No._____

In The
Supreme Court of the United States

TRACY CHANG AND HOWARD HSU,
Petitioners,
v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Defendants requested instructions on their theory of defense, that they relied in good faith upon the professional advice of their CPAs when preparing the tax returns at issue in this matter, tax return preparers who publicly marketed themselves as being able to reduce taxes dramatically, when all returns were prepared, signed and submitted by the tax return preparers. May a court refuse to give an instruction concerning a criminal defendant's theory of defense by asserting that the instruction concerning the elements of the charged crime encompasses the defendant's theory of defense?

2. May a search warrant—which did not limit the search by time or criminal activity, which sought twenty broad categories including "all electronic devices," and which the district court recognized afforded discretion to the officers executing the search—be upheld based on modifications imposed by the district court *after* the search was conducted and all the seized items analyzed?

3. Does an individual have standing under the Fourth Amendment to contest the search of a house in which he stored personal and business effects in closed containers outside of commons areas, maintained a bedroom, and occasionally slept in; he was a specific target of the search warrant; and his personal and business effects were seized?

PARTIES TO THE PROCEEDING BELOW

All the parties are listed in the caption.

RULE 29.6 STATEMENT

None of the petitioners is a nongovernmental corporation. None of the petitioners has a parent corporation or shares held by a publicly traded company.

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OTHER AUTHORITIES

Tracy Chang and Howard Hsu respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Memorandum of the Court of Appeals is unreported and is found at Appendix, App. 1. The district court's final judgment against Petitioners is found at App. 7 and 22. The order of the United States District of Northern California denying Petitioners' motion to suppress is unreported and is found at App. 37. The Court of Appeals' order denying Petitioners' timely petition for rehearing and rehearing en banc was entered September 5, 2018, and is found at App. 59. The district court's instructions to the jury is found at App. 61.

JURISDICTION

Petitioners seek review of the decision of the United States Court of Appeals for the Ninth Circuit entered on July 17, 2018. Timely petitions for rehearing and rehearing en banc were denied on September 5, 2018. App. 59–60. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 4

The right of the people to be secure in their

persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. § 371 – Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

26 U.S.C. § 7206 – Fraud and false statements

Any person who—

(1) Declaration under penalties of perjury

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance

> Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or
>
> [. . .]
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

The Internal Revenue Service ("IRS") initiated a criminal investigation into an internet affiliate-marketing[1] business, Didsee Corporation ("Didsee"), for the 2007, 2008, and 2009 tax years, which resulted in criminal charges for tax evasion against Didsee's two owners and operators, Tracy Chang ("Chang") and Howard Hsu ("Hsu"), mother and son (collectively, "Petitioners"). The United States alleged that Hsu conspired with Chang to defraud the United States in

[1] Affiliate marketing is the process of earning a commission by promoting other people's (or companies') products.

violation of 18 U.S.C. § 371. Chang was also charged with willfully making and subscribing a false 2008 corporate income tax return for Didsee in violation of 26 U.S.C. § 7206(1). Hsu was also charged with three counts of willfully aiding and assisting in the preparation of a false tax return related to the 2008 tax return, the 2009 tax return, and the amended 2007 tax return for Didsee, each in violation of 26 U.S.C. § 7206(2).

Search Warrant

In the course of the IRS investigation, a search warrant was obtained and executed for a single-family residence at 3435 Clement Street, San Francisco, California—the current residence of Chang and the second home of Hsu, where he maintained a bedroom, where he occasionally slept, where he received mail, and where he stored personal and business papers and effects in locked containers outside of common areas.

The search warrant specifically targeted ten "persons, entities, or addresses", including Chang and Hsu. App. 81–82 The warrant then authorized the seizure of twenty broad categories of documents comprising all business records, including all: (16) passwords or other similar information to access computers; (17) electronic devices; (18) computer software; (19) instructions relating to any electronic device; and (20) "stored electronic data that might help identify who was using a computer at a particular time." App. 82–86. The warrant instructed the

searching officers to search for documents "including the time period December 2006 until January 2010" and to search for "records, documents, files, or materials, in whatever form…" App. 81–82. The warrant did not specify any alleged criminal activity for which the search was being conducted. See App. 77–92. Though the IRS special agent's affidavit in support of the application for the search warrant specifically identified the suspected crimes, as well as other specific information absent from the Description of Items to be Seized in the search warrant itself—including financial account numbers, time frames, sums, names, and email addresses—this information was not contained in the search warrant and the supporting affidavit was not attached to the search warrant given to the searching officers. See *ibid.*

