*."[3] Here, in contrast, the warrants failed to set forth why "no other practical alternative exist[ed]" apart from seizure of CDT's database.[4] Nor could the government make such a showing. At the very moment when the government was seeking the warrants, CDT and the Players Association were litigating with the government the propriety of grand jury subpoenas seeking the very same materials.[5] The "practical alternative" here would have been to permit those proceedings to run their course.

And, contrary to the government's assertions, the "detailed protocol" in this case provided no protection to the aggrieved parties. The government-crafted protocol permitted it to seize CDT's computers and then conduct an off-site search. And, of course, as the government notes repeatedly, the majority's decision held that the materials were, in fact, "legally seized;" *i.e.*, the computers were searched off-site pursuant to the first part of the protocol. The government then translates this finding into a conclusion that all of the evidence seized may be retained indefinitely because the evidence was "legally seized." Thus, according to the government, the mere presence of a "detailed protocol" with a broad and aptly characterized "catch-all provision" allows it to seize a limitless amount of confidential records without probable cause, and then examine and retain those materials *indefinitely*. And all this is done without any meaningful judicial

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[3] *Id.* at 596 (emphasis added).

[4] *See* ER 137-168.

[5] ER 4141-70.

oversight. That cannot qualify as the constitutional protections mandated by *Tamura*, and the panel correctly found that there is no real protection provided by such a circular protocol.

So too, to the extent that the protocol purported to impose any restraints on the government's conduct, the government found those strictures easy to ignore, showing the danger presented by leaving the fox in charge of the hen house. For example, the warrant's "protocol" required the computer data to "be reviewed by appropriately trained personnel in order to extract and seize any data that falls within the list of items to be seized."[6] But Judge Cooper found that

> "[O]nce the items were seized, the requirement of the Warrant that any seized items not covered by the warrant be first screened and segregated by computer personnel was completely ignored. Agent Novitzky himself reviewed the seized computer data and used what he learned to obtain the subsequent search warrants issued in Northern California, Southern California, and Nevada."[7]

The protocol also gave the government 60 days to return any data that did "not fall within any of the items to be seized pursuant to the warrant or [that was] not otherwise legally seized." But once again, the government acted as though the protocol was just some fine print that it could safely ignore. In fact, the government returned *none of the material* that it seized in April 2004 within the 60 day period, and much later did so only after opposing an order of court requiring

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[6] ER 140-41.

[7] ER 38.

that it do so. This conduct affirmatively illustrates the importance of the judicial intervention the government so much seeks to avoid The government had no trouble convincing itself that the "detailed protocol" permitted it to seize and retain *all* of these materials, which included testing results for more than a dozen other professional sports, amateur sports competitions and commercial entities, without exception.[8] Can anyone doubt that a neutral and detached magistrate, charged with safeguarding the Fourth Amendment, would have reached very different conclusions?

The government's argument for neutering *Tamura* finds no support in *United States v. Hill*[9] or *United States v. Adjani*.[10] The government incorrectly asserts that *Hill* and *Adjani* "addressed whether any special procedure should be required once a computer has been properly removed off-site" and found that no such procedure applied.[11] Neither of those cases involved a raid on an innocent business that stores the sensitive confidential records of thousands of persons who are themselves under no suspicion of criminal activity. In neither of those cases did the innocent entity make timely and practical offer to segregate and produce the records relating to the handful of individuals under investigation. In neither of those cases did the government move from district to district in a concerted effort

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[8] *See e.g.*, ER 1556-83.

[9] 459 F.3d 966 (9th Cir. 2006).

[10] 442 F.3d 1140 (9th Cir. 2006)

[11] Gov. Pet. at 9.

to avoid the effect of ongoing proceedings testing its entitlement to the records in question.

Moreover, the *Hill* decision itself observes that searches of intermingled computer files present a difficult situation; that the proper steps for agents to take in the computer context have "not been clearly defined"; and that the case did "not provide [an] occasion" to resolve the issue.[12] That is a far cry from holding that *Tamura* is a dead letter.

**B. There is no ambiguity in the majority's opinion.**

The government soft-pedals its request for review by asserting that the majority's opinion is "ambiguous" about the magistrate's role upon remand. This argument is specious, making it all the more insulting. While it may be "unclear to the government whether the Court intended for the magistrate's role to go beyond mere oversight through approval of a warrant [rather than] conducting the search herself[,]"[13] the magistrate's role is unmistakable to any other reader of the majority's opinion. Finding that the "magistrate is in the best position to sort through the actual evidence and to determine those files that may be kept when aggrieved parties seek relief[,]"[14] the majority held that "[a]fter the magistrate determines which sealed items fall within the search warrant, the government may retain and use such items; all others must be returned to the person or entity

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[12] 459 F.3d at 978 n.14 (noting the applicability of *Tamura* to this issue).

[13] Gov. Pet. at 12.

[14] Majority Opinion at 19832.

searched."[15]

The opinion answers squarely and clearly the question that purportedly confounds the government. It simply does not like the answer, but that provides no grounds to support its petition.

### C. No Supreme Court precedent bars magistrates from playing the protective role set out for them in *Tamura*.

The government actually tries to persuade this Court that Tamura contradicts Supreme Court precedent holding that "magistrates may not take on the role of separating relevant from intermingled evidence."[16] That is not even remotely true. The case the government cites for this proposition—*Lo-Ji Sales, Inc. v. New York*,[17]—in no way concerns, much less prohibits, a magistrate from reviewing the seizure of intermingled documents. Rather, the Supreme Court in *Lo-Ji Sales* condemned a judicial officer's leading a search party in an open-ended, unlimited search of a bookstore's inventory.

*Lo-Ji Sales* concerned a warrant requesting that a Town Justice accompany police officers in searching a local bookstore for films that violated New York's obscenity laws.[18] Because the Justice would be assessing the films on site, the warrant "described" the things to be seized as being materials determined by the Justice to be in violation of New York law.[19] During the search, the Justice directed the officers to seize certain materials, which then formed the basis for the

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[15] Majority Opinion at 19826-27.

[16] Gov. Pet. at 14.

[17] 442 U.S. 319 (1979).

[18] 442 U.S. at 321.

criminal obscenity charges brought against the bookstore.[20]

The Supreme Court found fault with this procedure. First, it found the search warrant's lack of description to be reminiscent of those general warrants barred by the Fourth Amendment.[21] Unsurprisingly, the Court condemned the open-ended search for items that could be deemed illegal, with no limitation set forth in the warrant and no restrictions on the party conducting the search.[22]

Second, the Supreme Court held that the procedure in *Lo-Ji Sales* unlawful because the judicial officer abandoned the "neutrality and detachment demanded of a judicial officer" when he became "a member, if not the leader, of the search party which was essentially a police operation."[23] Unlike here, the judge in *Lo-Ji Sales* was not evaluating whether the government *had seized* materials described by a warrant; rather, the judge *himself* conducted an open-ended search of the premises as an "adjunct law enforcement officer."[24]

*Lo-Ji Sales* cannot assist the government here. The role of the magistrate under the *Tamura* procedures is to review the materials already seized by the government, and then to determine whether those materials are in fact the limited set of materials specifically described by the warrant. The Players Association and CDT have never urged, and this Court has not ordered that the magistrate join the

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[19] *Id.* at 321-22.
[20] *Id.* at 322-24.
[21] *Id.* at 325.
[22] *Id.* at 325-26.
[23] *Id.* at 326-27.
[24] *Id.*

executing agents on site in their search for evidence of wrongdoing. Rather, CDT demanded at the time of the search—and the majority's opinion now requires—that the magistrate review the materials seized and retained by the government to determine whether those materials comply with the specific limitations imposed by the warrant. And *that* is a quintessentially judicial function.[25]

**D. The government's policy arguments are unpersuasive.**

The government tries to bolster its case for unfettered search authority by imagining dire burdens on the judiciary and by ignoring the record of this case. But its policy arguments are unpersuasive for two reasons.

First, it is very troubling that the government's complaint is that complying with the majority's opinion would be difficult because the government routinely seizes materials that do not fall within the scope of the warrants it obtains.[26] Routine governmental overreaching is not a legitimate basis for diluting Fourth Amendment protections. If the government is concerned about the burdensome obligations associated with overbroad seizures, it need only take reasonable measures to avoid seizing materials for which it has not established probable cause. In this case, that would have required nothing more burdensome than spending the two hours or so needed to word search the test results for the players names

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[25] The government's reliance upon *Shadwick v. Tampa*, 407 U.S. 345 (1972) is similarly misplaced. That case held that a municipality's court clerks were supervised by the judiciary, not the executive, and qualified as neutral and detached magistrates for the purposes of the Fourth Amendment. 407 U.S. at 349-51.

[26] Gov. Pet. at 16.

responsive to the warrants,[27] or saying "Yes" to CDT's offer to segregate and disclose the pertinent records.

Second, the government's scenario of befuddled magistrates attempting to cope with encrypted files and unusual formats has no bearing on this case and probably would arise only rarely—especially if the government took reasonable steps to avoid overbroad seizures in the first place. This is not a case where the searched party is suspected of having tried to disguise or conceal incriminating computer records. The record establishes and the government concedes that CDT is a legitimate business that stored its business records the same way that most modern businesses do: on a computer database. There is no evidence that anything was amiss with CDT's electronic record storage; there was no encryption, no hidden computer files, and nothing to prevent the government from searching the computerized materials on-site on the day of the search. It would have taken a minimally competent Windows user less than two hours to search the materials for the data responsive to the warrant.[28] In fact, the government's agents themselves relied on CDT's employees to identify the database at issue and could have relied on CDT's employees to identify the particular files that held the materials subject to the warrant.[29] In short, the dire burdens that the government conjures up have no bearing on the case at hand.

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[27] ER 2089-92.

[28] ER 2089-92.

[29] ER 2836-37. The government also forgets that CDT provided these very materials to the government and obviated the need for any search. ER 1155-56; 1763-67, 2043-46.

Even if complex cases later arise in which a magistrate finds it appropriate to rely on a special master to ensure that the government seizes no more than was authorized, that possibility should not affect the outcome of this case. The Court should decline the government's invitation to fashion a new rule in this case that would eliminate crucial Fourth Amendment protections based on speculation about what might happen in other cases presenting very different facts.

## III. CONCLUSION

To moot the issues raised by CDT's and the Players Association's challenge to overbroad grand jury subpoenas, the government embarked on a tortured course of conduct that three separate district court judges condemned in unusually harsh language. Most relevant here was the government's seizure and retention of confidential testing records for thousands of individuals in a variety of sports based on a warrant that authorized the seizure of records for 10 baseball players. The government had ample opportunity to obtain these 10 records much less intrusively. It not only rejected those opportunities, it used a narrow warrant to seize, examine, and retain indefinitely a universe of testing records for which probable cause was never established.

A majority of this panel found that each of the learned district judges clearly erred in its assessment of the facts, and reversed those courts. But that was not enough for the government. In response to the requirement that upon return to the lower courts, the government finally permit magistrate review of the overly broad seizure at issue, the government complained, seeking complete evisceration of any judicial review of its search authority. The government's view, if accepted,

reduces the judiciary's role to one in which it is only to rubber stamp a warrant application, without any oversight into the government's conduct and the scope of its seizure. Its petition reduces the Fourth Amendment to nothing more than ink on parchment, with little or no real protection left for the citizenry. In short, the government's rapacious appetite for search authority calls for heightened vigilance for Fourth Amendment protections, not less.

For the foregoing reasons, this Court should deny the government's rehearing petition. Instead, the Court should grant the petition filed by the Players Association and by CDT and supported fully by the Chamber of Commerce; and it should conduct *en banc* review of the important questions raised by that petition concerning the impact of the panel decision on Ninth Circuit precedent regarding seizures of private computerized records and the timeliness of appeals.

Respectfully submitted,

Dated: March 20, 2007

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Dated: March 20, 2007

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 32(e)(4)(i), I hereby certify that Plaintiff-Appellees' Response to Government's Petition for Rehearing, filed with this Court on March 21, 2007, was proportionally spaced in 14-point Times New Roman typeface and contained 3,120 words. Together with this Certificate of Compliance, which is proportionally spaced in 14-point Times New Roman typeface and contains 81 words, Plaintiff-Appellees' complete filing on this appeal contains 3,363 words.

Executed on March 20, 2007, at San Francisco, California.

ETHAN A. BALOGH

## PROOF OF SERVICE

I am employed in the City and County of San Francisco, State of California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Keker & Van Nest, LLP, 710 Sansome Street, San Francisco, California 94111.

