NO. _____

In the
Supreme Court of the United States

IN RE: SPECIAL FEBRUARY 2011-1 GRAND JURY SUBPOENA DATED SEPTEMBER 12, 2011
T.W.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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January 9, 2013

QUESTION PRESENTED

This case involves the relationship between two aspects of this Court's Fifth Amendment self-incrimination jurisprudence: the "act-of-production privilege" and the "required records doctrine." Petitioner has been commanded by subpoena to produce records of any foreign banking interests he may have held during a specified period. The Bank Secrecy Act ("BSA") imposes a requirement on all taxpayers to keep records of such interests. Because Petitioner has not previously disclosed any such interests, the government concedes that the compelled act of producing such records would be testimonial and incriminatory and thus gives rise to an act-of-production privilege under the Fifth Amendment. Nonetheless, the government contends, and the Seventh Circuit agreed, that the required records doctrine "overrides" or "supersedes" Petitioner's constitutional privilege because the records are required by the BSA. The court based that conclusion on this Court's decision in *Shapiro v. United States*, 335 U.S. 1 (1948), a case addressing whether the contents of records were "public" or "private" back when the Court considered the *contents* of private, but not public, papers protected by the Fifth Amendment. The Court has long since abandoned the understanding that the *contents* of any records—private or public—are protected, and instead emphasized that the relevant question is whether the act of producing records is testimonial and incriminatory, and thus protected by the Fifth Amendment. The question presented is:

Can the required records doctrine be invoked to "override" or "supersede" the Fifth Amendment act-of-production privilege that concededly arises when, as here, the record-keeping requirement presumptively applies to all taxpayers and the compelled production of records would be testimonial and incriminatory?

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PETITION FOR WRIT OF CERTIORARI

This case presents an exceptionally important question about the relationship between two aspects of this Court's Fifth Amendment jurisprudence: the "act-of-production privilege" and the "required records doctrine." The government served Petitioner with a subpoena demanding a record of any foreign banking interests he may have held during a specified period. The Bank Secrecy Act presumptively requires all taxpayers, on pain of criminal penalty, to create, retain, and file records of their foreign banking interests. Because Petitioner has not disclosed any such interests during the relevant period, the government concedes, as it must, that the act of producing the records it requests would incriminate Petitioner. For that reason, there is no dispute that Petitioner has asserted a valid Fifth Amendment privilege under the Court's "act-of-production" cases, which hold that the compelled act of producing papers may be protected by the privilege, even if the contents of the papers are not, when the act of production itself could reveal incriminatory information.

Nonetheless, the Court of Appeals accepted the government's contention that the "required records doctrine," a 65-year-old doctrine necessitated by a conception of the Fifth Amendment that the Court has long since abandoned, "overrides" otherwise valid invocations of the privilege against self-incrimination, under the fiction that an individual waives his constitutional privilege whenever he engages in any conduct for which records must be kept. That decision is part of a pattern of recent Court of Appeals decisions treating the judicially created and arguably

obsolete required records doctrine as an "exception" to the Constitution's Fifth Amendment privilege in materially analogous contexts.

As those decisions reflect, lower courts are in serious need of this Court's guidance in this area of increasing importance in light of the government's recent and aggressive enforcement tactics. The notion that the required records doctrine provides an exception to a valid invocation of the act-of-production privilege is fundamentally incompatible with the bedrock principle that the Fifth Amendment privilege is unequivocal and admits of no exceptions. Yet Courts of Appeals have repeatedly and mistakenly concluded that this Court's decision in *Shapiro v. United States*, 335 U.S. 1 (1948), compels that untenable conclusion.

Shapiro, which did not involve the act-of-production privilege at all and was based on a now-abandoned conception of the Fifth Amendment privilege, does no such thing. Properly understood, the required records doctrine *Shapiro* articulated was never an exception to the Fifth Amendment at all, but was merely a means of deciding whether records were "public" or "private" for purposes of determining whether their contents were protected by the privilege in the first place under the rules of the *ancien régime*. Whatever force that doctrine once had, it is largely obsolete now that the Court no longer considers the contents of any records protected by the privilege. Instead, the Fifth Amendment is now construed to protect not the contents of papers, but the testimonial character of the act of production, which does not turn on the "public" versus "private"

nature of the underlying documents. It would make no sense at all if that act-of-production privilege, which is explicitly premised on the notion that the contents of the records being produced are *not* entitled to Fifth Amendment protection, could be overcome by invoking a doctrine designed to determine whether or not the contents of records are protected.

Nonetheless, rather than acknowledge that the required records doctrine is conceptually orphaned and thus largely irrelevant, Courts of Appeals have repeatedly accepted the government's invitation to convert it into an "exception" to trump valid invocations of the privilege. Worse still, they have done so in the context of a raft of investigations under the Bank Secrecy Act, which presumptively imposes record-keeping requirements on every taxpayer, and which Congress explained was intended to facilitate criminal investigation, not commercial regulation. This context is quite unlike the traditional required records context, in which the act of production reveals nothing more than the already public fact of participation in a regulated industry for which record-keeping is required. Here, the government is attempting to force citizens to reveal the presence or absence of records, in circumstances in which the very act of production will reveal incriminating facts not otherwise public that will serve as the lynchpin of the contemplated prosecutions. This is the precise situation in which the Fifth Amendment act-of-production privilege applies.