According to search warrant inventory, personal records and documents of both Chang and Hsu were seized, including: a daily planner with a black leather cover from the master bedroom; a copy of Hsu's driver's license (dated September 10, 1998); a social security statement; news articles from 2000 through 2011; an unspecified business proposal from the year 2000; 2007 and 2008 federal tax returns; a 2009 tax return for John Hsu and Chang; personal communications between Chang and Hsu sent after January 1, 2010; bank statements and bills from multiple bank accounts from 2006 to 2010; accounts in the name of various individuals and Didsee

Corporation; utility bills and personal expenditures of Hsu; a document written in Chinese re: tax matters; one imaged HP Pavilion computer; one imaged Acer Aspire laptop; and an external Seagate hard drive. App. 89–92. No effort was made to sequester seizable information from the computers at the property, as the warrant instructed, and the government never destroyed seized data that fell outside the warrant's scope. See App 87–89.

On August 4, 2016, Petitioners jointly moved to suppress evidence obtained from the search. In a written order, the District Court denied Hsu standing to contest the search warrant, then held that "evidence pertaining to categories 4, 6, 10, 16, 18, and 20 of the search warrant, as well as evidence not pertaining to the time period December 2006 to January 2010, is suppressed as to Chang," but total suppression was not required because the "defective categories concerned 'only a specific subset of items . . . and the lion's share of the categories did not violate the Fourth Amendment.'" App. 54, 37–58.

Evidence at Trial

During the jury trial, the prosecution called various IRS special agents who were involved in the search conducted at 3435 Clement Street. These officers testified that they imaged "bit-for-bit" the laptops and hard drives seized from 3435 Clement Street, even though Chang protested to the officers executing the search, and that the images from the

computers were and are retained by the IRS. The prosecution relied on evidence from these computers during trial.

Petitioners presented evidence that they relied upon the advice of two Certified Public Accountants whom they had hired to prepare Didsee's 2007, 2008, 2009, and amended 2007 tax returns. Petitioners introduced evidence that Hsu first approached the CPA to prepare the 2007 federal income tax return, which was not part of the criminal charges against Petitioners, and the CPA used that as a platform to persuade Petitioners that they were overpaying tax and the CPA could provide "a step-by-step action plan to position yourself and using tax loopholes so you can legally lower your tax" by, on average, $20,000 to $150,000 per year. App. 93–104. In response, Hsu expressed concern that he did not want to move "personal expenses, which are minimal, over to [Didsee]" to minimize his taxes, but the CPA assured him that he can still lower his taxes without shifting personal expenses and persuaded Hsu to fill out a questionnaire that she provided. *Ibid.* Throughout these memorialized conversations, Hsu answered every question and provided the information that the CPA requested; the CPA never expressed concern that information was withheld. *Ibid.* The CPA then provided to Hsu a detailed memorandum explaining how Hsu should create three new entities to shift his expenses, such as "out-of-pocket medical expenses as a

business expense," and begin royalty payments among these companies to reduce his taxes. App. 105–170. Petitioners used the same CPA, and her successor-in-interest, to file Didsee's next three tax returns, which comprised the basis of the criminal charges brought against them. During cross-examination of the CPA, counsel for Petitioners relied upon this theory of defense and confirmed that the CPA wrote books entitled "Secrets of a Tax-Free Life," "Tax Breaks of the Rich and Famous," "Breaking the Tax Code – How to Keep More of What you Earn," and "You Can Deduct That? – How Small Business Owners Can Transform Ordinary Spending Into Tax Savings".

Jury Instructions

Petitioners requested two jury instructions that encompassed their theory of defense, one for good faith and one for good-faith reliance. Petitioners' proffered good faith instruction read:

> The government cannot establish the element of willfulness or intent to defraud without negating a defendant's claim that he was ignorant of the law, that he misunderstood the law, or that he held a good-faith belief his conduct did not violate the law.