On March 21, 2007, I served the following document(s):

**RESPONSE TO GOVERNMENT'S PETITION FOR REHEARING**

by **COURIER**, by placing a true and correct copy in a sealed envelope addressed as shown below, and dispatching a messenger from Worldwide Network, whose address is 520 Townsend Street, 1st Floor, San Francisco, CA 94103, with instructions to hand-carry the above and make delivery to the following during normal business hours, by leaving the package with the person whose name is shown or the person authorized to accept courier deliveries on behalf of the addressee.

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Executed on March 21, 2007, at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

ARLENE PICAR

**Nos. 05-10067, 05-15006 & 05-55354**

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Defendant-Appellant,

v.

COMPREHENSIVE DRUG TESTING, INC., et al.,

Movants-Appellees.

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# GOVERNMENT'S OPPOSITION TO APPELLEES' PETITION FOR REHEARING AND REHEARING *EN BANC*

APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE NORTHERN DISTRICT OF CALIFORNIA (No. CR Misc. 04-234 SI), THE CENTRAL DISTRICT OF CALIFORNIA (No. CV 04-2887 FMC (JWJx)), AND THE DISTRICT OF NEVADA (No. CV-S-04-0707-JCM-PAL)

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**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Defendant-Appellant,

v.

COMPREHENSIVE DRUG TESTING, INC., et al.,

Movants-Appellees.

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# GOVERNMENT'S OPPOSITION TO APPELLEES' PETITION FOR REHEARING AND REHEARING *EN BANC*

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## INTRODUCTION

In a published opinion filed on December 27, 2006, this Court held that the government acted properly in obtaining drug test samples, computer records, and other evidence relating to Major League Baseball ("MLB") players pursuant to several search warrants and subpoenas. *See United States v. Comprehensive Drug Testing, Inc.*, 473 F.3d 915 (9th Cir. 2006). On February 12, 2007, Comprehensive Drug Testing, Inc. ("CDT") and the Major League Baseball Players Association ("MLBPA") (collectively, "Appellees") filed a joint petition for rehearing and

rehearing en banc. That same day, the United States filed a petition for panel rehearing. On February 28, 2007, this Court directed both parties to file responsive briefs by March 21, 2007.

Except as specified in the government's petition for panel rehearing,[1] the majority decision does not conflict with any decision of the Supreme Court or this Court. In addition, the questions raised by Appellees are not of exceptional importance. The panel decision cannot be interpreted, as Appellees claim, to allow the government to rummage through computer files without probable cause. Rather, the warrants here were supported by probable cause and included a detailed protocol to guide the agents' search of the computer evidence. Thus, even if Federal Rule of Criminal Procedure 41(g) were a mechanism for suppressing evidence or protecting privacy interests – which it is not – the government's procedure more than satisfied the requirements of computer search cases decided by this Court after *CDT* was argued. In addition, the majority's conclusion that the government could simultaneously pursue the same material via a search

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[1] In Part IV.B of the majority opinion, the panel stated that "the government has yet to comply with its duty of adequate off-site review" of the intermingled computer records, and that, "upon a proper post-seizure motion by the aggrieved parties, the record should be sealed and reviewed by a magistrate." *Id.* at 938-39. As explained in the government's petition, that holding should be excised, clarified, or corrected by the panel. *See* Government's Petition for Panel Rehearing ("Govt. Pet."), *passim*.

warrant and a grand jury subpoena is consistent with relevant precedent, and the jurisdictional issue raised by Appellees has little application outside this unique set of facts. Accordingly, en banc review is not appropriate.

## BACKGROUND[2]

These three consolidated appeals arose out of the government's investigation of suspected illegal steroid distribution. After developing probable cause to believe that a number of MLB players were receiving illicit steroids from the Bay Area Lab Cooperative ("Balco"), the government attempted to obtain drug test results from the two laboratories responsible for testing MLB players: CDT and Quest Diagnostics, Inc. ("Quest"). In January 2004, the government issued subpoenas to both labs seeking test results for all MLB players. *CDT*, 473 F.3d at 920. When the labs refused to turn over any results, the government in March 2004 issued new, narrower subpoenas seeking results related only to Balco-connected players. *Id.* On April 7, 2004, one day before the return date of the narrowed subpoenas, the MLBPA and CDT filed a motion to quash in the Northern District of California. *Id.* at 921

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[2] Appellees' petition relies on the dissent's rendition of the facts but provides no record evidence to suggest that the majority's factual account is inaccurate. Even if the majority's account were somehow inaccurate, which it is not, that would at most support panel rehearing. *See* Federal Rule of Appellate Procedure ("FRAP") 35.

Shortly thereafter, the government applied for warrants to search CDT's Long Beach office and Quest's Las Vegas lab. *Id.* Those warrants, which authorized seizure of drug test records and specimens for ten Balco-connected players and other records pertaining to the "administration of [MLB's] drug testing program," were approved by magistrate judges in the respective jurisdictions. *Id.* The warrants provided a detailed protocol for the on-site search and potential removal and off-site search of computer equipment and computer storage devices. *Id.*[3] In affidavits supporting the warrants, the government noted that the evidence sought was already the subject of grand jury subpoenas and that a motion to quash was expected. *Id.*

During the search of CDT on April 8, 2004, agents discovered and seized, among other evidence, a hard-copy document that revealed intermingled positive drug test results for some of the named players, as well as a number of other players not named in the warrant. *Id.* at 922. Agents also identified "a computer directory containing all of the computer files for CDT's sports drug testing

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[3] Among other things, the warrant specified that computer-trained law enforcement personnel would "make an initial review of any computer equipment and storage devices to determine whether these items can be searched on-site in a reasonable amount of time." Excerpts of Record ("ER") 140. If the computers could not feasibly be searched on-site, the warrant authorized removal of the computer equipment to an off-site location and then specified a detailed protocol for review of that data. ER 140-41; *see also* Govt. Pet. at 8-9 & n.1.

programs." *Id.* As authorized by the warrant, the agents copied and seized "the entire [so-called "Tracey"] directory for off-site analysis, because of the time and intrusiveness involved in searching the voluminous directory on site." *Id.*

On May 5 and 6, 2004, the government executed additional search warrants seeking further information from CDT and Quest, and on May 6, 2004, the government sought grand jury subpoenas for that evidence. *Id.* at 924-25.

In April and May of 2004, the MLBPA filed motions in three jurisdictions (the Northern and Central Districts of California and the District of Nevada) under Rule 41(g) seeking return of the property. *Id.* at 923-34. All three courts granted those motions. The government appealed from the Central District and District of Nevada orders. *Id.* at 924.

Meanwhile, on September 13, 2004, the MLBPA filed a motion in the Northern District of California to quash the May subpoenas, and in December 2004, the district court granted that motion on the grounds that the government's conduct was unreasonable and constituted harassment. *Id.* at 924-25. The government's appeal from that order is consolidated here.

On appeal, the *CDT* panel reversed the decisions of all three district courts, holding that (1) the government's appeal of the Central District order returning property was timely; (2) the Central District and District of Nevada courts erred in

ordering the government to return property; and (3) the Northern District court erred in quashing the subpoenas. In an opinion concurring in part and dissenting in part, Circuit Judge Sidney Thomas disagreed with the majority on a variety of factual issues and also disagreed with all three of those holdings.

## EN BANC REHEARING IS UNWARRANTED.

En banc rehearing "is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." FRAP 35(a). A petition must state that "(A) the panel decision conflicts with a decision of the United States Supreme Court or [this Court] . . . or (B) the proceeding involves one or more questions of exceptional importance." FRAP 35(b)(1). Neither criterion is established here.

### A. *CDT* Does Not Conflict with Any Decision of the Supreme Court or This Court.

There is no merit to Appellees' contention that *CDT* conflicts with either *United States v. Tamura*, 694 F.2d 591 (9th Cir. 1982), or *Shapiro v. Paradise Valley Unified Sch. Dist.*, 374 F.3d 857 (9th Cir. 2004), and Appellees do not assert any conflict with regard to the subpoena issue.

### 1. *CDT* Does Not Conflict with *Tamura*.

Appellees argue that *CDT* conflicts with *Tamura*'s statement that "any wholesale removal of intermingled documents [should] 'be monitored by the judgment of a neutral, detached magistrate.'" Appellees' Pet. 8 (quoting *Tamura*, 694 F.2d at 596). The *CDT* panel interpreted that advisory dicta to mean that a magistrate must, upon an aggrieved party's motion, review evidence subsequent to removal of that evidence off-site to ensure that the evidence falls within the scope of the warrant. Appellees contend that *Tamura* requires a magistrate to review evidence even absent any motion by an aggrieved party. Appellees' Pet. 9-10; *see also* 473 F.3d at 964-65 (Thomas, J., dissenting) (court should "enforce the procedure outlined in *Tamura* and require that a neutral magistrate examine the co-mingled [electronic] data that the government proposes to seize"). But *Tamura* does not require any such procedure, and subsequent Ninth Circuit decisions in the computer context demonstrate that, if anything, *CDT* should not have required magisterial review of any evidence.

In *Tamura*, officers executed a warrant that authorized on-site search and seizure of three categories of records from a Los Angeles office but did not specify any protocol for removing those documents off site. *See* 694 F.2d at 594. When agents were unable to complete the search on site, they seized 11 boxes of

computer printouts, 34 file drawers of vouchers, and 17 drawers of cancelled checks, then hauled those documents to another location and "sifted through them and extracted the relevant documents." *Id.* The wholesale seizure was deemed improper because "agents seized – without any limiting effort – files unrelated to the items mentioned in the search warrant." *CDT*, 473 F.3d at 933 (citing *Tamura*, 596 F.2d at 594). As the *CDT* panel recognized, dicta in *Tamura* suggested two options for officers in future cases faced with voluminous intermingled documents: (1) sealing and holding the documents pending approval by a magistrate of a further search warrant, or (2) if officers knew about the intermingled documents ahead of time, specifying "substitute protective procedures" in the warrant. *Id.*

*CDT* does not conflict with *Tamura* for at least three reasons. First, the cited language in *Tamura* is merely advisory dicta and not binding on any subsequent Ninth Circuit panel. Dicta does not create any true conflict.

Second, *CDT* more than satisfies even the advisory guidance in *Tamura*. *Tamura* does not – contrary to the view of the dissent and Appellees – require a magistrate to review any evidence personally. *See* Govt. Pet. Rather, *Tamura* merely suggests that, if evidence is to be moved off-site, either the warrant must specify procedures ahead of time to guide that removal, or the government must

seek an additional warrant that provides such parameters. Unlike in *Tamura*, the warrant here did specify the procedure both for removal of computer records to an off-site location and for the subsequent search of those records. *See* ER 141. That procedure, which was approved by the magistrate beforehand when he blessed the warrant, more than satisfied *Tamura*'s suggested protocol.

Third, the lack of conflict is underscored by two Ninth Circuit cases decided subsequent to oral argument in the present case – and not addressed by the panel or Appellees – that have clarified and essentially superseded *Tamura*'s advisory dicta as applied to computer searches. Far from "drastically curtail[ing] the reasonable privacy expectations of anyone whose confidential information is held in a computerized database," Appellees' Pet. 1, *CDT* actually provides more protection than recent computer search decisions.

In the first new case, *United States v. Hill*, 459 F.3d 966 (9th Cir. 2006), the defendant challenged the search of his computer for child pornography on the grounds that the warrant was overbroad and invalid because "it did not include a search protocol to limit the officers' discretion as to what they could examine when searching the defendant's computer media." *Id.* at 977. *Hill* held that, under the circumstances, no search protocol was necessary, and that it was also unnecessary to explain the absence of a search protocol in the warrant application.

*Id.* at 978 ("[W]e look favorably upon the inclusion of a search protocol; but its absence is not fatal."). All that was required was that the government demonstrate to the magistrate why "such a broad search and seizure authority is reasonable in the case at hand." *Id.* at 975. In other words, "there must be some threshold showing before the government may 'seize the haystack to look for the needle.'" *Id.* *Hill* plainly contemplated that officers may at times conduct off-site computer searches pursuant to a magistrate-approved warrant even where, unlike here, there was no detailed search protocol.