Treating that privilege as trumped by the obsolete required records doctrine gets matters exactly backwards. Even on its own terms, the required records doctrine cannot be applied to compel production of records required of every taxpayer for criminal investigatory, not regulatory, reasons. But even if the doctrine did apply, it would not—and could not—override the act-of-production privilege that both the government and the lower courts necessarily concede exists here.

Because the lower courts have viewed this purported exception to the Fifth Amendment as compelled by *Shapiro*, only this Court can correct this error. And the government's increasing resort to this tactic in Bank Secrecy Act prosecutions makes the need for the Court's review particularly acute. This case presents an ideal vehicle to correct this recurring misreading of *Shapiro* because Chief Judge Holderman rejected the government's position, and the case came to the Seventh Circuit on the government's appeal of this clean legal issue. In cases in which District Courts accept the government's argument, by contrast, compelled production of the records will be ordered, and it will be difficult for this issue to be presented on appeal. This Court should grant certiorari to resolve the pervasive confusion in this area of ever increasing importance.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 691 F.3d 903 and reproduced at App. 1–12. The District Court's opinion is reported at 852 F. Supp. 2d 1020 and reproduced at App. 14–28.

JURISDICTION

The Court of Appeals issued its opinion on August 27, 2012, and denied Petitioner's timely petition for rehearing en banc on October 24, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution is reproduced at App. 29.

The relevant portions of the Bank Secrecy Act are codified at Title 31, sections 5311 and 5314 of the United States Code and reproduced at App. 30–32.

The relevant portions of the regulations promulgated pursuant to the Bank Secrecy Act are codified at Title 31, sections 1010.350 and 1010.420 of the Code of Federal Regulations and reproduced at App. 33–43.

STATEMENT OF THE CASE

This case involves an invocation of the Fifth Amendment's self-incrimination privilege in response to a subpoena issued pursuant to regulations under the Bank Secrecy Act. The basic question is whether the mere fact that the Act requires virtually every citizen and resident to keep certain records of their interests in foreign financial institutions is sufficient to override any Fifth Amendment privilege that otherwise exists, even when the whole point of a subpoena is to determine whether an individual has an interest that subjects him to the record-keeping requirement in the first place. Although the District

Court concluded that the constitutional privilege must prevail in that context, the Court of Appeals disagreed and compelled Petitioner to comply with the subpoena. That conclusion, which has now been reached by three Courts of Appeals in little more than a year, reflects a fundamental misunderstanding of the Fifth Amendment and this Court's jurisprudence.

A. Constitutional and Jurisprudential Background

The Fifth Amendment guarantees that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The privilege comprises three elements: compulsion, testimony, and self-incrimination. When all three are present, the privilege is "unequivocal and without exception." *In re Gault*, 387 U.S. 1, 47 (1967). Nothing short of a grant of absolute immunity will overcome it. *See Kastigar v. United States*, 406 U.S. 441, 445 (1972).

Although it has long been settled that the Fifth Amendment privilege applies to both oral and written testimony, the Court's jurisprudence in the latter area has fundamentally and foundationally shifted over the past century. In its landmark decision in *Boyd v. United States*, 116 U.S. 616 (1886), the Court interpreted the privilege to protect against compelled production of incriminatory private papers, treating the content of those papers as entitled to protection under a conception of the Fifth Amendment that focused on privacy concerns. While *Boyd* remained the law, the main question in cases involving compelled production of records thus became whether the records fell on the "private" or "public" side of the

line. In the course of answering that question, the Court developed what came to be known as the "required records doctrine," under which records were not considered "private" if they were kept pursuant to an otherwise valid regulatory scheme that required preservation of records of the kind someone engaged in the regulated activity customarily would keep. *See Shapiro v. United States*, 335 U.S. 1 (1948) (concluding that privilege did not attach to business records a licensed fruit wholesaler was required to keep under price control scheme).

Over time, *Boyd*'s conception of the Fifth Amendment as embodying a right to privacy in the contents of papers came under increasing criticism, and the Court ultimately abandoned it in *Fisher v. United States*, 425 U.S. 391 (1976). In doing so, however, the Court did not abandon the notion that the Fifth Amendment may protect against compelled production of papers. It instead concluded that the proper focus of the inquiry is on whether the act of producing papers would be both testimonial and incriminatory, not whether the information they contain is "private." *See id.* at 409. Thus, at the same time that the Court concluded that "the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence," it also concluded that the privilege does apply "when the accused is compelled to make a *Testimonial* Communication that is incriminating." *Id.* at 408 (emphasis added). Accordingly, the relevant question after *Fisher* became whether the act of producing a document would "communicate information about [its] existence, custody, and authenticity" that is incriminating independent from

its contents. *United States v. Hubbell*, 530 U.S. 27, 37 (2000). If so, then the Fifth Amendment protects against compelled production under what is known as the "act-of-production privilege."