This was a direct quote from the Ninth Circuit case, *United States v. George*. 420 F.3d 991, 999 (9th Cir. 2005). Petitioners' proffered good-faith reliance instruction read:

A complete defense to the charges in the indictment is where the tax violation was the result of a failure of an accountant to exercise due care or diligence, and not the result of the Defendants' actions. Title 26, Code of Federal Regulations, Section 16694-1 provides that an accountant or tax preparer who prepares taxes for a person "may not ignore the implications of information furnished to the preparer or actually known by the preparer. The preparer must make reasonable inquiries if the information as furnished appears to be incorrect or incomplete. The preparer must make appropriate inquiries to determine the existence of facts and circumstances required by a[n] [Internal Revenue] Code section or regulation as a condition to the claiming of a deduction." If you find that an accountant or tax preparer ignored any information, did not make reasonable inquiries as to whether any information provided to him was complete and correct, or otherwise was not diligent, thorough or careful to the best of his ability, and that the failure to exercise due care caused the tax violations charged in the indictment, you must acquit the Defendants.

This was derived directly from an instruction approved by the Eleventh Circuit in *United States v. Kottwitz*. 614 F.3d 1241, 1269 (11th Cir. 2010), *opinion withdrawn and reissued in relevant part*, 627 F.3d 1283 (11th Cir. 2010).

The district court rejected both of Petitioners' requested instructions on their theory of defense. See App. 61–76. Instead, the district court instructed the jury only upon the elements of the charges and the definition of willfulness:

> In order to prove that the defendants acted "willfully," the government must prove beyond a reasonable doubt that the defendants knew federal tax law imposed a duty on him or her, and the defendants intentionally and voluntarily violated that duty.

App. 73.

On February 13, 2017, the jury returned a guilty verdict on all counts. Final judgment was entered on June 2, 2017. App. 7–36.

Ninth Circuit's Decision

Petitioners each filed a timely appeal arguing that the district court erred in its ruling on Petitioners' motion to suppress and jury instructions, among other issues. In their appeal, Petitioners' relied on the many cases reiterating the necessary limitations on officers executing a search warrant, as well as recent case law concerning theory of defense instructions, particularly

concerning good faith, in criminal tax cases.

The Ninth Circuit submitted the case without oral argument and affirmed. App. 1–6. Regarding Petitioners' Fourth Amendment challenge, the Ninth Circuit wrote:

> First, the court correctly concluded that Hsu lacks Fourth Amendment standing to challenge the search of Chang's house. See United States v. $40,955.00 in U.S. Currency, 554 F.3d 752, 757–58 (9th Cir. 2009) (holding that an adult who did not live with her parents lacked Fourth Amendment standing to challenge a search of their house despite the fact that she "had free access and a key to the house . . . [and] stored items in [a] safe" that was opened during the search). Second, because the search warrant limited the items that could be seized to those related to a specific time period, it was not a "general" warrant requiring total suppression. See United States v. Kow, 58 F.3d 423, 427 (9th Cir. 1995) (holding that a warrant was defective because, among other shortcomings, it "did not limit the scope of the seizure to a time frame within which the suspected criminal activity took place"). The district court correctly concluded that the

> overbroad portions of the warrant were severable and required only partial suppression. See United States v. SDI Future Health, Inc., 568 F.3d 684, 707 (9th Cir. 2009) (holding that partial suppression was appropriate where "the lion's share of the [warrant] did not violate the Fourth Amendment"); United States v. Kow, 58 F.3d 423, 427 (9th Cir. 1995) (holding that a warrant was defective because, among other shortcomings, it "did not limit the scope of the seizure to a time frame within which the suspected criminal activity took place"). Finally, we agree with the district court that the affidavit submitted to obtain the warrant provided the judge with a substantial basis to conclude that there was probable cause to search Chang's house, including any computers found there. United States v. Gourde, 440 F.3d 1065, 1069 (9th Cir. 2006) (en banc).

App. 2–3.

Regarding Petitioners' challenge to the district court's jury instructions, the Ninth Circuit wrote, in pertinent part:

> Defendants were not entitled to either a "good faith" or a "reliance" instruction, because the court instructed the jury that

> it could convict Defendants only if it found that they "knew federal tax law imposed a duty on [them], and the[y] intentionally and voluntarily violated that duty." See United States v. Sarno, 73 F.3d 1470, 1487–88 (9th Cir. 1995) (holding that a defendant is not entitled to either a good-faith or a reliance instruction where an adequate instruction on specific intent is given).

App 3–4.