In the second new case, *United States v. Adjani,* 452 F.3d 1140 (9th Cir. 2006), this Court found that a procedure in which FBI agents broadly seized all computer data and later filtered it off-site satisfied the Fourth Amendment. Specifically, the FBI "seized Adjani's computer and external storage devices, which were later searched at an FBI computer lab," and also seized a computer owned by Adjani's roommate. *Id.* at 1142. The warrant stated that "[i]n searching the data, the computer personnel will examine all of the data contained in the computer equipment and storage devices to view their precise contents and determine whether data falls within the items to be seized as set forth herein." *Id.* at 1144. This Court upheld the warrant against a Fourth Amendment specificity challenge, and rejected defendants' argument that the warrant should have

restricted the government to search only parts of the computer, noting that "agents are limited by the long-standing principle that a duly issued warrant, even one with a thorough affidavit, may not be used to engage in a general, exploratory search." *Id.* at 1150. Because the warrant contained "a detailed computer search protocol," however, this Court found that "[s]uch specificity increases our confidence that the [magistrate] was well aware of what he was authorizing and that the agents knew the bounds of their authority in executing the search." *Id.* at 1149 n.7. As in *Adjani*, the CDT warrant contained such a detailed protocol for off-site review.

**2. *CDT* Does Not Conflict With *Shapiro*.**

Appellees argue – for the first time in their petition – that the government's appeal from the Central District order returning property was untimely because the government's motion for reconsideration was not filed within 10 days after the entry of judgment. Appellees' Pet. 14-15. Appellees further assert that the appellate court's exercise of jurisdiction creates a conflict with *Shapiro*. Again, there is no conflict.

First, although Rule 41(g) motions may be civil in nature when filed after the conclusion of criminal proceedings, *see United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005) (pre-indictment Rule 41(g) motion treated as civil equitable proceeding), the Rule 41(g) motion at issue here arose in the context of an active

criminal investigation.[4] And the government's motion for reconsideration was timely under rules governing criminal appeals. *See United States v. Dieter*, 429 U.S. 6, 8 (1976) ("[T]he consistent practice . . . has been to treat timely petitions for rehearing as rendering the original judgment nonfinal for purposes of appeal for as long as the petition is pending."). It is undisputed that neither party received notice of the October 1, 2004 order until November 2, 2004, *see* Movants' Excerpts of Record ("MER") 3063 n.1, and that the government filed its reconsideration motion on November 19, 2004. Under *United States v. Belgarde*, 300 F.3d 1177 (9th Cir. 2002), a motion for reconsideration in a criminal case "is timely if it is filed within the time for appeal, and an appeal is timely if it is filed within the time to appeal after the denial of the motion for reconsideration." *Id.* at 1180. The government had 30 days to file an appeal, and the government filed its reconsideration motion within 30 days of receiving notice of the October 1 order.

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[4] The government was pursuing an ongoing grand jury investigation of suspected criminal conduct, and had indicted several defendants in February 2004, before the seizures at issue here. Although the government is not aware of any case determining whether jurisdiction is criminal or civil where, as here, a *third party* filed a Rule 41(g) motion seeking return of property that was needed as evidence in a pending prosecution, it makes sense that such a motion would be treated under the criminal rules. *See, e.g.*, *United States v. Howell*, 425 F.3d 971, 974 (11th Cir. 2005) ("When an owner invokes Rule 41(g) after the close of *all* criminal proceedings, the court treats the motion for return of property as a civil action in equity.") (emphasis added).

The appeal of both the original order and the February 9, 2005 denial of reconsideration was thus timely submitted when it was filed 30 days after the district court denied the reconsideration motion.[5]

Second, in the alternative, even if this were construed as a civil case,[6] there is no conflict with *Shapiro* because Appellees forfeited any timeliness objection to the government's reconsideration motion. Under FRAP 4, tolling occurs if "[a] party timely files" a motion "to alter or amend under Rule 59" or "for relief under Rule 60." FRAP 4(a)(4)(A)(iv) and (vi).[7] Although the motion for reconsideration was not filed within 10 days of the government receiving notice of the court's order, and although this Court has previously held that the 10-day time limit in Rule 59(e) is jurisdictional and cannot be extended by this court, *Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*, 374 F.3d 857, 863 (9th Cir. 1984), the

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[5] Because the *CDT* panel analyzed this as a civil appeal, the panel should correct that holding. Such correction does not merit en banc review, however.

[6] The government never cited Local Rule 7-18 or any other civil rule to the district court, and never had an opportunity to correct that court's incorrect invocation of Rule 7-18. In the court of appeals, similarly, the government did not cite any civil rule and instead relied on *Belgarde*, a criminal case.

[7] Consistent with the dissent's construal of the motion for reconsideration as either a Rule 59 or Rule 60 motion, *CDT*, 473 F.3d at 955-56 (Thomas, J., dissenting), the government agrees that a motion filed pursuant to a local rule cannot toll the time to file a civil appeal unless the motion is also construed as one listed in FRAP 4(a)(4)(A).

application of *Shapiro* to this case must be modified in light of recent cases. *See, e.g.*, *United States v. Eberhart*, 546 U.S. 12 (2005). Appellees never objected in the district court or before the *CDT* panel that the motion was untimely.[8] In *United States v. Sadler*, No. 06-10234, 2007 WL 610976 (9th Cir. Mar. 1, 2007), this Court applied *Eberhart* to hold that, although the time limits for filing a civil appeal under FRAP 4(a) are jurisdictional, that is only so because the Rule "implement[s] the limitations Congress imposed on this Court by statute." *Id.* at *4. Thus, in a case where a time limit in the Rule did not derive from a statute, a party's failure to object on timeliness grounds would result in that party's forfeiture of any jurisdictional claim. Here, whereas the 30- or 60-day time limit for filing a notice of appeal derives from a statute, 21 U.S.C. § 2107, and is therefore jurisdictional, Rule 4(a) does not incorporate a statutory time limit in its provision of tolling for Rule 59(e) or Rule 60 motions. Because Appellees failed to make a timeliness objection to the filing of the motion for reconsideration, therefore, they forfeited that argument.

In any event, as even the dissent concedes, the government's appeal from the denial of its reconsideration motion was filed within 30 days and therefore was

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[8] Rather, Appellees argued that the motion could not be construed substantively as a motion for reconsideration. No member of the panel agreed with that argument.

indisputably timely. *See* 473 F.3d at 957 (Thomas, J., dissenting). Because of the significant legal and factual errors committed by the district court in its initial order, the court committed a clear abuse of discretion by denying that motion. *See Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1442 (9th Cir. 1991) (reconsideration warranted under Rule 60(b) for "extraordinary circumstances"). Because the government challenged the fundamental premises of the court's original order in its motion, appeal from the order denying reconsideration essentially raised all of the same questions at issue in this appeal.

#### 3. There Is No Conflict Regarding the Subpoena Issue.

Appellees do not even assert a conflict on the issue of whether the subpoenas were properly quashed, and indeed they cite no legal authority at all to support their position on the merits. *See* Appellees' Pet. 12-14.

### B. The Panel's Decision Does Not Involve A Question of Exceptional Importance and In Any Event Is Correct.

#### 1. The Panel's Decision Does Not Involve a Question of Exceptional Importance.

None of the three questions raised in Appellees' petition is of exceptional importance. As already explained, the decision does not "conflict[] with the authoritative decisions of other United States Courts of Appeals that have addressed the issue[s]," which is a significant indicator of whether a question is

exceptionally important. FRAP 35(b)(1)(B).

In addition, the computer search question is now controlled by *Hill* and *Adjani*, and therefore any decision on that issue would not provide further guidance. And Appellees' concern about the privacy of medical records is greatly overstated. Despite that the test results here were contained in computer files, the agents' search of those files is really no different just because it is conducted off-site pursuant to the search warrant protocol than if it were conducted on-site (which, everyone agrees, would have been legal). As *Hill* and *Adjani* exemplify (*see supra*), absent a privilege, legitimate law enforcement purposes often override citizens' privacy interests. *See, e.g.*, *Roe v. Sherry*, 91 F.3d 1270, 1272-73 (9th Cir. 1996) (HIV test results properly seized under plain view doctrine); *Johnson v. United States*, 971 F. Supp. 862, 871 (D.N.J. 1997) (under Rule 41, Cayman Islands' interest in maintaining confidential records was outweighed by United States' interest in enforcing criminal laws).

In any event, Rule 41(g) is designed to facilitate the return of tangible physical property to its rightful owner when the government's investigative need for that property has ceased. *See United States v. Mills*, 991 F.2d 609, 612 (9th Cir. 1993) (Rule 41(g) motion "properly denied [if] the government's need for the property as evidence continues."). Rule 41(g) is *not* a rule for suppressing

evidence, protecting privacy interests, or punishing government investigative conduct. *See, e.g., J.B. Manning Corp. v. United States*, 86 F.3d 926, 927-28 (9th Cir. 1996) ("[S]uppression and return of property are separate and distinct inquiries," and "property returned to the owners can still be admitted as evidence at any hearing or trial."). The law provides other mechanisms, such as civil actions, suppression motions, and protective orders to address such concerns. *See, e.g., A Bldg. Housing a Business*, 139 F.R.D. 111, 118 (W.D. Wis. 1990) (protective order is proper remedy for individual alleging harm based on "adverse publicity which has accompanied the search and investigation").

Resolution of the subpoena issue is also so clearly determined by existing precedents that it fails to rise to the level of exceptional importance. Appellees contend that *CDT* gives "the government *carte blanche* to (1) use a warrant for some piece of data on a computer as the pretext for seizing the entire computer and perusing its contents, and then (2) subpoena any computerized records that it identifies in the first step." Appellees' Pet. 12-14. Appellees may be correct as a factual matter, but that result is exactly what the law contemplates when it comes to the parallel use of warrants and subpoenas. As *CDT* explained in detail, warrants and subpoenas are very different tools requiring different levels of judicial scrutiny. *CDT*, 473 F.3d at 940-41. Thus, "[i]nsurance it may have been"

for the government to use the two procedures to obtain the same evidence, "but, under the Fourth Amendment, unreasonable it was not." *Id.* at 941.

### 2. The Panel's Decision is Also Correct.

In any event, "this [C]ourt should rehear a case en banc when it is *both* of exceptional importance *and* the decision *requires correction*." *Newdow v. U.S. Congress*, 328 F.3d 466, 469 (9th Cir. 2003) (as amended) (Reinhardt, J., concurring in denial of rehearing en banc), *rev'd on other grounds by Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004). Here, as already discussed, the panel's holdings on the three issues raised by Appellees are correct and do not merit en banc review.

Moreover, the legal rule sought by Appellees in the computer search context is patently unreasonable. Appellees would extend *CDT*'s holding in Part IV.B to require magistrates personally to review all computer evidence prior to its use by the government. Appellees' Pet. 8. As explained in the government's petition, such a holding is untenable even if limited to cases where a party makes a motion; to extend that holding to *all* computer search cases would only magnify the serious constitutional and practical problems identified by the government. Thus, except as noted in the government's petition, the panel's decision provides the correct level of constitutional protection and should be upheld.

## CONCLUSION

For these reasons, rehearing en banc is unwarranted.

Dated: March 21, 2007

Respectfully submitted,

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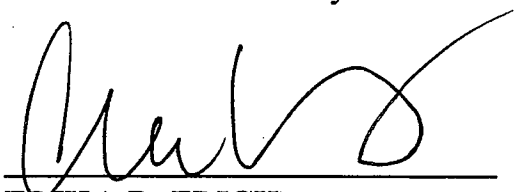

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DATE OF DECISION: JANUARY 24, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN RE: GRAND JURY SUBPOENA DATED MAY 6, 2004 ON COMPREHENSIVE DRUG TESTING, INC. AND QUEST DIAGNOSTICS, INC.

UNITED STATES OF AMERICA,

Defendant-Appellant,

v.

COMPREHENSIVE DRUG TESTING, INC., AND MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

Plaintiffs-Appellees.



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**PETITION FOR REHEARING AND REHEARING *EN BANC***

Appeal from the United States District Courts for
The Northern District of California (No. CR Misc. 04-234 SI);
The Central District of California (No. CV 04-2887 FMC (JWJx));
and the District of Nevada (No. CV-S-04-0707 JCM-PAL)

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## I. FRAP 35(b) Statement

The panel decision conflicts with *United States v. Tamura*[1] and *In re Palmer*.[2] Consideration by the full Court is therefore necessary to secure and maintain uniformity of the Court's decisions. Moreover, this appeal involves questions of exceptional importance, as explained below.

## II. Introduction

Over a strong dissent, the panel in this case effectively eliminated Fourth Amendment protection for anyone whose confidential information is held in a computerized database—which means, in effect, nearly everyone. En route to that result, the panel discarded the procedural protections that this Court laid out in *United States v. Tamura* for when the government seizes—without probable cause—private information that it finds "intermingled" with the targets of a search. And the panel improperly rejected the factual findings of three district judges from three judicial districts—including findings in two final orders that the government failed to appeal—who condemned the government's conduct below as "extremely troubling," "absolutely staggering," and tantamount to throwing the "Fourth Amendment out the window," and who each held that the government had callously disregarded the constitutional rights of hundreds of individuals.

