No. 11-1026

# In The Supreme Court of the United States

M.H.,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## REPLY TO BRIEF FOR THE GOVERNMENT IN OPPOSITION


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## INTRODUCTION

The Government does not deny that there are hundreds, and likely thousands, of criminal investigations underway as a result of disclosures by a dozen foreign banks. Targets of these investigations have asserted the privilege against self-incrimination and been met by the Government's invocation of the required records exception. This Court should grant certiorari to resolve the confusion among the lower courts as to whether the Fifth Amendment privilege against self-incrimination applies when individuals are required to produce records of foreign bank accounts that are incriminating.

Already three courts have issued written opinions on this issue. One, the Ninth Circuit in this case, found that the requirements of the required records exception were met. In contrast, two federal district courts have found the exception inapplicable in cases with facts identical to this one. Although the Government emphasizes that it has appealed these decisions, it misses the more important point: the divergence among these decisions in cases with identical facts shows the confusion in the law and the need for clarification by this Court. It would be far preferable for this Court to resolve this issue now while hundreds of similar cases are at an early stage. Moreover, the underlying issue in this case – the appropriate scope of the required records exception to the Fifth Amendment – arises in many different contexts.

## THIS COURT SHOULD GRANT REVIEW TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE THAT IS ARISING IN A LARGE NUMBER OF CASES, ABOUT WHICH THE LOWER FEDERAL COURTS DISAGREE, CONCERNING THE APPLICATION OF THE REQUIRED RECORDS EXCEPTION TO THE FIFTH AMENDMENT PRIVILEGE

### A. The Ninth Circuit's Decision Conflicts with This Court's Application of the Required Records Exception

This Court has held that the required records exception is only applicable when three criteria are satisfied: (1) the purpose of the Government's *inquiry* is essentially regulatory, (2) the information sought is of a kind that is "customarily kept," and (3) the records themselves have assumed "public aspects" which render them at least analogous to public documents. *Grosso v. United States*, 390 U.S. 62, 67-68 (1968). The *inquiry* here is made by the grand jury and thus is criminal in nature. The Ninth Circuit collapsed this three-part test into a single prong: whether the record-keeping *requirement* (not the *inquiry*) in question is essentially regulatory.

There is confusion as to the meaning and application of each prong of this test which requires clarification by this Court. As to the first prong, the Government asserts that the BSA is regulatory, not criminal, based on dicta in *Shultz* that the Act "seems to have been equally concerned with civil liability."

*California Bankers Association v. Shultz*, 416 U.S. 21, 76-77 (1974).

*Shultz* is inapplicable because it was a constitutional challenge to the reporting requirements. It did not address the Fifth Amendment's privilege against self-incrimination. The Court noted plaintiffs failed to allege that the required information was incriminating and specifically refused to address the required records exception: "[i]t will be time enough for us to determine what, if any, relief from the reporting requirement [the plaintiffs] may obtain in a judicial proceeding when they have properly and specifically raised a claim of privilege with respect to particular items of information required by the Secretary, and the Secretary has overruled their claim of privilege." *Id.* at 75.

That time has now arrived. M.H. asserted the privilege against compulsory criminal process. This necessitates deciding whether the "inquiry" should be deemed criminal or regulatory. The BSA itself, its legislative history and judicial precedent make clear that its primary purpose is to detect criminal conduct, specifically money laundering, terrorism and tax evasion. (Pet. at pp. 31-34.) But if a statute's primary purpose is criminal law enforcement, should it be deemed otherwise because it also serves a regulatory function?

Tellingly, the Government points to *no* regulatory uses for the required information. FBARs are processed by the same unit that investigates money

laundering and currency transactions and its purpose is purely criminal enforcement. The Government offers no explanation of what it does with the FBAR information – other than prosecuting violators. The bank customer is not "regulated" in any way. In every other required records case, it is the business that is regulated – not the customer.