B. The Proceedings Below

1. In an effort to aid the government in "criminal, tax, or regulatory investigations or proceedings" and "to protect against international terrorism," the Bank Secrecy Act ("BSA" or "Act") requires citizens and residents of the United States to keep records of specified transactions and relations with "a foreign financial agency." 31 U.S.C. §§ 5311, 5314(a). Under regulations implementing the Act, any "United States person having a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country" in a given year must report that fact to the Internal Revenue Service ("IRS") and file a Report of Foreign Bank and Financial Accounts (known as an "FBAR") with the Treasury Department. 31 C.F.R. § 1010.350(a). That filing is not a tax payment, and it need not be accompanied by bank statements or any other official documentation of that sort. It is merely a document created by the filer to inform the government of his or her specified foreign banking activities. Such records must be kept for five years and must be "available for inspection" at all times. *Id.* § 1010.420. Anyone who "willfully violat[es]" these regulations commits a felony. 31 U.S.C. § 5322. So does anyone who "[w]illfully" submits a false statement on a tax return, such as a statement falsely denying having an interest in or authority over a foreign account subject to the regulations. 26 U.S.C. § 7206(1).

In October 2009, the IRS informed Petitioner that he was under investigation by one of its special agents and a prosecutor from the Department of Justice's tax division. *See* App. 2.[1] Nearly two years later, a grand jury issued a subpoena directing Petitioner to provide, from October 2006 until present, "Any and all records required to be maintained pursuant to 31 C.F.R. § 103.32 [subsequently relocated to 31 C.F.R. § 1010.420] relating to foreign financial accounts that you had/have a financial interest in, or signature authority over." App. 2 (brackets in original). In addition, the subpoena "commands" Petitioner "to appear and testify before the grand jury." App. 2. The government "tentatively excused" Petitioner's appearance and testimony, however, "in the event documents were produced assuming the documents were properly authenticated." App. 15 n.1.

The subpoena does not suggest the grand jury or the government has reason to believe Petitioner is more likely than anyone else to have responsive records. Nor does it identify any particular account or bank for which records should be produced. The government has made clear, however, that the grand jury is conducting a criminal investigation and that Petitioner is the target. "It appears that [Petitioner] did not file" FBARs "in 2006, 2007, or 2008," App. 16, so production of any records acknowledging an interest in a foreign account in those years would appear to amount to an admission that he committed

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[1] In keeping with the Seventh Circuit's nomenclature, the petition refers to Petitioner as "T.W." for "Target Witness."

the crime the government seeks to uncover and serve as the lynchpin of the government's intended prosecution.

2. Petitioner moved to quash the subpoena on the ground that compelling him to comply with it would violate his Fifth Amendment act-of-production privilege because it would compel him to inform the government whether or not he engaged in any foreign banking activities that he failed to report. The District Court agreed and quashed the subpoena. App. 14–28.

In doing so, the court explicitly rejected the government's contention that Petitioner's act-of-production privilege did not apply because the records at issue were covered by the required records doctrine. As the court explained, "application of the required records doctrine has become more complex in the more than half a century since the Supreme Court decided *Shapiro*." App. 18. When *Boyd* "was the law of the land," the court noted, "[t]he need for an exception to [its] categorical" protection of private papers "was ... plain." App. 19. But that is "no longer the case" since this Court's "focus on whether a communication is 'testimonial' led it to abandon the *Boyd* rule." App. 21. Thus, "the distinction between public and private documents that formed the foundation of *Shapiro* can no longer" be the determining factor in whether the privilege may be asserted. App. 21. Instead, what matters is "whether the individual's compelled production of the subpoenaed records causes him to admit any incriminating fact beyond the mere existence and

applicability of the regulatory program that requires the records' maintenance and production." App. 23.

The court acknowledged that "there is no danger [of] that" in "the typical required records case," for it is "usually obvious" that an individual is "participat[ing] in the regulated activity." App. 25. No one doubts that an open and notorious fruit wholesaler is in the fruit wholesaling business, and compelled disclosure of records required in that business reveals nothing that was not already disclosed by participation in the regulated business. Here, by contrast, the record-keeping requirement presumptively applies to all taxpayers, and so compliance with the subpoena "would compel [Petitioner] to admit that he has an interest in one or more foreign bank accounts and that he is thus participating in the regulated activity," App. 24, which is not otherwise obvious and is indeed the very information the government seeks to uncover.

Moreover, the court pointed out, the government seeks that information under a statute that, according to its own "declaration of purpose," is designed "not to regulate a public market or to protect consumers, but rather to advance the Government's 'criminal, tax, or regulatory investigations or proceedings,' or to 'protect against international terrorism.'" App. 26 (quoting 31 U.S.C. § 5311). In that context, applying the required records doctrine to force Petitioner to produce records of his private activities would result in "a compelled admission that the Fifth Amendment protects him from having to make." App. 26. The court thus concluded: "The Government must do more work

than simply requiring [Petitioner] to incriminate himself by producing his own files if it wishes to find evidence during this grand jury investigation that [Petitioner] has an incriminating interest in foreign bank accounts." App. 28.

3. The government appealed, and the Court of Appeals reversed. The court did not take issue with the District Court's finding that, "beyond dispute, [Petitioner's] compliance with the subpoena, that is, the act of producing the requested records, is incriminating." App. 3. Yet it nonetheless agreed with the government that "the Required Records Doctrine … overrides any act of production privilege that [Petitioner] has." App. 6. The court candidly admitted that, in its view, "it makes little difference" whether the required records doctrine is viewed as "an outright exception to the Fifth Amendment" or "a threshold inquiry to determine whether the privilege attaches in the first place." App. 6–7. Either way, it concluded, the doctrine categorically "overrides or supersedes" "any Fifth Amendment privilege," regardless of "whether the privilege arises by virtue of the contents of the documents or by the act of producing them." App. 11. Otherwise, the court feared, the government's ability "to inspect the records it requires an individual to keep as a condition of voluntarily participating in [a] regulated activity" could be "easily frustrated." App. 11.