With a search warrant for the records of only ten Major League Baseball players, the government seized drug-testing records for *every* Major League Baseball player (some 1,200 in all), along with thousands of other confidential

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[1] 694 F.2d 591 (9th Cir. 1982).

[2] 207 F.3d 566 (9th Cir. 2000).

records for people who had the misfortune to have data about them stored in the same computer directory. It rejected requests that it seal the records it had seized and use an orderly procedure to separate the few that the warrant covered from the many it did not. It then allowed its lead case agent to pore through *all* of the seized records. Finally, it prepared a series of "stepping stone" search warrants and subpoenas in an effort to sanitize its actions and keep the records it improperly seized.

If the panel's decision is allowed to stand, the government now will be authorized to seize, retain, and read all private information contained in electronic databases, so long as *any* information responsive to a warrant resides somewhere on the database. All that will be required is boilerplate language in the warrant application about the difficulty of sorting electronic data to justify the wholesale seizure of massive amounts of computerized information of persons not suspected of any crime, followed by the warrantless search of that information. And should any seized data later be ordered returned, the panel's decision authorizes the government to subpoena it right back.

As Judge Thomas noted in dissent, the panel's decision conflicts with this Circuit's precedent in *Tamura*, and substantially overrules its teachings regarding the proper treatment of intermingled records.[3] Judge Thomas also emphasized this case's exceptional importance, observing that the "decision will allow the government unprecedented easy access to confidential medical and other private information about citizens who are under no suspicion of having been involved in

[3] Dissent at 1137-38.

criminal activity."[4] Judge Thomas warned that the consequence of the panel's decision is that the "Fourth Amendment does not afford any meaningful protection at all for our citizens' most private information."[5] *En banc* review is therefore vitally necessary.

If that were not enough, the panel's decision also disrupts settled Circuit law on the finality of judgments. Two final orders that the government failed to appeal—including the first order to decide the issue—held that the government violated the Fourth Amendment in its first search and seizure by seizing and reviewing confidential records of people other than the 10 named in the warrant. This case should therefore have been affirmed based solely on collateral estoppel. *En banc* review is therefore also needed to repair the damage that the panel's decision does to that doctrine.

## III. Factual Background

Unlike the majority opinion, Judge Thomas's dissent sets forth an accurate and comprehensive summary of the facts.[6] Briefly, in 2002, the Major League Baseball Players Association (the "Players Association") and Major League Baseball agreed to conduct suspicionless drug tests of every player during the 2003 season. The purpose of the tests was to gauge the magnitude of apparent steroid use in baseball, which would determine what type of testing would occur in

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[4] *Id.*

[5] *Id.* at 1186.

[6] *See* Dissent at 1138-1158.

subsequent years.[7] The collective-bargaining agreement assured the players that the 2003 testing would be anonymous and confidential, and that the samples and individual test data would be destroyed once the results were tabulated.

Also in 2003, the government began investigating the Bay Area Lab Co-Operative ("Balco"), a business that the government suspected of supplying illegal steroids to athletes, including several baseball players. As part of that investigation, on January 16, 2004, the government served a grand jury subpoena on Comprehensive Drug Testing, Inc. ("CDT"), which had administered the testing of Major League Baseball players. Although the government suspected only ten baseball players of receiving steroids from Balco, it subpoenaed the drug-test results of *every* Major League Baseball player.

The Players Association and CDT, gravely concerned that the subpoena invaded players' privacy rights, tried to work with the government to resolve those concerns. They assured the government in writing that CDT would preserve all of the subpoenaed records until their disputes were resolved by negotiation or litigation. The Chief of the Criminal Division wrote a letter to CDT's counsel accepting those assurances.[8] At the government's request, the Players Association and CDT then prepared and presented a detailed "white paper" explaining the serious constitutional privacy concerns that the subpoenas raised.[9]

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[7] As the Dissent acknowledged, a "positive" test result would not necessarily indicate steroid use, since it could also be caused by legal over-the-counter supplements. *See* Dissent at 1139.

[8] ER 2735, 2739.

[9] The Majority asserts that the Players Association and CDT threatened to "fight production of even a single drug test all the way to the Supreme Court." (Majority

On March 3, the government served a second subpoena on CDT seeking the records of only eleven named baseball players. It refused, however, to withdraw the first subpoena. On April 7, with no resolution reached, the Players Association and CDT filed a motion to quash the subpoenas in the Northern District of California.

Upon learning that a motion to quash was about to be filed, the government applied for a warrant to search CDT's offices and seize the records of ten specifically named baseball players (the same players named in the March 3 subpoena, with one omitted). It applied for the warrant in the Central District of California without notice to the Players Association, CDT, or the Northern District Court.

In the warrant application, the government failed to apprise the magistrate judge that it had previously subpoenaed from CDT the drug-testing records for every Major League Baseball player, not just the ten that it named in the warrant application. And it failed to apprise the magistrate judge that it had accepted written assurances that CDT would preserve the subpoenaed records until the parties resolved their disputes. To the contrary, the application justified the removal of computer data from CDT's premises by warning that users may delete, alter, or destroy such data. It noted that computer data was "particularly vulnerable to inadvertent or intentional modification or destruction." In making these statements, the government had absolutely no reason to believe that CDT had engaged in subterfuge, or that it would be in any way difficult to isolate the records

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at 1085-1086). That assertion is inaccurate and finds no support in the record.

for the 10 people named in the warrant.

The warrant also stated that "[L]aw enforcement personnel trained in searching and seizing computer data" (designated "computer personnel") would determine whether an on-site search of the computer data was practical, or whether the government should instead make a copy for offsite review. If seizure of all data or equipment was necessary, the "computer personnel" would then review the data, retaining only the evidence authorized for seizure and designating the remainder for return within 60 days. The affidavit supporting the warrant application stated that obtaining information to link the test results to the 10 individual players was necessary "to ensure that samples of individuals not associated with Balco are left undisturbed."

Once the government obtained the warrant for records of the ten named players, it entered CDT and seized all of the records that it had desired all along, and much more. Even though CDT informed the agents that it had already segregated from its computer records the drug-testing records for the 10 players listed on the subpoena, demonstrating its willingness to produce the information that was legitimately requested, the government nonetheless copied and seized an entire computer directory (referred to as the "Tracey directory") containing confidential records of *all* Major League Baseball players, along with thousands of other confidential records.

The agents did not use keyword searches or other means to identify and segregate the electronic information that was responsive to the warrant, although they easily could have. Instead, agents copied and seized the entire Tracey

directory, including subdirectories that plainly held large quantities of private data outside the scope of the warrant.

As the government was in the process of seizing these and other materials, CDT's counsel objected both orally and in writing to the government's search and seizure of records beyond the scope of the warrants.[10] During the search, CDT's counsel called the U.S. Attorney's Office's Criminal Division and expressed concern that agents were reviewing and seizing highly confidential drug testing records of individuals who were not named in the warrant.[11] CDT's counsel faxed a memorandum to the Assistant United States Attorneys asking them to agree to appoint a special master or other neutral party to review and redact the seized materials so that the government would retain only those records that the warrant described.[12] Alternatively, CDT's counsel asked the government, pending a judicial determination, to impound and not review any seized records containing confidential information outside the warrant's scope.[13] The government refused each request.[14]

Over the ensuing days and weeks, the government obtained and executed additional search warrants in the Northern District of California, the Central District of California, and the District of Nevada to secure every "positive" test result and sample from the 2003 Major League Baseball testing program. It

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[10] ER 1155-56, 2764-65.

[11] ER 1155.

[12] ER 2764-65.

[13] ER 1155-56, 2764-65.

[14] ER 1156.

obtained the asserted probable cause for these warrants by having a case agent comb through Major League Baseball players' confidential records that agents had seized when they executed the first warrant, looking for every "positive" test result. As one district court found as fact, "[o]nce the items were seized, the requirement of the Warrant that any seized items not covered by the warrant be first screened and segregated by computer personnel was completely ignored."[15] In addition to executing these new search warrants, the government issued new grand jury subpoenas for over 100 baseball players' test results and urine samples—players it had identified by reading their private information seized without probable cause or any valid authority.

On August 9, August 19, and October 1, 2004, Judges Susan Illston in the Northern District of California, James Mahan in the District of Nevada, and Florence-Marie Cooper in the Central District of California each held that the government had callously disregarded the Fourth Amendment rights of the people whose records it had seized and read even though they were not named in the initial warrant. Each judge ordered the government to return or destroy all materials relating to those people, while permitting it to keep records for the ten baseball players that the initial warrant named. On December 10, 2004, Judge Illston quashed the later subpoenas for the records of persons whom the government had identified by reading the information it had improperly seized.

The government chose not to appeal Judge Illston's August 9 order, and

[15] ER 38. The majority disregards this limitation in the warrant. *Compare* Majority at 19815-16 and n.36 *with* ER 2748-49.

failed to timely appeal Judge Cooper's order.[16] As discussed below, however, the majority reversed Judge Mahan's order and Judge Illston's December 10 order quashing the subpoenas. In the process, it wrote new rules for the search and seizure of computerized records that, if allowed to stand, will drastically curtail privacy rights in the 21st century.

## IV. Petition for Rehearing and Rehearing *En Banc*

### A. The majority's opinion directly conflicts with the need for magistrate oversight that this Court set forth in *United States v. Tamura.*

In *Tamura,* this Court cautioned that "the wholesale *seizure* for later detailed examination of records not described in a warrant ... has been characterized as 'the kind of investigatory dragnet that the fourth amendment was designed to prevent.'"[17] *Tamura* therefore required as an "essential safeguard" that any wholesale removal of intermingled documents "be monitored by the judgment of a neutral, detached magistrate."[18]

These protections have become more necessary than ever in this day and age, and in this type of case. Since *Tamura* was decided, virtually every business has switched to computerized record-keeping, where a single "document" may contain records relating to thousands of people and transactions. Moreover, *Tamura* involved the seizure of ordinary business records; it did not involve the heightened privacy interest in confidential testing records, nor did it involve a

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[16] *See* Majority Opinion at 1105.

[17] *Tamura*, 694 F.2d at 595 (quoting *United States v. Abrams*, 615 F.2d 541, 543 (1st Cir. 1980)).

[18] *Tamura*, 694 F.2d at 596.

computer search. In this case, where those factors *were* present, one might have expected the panel to embrace *Tamura*'s teachings all the more firmly.

Remarkably, the majority did just the opposite: it promulgated a new set of procedures that allow the government to seize an entire computer database containing thousands of files—the vast majority of which, on their face, are not authorized for seizure—search them at its leisure, and then freely use the fruits of that search. The government may thus seize and use without restriction items to which it had no constitutional entitlement in the first instance, just because those items are stored electronically in the same database that contains an item authorized for seizure. As Judge Thomas noted in dissent, the panel decision eviscerates the Fourth Amendment's particularity requirement, and "marks the return of the prohibited general warrant," putting "Americans' most basic privacy interests in jeopardy." [19]

Although the majority would require the warrant to contain an electronic search "protocol," all that the protocol needs is a boilerplate recitation of the difficulties of searching computerized data to justify the wholesale removal *and* warrantless search of confidential records. According to the majority, the mere presence of a search protocol is talismanic: Just *having* a protocol is enough to

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[19] Dissent at 1184 and 1187. *See also United States v. Rettig*, 589 F.2d 418 (9th Cir. 1978) (when the government uses a warrant as a pretext to search for and seize materials that it does not describe, the warrant is invalid, and all evidence seized during the search must be suppressed; *Maryland v. Garrison*, 480 U.S. 79, 84 (1987) ("By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the [particularity] requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.")

preclude a magistrate or other neutral party from any role in post-seizure review—even if the protocol does not constrain the government in any significant way, and even if the government violates the few restrictions that a protocol may impose, as it did in this case.[20]

Indeed, if the wholesale removal and off-site review of computerized records was permissible in this case, it is hard to imagine any case where it would be impermissible. In obtaining the warrant, the government presented no particularized information that CDT was likely to hide or tamper with electronic records—all that it offered was a few boilerplate paragraphs that describe every computer in the world.[21] Nor *could* it have made any particularized showing about CDT. CDT is an innocent third-party business that was under no suspicion of criminal activity. It sought to fulfill the trust placed in it as the guardian of confidential records by seeking a judicial determination of the government's right to the contested records after its good faith efforts to negotiate failed.[22] And the Chief of the Criminal Division had already accepted in writing CDT's promise to

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[20] *See, supra*, p. 13, fns. 27-30; *see also United States v. Hill*, 459 F.3d 966, 975 (9th Cir. 2006) ("There may well be situations where the government has no basis for believing that a computer search would involve the kind of technological problems that would make an immediate onsite search and selective removal of relevant evidence impracticable.") Three district judges found this to be that exact situation.