Jurisdiction

The Northern District of California had jurisdiction over this matter pursuant to 18 U.S.C. § 3231; the causes of action were based on 18 U.S.C. § 371 and 26 U.S.C. § 7206. The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291; the appeal was from a final judgment of the Northern District of California entered on June 2, 2017.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT REVIEW OF THE COURT OF APPEAL'S DECISION BECAUSE IT CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS

A. This Court Should Grant Certiorari To Resolve A Split

Among the Circuits As To Whether And When A Court Must Instruct The Jury Regarding Good-Faith Reliance As A Theory Of Defense In Federal Tax Fraud Cases

Following this Court's guidance, Circuit Courts agree that "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." See, e.g., *Matthews v. United States*, 485 U.S. 58, 63 (1988); *United States v. Condon*, 132 F.3d 653, 656 (11th Cir. 1998); *Sarno*, 73 F.3d at 1484; *United States v. Lindo*, 18 F.3d 353, 356 (6th Cir. 1994). More specifically, a defendant is entitled to an instruction on his theory of defense if "(1) the instruction provides a correct statement of the law; (2) the theory of defense is supported by the evidence; (3) the theory of the defense is not part of the government's charge; and (4) the failure to include the instruction would deprive the defendant of a fair trial." See, e.g., *United States v. Kokenis*, 663 F.3d 919, 929 (7th Cir. 2011).

There exists an exception to this general rule in federal fraud cases: an instruction on a defendant's good faith defense need not be given if the jury is properly instructed concerning the requisite specific intent of willfulness. See e.g., *United States v. Pomponio*, 429 U.S. 10, 12–13 (1976); see also *Cheek v. United States*, 498 U.S. 192 (1991). This exception

exists because, in the context of fraud cases, a defense of good faith is the inverse of the specific intent required for the crime charged—a voluntary and intentional violation of the law. See *Pomponio*, 429 U.S. at 12–13.

Since this exception was announced, Circuits have split as to whether the exception applies equally to a good-faith reliance defense and accompanying instruction.[2] Notwithstanding the normal rules governing 'theory of defense' requests, the Ninth and Seventh Circuits have held that the failure to give an instruction on a good-faith reliance defense "is not fatal so long as the court clearly instructed the jury as to the necessity of 'specific intent' as an element of a crime" by way of a general instruction. *Sarno*, 73 F.3d at 1487; *United States v. Brimberry*, 961 F.2d 1286, 1291 (7th Cir. 1992).

The Eleventh and Tenth Circuits disagree.[3]

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[2] Circuits agree that, to be entitled to a good-faith reliance instruction, "a defendant must show that (1) he fully disclosed all material facts to his advisor, and (2) he relied in good faith on the advice given to him." *Condon*, 132 F.3d at 656. This may be shown via circumstantial evidence and does not need to come from a defendant's own testimony. See, e.g., *Kokenis*, 662 F.3d at 929.

[3] The Eighth and Sixth Circuits, while not having ruled on this issue specifically, seem to lean toward the position that a good-faith reliance defense may not be refused simply because the jury is instructed as to the required specific intent for the crimes at issue. See *Eighth Circuit Model Criminal Jury*

There, a good-faith reliance instruction may not be refused simply because the court instructed the jury as to the necessity of specific intent as an element of the crime. *Kottwitz*, 614 F.3d at 1272; *United States v. Morris*, 20 F.3d 1111, 1117 (11th Cir. 1994); *United States v. Haddock*, 956 F.2d 1534, 1547 (10th Cir. 1992), *abrogated on other grounds by United States v. Wells*, 519 U.S. 482 (1997) ("In this circuit, we have held that general instructions on willfulness and intent are insufficient to fully and clearly convey a defendant's good faith defense to the jury."). Rather, "[w]hether the defendant fully disclosed the relevant facts, failed to disclose all relevant facts, or concealed information from his advisor, and relied in good faith in his advisor are matters for the jury—and not the court—to determine, under proper instruction." *Kottwitz*, 614 F.3d at 1272; see also *United States v. Johnson*, 713 F.3d 654, 661 (11th Cir. 1983) ("credibility choices lie within the province of the jury.").

Instructions, Instruction 9.08B, Committee Comments (" 'Good faith' is a theory of defense in tax evasion, failure to file a tax return, employment tax, and false return cases. Where the defendant has presented evidence of good faith, he or she is entitled to a good-faith jury instruction. See Instruction 9.08A, infra; *United States v. Kouba*, 822 F.2d 768, 771 (8th Cir. 1987)."); *United States v. Rozin*, 664 F.3d 1052, 1060–61 (6th Cir. 2012) (examining evidence presented at trial rather than instruction concerning elements of crime and specific intent).