As for Petitioner's alternative argument that the required records doctrine does not even apply here in the first place since the BSA is a primarily criminal enforcement scheme, the court rejected it without analysis, simply citing a recent Ninth Circuit

decision rejecting the same argument in a similar case. *See* App.12 (citing *In re M.H.*, 648 F.3d 1067 (9th Cir. 2011), *cert. denied*, No. 11-1026, 133 S. Ct. 26 (2012)).

4. Petitioner filed a timely petition for rehearing or rehearing en banc, which the Court of Appeals denied on October 24, 2012. App. 13. Shortly thereafter, the government reissued the subpoena and demanded Petitioner's immediate compliance, refusing to allow Petitioner to pursue an expedited petition for certiorari first. Accordingly, on November 30, 2012, Petitioner complied with the subpoena, while continuing to assert his Fifth Amendment privilege against self-incrimination.

REASONS FOR GRANTING THE PETITION

This case squarely presents a constitutional question of paramount importance involving a perceived conflict between two Fifth Amendment doctrines that the Court has not addressed for more than a decade but that have become a recent and persistent source of confusion in the lower courts. There is no dispute that forcing Petitioner to comply with the subpoena at issue compelled him to make a testimonial and incriminatory disclosure that the act-of-production privilege protects against. Unlike a typical required records case, where the production of records discloses nothing more than the obvious fact that the person is participating in the business to which the record-keeping requirement applies, here, the act of production discloses an otherwise unknown fact that essentially proves the government's case. The Court of Appeals nonetheless concluded that Petitioner's Fifth Amendment privilege is

"overridden" or "superseded" by the required records doctrine, a 65-year-old doctrine tethered to a conception of the privilege that this Court has long since abandoned. That conclusion is fundamentally irreconcilable with this Court's precedents and the Constitution.

It is bedrock constitutional law that the Fifth Amendment privilege against self-incrimination is unequivocal and admits of no exceptions. Thus, when the distinct act of producing records under compulsion is testimonial and incriminating, wholly independent of the contents of the records, neither the required records doctrine nor anything else short of a grant of immunity can overcome the privilege. Nothing about the required records doctrine is to the contrary. That doctrine was never intended to serve as an "exception" to valid invocations of the Fifth Amendment. It was simply a means of determining whether the Fifth Amendment even attached to the contents of documents, during the period in which the Fifth Amendment protected the contents of documents if, but only if, they were "private," not "public." The need for the doctrine vanished over 35 years ago with this Court's rejection of any protection for the contents of any documents.

That the abandonment of Fifth Amendment protection for the contents of documents necessitates reexamination of any continuing role for the required records doctrine has long been recognized. *See, e.g.,* Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. Pitt. L. Rev. 27, 72 (1986). But the government's recent and aggressive efforts to use the required records doctrine as an

exception to the act-of-production privilege in a string of prosecutions under the Bank Secrecy Act have brought the issue to a head and made the need for this Court's review acute. The tension between the required records and act-of-production cases is relatively minimal in the classic required records context involving participants in a heavily regulated industry with record-keeping requirements. If someone is openly engaged in fruit wholesaling (as in *Shapiro*) or alcohol sales, the act of production itself discloses nothing not already disclosed by the public act of participating in the regulated activity. In such cases, the required records doctrine would have applied for largely the same reasons that the act of production does not. But the situation is fundamentally different when the government presumptively requires every citizen and resident to keep certain records if they engage in an activity that is not otherwise public, like having control over personal foreign bank accounts. In that situation, the fact that records are required to be kept in no way suggests the act of production is not incriminating. Thus, for the government to argue—and for courts to accept—that the required records doctrine trumps the act-of-production privilege in this context threatens the core protection of the Fifth Amendment.

Nonetheless, three Courts of Appeals have now concluded as much within the span of barely more than a year. As the District Court in this case recognized, that conclusion is untenable and cries out for this Court's review. A doctrine developed decades before the Court even recognized the act-of-production privilege, and designed to determine whether the Fifth Amendment applied in the first

place, cannot plausibly be understood as having anticipatorily created an exception to the Constitution's unequivocal privilege against self-incrimination. Indeed, the whole point of the act-of-production privilege is to determine whether the privilege exists when the contents of records are *not* protected. It would be more than passing strange if a privilege explicitly premised on the assumption that the contents of records are not entitled to Fifth Amendment protection could be overcome by satisfying a doctrine designed to determine whether or not the contents are protected. Even so, the decision below makes clear that Courts of Appeals incorrectly consider themselves bound by *Shapiro* to reach that conclusion. Thus, only this Court can fix this problem.

The stakes implicated by the question presented are high indeed. While nothing may prevent the federal government from enacting a statute that requires every citizen and resident to keep certain records if they engage in activity that is not otherwise public, the enforcement of that statute must conform to our founding document. It is one thing for the government to force a fruit wholesaler to produce records when the act of production will reveal nothing more than that the fruit wholesaler is a fruit wholesaler. It is quite another matter for the federal government to use a record-keeping requirement presumptively applicable to everyone and an obsolete Supreme Court case to force an act of production that would reveal whether a taxpayer is a lawbreaker. Fortunately, this Court's Fifth Amendment act-of-production jurisprudence already distinguishes between those two very different situations. However,

with the lower courts considering themselves bound by *Shapiro* to conclude otherwise and the government aggressively invoking the required records doctrine in BSA investigations, the need for this Court's review is paramount.