[21] The warrant affidavit stated, for example, that "[c]omputer users can attempt to conceal data within computer equipment and storage devices through a number of methods," and that "[c]omputer hardware and storage devices may contain 'booby traps' that destroy or alter data if certain procedures are not scrupulously followed." ER 3202.

[22] Indeed, if the majority's decision is allowed to stand, it will damage CDT's and similar businesses' ability to serve as independent guardians of such highly confidential medical information.

preserve the records until that proceeding concluded.[23]

Moreover, the computerized records at issue here are drug-test results that implicate significant privacy interests under a long line of United States Supreme Court and Ninth Circuit precedent. In his dissent, Judge Thomas recognizes the significance of the privacy interests at stake, noting the exceptional importance of this case in the context of records stored on a computer in any hospital, drug-treatment center, or testing laboratory.[24] As Judge Thomas warns,

> Approving of the tactics employed here would entitle the government to seize the medical records of anyone who had the misfortune of visiting a hospital or belonging to a health care provider that kept patient records in any sort of master file which also contained the data of a person whose information was subject to a search warrant....Under the majority's holding, no laboratory or hospital or health care facility could guarantee the confidentiality of records.[25]

Judge Thomas's dissent thoroughly dissected the new rules and showed that they undermine nearly every conceivable Fourth Amendment protection for computerized records. He observes that under the majority's rationale, the government may now seize anyone's private medical records and remove the records for a later warrantless search, "so long as those records are intermingled with records that are responsive to a warrant and the government can justify that on-site sorting of those records would be impractical."[26] Instead of interposing a neutral and detached magistrate between the time that the government seizes

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[23] ER 2735, 2739.

[24] Dissent at 1184 – 1188.

[25] Dissent at 1184.

[26] *Id.* at 1137.

intermingled records and the time it sits down to review them, as *Tamura* requires, the new rules give the government an easy end run around magistrate review that simply "invites an abuse of the off-site process."[27]

The majority's flawed holding emerged from an equally flawed methodology that exhibited a surprising disregard for the district courts' role as finder of fact. The district courts made factual findings that the government violated the terms of the CDT search warrant by seizing records for all athletes.[28] They found as fact that the government "completely ignored" the warrant's protocol for segregating responsive information,[29] that the government's actions were motivated by a desire to prevent judicial review,[30] and that the government's refusal to follow its own procedures evinced bad intent.[31] Each district judge found that the government's actions were so egregious that they rose to the level of a "callous disregard" for the rights of the players.[32] But instead of deciding whether the district courts had abused their discretion,[33] the majority stepped into the lower courts' shoes and acted as the fact finder.[34] The majority thus permitted itself to brush aside these and other district-court findings of government duplicity and overreaching, recounted at length in Judge Thomas's carefully framed

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[27] *Id.* at 1174

[28] ER 38-40; 670-73; 2456-57.

[29] ER 38.

[30] ER 41; 2456.

[31] ER 41; *see also* Dissent at 1164-65.

[32] ER 35-42; 670-73; 2456-57.

[33] *See United States v. Washington*, 394 F.3d 1152, 1157 (9th Cir. 2005).

[34] *See, e.g.*, Majority at 1121 – 1125.

dissent.[35]

The panel's decision thus inaugurates a new era in which the government has unlimited power to seize, search and use intermingled computerized records that goes far beyond the scope of the warrant, even when those records contain confidential medical information of innocent third persons. Thus, at a particularly inopportune juncture in history, and in an especially inappropriate factual context, the majority turned its back on *Tamura*'s teaching that "the wholesale seizure . . . of records not described in a warrant . . . [constitutes] the kind of investigatory dragnet that the Fourth Amendment was designed to prevent."[36] *En banc* review is therefore necessary to rectify Ninth Circuit law and make it once again capable of safeguarding the privacy of computerized records in the 21st century.

**B. The majority opinion conflicts with settled Circuit precedent on the finality of judgments.**

The panel's decision also throws the status of collateral estoppel in this Circuit into doubt. This Court has long held that a final judgment on issues actually litigated precludes a party to that judgment from litigating those same issues again.[37] And with good reason—the Supreme Court has observed that the rule of issue preclusion "is demanded by the very object for which civil courts have been established," and "[i]ts enforcement is essential to the maintenance of social order[.]"[38] But the majority cast aside this principle by reviewing *de novo*

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[35] *See* Dissent at 19864-74.

[36] *Tamura*, 694 F.2d at 595 (internal quotation and citation omitted).

[37] *See,e.g., In re Palmer*, 207 F.3d at 568.

[38] *Southern Pacific Railroad v. United States*, 18 S.Ct. 18, 49 (1897).

the legality of the April 8 search—an issue that was already decided in two final judgments that the government failed to appeal. Unless its decision is reversed, the finality of judgments in this Circuit will thus be severely undermined.

Judge Illston's August 9, 2004 order held unequivocally that the government's initial search and seizure of CDT's computer records on April 8 went "beyond what was authorized by the warrant [and] therefore, it violates the Fourth Amendment."[39] The government chose not to appeal that order. Judge Cooper's October 1 order also held that the April 8 search and seizure violated the Fourth Amendment.[40] The government failed to timely appeal that order.[41] Both orders are final and entitled to *res judicata* effect.[42]

The majority acknowledged that the April 8 search and seizure supplied the alleged probable cause for the later warrant in Nevada, and therefore that the legality of that search was the "dispositive" issue before Judge Mahan.[43] Yet the

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[39] ER 2456-57.

[40] ER 35-42.

[41] *See* Majority Opinion at 1105.

[42] "In federal courts, a district court judgment is 'final' for purposes of res judicata." *Orion Tire Corp. v. Goodyear Tire & Rubber Co.*, 268 F.3d 1133, 1135 n. 2 (9th Cir. 2001). The government may nevertheless argue that *one* of these two judgments—Judge Cooper's order of October 1, 2004—should not be given preclusive effect in the case before Judge Mahan, because Judge Cooper ruled after Judge Mahan did. *See Orion Tire Corp.*, 268 F.3d at 1135 – 36 (holding that a later, unappealed decision did not collaterally estop the appeal of an earlier decision.) The circuits are split on this issue. *See, e.g., Grieve v. Tamerin*, 269 F.3d 149, 153-154 (2nd Cir. 2001) (holding that the opposite result is required to fulfill the purposes of the collateral-estoppel doctrine). But the principle has no effect here in any event, because Judge Illston's August 9 ruling preceded Judge Mahan's ruling from the bench on August 19.

[43] Majority Opinion at 1113, n. 43; *see also Wong Sun v. United States*, 371 U.S. 471, 484 (1963) (government cannot rely on fruits of illegal search to justify

majority disregarded the two final judgments that had already decided that issue, and entered a new ruling that directly contradicts them, holding that the April 8 search and seizure *did* comply with the Fourth Amendment. As Judge Thomas recognized in his dissent, the collateral-estoppel doctrine requires that Judge Mahan's decision be affirmed *regardless* of whether the majority agreed with his analysis of *Tamura* or the underlying search at CDT.[44]

This case presents a compelling example of why the enforcement of that doctrine is so critical. A key part of the government's strategy below was to take issues from court to court, presenting incomplete information to each judicial officer, so that it could bypass an orderly determination of its rights and take and review all of the information it wanted.[45] If it is permitted to use the fruits of a search already held to be unconstitutional to support new warrants—as the majority opinion permits it to do—that strategy will be fully vindicated. This Court should thus grant *en banc* review to rectify the Circuit's jurisprudence on collateral estoppel.

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subsequent search).

[44] Dissenting Opinion at 1162 – 1163; *see also U.S. v. Real Property Located in El Dorado County*, 59 F.3d 974 (9th Cir. 1995) (because the legality of search was fully and fairly litigated in state court prosecution, defendant was collaterally estopped from raising Fourth Amendment issue as a defense to civil forfeiture action); *United States v. U.S. Currency in the Amount of $228,536.00*, 895 F.2d 908 (2d Cir. 1989) (applying collateral estoppel to prevent relitigation in a civil forfeiture proceeding of a Fourth Amendment issue raised during suppression hearings at prior criminal trial).

[45] *See* ER 2456-57.

### C. The majority erroneously restricted district courts' discretion to quash unreasonable and abusive subpoenas based on the totality of the circumstances.

As set forth above, the majority paved the way for the government to seize and read confidential computerized records, without any judicial oversight, so long as the government includes boilerplate language in the warrant about the "difficulties" of sorting electronic data. But it did not stop there. It also blessed a procedural end run that will enable the government to keep any seized records that it wants—even in the rare instances when a judge orders the records returned.

The majority reversed, as an abuse of discretion, Judge Illston's order quashing two subpoenas for over 100 baseball players' test results and samples, which the government issued at the end of its barrage of search warrants.[46] It is undisputed that the government identified the players named in the subpoenas by reading confidential information about them that it seized from CDT.

The majority dismissed the district court's finding that these subpoenas were unreasonable and abusive as being directed merely to the issuance of "contemporaneous search warrants and subpoenas."[47] But the district court objected to much more than that. It condemned the entire course of conduct by which the government connived to obtain Major League Baseball drug-testing records without probable cause. It found that the subpoenas "were the culmination of a series of actions taken by the government in order to prevent MLBPA and CDT's attempt to move to quash the January and March subpoenas", and chastised

[46] Majority at 19827-30.

[47] Majority at 19828.

the government for "the way that the case was taken from one judge to another judge to another judge, [and] the way that as soon as it was challenged in one court it was immediately litigated in a different court without full information being shared among the courts."[48] And it raised grave concerns that the government's tactics and arguments in this case threatened to gut the Fourth Amendment's protection of computerized data.

In short, the government's conduct here was much more troubling than one would understand from the majority's prosaic recitation of the facts. At the end of it all, Judge Illston, the jurist who presided over the Balco investigation from the beginning, said enough was enough. Judge Illston found these subpoenas to be "unreasonable", to "constitute harassment", and to be "an abuse of the grand jury process."[49] As Judge Thomas concluded, that decision "is fully supported by the record and certainly cannot be said to be an abuse of discretion.[50]

Moreover, in affirming the subpoenas, the majority ignored the sensitive and private nature of the records that they sought.[51] The Players Association and CDT argued below that these heightened privacy interests created an independent basis to quash the subpoenas[52]—an issue that the district court never reached. Yet, by

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[48] ER 71, 2456.

[49] ER 71-2.

[50] *See* Dissent at 1183.

[51] The Supreme Court has recognized that the unauthorized dissemination of drug test results to third parties is a "serious intrusion" on privacy. *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001).

[52] *See, e.g., In re Grand Jury Proceeding*, 455 F. Supp. 2d 1281, 1285-86 (D.N.M. 2006), and *United States v. Nicolosi*, 885 F. Supp. 50, 55 (E.D.N.Y. 1995). In both these cases, the courts quashed grand jury subpoenas for saliva samples because

declaring the subpoenas valid, the majority seemingly rejected that argument without considering it. That ruling will create Circuit precedent authorizing the government to obtain confidential drug testing records and urine samples of hundreds of citizens without any showing of probable cause, and without any meaningful prospect of judicial review.

If the majority's opinion is allowed to stand, it will create Circuit law giving the government *carte blanche* to (1) use a warrant for some piece of data on a computer as the pretext for seizing the entire computer and analyzing its highly confidential contents, and then (2) subpoena any computerized records that it identifies in the first step. Thus, even if an aggrieved party challenges an overbroad seizure and manages to prevail before a judge, the government will know that party's private information and will have free reign to "subpoena it right back." District judges will be powerless to stand in the government's way and, as Justice Holmes warned, the Fourth Amendment will be reduced "to a form of words."[53] *En banc* review is therefore also required to restore the district court's discretion to quash abusive and unreasonable subpoenas.

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the government could not show particularized suspicion to justify the search under the Fourth Amendment. Both courts found that the key fact triggering heightened Fourth Amendment scrutiny was not any invasion of privacy involved in collecting the sample, but rather that "the identity information contained within the sample implicates the subject's privacy interests." *Nicolosi*, 885 F. Supp. at 55; *Grand Jury Proceeding*, 455 F. Supp. at 1285-86. Those same interests are unquestionably present here.