Both the district court and the Ninth Circuit rejected Petitioners' requested jury instructions on their two theories of defense, good faith and good-faith reliance, because "the court instructed the jury that it could convict Defendants only if it found that they 'knew federal tax law imposed a duty on [them], and the[y] intentionally and voluntarily violated that duty.'"[4] App. 4. Unlike the Eleventh or Seventh Circuits, the Ninth Circuit disregarded the evidence supporting Petitioners' request. See *ibid.* Yet, when considering that no instruction mentioned good faith, the courts removed a question of fact from the jury in a case where a reasonable jury could find that Petitioners' relied on the advice of their CPAs in good faith, which is a complete defense to the charges brought against them. *Kottwitz*, 614 F.3d at 1271.

As expounded above, Petitioners' counsel introduced evidence at trial that Petitioners' did not seek to minimize their taxes until persuaded to do so by the CPA hired to file Didsee's 2007 tax return. App.

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[4] In the Ninth Circuit, a failure to instruct the jury upon a legally and factually cognizable defense is not subject to harmless error analysis. *Sarno*, 74 F.3d at 1485. The legal adequacy of the instructions actually given by the district court is reviewed *de novo*, and the district court's determination of the factual basis for a requested instruction is reviewed under an abuse of discretion standard. *Ibid.*; see also *United States v. Chavin*, 316 F.3d 666, 670 (7th Cir. 2002) (district court's refusal to give a theory of defense instruction reviewed *de novo*).

93–104. Petitioners' counsel further introduced evidence that Hsu responded to each of the CPA's questions, and the CPA never expressed concern over the information provided. *Ibid.* The CPA then prepared a detailed memorandum for Petitioners explaining how to create new entities, shift expenses, and begin royalty payments between the entities as a proper and legal way to minimize their tax payments by, on average, $20,000 to $150,000 annually. *Ibid.*; App. 115–170. Petitioners then used the same CPA, and her successor-in-interest, to file their next three federal tax returns, which were the sole basis of the charges against them. Based upon this evidence, "a juror could find … evidence to conclude that [Petitioners] provided all material facts to their accountant, and … could find … evidence that [Petitioners] relied in good faith on that accountant's advice and decisions." *Kottwitz*, 614 F.3d at 1274; see also *Sarno*, 73 F.3d at 1487 ("The quantum of evidence sufficient to support a 'theory of the case' instruction is slight indeed."); *Kokenis*, 662 F.3d at 929 ("A defendant 'only needs to demonstrate a foundation in the evidence, 'however tenuous,' to support his theory…").

Refusing to give Petitioners' requested theory of defense instruction despite this evidence is tantamount to refusing an instruction on a theory of defense simply because the jury is properly instructed concerning the elements of the crime. This removes a

material question of fact from the jury's consideration. See *United States v. Sassak*, 881 F.2d 276, 279 (6th Cir. 1989) ("It is undisputed that failure to properly charge the jury as to the willfulness element of the offense would have substantially impaired [the] defense."). Accordingly, this Court should grant review to resolve the split between the Ninth Circuit—which will refuse to instruct a jury concerning a good-faith reliance defense in effectively every case—and the Eleventh or Tenth Circuits—which submit the question of good faith to the jury, under proper instruction, as a question of fact.

B. This Court Should Grant Certiorari To Resolve The Conflict Between The Ninth Circuit's Decision And The Many Decisions Of Other Circuits, Following Guidance of This Court, Stressing The Importance Of Limiting The Discretion Of The Officer Executing A Search Warrant

As this Court held long ago: "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, *nothing* is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275

U.S. 192, 196 (1927) (emphasis added). Yet, contrary to this clear instruction, the Ninth Circuit upheld a search warrant in this case that bestowed broad discretion to the officers executing it, an outcome that seemingly would not have been possible in other Circuits.

The Ninth Circuit stated as follows: "[B]ecause the search warrant limited the items that could be seized to those related to a specific time period, it was not a 'general' warrant requiring total suppression." App. 2. However, the warrant contained no such limit. The warrant actually read: "The property sought to be seized is limited to the records, documents, and items described below *including* the time period December 2006 until January 2010..." App. 81 (emphasis added).