The problem with the Government's position is that it conflates this Court's analysis concerning the underlying constitutionality of certain provisions with the application of the required records exception. A statute, like the BSA, which does not require the reporting of conduct that is illegal per se, may be constitutional and yet be used for criminal purposes, such that it does not satisfy the regulatory prong of the required records exception. The case which best explains this distinction is *United States v. San Juan*, 405 F. Supp. 686, 693 (D. Vt. 1975).

As to the second prong of the test, whether the records are customarily kept, the Ninth Circuit changed the *Grosso* test by holding that the records are "customarily kept" if the individual has *access* to the information and can obtain it in response to requests from the Government. But no court has held that having access to the business records of a third party is sufficient to meet the requirement that the records be customarily kept by the subpoenaed respondent. The Government says that there is "no authority" for a requirement that the records are "personally" kept by the defendant. But that is

exactly what this Court has held. *Grosso,* 390 U.S. at 68; *Marchetti v. United States*, 390 U.S. 39, 57 (1968).

The Ninth Circuit's test would also render the statute criminalizing the failure to *maintain* records meaningless. 31 U.S.C. § 5322(a). No defendant could be convicted for failing to maintain bank records because the banks always have them.

The final prong of the test examines whether the documents sought have "public aspects." *Grosso*, 390 U.S. at 68; *Marchetti*, 390 U.S. at 57. The Ninth Circuit concluded these are "public documents" because the law requires that the records be kept. (App. at 24-25.) But this is directly contrary to this Court's decisions. *Marchetti* and *Grosso* expressly hold that the mere fact that the Government has required certain information be maintained and/or disclosed, does not make the information public. *Marchetti*, 390 U.S. at 57; *Grosso*, 390 U.S. at 68. This Court needs to decide whether a document is "public" simply because an activity is voluntary and subject to regulatory requirements.

### B. The Confusion Among the Lower Courts

The Government does not deny that the courts disagree about the form and application of the required records exception. The disagreement between the Ninth Circuit and these district courts reflects underlying differences among the Circuits. For example, the Seventh Circuit has held that records required to be kept under the tax laws do not fit within

the required records exception to the Fifth Amendment. *Smith v. Richert*, 35 F.3d 300, 303 (7th Cir. 1994); *United States v. Porter*, 711 F.2d 1397, 1405 (7th Cir. 1983). The Government says that these decisions distinguish reporting requirements that apply to the public as opposed to record keeping requirements imposed as "a condition of engaging in a relatively narrow sphere of activity" subject to government regulation. But nowhere does the Seventh Circuit draw this distinction. Moreover, what is a "narrow sphere of activity"?

Indeed, the Government's distinction is flatly inconsistent with *Marchetti* and *Grosso* which concerned federal tax statutes requiring gamblers to pay an excise tax, register with the IRS, preserve daily records of wagers and permit inspection of books and accounts. Gambling is a narrower activity than maintaining a foreign bank account for any purpose. Yet, this Court found individuals could not be compelled to comply with the gambling reporting requirements.

Contrary to the Government's assertion, many cases have emphasized that the required records exception was meant to apply to records that are kept in the course of engaging in a highly regulated activity. *See, e.g., In re Grand Jury Proceedings, Doe M.D.*, 801 F.2d 1164, 1168 (9th Cir. 1986) (licensed physician required to produce records of sales of dangerous drugs required to be kept and open to inspection by law); *In re Grand Jury Subpoena Duces Tecum, Underhill*, 781 F.2d 64, 65-66 (6th Cir. 1986) (car

dealership required to produce odometer statements required to be reported by federal law). These cases view the required records exception as narrow and applicable to records that are routinely kept as part of operating a regulated business.

The crucial underlying question is: what is the appropriate scope of the required records exception to the Fifth Amendment? Many courts have explicitly said that it is narrow. *See Underhill*, 781 F.2d at 67; *In re Grand Jury Subpoenas*, 772 F. Supp. 326, 333 (N.D. Tex. 1991); *In re Sambrano Corp.*, 441 BR 562, 568 (Bankr. W.D. Tex. 2010). In contrast, the Ninth Circuit and the Government interpret it broadly to apply to any records that an individual is required to keep, or access, in engaging in regulated activity.