[53] *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391-92 (1920).

## V. CONCLUSION

To moot the issues raised by CDT's and the Players Association's challenge to overbroad grand jury subpoenas, the government embarked on a tortured course of conduct that three separate district court judges condemned in unusually harsh language. Most relevant here was the government's seizure and retention of massive amounts of confidential medical information about thousands of persons not suspected of criminal activity, based on a warrant that authorized the seizure of records for 10 baseball players. It rejected requests to use an orderly procedure to segregate the records identified in the warrant, and instead used a narrow warrant to seize, examine, and retain indefinitely a universe of testing records for which it never established probable cause.

A majority of this panel found that each of the learned district judges clearly erred in its assessment of the facts, and reversed those courts. But that is only half the problem. The majority not only blessed the government's outrageous conduct in this case, it invited much more of the same. The panel decision paves the way for the government to seize and review massive amounts of confidential computer information – without any Fourth Amendment scrutiny whatsoever – so long as the government includes boilerplate language in the warrant about the difficulty of sorting electronic data. The majority's view, if allowed to stand, reduces the judiciary's role to one in which it is only to rubber stamp a warrant application, without any oversight into the government's conduct or the scope of its seizure. Its decision transforms warrants into blank checks, and reduces the Fourth Amendment to nothing more than ink on parchment, with little or no real

protection left for the citizenry.

For the foregoing reasons, the majority's opinion conflicts with established Ninth Circuit precedent and raises questions of exceptional importance regarding searches and seizures of computerized data. The Players Association and CDT therefore respectfully request that the Court grant this petition and permit an *en banc* panel to consider fully the significant issues that this appeal presents.

Respectfully submitted,

Dated: March 10, 2008

KEKER & VAN NEST, LLP

By: _____
ELLIOT R. PETERS
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MAJOR LEAGUE BASEBALL
PLAYERS' ASSOCIATION

Dated: March 10, 2008

SIDEMAN & BANCROFT, LLP

By: _____
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TESTING, INC.

**Form 11. Certificate of Compliance Pursuant to Circuit Rules 35-4 and 40-1**

**Form Must be Signed by Attorney or Unrepresented Litigant and Attached to the Back of Each Copy of the Petition or Answer**

**(signature block below)**

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

X Proportionately spaced, has a typeface of 14 points or more and contains 5,442* words (petitions and answers must not exceed 4,200 words).

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* Motion for permission to exceed page limit filed herewith.

## PROOF OF SERVICE

I am employed in the City and County of San Francisco, State of California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Keker & Van Nest, LLP, 710 Sansome Street, San Francisco, California 94111.

On March 10, 2008, I served the following document(s):

**PETITION FOR HEARING AND REHEARING *EN BANC***

by **COURIER**, by placing a true and correct copy in a sealed envelope addressed as shown below, and dispatching a messenger from Nationwide Legal, whose address is 1255 Post Street, Suite 500, San Francisco, CA 94109, with instructions to hand-carry the above and make delivery to the following during normal business hours, by leaving the package with the person whose name is shown or the person authorized to accept courier deliveries on behalf of the addressee.

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Executed on March 10, 2008, at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

JOANNE WINARS

O'Connolen
Thomas
Tallman

ORIGINAL

NOS. 05-10067, 05-15006 & 05-55354

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE: GRAND JURY SUBPOENA DATED MAY 6, 2004 ON COMPREHENSIVE DRUG TESTING, INC. AND QUEST DIAGNOSTICS, INC.

UNITED STATES OF AMERICA,

Defendant-Appellant,

v.

COMPREHENSIVE DRUG TESTING, INC., AND MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

Plaintiffs-Appellees.



**DECLARATION OF ELLIOT R. PETERS IN SUPPORT OF PROCEDURAL MOTION FOR PERMISSION TO EXCEED PAGE LIMIT FOR PETITION FOR REHEARING *EN BANC***

Appeal from the United States District Courts for
The Northern District of California (No. CR Misc. 04-234 SI);
The Central District of California (No. CV 04-2887 FMC (JWJx));
and the District of Nevada (No. CV-S-04-0707 JCM-PAL)

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I, ELLIOT R. PETERS, declare under penalty of perjury that the following is true:

1. I am a member of the law firm Keker & Van Nest LLP, counsel to the Major League Baseball Players Association (the "Association").

2. On January 24, 2008, a three-judge panel of the Court issued a superseding opinion in the three consolidated cases involving the government's seizure of private medical records of Major League Baseball players in connection with the government's long running investigation of the Bay Area Lab Co-Operative (BALCO). The appeal involves both complex legal issues and extensive factual background.

3. The Association and Comprehensive Drug Testing, Inc. ("CDT") are filing a single, joint petition for rehearing *en banc* in the three consolidated cases. The Association and CDT believe that good cause and substantial need exists to file a petition that exceeds the page and type-volume limits set forth in Circuit Rule 40-1. Giving a full explanation of the applicable facts and law in the consolidated cases, as well as the ramifications of the panel's decision, requires more than the fifteen pages ordinarily allotted for such a petition.

4. The Association and CDT have worked diligently to present the issues raised in this petition as concisely as possible. However, the numerous distinct aspects of this case make it infeasible to present all issues, along with the necessary factual background, within the limits set forth in Circuit Rule 40-1.

This declaration was executed on March 10, 2008 in San Francisco, California. I declare under penalty of perjury under the laws of the State of California and the laws of the United States that the foregoing is true and correct.

ELLIOT R. PETERS

## PROOF OF SERVICE

I am employed in the City and County of San Francisco, State of California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Keker & Van Nest, LLP, 710 Sansome Street, San Francisco, California 94111.

On March 10, 2008, I served the following document(s):

**DECLARATION OF ELLIOT R. PETERS IN SUPPORT OF PROCEDURAL MOTION FOR PERMISSION TO EXCEED PAGE LIMIT FOR PETITION FOR REHEARING *EN BANC***

by **COURIER**, by placing a true and correct copy in a sealed envelope addressed as shown below, and dispatching a messenger from Nationwide Legal, whose address is 1255 Post Street, Suite 500, San Francisco, CA 94109, with instructions to hand-carry the above and make delivery to the following during normal business hours, by leaving the package with the person whose name is shown or the person authorized to accept courier deliveries on behalf of the addressee.

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Executed on March 10, 2008, at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

JOANNE WINARS

NOS. 05-10067, 05-15006 & 05-55354

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE: GRAND JURY SUBPOENA DATED MAY 6, 2004 ON COMPREHENSIVE DRUG TESTING, INC. AND QUEST DIAGNOSTICS, INC.

UNITED STATES OF AMERICA,

Defendant-Appellant,

v.

COMPREHENSIVE DRUG TESTING, INC., AND MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

Plaintiffs-Appellees.



**PROCEDURAL MOTION FOR PERMISSION TO EXCEED PAGE LIMIT FOR PETITION FOR REHEARING *EN BANC***

Appeal from the United States District Courts for
The Northern District of California (No. CR Misc. 04-234 SI);
The Central District of California (No. CV 04-2887 FMC (JWJx));
and the District of Nevada (No. CV-S-04-0707 JCM-PAL)

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COMPREHENSIVE DRUG TESTING, INC.

Under Federal Rule of Appellate Procedure 32(a)(7), Circuit Rule 32-2, and General Order 6.3a, defendants-appellees Major League Baseball Players Association ("Association") and Comprehensive Drug Testing, Inc. ("CDT") hereby move that the Court—or the Clerk acting pursuant to General Order 6.3a—enter an order allowing the Association and CDT to file a petition for rehearing *en banc* that exceeds the page and type-volume limitation set forth in Circuit Rule 40-1.[1]

The Association and CDT respectfully submit that good cause and substantial need exists to file a petition that exceeds the limits set forth in Circuit Rule 40-1. (*See* Declaration of Elliot Peters at ¶3). The Association and CDT are filing a single, joint brief that addresses an appeal of three consolidates cases. Each of the three cases involves different aspects of the government's seizure of private medical records of Major League Baseball players in connection with the government's long running investigation of the Bay Area Lab Co-Operative (BALCO). (*See* Declaration of Elliot Peters at ¶2). The appeal involves both complex legal issues and extensive factual background. (*Id.*)

Although the Association and CDT have worked diligently to present the issues raised in this petition as concisely as possible, the numerous distinct aspects of this case make it infeasible to present all issues, along with the necessary factual background, within the limits set forth in Circuit Rule 40-1. (*See* Declaration of Elliot Peters at ¶4). Moreover, as explained in Judge Thomas' dissent, this appeal involves questions of exceptional importance. Giving a full explanation of the

[1] The Association and CDT are filing a Form 11 along with their joint petition which certifies that it consists of 5,442 words—1,242 words over the limit set forth in Circuit Rule 40-1.

applicable facts and law relating to the consolidated appeals, as well as the ramifications of the panel's decision, requires more than the fifteen pages ordinarily allotted for such a petition. This motion is brought not for delay but that justice can be done.

## CONCLUSION

For the foregoing reasons, the Association and CDT request that the Court enter an order allowing appellees to file a petition for rehearing *en banc* that exceeds the page and type-volume limitation set forth in Circuit Rule 40-1.

Respectfully submitted,

Dated: March 10, 2008

KEKER & VAN NEST, LLP

By: _____
ELLIOT R. PETERS
Attorneys for APPELLEE
MAJOR LEAGUE BASEBALL
PLAYERS' ASSOCIATION

Dated: March 10, 2008

SIDEMAN & BANCROFT, LLP

By: _____ / SY DS w/ permission
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Attorneys for APPELLEE
COMPREHENSIVE DRUG
TESTING, INC.

## PROOF OF SERVICE

I am employed in the City and County of San Francisco, State of California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Keker & Van Nest, LLP, 710 Sansome Street, San Francisco, California 94111.

On March 10, 2008, I served the following document(s):

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

JOANNE WINARS

**Form 11. Certificate of Compliance Pursuant to Circuit Rules 35-4 and 40-1**

**Form Must be Signed by Attorney or Unrepresented Litigant and Attached to the Back of Each Copy of the Petition or Answer**

**(signature block below)**

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

X Proportionately spaced, has a typeface of 14 points or more and contains 5,442 words (petitions and answers must not exceed 4,200 words).

**or**

____ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

**or**

____ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

Signature of Attorney or Unrepresented Litigant

**(New Form 7/1/2000)**

**Nos. 05-10067, 05-15006 & 05-55354**

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Defendant-Appellant,

v.

COMPREHENSIVE DRUG TESTING, INC., et al.,

Movants-Appellees.

---

# UNITED STATES' OPPOSITION TO APPELLEES' PETITION FOR REHEARING AND REHEARING *EN BANC*

APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE NORTHERN DISTRICT OF CALIFORNIA (No. CR Misc. 04-234 SI), THE CENTRAL DISTRICT OF CALIFORNIA (No. CV 04-2887 FMC (JWJx)), AND THE DISTRICT OF NEVADA (No. CV-S-04-0707-JCM-PAL)

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**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Defendant-Appellant,

v.

COMPREHENSIVE DRUG TESTING, INC., et al.,

Movants-Appellees.

---

# UNITED STATES' OPPOSITION TO APPELLEES' PETITION FOR REHEARING AND REHEARING *EN BANC*

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## INTRODUCTION

Appellees Major League Baseball Players Association (MLBPA) and Comprehensive Data Testing, Inc. (CDT), petition for rehearing en banc of the Court's decision reversing an order granting their motion under Federal Rule of Criminal Procedure 41(g) for return of property. Reduced to its essentials, appellees' petition asks this Court to grant rehearing en banc to determine the proper approach when the government seeks and obtains a warrant to seize documents that are intermingled in an electronic storage medium with a larger

body of documents. In particular, the petition challenges the panel's conclusion that agents who executed a warrant properly relied on a protocol approved by the issuing magistrate that allowed the agents to copy computer files and directories for a later off-site search. In other words, the petition does not challenge the scope of the warrant, only its authorization to allow the agents to complete the search off site.

Rehearing of the panel decision is unwarranted, for several reasons. First, the panel's ruling upholding the search protocol is consistent with the analysis employed by the Supreme Court and this Court in prior cases, including *United States v. Tamura*, 694 F.2d 591 (9th Cir. 1982), and gives magistrates adequate authority to regulate the seizure of information for off-site completion of a search. Appellees are therefore wrong in asserting that the panel's decision authorizes the government to engage in "wholesale" seizures of information without judicial oversight.