The word "included" has meaning—it cannot be ignored or read out of the warrant. Quite clearly, it directs the officers to seize documents outside the specified dates; if the dates specified are included, there must be documents on other dates that are also included, so the warrant contained no temporal limitation. Warrants without a temporal restriction have been held overbroad, absent extenuating circumstances. See, e.g., *United States v. Abboud*, 438 F.3d 554, 575–76 (6th Cir. 2006) (warrant held overbroad for failure to limit business records by relevant dates); *United States v. Ford*, 184 F.3d 566, 576 (6th Cir.1999) (" 'Failure to limit broad descriptive terms by relevant dates, when such dates are available

to the police, will render a warrant overbroad.'" (citations omitted)); *United States v. Abrams*, 615 F.2d 541, 543 (1st Cir. 1980) (warrant suppressed that contained "no limitation as to time," among other shortcomings).

Unlike the Ninth Circuit, the district court recognized the significance of the word "included." It stated: "while the opening paragraph included a date range, it did so with clumsy language that could have been read to either (1) limit the items to be seized to the time period December 2006 until January 2010, or (2) specify that items to be seized should include at least the time period December 2006 until January 2010. See Search Warrant Attachment B." App. 52. While Petitioners disagree that the quoted language could have served as a limitation, it doesn't matter: a warrant that can reasonably be read as specifying that "items to be seized should include at least the time period December 2006 until January 2010" gives the executing officers discretion to treat the dates in the warrant as license to seize documents outside the date range. See *Marron*, 275 U.S. 192; *Abboud*, 438 F.3d at 575–76; *Abrams*, 615 F.2d at 543. In fact, the officers executing the warrant did just that: they seized emails, documents, entire computer hard drives, and other personal information outside the specified time period. App. 89–92. As evidenced by the documents seized, the officers read the search warrant as specifying that the items to be seized should include at

least the time period December 2006 until January 2010, not that the search was limited to that period. Contrary to what the Ninth Circuit seemed to believe, "[t]he government did not limit the scope of the seizure to a time frame within which the suspected criminal activity took place . . ." *United States v. Kow*, 58 F.3d 423, 427 (9th Cir. 1995).

A temporal restriction is not the only omission in the warrant; the lack of particularity is worsened by the absence of any reference to suspected criminal activity to which the subsequent twenty broad categories of documents relate. See App. 77–86; see also, e.g., *In re 6509 Fifth Ave. & Related Props.*, 830 F.3d 66, 99 (2d Cir. 2016) ("[F]or a warrant to meet the particularity requirement, it must identify the alleged crime for which evidence is sought."). This also was recognized by the district court but ignored by the Ninth Circuit. App. 52 ("…the opening paragraph did not identify what those alleged crimes were. The government identifies no portion of the warrant that included this information."). Indeed, the warrant provides even less guidance to searching officers than warrants that simply seek evidence of the violation of a specified statute, which have consistently been struck down across the country as insufficient to meet the Fourth Amendment's particularity requirement. See, e.g., *United States v. Leary*, 846 F.2d 592, 602 (10th 1988) ("An unadorned reference to a broad federal statute does not sufficiently limit the scope of

a search warrant. Absent other limiting factors, such a warrant does not comply with the requirements of the fourth amendment."); *Voss v. Bergsgaard*, 774 F.2d 402, 405–06 (10th Cir. 1985) ("Even if the reference to [18 U.S.C.] section 371 is construed as a limitation, it does not constitute a constitutionally adequate particularization of the items to be seized. … [A] warrant that simply authorizes the seizure of all files, whether or not relevant to a specified crime, is insufficiently particular.") *United States v. Roche*, 614 F.2d 6, 8 (1st Cir. 1980) (limitation of the search at issue to evidence relating to a violation of 18 U.S.C. § 1341 provided "no limitation at all").

Without any temporal limitation or specification of suspected criminal activity, the twenty broad categories of documents sought by the warrant, including an unbridled search and seizure of all electronic devices,[5] is not sufficiently particular to pass Fourth Amendment muster. See *United States v.*

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[5] See *United States v. Galpin*, 720 F.3d 436, 445, 447 (2d Cir. 2013) ("Where … the property to be searched is a computer hard drive, the particularity requirement assumes even greater importance."); *United States v. Onero*, 563 F.3d 1127, 1132 (10th Cir. 2009) (same); see also *United States v. Ganias*, 824 F.3d 199, 217 (2d Cir. 2016) (*en banc*) (the "seizure of a computer hard drive, and its subsequent retention by the government, can give the government possession of a vast trove of personal information about the person to whom the drive belongs, much of which may be entirely irrelevant to the criminal investigation that led to the seizure.").