If the Ninth Circuit's approach is followed, the exception will simply swallow the privilege. The Government can require records to be kept, no matter how incriminating. A mere regulation is then sufficient to negate a constitutional privilege. That is exactly what the Ninth Circuit did here and why this Court should grant review.

### C. The Confusion Concerning the Required Records Exception and the "Act of Production" Doctrine

The Government argues that the act of production doctrine and the required records exception are distinct. But the Government ignores the confusion concerning the interplay of the two doctrines.

Justice Alito acknowledged that there is a need to reexamine the required records exception in light of this Court's development of the act of production doctrine. Samuel A. Alito, Jr., *Documents and the Privilege Against Self Incrimination*, 48 U. Pitt. L. Rev. 27, 71-72 (1986).

This Court has held that when the act of production has incriminating testimonial aspects, the Fifth Amendment protection is as strong as the guarantee against being compelled to provide self-incriminating oral or written testimony. *United States v. Hubbell*, 530 U.S. 27, 34 (2000). The Seventh Circuit, in a decision by Judge Posner, has also found that the required records exception must be applied within the framework of the act of production doctrine. *Richert*, 35 F.3d at 304. This directly contradicts the Ninth Circuit opinion. It is imperative that these doctrines be reconciled.

Contrary to the Government's contentions, this Court has never compelled the production of records, without immunity, when the act of production is incriminating. In *Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549, 561 (1990), this Court compelled the production of a child in a civil proceeding after considering the strong need for protecting the child's welfare and the minimal Fifth Amendment implications. Similarly, in *California v. Byers*, 402 U.S. 424, 427 (1971), this Court, "balancing the public need on the one hand, and the individual claim to constitutional protections on the other" held that an individual may be compelled to give his

name at the scene of an accident since the compelled act was neutral, not testimonial, and would not serve as a basis for a criminal violation.

The Ninth Circuit held that because these records were required, respondent had no Fifth Amendment rights. That holding went far beyond *Byers* and *Bouknight*, which specifically do not foreclose assertion of the privilege. *Bouknight*, 493 U.S. at 561-562 ("The State's regulatory requirement in the usual case may neither compel incriminating testimony nor aid a criminal prosecution but the Fifth Amendment protections are not thereby necessarily unavailable to the person who complies with the regulatory requirement after invoking the privilege and subsequently faces prosecution."); *Byers*, 402 U.S. at 433 (affirming an individual's right "to assert a Fifth Amendment privilege concerning specific inquiries.").

Thus, this Court has consistently held even though general reporting requirements are constitutional, an individual can still assert Fifth Amendment rights to particularized questions or inquiries when the response has incriminating testimonial aspects. The Ninth Circuit here failed to consider the district court's uncontroverted finding that the documents sought from M.H. were incriminating. (App. at 31-32.) The requirement's constitutionality does not preclude the possibility that a particular act of producing records will be privileged. This Court has expressly said so. *United States v. Sullivan,* 274 U.S. 259, 264 (1927); *Byers*, 402 U.S. at 433; *Bouknight*, 493 U.S. at 562.

This is precisely the situation here. M.H. does not assert that the FBAR requirements are facially invalid or that the Government cannot prosecute M.H. for an FBAR violation. Rather, M.H. contends that the Government may not compel the target of its criminal investigation to perform an incriminating and testimonial act – without immunity – so that the Government can determine whether a crime occurred.

The Government argues that M.H. has voluntarily waived his Fifth Amendment right because he has voluntarily entered into a regulated activity. But the Government fails to demonstrate how that waiver was knowingly made. There is no waiver language on the FBAR form nor the bank account applications. Furthermore, most of these targets, like M.H., were foreign citizens who lived abroad and maintained "foreign" bank accounts. How were they to know that by moving to the U.S. they automatically waived a constitutional right?