Second, this Court should not impose inflexible and unworkable requirements or procedures on magistrate judges confronted with an application for a warrant to seize documents located in a computer or other storage media. Instead, as the panel recognized, magistrate judges may use existing Fourth Amendment requirements to ensure that a warrant is executed in a manner that

protects privacy or other sensitive individual interests. Indeed, the Supreme Court held as much 30 years ago in discussing warrants to seize information protected by the First Amendment. *See Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

Third, Rule 41(g) is not a means for suppressing evidence or punishing government misconduct, and a court may order property returned in response to a Rule 41(g) motion only when the movant can establish a "reprehensible" violation of the Fourth Amendment. *See J.B. Manning Corp. v. United States*, 86 F.3d 926, 927-28 (9th Cir. 1996); *Ramsden v. United States*, 2 F.3d 322, 327 (9th Cir. 1993). Here, the panel simply concluded that the government's conduct did not constitute an "egregious" or "reprehensible" Fourth Amendment violation. Even if that ultimate conclusion were incorrect (and it is not), rehearing is not necessary to address the panel's interpretation of Rule 41(g).

## BACKGROUND

### I. The grand jury subpoenas and searches

In January 2004, as part of an investigation of illegal steroid distribution by the Bay Area Laboratory Co-Operative ("Balco"), the government issued grand jury subpoenas to two laboratories that conducted drug testing for major league baseball players, CDT and Quest Diagnostics, Inc. (Quest), seeking drug-testing

results for all major league baseball players.[1] When the labs refused to comply, the government issued new subpoenas that sought drug-testing results only for ten players connected to Balco. On April 7, 2004, one day before the return date for the new subpoenas, MLBPA and CDT moved to quash the subpoenas.

On the same day, after learning that appellees intended to file a motion to quash, the government applied for warrants to search CDT's office in Long Beach, California, and Quest's laboratory in Las Vegas, Nevada. The supporting affidavits stated that the information sought was the subject of pending grand jury subpoenas and that the government expected a motion to quash to be filed. Based on the government's application, magistrate judges in the Central District of California and the District of Nevada issued warrants to search for drug-testing records for the ten named players, as well as materials "detailing or explaining" CDT's and Quest's administration of major league baseball's drug-testing program. The warrants included a protocol for the on-site search and, if necessary, removal for off-site search of computers and computer storage devices. That protocol allowed the agents to seize either a copy of data stored in a computer or the computer equipment itself when agents "trained in searching and seizing computer data" determined that off-site review was necessary to complete the

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[1] The facts are taken from the panel majority decision at pages 1085-93.

search.

When federal agents executed the search warrant at CDT on April 8, 2004, CDT personnel were initially cooperative, but later in the morning a CDT director told the lead agent that CDT personnel would not assist federal officers in locating the evidence that they were authorized to seize. At noon, after negotiations between CDT's attorneys and the government, CDT identified two computers on which the government would find information relevant to the search warrant. More than two hours later, CDT personnel identified a computer directory containing all of the computer files for CDT's sports drug-testing program. This directory, labeled "Tracey," contained many subdirectories and hundreds of files. Because of the amount of time it would take to review the Tracey directory, the agents decided to rely on the warrant's provisions allowing them to copy the directory for off-site examination. The agents did not remove any computers or hard drives from CDT.

On April 30, 2004, the government obtained a warrant to seize data regarding drug testing of major league baseball players from the Tracey directory. On May 5, 2004, using information obtained from the Tracey directory, the government applied for and obtained warrants to seize from Quest and CDT all specimens and records relating to more than 100 non-Balco players who had tested

positive for steroids. In April and May 2004, the MLBPA filed motions in the District of Nevada and the Central and Northern Districts of California under Rule 41(g) seeking the return of the property seized in the searches. Judges in all three districts later granted the motions.

On May 6, 2004, the government issued grand jury subpoenas for Quest and CDT seeking records of positive steroid test results for more than 100 major league baseball players. In December 2004, a district judge in the Northern District of California granted CDT's motion to quash the subpoena, finding that the government's conduct was unreasonable and harassing. The government filed notices of appeal of the orders issued by the courts in Nevada and the Central District of California granting the Rule 41 motions and of the order issued by Northern District of California quashing the May 6 subpoena.

## II. This Court's ruling

In an amended opinion issued on January 24, 2008, the Court reversed the Nevada district court's order granting the Rule 41 motion filed in that district, finding that the searches of Quest and CDT did not constitute an "egregious" violation of the Fourth Amendment.[2] At the outset, the Court found that the

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[2] The Court held that MLBPA had standing to file a Rule 41 motion and that the government's notice of appeal of the order granting the Rule 41 motion in the Central District of California was not timely and therefore that the Court

Nevada district court had properly assumed jurisdiction over the Rule 41(g) motion. In so ruling, however, the Court disagreed with the district court's conclusion that the government had shown "callous disregard for the constitutional rights" of MLBPA and CDT. In particular, the Court rejected MLBPA's assertion that because of the "highly sensitive and confidential nature of drug testing samples," the government must show "extraordinary justification" for the seizure of those materials. Acceptance of that reasoning, the panel explained, would mean that "any seizure of confidential records would reveal callous disregard of privacy rights, even if such seizure were expressly authorized by a lawful search warrant." Maj. Op. 1109. Here, the Court held, the government obtained a search warrant authorizing the seizure of urine samples and drug testing records from a magistrate judge who knew that MLBPA and CDT had moved to quash the subpoenas for those materials. Maj. Op. 1109-10.

On the merits, the Court found that the seizure of property from Quest in Nevada was reasonable, and it rejected MLBPA's assertion that the government improperly relied on information in "intermingled files" at CDT "to name individuals other than the ten players previously identified." Maj. Op. 1112. After reviewing this Court's cases discussing the search of "intermingled

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lacked jurisdiction over that appeal. Maj. Op. 1095-1107.

documents" (that is, documents that fall within a search warrant intermingled with documents that are outside the search warrant), the Court held that "the CDT search was lawful" because it was undertaken pursuant to a warrant that authorized the agents to seize computer equipment and storage devices containing intermingled files and remove them for later review to identify the documents specified in the warrant. Maj. Op. 1121. As the majority explained, that warrant rested on an affidavit that described "the anticipated difficulties of sorting computer data on-site" and "proposed a protocol to guide and limit the seizures of intermingled evidence." Maj. Op. 1122. In addition, the Court found, "the government complied with the protocol in the warrant" by seizing computer directories containing intermingled files only after a trained agent "determined that on-site review would not be feasible in a reasonable amount of time." Maj. Op. 1122. For these reasons, the "government's behavior in this case was reasonable and fell far short of the egregious and unchecked intrusions that might justify a return of property under Rule 41(g)." Maj. Op. 1126-27. Because the CDT search was lawful, the use of the fruits of that search to conduct the Quest search in Nevada and the later search of the Tracey directory did not violate the Fourth Amendment. Maj. Op. 1126; *see id.* at 1091 n.20.

The Court also found that the district court in the Northern District of

California erred in quashing the subpoenas issued on May 6, 2004, which sought from CDT and Quest the drug-testing records and specimens for all major league baseball players who tested positive for steroids. Maj. Op. 1128-31. The Court rejected the district court's conclusion that the subpoenas "constituted harassment" because the subpoenas sought the same material covered by the search warrants. Instead, the Court found, the "the government [may pursue] the same information through contemporaneous issuance of subpoenas and applications for search warrants." Maj. Op. 1128.

## ARGUMENT

## THE PETITION FOR REHEARING SHOULD BE DENIED

### I. The panel correctly held that relief was not warranted under Rule 41(g)

Appellees contend (Pet. 1) that the panel decision "effectively eliminated Fourth Amendment protection for anyone whose confidential information is held in a computerized database." In fact, the panel's decision does not address the extent to which agents may search a computerized data base or any other electronic or physical storage facility. Instead, the panel decision addresses the narrow question of when agents may seize materials that they are entitled to search in order to complete their search off-site. The panel's resolution of that question rests firmly in established Fourth Amendment law, and its decision preserves the

traditional role of magistrate judges to ensure that search warrants are executed in a manner that preserves the privacy interests at the heart of the Fourth Amendment. Accordingly, rehearing is unwarranted to address the panel's Fourth Amendment analysis.

The agents possessed a valid warrant to search CDT for drug-testing records and specimens for ten named Balco-connected players, as well as other materials detailing CDT's or Quest's administration of Major League Baseball's drug-testing program. Under settled law, the agents were entitled to search in any place within the premises described in the warrant where those items could be found, *see United States v. Ross*, 456 U.S. 798, 820-21 (1982), and to peruse each document or file that they could lawfully examine to determine whether it fell within the specifications of the warrant. *Andresen v. Maryland*, 427 U.S. 463, 481 n.11 (1976) ("In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized."); *United States v. Rude*, 88 F.3d 1538, 1551 (9th Cir. 1996) ("The record reveals that the agents had to peruse each document to determine whether it related to other fraudulent activity."). Moreover, there is no dispute that the agents could have stayed on CDT's premises for as long as it took to complete a lawful search for the items specified in the

warrant. *See* 2 Wayne R. LaFave, SEARCH AND SEIZURE § 4.10(d) at 766-67 (4th ed. 2004).

Thus, the primary question that the panel had to resolve was whether it was reasonable for the officers to seize materials that they were entitled to search in order to complete their search off-site. The panel held that the warrant to search CDT properly allowed the agents to seize intermingled computer files for later review to separate documents or files that the agents had the authority to seize from documents or files that fell outside the warrant. As the panel explained, the warrant contained a protocol that adequately governed the agents' decision whether to complete the search while at CDT or transport the relevant computer files off-site for later review.

That conclusion is consistent with decisions from the Supreme Court and this Court. The Supreme Court has made clear that the magistrate issuing a warrant has authority to impose preconditions on the search and seizure in order to protect against the seizure of sensitive material or evidence outside the warrant. In *Zurcher v. Stanford Daily*, 436 U.S. 547, 554 (1978), the Court held that when the government seeks a warrant to search for and seize materials protected by the First Amendment, the issuing magistrate may enforce "the preconditions for a warrant – probable cause, specificity with respect to the place to be searched, and the things

to be seized, and overall reasonableness – in order to protect against searches or seizures that exceed the scope of the government's probable cause or disrupt First Amendment activities." 436 U.S. at 565-66.[3]

In *Tamura*, the Court applied this principle (without mentioning *Zurcher*) in ruling that when "the need for transporting the documents [to complete a search] is known to the officers prior to the search, they may apply for specific authorization for large-scale removal of material, which should be granted by the magistrate issuing the warrant only where on-site sorting is infeasible and no other practical alternative exists." 694 F.2d at 596. More recently, in *United States v. Hill*, 459 F.3d 966, 975 (9th Cir. 2006), the Court explained that the government may ordinarily seize computer media to determine whether it contains information specified in a search warrant only when the government makes "some threshold showing" that the government needs to "'seize the haystack to look for the needle.'" The Court explained, "We do not approve of issuing warrants

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[3] *Zurcher* requires rejection of the observation offered by the district court in the Central District of California (and quoted by the dissent (at 1156)) that a search warrant is "not the correct procedure for obtaining documents for [sic] a third party who is not a suspect." ER Tab 2B at 8. In *Zurcher*, the Court squarely held that "valid warrants may be issued to search *any* property, whether or not occupied by a third party, at which there is probable cause to believe that fruits, instrumentalities, or evidence of a crime will be found." The Court explained that "it is untenable to conclude that property may not be searched unless its occupant is reasonably suspected of crime and is subject to arrest." *Id.* at 559.

authorizing blanket removal of all computer storage media for later examination when there is no affidavit giving a reasonable explanation...as to why a wholesale seizure is necessary." *Id.* at 976 (citing *Tamura*, 694 F.2d at 595); *see United States v. Hay*, 231 F.3d 630, 637 (9th Cir. 2000) (seizure of entire computer reasonable because affidavit "justified taking the entire system off site because of the time, expertise, and controlled environment necessary for a proper analysis").

In short, the panel's decision that agents executing a warrant may obtain a magistrate's approval to seize intermingled files for later review is wholly consistent with the approach approved by this Court and the Supreme Court. Appellees (and the dissent) nevertheless attack the application of that precedent to this case, arguing that the protocol that determined whether the government could seize computer media for off-site search consisted of "boilerplate." Pet. 2, 10, Dissent at 1168. That contention is erroneous in several respects.