Galpin, 720 F.3d 436, 445 (2d Cir. 2013) (warrant must "specify the items to be seized by their relation to designated crimes."). Rather, the warrant's expansive categories are "so broad that it 'encompassed every business record that could be found on the premises.'" *United States v. Roberts*, 852 F.2d 671, 672–73 (2d Cir. 1988); see also *United States v. Bridges*, 344 F.3d 1010, 1015–18 (9th Cir. 2003) ("The list is a comprehensive laundry list of sundry goods and inventory that one would readily expect to discovery in any small or medium-sized business in the United States."). It is important to note that Chang's home was searched—the most private location of an individual's life—and Chang and her family were named targets of a warrant lacking other guidance. See *Riley v. California*, 134 S. Ct. 2473, 2491 (2014) (noting sensitive nature of records found in the home); *Dow Chemical Co. v. United States*, 476 U.S. 227, 231 (1986) (discussing the "intimacy, personal autonomy and privacy associated with the home"); see also *United States v. Falon*, 959 F.2d 1143, 1148 (1st Cir. 1992); *United States v. Humphrey*, 204 F.3d 65, 69 n.2 (5th Cir. 1997); 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.6(a) (5th ed. 2012) (property was not, by "its particular character, contraband").

This hazard, while concerning under any circumstance, is only exacerbated by the fact that the warrant explicitly targeted the contents of "all

electronic devices" without any instruction on what the government sought from the computers. See App. 77–86; *Galpin*, 720 F.3d at 447–48; *United States v. Rosa*, 626 F.3d 56, 61–63 (2d Cir. 2010) ("the warrant directed officers to seize and search certain electronic devices, but provided them with no guidance as to type of evidence sought…. We therefore conclude that the warrant failed to describe with particularity the evidence sought and, more specifically, to link that evidence to the criminal activity supported by probable cause.").

Petitioners were faced with the same situation as Mr. Mink in the Tenth Circuit: "The warrant authorized the search and seizure of all computer and non-computer equipment and written materials in Mr. Mink's house, without any mention of any particular crime to which they might be related, essentially authorizing a 'general rummaging' through Mr. Mink's belongings for any unspecified 'criminal offense.'" *Mink v. Knox*, 613 F.3d 995, 1010–11 (10th Cir. 2010). Warrants lacking meaningful parameters on an otherwise limitless search, such as this one, do not satisfy the particularity requirement. See, e.g., *United States v. Stubbs*, 873 F.2d 210, 211–12 (9th Cir. 1989) (lack of "objective standards by which an executing officer could determine what could be seized" and "no reference to any criminal activity" made the warrant defective); *United States v. Spilotro*, 800 F.2d 959, 964 (9th Cir. 1986) (Judge Kennedy) ("The use of generic

descriptions … might not have been fatal had the warrant more specifically identified the alleged criminal activities in connection with which the items were sought.").

Though warrants like this one have been routinely suppressed in other Circuits, the warrant in this case was allowed to stand through a post-hoc interpretation of plain language in the warrant to the contrary: the word "included" does not serve as a limitation, and a temporal limitation alone is insufficient. See, e.g., *Application of Lafayette Academy, Inc.*, 610 F.2d 1, 5, n.4 (1st Cir. 1979).

This Court should grant review to resolve the tension between the Ninth Circuit's ruling—seemingly holding that the district court's super-imposed time restriction suffices to correct any lack of particularity in the search warrant—and this Court's, and other Circuits', many decisions stressing the importance of limiting the discretion of the officers executing the search, not the discretion of the U.S. attorneys after indictment.

C. This Court Should Grant Certiorari To Resolve The Conflict Between The Ninth Circuit's Decision And The Many Decisions Of Other Circuits Concerning Who Has Standing To Contest A Fourth Amendment Search

It is settled law that "in order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of the search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." *Jones v. United States*, 362 U.S. 257, 261 (1960), *overruled on other grounds*, *United States v. Salvucci*, 449 U.S. 83 (1980).