### D. This Case is a Suitable and a Desirable Vehicle for Resolving These Issues

On numerous occasions, this Court has granted certiorari to review contempt orders stemming from grand jury proceedings when important constitutional questions arise. *See, e.g., Kastigar v. United States*, 406 U.S. 441, 442 (1972); *United States v. Dionisio*, 410 U.S. 1, 5 (1973); *United States v. Mara*, 410 U.S. 19 (1973); *Branzburg v. Hayes*, 408 U.S. 665 (1972). Similarly, this case is appropriate for review. The

"case" or "controversy" has not ended simply because the grand jury expired. The compelled production of records violates M.H.'s right against self-incrimination, which can be remedied by an order from this Court reversing the Ninth Circuit, quashing the subpoena and prohibiting any use of the produced records.

The Government intends to use the compelled act of production against M.H. in future proceedings. In recent pleadings, the Government represented "even if the Government cannot obtain mere authentication of the UEB records directly from Switzerland, the Government can use [M.H.'s] act of producing records against him in establishing the authenticity of the UEB account records." (Government's Renewed Mot. December 28, 2011.)

This Court has also held that a case is not moot simply because a grand jury witness complies with a contempt order. *Curcio v. United States*, 354 U.S. 118, 128 (1957); *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 422 (1983).

Furthermore, this case is not moot because the harm is "capable of repetition" while "evading review." *Turner v. Rogers*, 131 S. Ct. 2507, 2515 (2011). The life of a grand jury is 18 months, a period of time which this Court has deemed too short. *See* Fed. R. Crim. P. 6(g); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978).

There is also a reasonable expectation that the Government will empanel a successive grand jury to continue its investigation of M.H. 18 U.S.C. § 3331.

The parties recognized that reality and ***stipulated to toll the statute of limitations during the time this Court is considering certiorari***. The $250,000 bond which M.H. posted pending stay of the contempt order remains outstanding and has not been exonerated.

Finally, this case is at an ideal posture for review. The Government does not deny that there are hundreds, if not thousands of similar cases progressing through the legal system in which this issue arises. Requiring this case to proceed to final judgment would waste substantial judicial resources. The possibility that substantial evidence improperly obtained may be ultimately suppressed would create chaos in the lower courts and serious *Kastigar* problems.

In fact, the importance of Supreme Court review in this case, and the continued existence of a live controversy, is powerfully demonstrated by what has occurred in the district court in this case following the Ninth Circuit's decision and denial of a stay. At oral argument before the Ninth Circuit, the Government confirmed to the panel, that it sought *only* the five pieces of information[1] required by the FBAR form. (*See* transcript at 25:21-24; 26:5-9 and 47:1-4). Yet, after the Ninth Circuit rescinded its stay, the Government did an about-face and moved the district court to order M.H. to obtain *all* foreign bank statements,

[1] Name and number of account, name and address of bank, type of account, and highest maximum value each year. 31 C.F.R. § 1010.420.

regardless of whether they were in M.H.'s possession. The district court ordered M.H. to obtain bank statements, not previously generated nor kept, without regard to whether the actual statement included the year's highest balance or included transactions not required to be maintained or reported. The district court specifically refused to allow M.H. to redact information from the statements which fell outside the five requirements stating: "[b]ecause the Court believes the regulation requires foreign account holders to retain *all* foreign bank account records, *all* such records fall within the required-records exception and redaction is not necessary or appropriate." (December 6, 2011 Ord. at n. 2) (emphasis added.)

Additionally, the district court ordered M.H. to produce records from foreign accounts known and *unknown* to the Government, disregarding any requirement that the Government's knowledge of a specific account was a foregone conclusion. (December 29, 2011 Ord.) Thus, the Government has learned of accounts solely and exclusively from M.H.'s compelled production.

The Government asserts that the fact M.H. produced those bank statements is sufficient to authenticate them as admissible trial exhibits. (Govt's Renewed Mot. December 28, 2011 at p. 6.) This is truly chilling. It is the banks, not the customer, which generate and maintain the records in the course of their business. The Government seeks to short-circuit

foundational rules of evidence by stretching the Ninth Circuit's ruling beyond the breaking point.

## CONCLUSION

For these reasons, this Court should grant the writ of certiorari.

Respectfully submitted,

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