First, the Court followed *Hill* in holding that the affidavit in support of the warrant "must contain a candid recitation of the available information" bearing on the question whether the agents may seize material for off-site review. Maj. Op. 1122. Nothing in the panel's decision prevents a magistrate judge from scrutinizing the adequacy of the government's "recitation" or giving executing officers more detailed instructions to guide the decision whether to review

materials off-site in an appropriate case.

Second, the purpose of the protocol governing removal for off-site review is not to limit the scope of the search, but only where it occurs. The protocol is thus intended to guide the executing officers in making a straightforward decision: whether it is feasible to sort through intermingled files on-site or whether instead officers should be permitted to take intermingled files off-site for later review. Here, as the panel pointed out, the protocol reasonably put that decision into the hands of "law enforcement personnel trained in searching and seizing computer data." Maj. Op. 1088. Appellees fail to explain how the warrant could have given the executing officers more guidance in making that decision than the alleged "boilerplate" contained.

In contrast to the procedure employed by the agents and approved by the panel, appellees urge the Court to adopt a procedure that finds no support in the law and would be completely unworkable in practice. Appellees appear to assert (Pet.12) that when the government encounters intermingled data in executing a search for records likely to be found in a computer – that is, in virtually every search of a computer – it should not be allowed to remove the intermingled data for later review unless all the data is sealed and turned over to a magistrate judge to sift out the information specified in the warrant. As this Court pointed out in

*Hill*, however, requiring post-seizure review by magistrate judges would result in greater and lengthier privacy intrusions. If agents who wish to remove records that they are entitled to examine must seal those records for a magistrate judge to review, they will have a strong incentive simply to stay on the premises until they have looked at every document or computer file that could contain the information specified in the warrant. "'If the search took hours or days, the intrusion would continue for the entire period, compromising the Fourth Amendment value of making police searches as brief and non-intrusive as possible.'" *United States v. Hill*, 459 F.3d at 975 (quoting *United States v. Hill*, 322 F. Supp. 2d 1081, 1089 (C.D. Cal. 2004) (Kozinski, J., sitting by designation)).

Moreover, *Tamura* does not require the procedure that appellees advance. As the panel explained, *Tamura* distinguishes between two situations: first, when agents know in advance that they may have to remove data to sort through intermingled files, they should apply to the magistrate "for specific authorization for large-scale removal of material," 694 F.2d at 596; second, the *Tamura* Court "suggest[ed]" that in other instances, "Government and law enforcement officials generally can avoid violating fourth amendment rights by sealing and holding the documents pending approval by a magistrate of a further search." 694 F.2d at 565-96. Either approach, the *Tamura* Court explained, would satisfy the "essential

safeguard" that "wholesale removal must be monitored by the judgment of a neutral, detached magistrate." Here, agents employed the first approach by including a protocol in the warrant and supporting affidavit that guided the officers' decision whether to remove data for later review. The panel found that the warrant complied with *Tamura*, and that ruling is consistent with the plain language of that decision.

Contrary to appellees' suggestion, moreover, the second approach suggested by *Tamura* does not require magistrate judge review of the intermingled documents. Instead, *Tamura* contemplates that when officers confront an unanticipated need to transport intermingled documents off-site to complete their search, they should obtain permission from the issuing magistrate to do so. That dicta does not apply here because the agents anticipated the potential need to transport information off-site to complete their search and obtained the necessary prior authorization.

If, however, *Tamura*'s "suggest[ion]" that officers executing a warrant "seal[] and hold[] the [intermingled] documents pending approval by a magistrate of a further search" is construed to require magistrates actually to review seized documents, it is unworkable and unrealistic and may violate the separation of powers. In virtually every case in which the government obtains a warrant to

search a computer, information that falls within the warrant will be intermingled with a substantial quantity of information that is not within the warrant. Federal magistrate judges have neither the time nor the expertise to conduct such searches, and requiring them to do so would improperly involve them in the law enforcement function of gathering evidence. *See Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 327-28 (1979). That approach, moreover, would delay federal investigations while investigators waited for magistrate judges to familiarize themselves with the government's investigation and complete their review of seized materials. Litigation will ensue if either the government or the party aggrieved by the search disagrees with the magistrate's analysis. The *Tamura* Court could not have intended that result, and this Court should not adopt it.

The dissent (at 1170-71) also faulted the government for not accepting the representations of CDT personnel as to where documents or files specified in the warrant would be found. As the majority explained, however, CDT personnel became uncooperative during the course of the search, and they apparently misled the government about where documents specified in the warrant would be found. *See* Maj. Op. 1088-89. Only after the agents had been on the scene for several hours did CDT personnel agree to identify the computer files responsive to the warrant. Even if the agents had some obligation to accept CDT's representations

about where the objects of the search could be found, CDT's course of conduct justified the agents in disregarding CDT's assurances that it had supplied all responsive data.

More generally, acceptance of appellees' contention (which has no basis in the Fourth Amendment) would put government agents at the mercy of the competence and honesty of the occupants of searched premises. Computer files can be placed in the wrong folder or directory, given idiosyncratic or nondescriptive names, or otherwise concealed. Thus, the government may not discover relevant information even when the occupants of the searched premises act in good faith in identifying responsive information. *See United States v. Adjani*, 452 F.3d 1140, 1150 (9th Cir. 2006) (because "[c]omputer files are easy to disguise or rename," government "should not be required to trust the suspect's self-labeling when executing a warrant"); *United States v. Hill*, 322 F. Supp. 2d at 1090-91 ("Computer records are extremely susceptible to tampering, hiding, or destruction, whether deliberate or inadvertent.") (internal quotation marks and citation omitted). Moreover, imposing the requirement urged by appellees would require agents to decide (at the risk of having evidence suppressed) whether to accept the representations of the occupants of searched premises as to where information or evidence can be found.

Even if appellees' alarmist characterizations of the panel's reasoning are accepted at face value, this case does not represent the intrusion into the privacy of individual medical records of ordinary citizens that they find in it. The information that the government sought through the warrant consisted of results of testing to determine whether professional athletes took illegal steroids. The athletes agreed to the testing in a collective bargaining agreement negotiated by their union, Maj. Op. 1086 n.8, even though knowing possession of these steroids is a federal crime. *See* 21 U.S.C. §§ 841, 844. In short, the CDT and Quest searches were aimed at gathering information about professional athletes who agreed to submit to the tests so that Major League Baseball could determine the extent to which they possessed or used illegal steroids.[4] The baseball players' voluntary decision to undergo the potentially incriminating drug tests distinguishes this case from *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), in which government officials obtained urine tests from pregnant women seeking medical treatment without the women's consent to determine whether they had engaged in criminal activity.

Appellees and the dissent also take issue with the fact that the officers

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[4] Even if, as the dissent notes (at 1194-95), some of the tests yielded false positives, each positive test established probable cause to believe that a federal crime occurred, either through the possession or distribution of illegal steroids.

obtained a second warrant to seize information that they discovered in the intermingled documents. If, however, officers reviewing materials in a permissible search to locate documents falling within a warrant come across evidence of another crime, they may, at the least, obtain a warrant to seize that information. In other words, officers lawfully perusing documents to determine whether they fall within a warrant are not required to ignore evidence of a crime that they detect in the course of that otherwise legal examination of the document. *See Andresen v. Maryland*, 427 U.S. at 481-84 (upholding seizure of documents outside of warrant because officers conducting search recognized relevance to defendant's criminal activity). Accordingly, regardless of whether the plain view doctrine applies, *see United States v Rude*, 88 F.3d at 1551-53, officers may obtain a warrant to seize a document when an otherwise lawful review of that document during the execution of a warrant establishes probable cause to believe it is evidence of a crime.

Finally, even if appellees had identified error in the panel's Fourth Amendment analysis, en banc review is not appropriate. Appellees' challenge to the search arises out of a Rule 41(g) motion. Since its 1989 amendment, Rule 41(g) no longer includes an exclusionary rule, and the purpose of a Rule 41 motion is primarily to determine whether the government has a reasonable need

for seized property during an investigation. *See* Fed. R. Crim. P. 41, Advisory Comm. Notes to 1989 Amendments; *United States v. Mills*, 991 F.2d 609, 612 (9th Cir. 1993) (Rule 41(g) motion properly denied if "the government's need for the property as evidence continues") (internal quotation marks and citation omitted). Rule 41 is not intended to be a means for suppressing evidence, because that determination requires consideration of principles of standing, the exclusionary rule, and the purposes to which the government may put the evidence at trial. Advisory Committee Notes; *J.B. Manning Co. v. United States*, 86 F.3d at 927-28 ("suppression and return of property are separate and distinct inquiries") (internal quotation marks and citation omitted). Suppression, however, is exactly what appellees are seeking; they seek the return of physical evidence and all copies of documents seized during the searches. That relief is ordinarily unavailable under Rule 41(g), and, accordingly, it would be inappropriate for this Court to grant rehearing en banc to consider whether appellees are entitled to it.[5]

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[5] The petition also alleges (Pet. 13) that the panel majority disregarded district court findings of fact and "acted as fact finder." But the district courts' finding that the government acted in "callous disregard" of the baseball players' rights is a mixed question of law and fact reviewed for abuse of discretion, *see Ramsden*, 2 F.3d at 324, and the determination of the appropriate procedure for seizing electronic storage material for later off-site search presents a legal, not a factual, question. Appellees do not explain how any of the allegedly disregarded facts bears on that legal determination. Rehearing should be granted for questions of "exceptional importance," not to redress purported mischaracterizations of facts

## II. En banc review is not necessary to protect the finality of judgments

Appellees assert (Pet. 14-16) that the panel's decision conflicts with this Court's decisions concerning the finality of judgments. In support of that contention, they cite a single case, *In re Palmer*, 207 F.3d 566 (9th Cir. 2000), in which this Court simply reiterated general principles of collateral estoppel and found that it did not apply. Plainly, *Palmer* does not conflict with this case.

Nor is en banc review warranted to correct the panel's decision. Appellees argue that because Judge Cooper in the Central District of California found the CDT search illegal, collateral estoppel precludes relitigation of the lawfulness of that search in the Rule 41 motion filed in Nevada. As the panel pointed out, however, Judge Mahan considered the legality of the Nevada search before Judge Cooper ruled on the CDT search. Appellees concede (Pet. 15 n.42) that in *Orion Tire Corp. v. Goodyear Tire & Rubber Co.*, 268 F.3d 1133, 1135-36 (9th Cir. 2001), this Court held that "[t]he direct appeal of a judgment that *predates* the judgment asserted to have claim preclusive effect is not a 'future action' that can be barred by collateral estoppel." Accordingly, Judge Cooper's opinion cannot have collateral estoppel effect on this Court's consideration of Judge Mahan's ruling.

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that are immaterial to the court's decision.

Appellees also contend that the ruling by the district court in the Northern District of California should have preclusive effect on the panel's decision. But the district court limited its ruling to "just the material that would have been obtainable under the April 30th [2004] search warrant," not the April 7, 2004 warrants to search CDT and Quest. In addition, neither the majority nor the dissent considered whether the Northern District order had preclusive effect.

## III. The panel correctly reversed the order quashing the subpoenas

Appellees cursorily argue (Pet. 17-18) that rehearing en banc should be granted of the panel's decision overturning the order by the district court in the Northern District of California to quash the subpoena issued on May 6, 2004. The district court found that issuing the subpoenas to obtain the same information that the government obtained from the searches constituted harassment and was unreasonable. As the panel held, this Court approved the issuance of contemporaneous search warrants and subpoenas in *In re Grand Jury Subpoenas Dated December 10, 1987*, 926 F.2d 847, 854 (9th Cir. 1991). Appellees do not take issue with the panel's legal analysis or even acknowledge this Court's decision in *In re Grand Jury Subpoenas*.

Instead, appellees argue (Pet. 18) that the panel should have upheld the order quashing the subpoenas because of the "sensitive and private nature of the

records" sought by the subpoenas. But information is not immune from subpoena simply because it may be "sensitive" in some respect. In *Branzburg v. Hayes*, 408 U.S. 665, 680 (1972), the Court specifically held that "neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence." The Court further found that the public interest in pursuing and prosecuting crimes outweighed any interest in protecting the sources of information about those crimes. The same holds true here: a court may not quash a subpoena simply because it determines that the athletes' testing records constitute "sensitive" medical records.[6]

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[6] The grand jury subpoenas sought the same material that the government had obtained in prior search warrants. Therefore, if en banc review is granted, appellees would not be entitled to relief unless the en banc Court rejected the panel's analysis of both the Rule 41 motion and the subpoenas.