I. This Case Presents a Substantial Fifth Amendment Question that Is a Source of Continuing Confusion in the Lower Courts.

The central and dispositive question in this case is whether the required records doctrine provides an "exception" to the act-of-production privilege. As the District Court correctly recognized, the answer to that question should be self-evident. It has long been settled that the Fifth Amendment privilege is unequivocal and admits of no exceptions, and this Court has never suggested a different rule applies in the act-of-production context. Nonetheless, three Courts of Appeals have now concluded, each relying heavily on the one before it, that the required records doctrine trumps otherwise valid invocations of the act-of-production privilege. Although those courts purport to be bound by this Court's decision in *Shapiro*, their conclusion is in fact irreconcilable with this Court's precedents. The required records doctrine is not an exception to the Fifth Amendment privilege and never purported to be one. Rather, it was a gate-keeping test about whether the privilege even attached to the contents of certain documents, in an era when the contents of documents were protected if, but only if, they were "private," not "public," in character. This Court has long since discarded that conception of the Fifth Amendment, and the required records doctrine should not survive

the discarded conception to which it was tethered. It certainly should not be permitted to have an afterlife in which it destroys the core Fifth Amendment privilege in the context of a record-keeping requirement as broadly applicable as the Bank Secrecy Act. Even before its obsolescence, the doctrine was designed only to facilitate imposition of record-keeping requirements as a condition of participation in regulated industries, not to permit the government to force individuals to document and disclose their private affairs. The government's effort to revive and extend this doctrine in the latter context strikes at the heart of the Fifth Amendment and merits this Court's plenary review.

1. Any correct understanding of the relationship between the required records doctrine and the act-of-production privilege must begin with the undeniable fact that the required records doctrine "was developed without any consideration of the act of production" privilege. Alito, 48 U. Pitt. L. Rev. at 71–72. Indeed, the Court articulated the former nearly 30 years before it recognized the latter. Moreover, each doctrine is inextricably intertwined with the Court's treatment of its decision in *Boyd* and its shifting view of the extent to which the Fifth Amendment protects against compelled production of incriminatory private papers.

The required records doctrine came into being in an era when *Boyd* remained the law and the Court generally considered the contents of private papers categorically protected by the Fifth Amendment. The doctrine is largely attributed to the Court's decision in *Shapiro*, a 1948 case involving regulation of fruit

and produce wholesalers under the Emergency Price Control Act during World War II. As part of a comprehensive price control scheme, the federal price administrator required all licensed wholesalers to keep certain records of their business activities, such as sales and inventory receipts. *See* 335 U.S. at 4–5 n.3. When the Price Administrator issued a subpoena requiring licensed wholesaler Shapiro to produce those records, he complied, but asserted a Fifth Amendment privilege on the ground that the contents of the records might incriminate him and thus were protected under *Boyd*. *Id.* at 5. In rejecting that argument, the Court focused on the then-governing distinction between "papers exclusively private and documents having public aspects." *Id.* at 34. Because the commercial records at issue were of a kind customarily kept by those engaged in the business and were required to be kept pursuant to an otherwise valid regulatory scheme, the Court concluded that they fell on the public, unprotected side of the line.

As conceived, the required records doctrine thus was not an exception to the Fifth Amendment at all. It was simply a means of determining whether the contents of certain records were "private" or "public," at a time when that was the dividing line that determined whether the Fifth Amendment attached to the contents of documents. Equally important, it was developed in a case where there was no question that the individual from whom the records were sought was openly engaged in the regulated activity, and thus no question that any privilege must arise if at all from the *contents* of the records, not from the mere act of admitting their existence, which

confirmed only the already public fact that Shapiro was a licensed wholesaler. As a result, it is a doctrine uniquely tied to *Boyd* and its privacy-based conception of the privilege against self-incrimination, not to the concept of whether a requirement to keep and produce records is testimonial.

Thirty years later, the Court obviated any further role for the required records doctrine when it abandoned *Boyd* and held that "the Fifth Amendment protects against compelled self-incrimination, not (the disclosure of) private information." *Fisher*, 425 U.S. at 401. Thus, the nature of the *contents* of documents ceased to have independent Fifth Amendment significance. But at the same time, the Court made clear that abandoning *Boyd* did not obviate the need to determine whether a Fifth Amendment privilege arises when the government demands production of records. The Court instead recognized that "[t]he act of producing evidence in response to a subpoena" can "ha[ve] communicative aspects of its own, wholly aside from the contents of the papers produced," such as "tacitly conced[ing] the existence of the papers demanded and their possession or control." *Id.* at 410. Although that information may "add[] little or nothing to the sum total of the Government's information" in cases like *Shapiro*, where possession of the papers sought discloses nothing not already public, *id.* at 411, in cases where the existence or control of papers is the very information the government seeks to uncover, producing them would "have testimonial aspects and an incriminating effect" that the Fifth Amendment privilege protects against. *United States v. Doe*, 465 U.S. 605, 612

(1984). The Court thus rejected *Boyd* only on the understanding that "[a]lthough *the contents* of a document may not be privileged, *the act of producing* the document may be." *Id.* at 612 (emphasis added); *see also Hubbell*, 530 U.S. at 36 ("the act of producing documents in response to a subpoena may have a compelled testimonial aspect").