In affirming the district court's conclusion that Hsu lacks standing to challenge the search, the Ninth Circuit disregarded facts in the record showing that Hsu was far more than an occasional visitor to Chang's home: Hsu continuously maintained and occasionally used a bedroom in the home as an overnight resident; Hsu used the home as a business office by storing business proposals, tax forms for Didsee Corporation, personal and business records, and accounting for utility expenditures in closed containers outside of communal areas; and Hsu received mail at the home; all with the blessing and knowledge of the owner and operator of the property, Chang. These facts were undisputed before the district court and admitted by the government on appeal. See App. 40–42.

Despite this, the district court and the Ninth Circuit likened Hsu to an adult who had simply moved out of his parents' house with no ongoing, continuous, or independent relationship to the location. The Ninth

Circuit wrote:

> the [district] court correctly concluded that Hsu lacks Fourth Amendment standing to challenge the search of Chang's house. See United States v. $40,955.00 in U.S. Currency, 554 F.3d 752, 757–58 (9th Cir. 2009) (holding that an adult who did not live with her parents lacked Fourth Amendment standing to challenge a search of their house despite the fact that she "had free access and a key to the house . . . [and] stored items in [a] safe" that was opened during the search).

The Ninth Circuit's decision conflicts with past opinions of this Court and other Circuits that have conferred Fourth Amendment standing to contest a search for similarly-situated individuals, even when the searched location is solely a business office and not a home at all.[6] See, e.g., *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 388 (1920); *Mancusi v. DeForte*, 392 U.S. 364 (1968); *Minnesota v. Olson*, 485 U.S. 91 (1990); *Minnesota v. Carter*, 525 U.S. 83, 102

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[6] See *Riley v. California*, 134 S.Ct. 2473, 2491 (2014) (noting sensitive nature of records found in the home); *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986) (discussing the "intimacy, personal autonomy and privacy associated with the home"); see also *United States v. Falon*, 959 F.2d 1143, 1148 (1st Cir. 1992); *United States v. Humphrey*, 204 F.3d 65, 69 n.2 (5th Cir. 1997).

(1998); see also *Rakas v. Illinois*, 439 U.S. 128, 143 (1978); *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980) (considering all aspects of record in determining whether the defendant held an expectation of privacy); *United States v. Anderson*, 154 F.3d 1225, 1229–33 (10th Cir. 1998). In striking contrast, in the Tenth Circuit, an individual that merely stored containers in a friend's garage, with the friend's permission for unfettered access to check the property, had standing to challenge the search of both the friend's house and garage. *United States v. Harwood*, 470 F.2d 322 (10th Cir. 1972); see also *Salvucci*, 448 U.S. at 91 (property ownership is a "factor to be considered in determining whether an individual's Fourth Amendment rights have been violated."). Similarly, in the Fifth Circuit, an individual had a reasonable expectation of privacy, and thus standing to contest a search, in gambling records stored under his parents' bed even though "he did not reside regularly at his parents' home" because "he kept clothing there and occasionally remained overnight." *United States v. Haydel*, 649 F.2d 1152, 1154–55 (5th Cir. 1981). In the First Circuit, a town mayor was even found to have an expectation of privacy in items he stored in the attic to the building in which he maintained his office, even though the attic was accessible by anyone in the building, because the mayor took steps to segregate his personal items in the attic and because of the personal nature of the calendar book that was seized. *United States v.*

Mancini, 8 F.3d 104, 108–110 (1st Cir. 1993).

Even more than in *Harwood*, *Haydel*, or *Mancini*, Hsu did more than merely store containers in the garage, under the bed, or in the attic in Chang's home; Hsu used the home as a business office and a second residence. Hsu is not attempting to assert Fourth Amendment standing by virtue of his relationship to his parents but in his own right. Cf. *United States v. $40,955.00 in U.S. Currency*, 554 F.3d 752, 757–58 (9th Cir. 2009). Chang's home was the target of the search warrant precisely because Hsu operated his small, family-owned business from that location. As the record shows, all business activity for Didsee took place at the searched location and all records pertaining to the business were stored at that location. The principal reason that location was the subject of the search was that Hsu used that as the location of the business of which he was the "owner and operator." See App. 38.

No place outside the Ninth Circuit would Hsu have been denied standing to challenge the search of these premises. This is a clear conflict among the Circuits concerning a question of exceptional significance in today's world of extended families, bi-coastal, and shared-custody arrangements—in short, a world where the nuclear-family and single-family home is fast becoming the exception rather than the rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

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