As Justice Alito recognized shortly after the act-of-production privilege was articulated, that "the act of producing records may amount to testimonial self-incrimination … is no less true for required records than for records of any other type." Alito, 48 U. Pitt. L. Rev. at 76. At the same time, in most traditional required records contexts, the act of production will not be incriminating because it merely confirms that a regulated entity participates in the industry in which the record-keeping requirement applies. A publicly licensed fruit wholesaler reveals nothing by admitting possession of records required of a publicly licensed fruit wholesaler. But when the government presumptively imposes record-keeping requirements on everyone that require records to be kept if an individual engages in activities not otherwise publicly disclosed, requiring an individual to respond to a request for those records could "have a compelled testimonial aspect" wholly apart from their contents. *Hubbell*, 530 U.S. at 36. When that is the case, whether the records would satisfy the old required records doctrine is beside the point. What matters under modern Fifth Amendment jurisprudence is whether the compelled act of production is testimonial and incriminatory. That the government presumptively requires all citizens and residents to maintain certain records does not alter the

conclusion that the compelled act of producing those records would be incriminatory and testimonial. And there is absolutely no need to conduct an inquiry that is no longer legally relevant to obscure the reality that the Fifth Amendment act-of-production is fully applicable in that context.

2. As the District Court correctly recognized, that distinction between the once-relevant required records doctrine and the still-relevant act-of-production privilege is critical to this case and the countless other prosecutions the government is pursuing under the BSA. Petitioner's argument is not that the contents of the documents the government demanded might incriminate him, but that the mere act of forcing him to respond to the subpoena "would compel him to admit that he has an interest in one or more foreign bank accounts and that he is thus participating in the regulated activity," which is precisely the information the government hopes to discover and use to prosecute him. App. 24. In that context, whether the contents of the documents fall within the required records doctrine is irrelevant. So long as the distinct act of producing them is independently testimonial and incriminatory, which the government and lower courts concede it is, the Fifth Amendment privilege arises.

Neither the Seventh Circuit nor the government disputed the District Court's conclusion that Petitioner asserted a valid act-of-production privilege. Instead, the Seventh Circuit accepted the government's argument that the required records doctrine is a Fifth Amendment "exception" that

"overrides" or "supersedes" that privilege. App. 7. That conflation of two distinct doctrines (only one of which has continuing relevance) to eviscerate Petitioner's constitutional privilege is irreconcilable with the fundamental principle that the privilege against self-incrimination "is unequivocal and without exception." *In re Gault*, 387 U.S. at 47. Nothing in any of this Court's act-of-production privilege cases supports the notion that it alone admits of exceptions that the otherwise absolute Fifth Amendment does not. Nor would it make any sense for a doctrine developed to determine whether the *contents* of documents were privileged to trump a doctrine expressly premised on the notion that the act of producing documents may be privileged *even though the contents of the produced documents are not*. The far better understanding of the doctrines is that they are, and always have been, analytically distinct: One deals with the contents of records, the other deals with the act of producing records, and neither conflicts with or trumps the other.

Remarkably, the Seventh Circuit is not alone in rejecting that common-sense path to reconciling any tension between the doctrines. The Fifth and Ninth Circuits have reached the same conclusion as the Seventh Circuit in materially analogous cases, each involving the government's recent revival of the required records doctrine to justify a plethora of similar subpoenas issued pursuant to the BSA. *In re Grand Jury Subpoena*, 696 F.3d 428 (5th Cir. 2012); *In re M.H.*, 648 F.3d 1067 (9th Cir. 2011), *cert. denied*, No. 11-1026, 133 S. Ct. 26 (2012). As the Seventh Circuit also noted, other Courts of Appeals have reached the same conclusion in other contexts

involving both doctrines. *See, e.g.*, *In re Grand Jury Subpoena*, 21 F.3d 226, 229 (8th Cir. 1994) (holding that "the required records exception to the Fifth Amendment privilege will apply … even where the act of production could involve compelled testimonial self-incrimination"); *In re Grand Jury Subpoena Duces Tecum Served upon Underhill*, 781 F.2d 64, 69 (6th Cir. 1986) (treating required records as an "exception" to act-of-production privilege and noting earlier Second and Third Circuit decisions doing same).

As those decisions reflect, lower courts are deeply confused about the relationship between the required records doctrine and the act-of-production privilege, and are under the mistaken impression that this Court's decision in *Shapiro* creates an "exception" to the Fifth Amendment. Courts have simply and repeatedly concluded that *Shapiro*—a case that has nothing to do with the act-of-production privilege, preceded it by 30 years, and was decided under a now-abandoned conception of the Fifth Amendment—somehow overrides the entire line of act-of-production privilege cases that followed. As the District Court below correctly recognized, harmonizing that 65-year-old case with all the watershed developments in this Court's Fifth Amendment jurisprudence that have followed requires a much more nuanced analysis. Unless and until this Court undertakes that analysis itself, courts will continue reflexively applying the required records doctrine to the detriment of valid invocations of the Fifth Amendment privilege.

II. The Decision Below Expands Government Power at the Expense of the Core Protection of the Fifth Amendment.

The recent string of Court of Appeals decisions eviscerating the privilege in this context are all the more troubling because the combination of the government's invocation of the required records "exception" and its aggressive effort to use subpoenas to enforce a statute presumptively requiring record-keeping of every citizen and resident threatens core Fifth Amendment values. It is no coincidence that the question presented has not reached this Court in the 35 years since *Boyd* was abandoned. The government typically imposes record-keeping requirements only on open participation in heavily regulated activities, where the act of production itself is not protected because it reveals nothing that is not otherwise publicly known. And because the contents of papers are no longer protected, there is no need to invoke the required records doctrine in cases involving that kind of run-of-the-mill record-keeping requirement. Accordingly, for years, any tension between the required records and act-of-production doctrines remained largely dormant.

All of that has changed with the government's recent and aggressive efforts to use the BSA's widely applicable record-keeping requirements to issue subpoenas compelling taxpayers to reveal whether they are in compliance with those requirements. Unlike typical requirements that those publicly engaged in various highly regulated industries keep certain records, the BSA presumptively applies to virtually everyone and requires the keeping of

records that evidence information not otherwise publicly known, thus rendering the act of production itself testimonial and incriminating in many circumstances. The temptation for the government to attempt to invoke the required records doctrine as an "exception" to the act-of-production privilege in that context has proven irresistible.

The government's actions strike at the very heart of the Fifth Amendment privilege in ways that *neither* doctrine permits. The long-latent tension between the two doctrines has come to a head precisely because the whole point of the BSA's record-keeping requirements is to compel individuals to inform the government whether they have engaged in certain private activities. That not only makes the need for the act-of-production privilege most acute, but also makes the irrelevance of the required records doctrine most apparent. Whatever purpose that doctrine once served, it was never intended to "license widespread erosion of the privilege through ingeniously drawn legislation." *Marchetti v. United States*, 390 U.S. 39, 51–52 (1968). *Shapiro* itself emphasized that "there are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself." 335 U.S. at 32. And the Court made clear in subsequent cases that "[t]he Government's anxiety to obtain information known to a private individual does not without more render that information public." *Marchetti*, 390 U.S. at 57. Accordingly, the Court long ago rejected the notion that the government may employ the required

records doctrine to eviscerate the Fifth Amendment privilege merely by "formaliz[ing] its demands" for private information "in the attire of a statute." *Id.*

Yet that is exactly what the government has sought to use the BSA to do. As the District Court in this case recognized, "[a]n individual's voluntary decision to obtain a foreign bank account is private, unlike the voluntary decision to conduct business with the public in a regulated area." App. 26. Indeed, neither the government nor the Courts of Appeals have really contended otherwise. Instead, they simply insist that whether those affairs are private is beside the point because Congress has compelled their disclosure by statute. *See In re M.H.*, 648 F.3d at 1077 (personal information "assumes a public aspect" whenever it is "compelled in furtherance of a valid regulatory scheme"); *In re Grand Jury Subpoena*, 696 F.3d at 435 (citing *In re M.H.* for proposition that "if the government's purpose in imposing the regulatory scheme is essentially regulatory, then it necessarily has some public aspects"); App. 12 (incorporating *In re M.H.* by reference). In other words, as the District Court recently reversed by the Fifth Circuit put it, in the view of the government and the Courts of Appeals, "records privately kept become public the moment the government requires them to be kept." Op. on Denial of Compulsion at 2, *In re Grand Jury Subpoena*, No. 11-174 (S.D. Tex. Sept. 21, 2011) (Doc. 17).

Needless to say, that cannot possibly be true. It might well be useful for a State as part of its constitutional authority to regulate alcohol to require

residents to keep records reflecting all alcohol consumed by anyone in their home, including minors. But it would not be remotely consistent with the Fifth Amendment for state prosecutors to compel citizens to produce those records on the ground that the requirement to keep them is sufficient to eliminate the Fifth Amendment privilege.

The straightforward way to correct such reasoning is to clarify, now that the government's aggressive enforcement of the BSA has brought the issue to the fore, that the required records doctrine does not survive the abandonment of the *Boyd* doctrine to which it was tethered. But even if the doctrine somehow lives on, it becomes imperative to clarify that it cannot be used to compel production of documents under requirements presumptively imposed on every citizen and resident as part of a criminal enforcement effort rather than a commercial regulatory scheme. The doctrine only ever required disclosure when three factors were satisfied:

> [F]irst, the purposes of the United States' inquiry must be essentially regulatory; second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and third, the records themselves must have assumed "public aspects" which render them at least analogous to public documents.

Grosso v. United States, 390 U.S. 62, 67–68 (1968); *see also Marchetti*, 390 U.S. at 57. Thus, by its nature, the doctrine would not even apply when, as here, the government has simply demanded that all

individuals create, keep, and produce documentation of their private affairs to aid the government in determining whether they have committed crimes. "[T]hat the Government has formalized its demands in the attire of a statute" does not "stamp information with a public character." *Id.* Otherwise, the required records doctrine would reduce to a tautology.

Thus, even if the required records doctrine still has force somewhere, it has none here, as the BSA's record-keeping requirement cannot be understood as "essentially regulatory." Indeed, the BSA makes no pretense of that—the statute declares on its face that its requirements are intended to facilitate the government's "criminal, tax, or regulatory investigations or proceedings." 31 U.S.C. § 5311. In short, "this wolf comes as a wolf," *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting); the BSA requires individuals to keep information to facilitate criminal investigation, pure and simple.[2]

Neither the required records doctrine nor anything else permits the government to impose a statutory requirement that virtually all individuals create, keep, and produce records explicitly designed

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[2] That the BSA does not impose a run-of-the-mill record-keeping requirement is also clear from the fact that the BSA regulations require individuals not to keep and produce bank statements or other formal regulatory documents, but to *create* a record of any interest they may have in a foreign bank. *See* 31 C.F.R. § 1010.420 (requiring individuals to keep some record of name, number, type, and value of foreign account and name and address of foreign bank).

to aid in prosecuting crimes and then use an open-ended subpoena to compel disclosure of those records. Whatever role the required records doctrine may have to play in a case like *Shapiro*, "the constitutional privilege" cannot be considered "meaningfully waived" when the government has directed an individual "simply to provide information, unrelated to any records which he may have maintained, about his [private banking] activities." *Marchetti*, 390 U.S. at 57. That kind of "requirement is not significantly different from a demand that he provide oral testimony" of those activities, and thus is every bit as precluded by the privilege under any correct Fifth Amendment analysis. *Id.* Put differently, the government cannot compel the creation of a record and then compel its production in a situation that is both testimonial and incriminating.

The District Courts in both this case and the Fifth Circuit case recognized as much. As the latter explained, the government "may not eviscerate the limits on its authority under the Constitution by turning every regulated choice into a constitutional waiver." Op. on Denial of Compulsion at 7, *In re Grand Jury Subpoena* (S.D. Tex.). Yet that is precisely what the Courts of Appeals have permitted in these cases, applying the required records doctrine to allow "the constitutional privilege [to] be entirely abrogated by" subpoenas to enforce the BSA. *Marchetti*, 390 U.S. at 57. There is no reason to allow the required records doctrine to outlive both its usefulness and the demise of the Fifth Amendment doctrines to which it is tethered. But there is certainly no reason to extend it to situations where it

never applied in the first place—especially in the context of a statute that sweeps far beyond any regulated industry and presumptively imposes record-keeping requirements on every citizen and resident.[3]

III. This Case Presents an Ideal Vehicle to Resolve the Important and Recurring Constitutional Question Presented.

Three Courts of Appeals have now resolved the question presented in the same context, all reaching the same erroneous conclusion, in the span of little more than a year. This flurry of activity addressing the mostly dormant required records doctrine is no coincidence. For decades after *Shapiro* was decided, this Court was "wary of embracing the required records rule, and government authorities [were] markedly reluctant to rely on it." Alito, 48 U. Pitt. L. Rev. at 73. All that has changed recently, however, as the government has aggressively invoked the

[3] At least two members of this Court have questioned its retreat from *Boyd*, noting that "[a] substantial body of evidence suggests that the Fifth Amendment privilege protects against the compelled production not just of incriminating testimony, but of any incriminating evidence." *Hubbell*, 530 U.S. at 49 (Thomas, J., concurring, joined by Scalia, J.); *see also* Alito, 48 U. Pitt. L. Rev. at 79 (noting that Fifth Amendment was derived from state provisions "most naturally interpreted to apply both to live testimony and to documents"). If the Court were to reconsider its retreat from *Boyd*, it would then need to refine its analysis of the scope of the required records doctrine, and this case would be an appropriate vehicle to do so since the doctrine cannot be extended to compel production of records presumptively required of everyone.

required records doctrine in hundreds of cases like this one to compel individuals to disclose their private foreign banking activities in the hope of uncovering criminal violations. *See, e.g.*, *U.S. Targets Clients Directly in Hunt for Cash Hidden Offshore*, *N.Y. Times*, Dec. 29, 2011[4] (discussing prosecutors' newfound reliance on required records doctrine); U.S. Dep't of Justice, Offshore Compliance Initiative (2012)[5] (describing investigations into offshore bank accounts as DOJ Tax Division's "top litigation priority").

This case presents an ideal vehicle for the Court to provide the lower courts with much-needed guidance in this context, which involves doctrines that the Court has not addressed for more than a decade but that have taken on increasing importance with the government's aggressive enforcement tactics. In this case, there is no dispute that, but for whatever application the required records doctrine may have, Petitioner would have a valid act-of-production privilege against responding to the subpoena. *See* App. 16 ("the Government does not dispute[] that producing the requested records would be an admission by [Petitioner]" of potentially incriminatory information); App. 6 (same). As both the District Court and the Court of Appeals thus expressly recognized in directly addressing the question

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[4] *Available at* http://www.nytimes.com/2011/12/30/business/global/us-targets-clients-directly-in-hunt-for-cash-hidden-offshore.html?pagewanted=all.

[5] *Available at* http://www.justice.gov/tax/offshore_compliance_initiative.htm.

presented, this case turns squarely on resolution of whether the required records doctrine may be applied to "override[] any act of production privilege that [Petitioner] has." App. 6; *see also* App. 17.

This case also suffers from none of the procedural complications that often prevent the issue from reaching this Court or the Courts of Appeals. Because an individual generally may not appeal the denial of a motion to quash a subpoena, but must instead either take contempt or wait until after indictment, prosecution, and conviction to appeal, *see Cobbledick v. United States*, 309 U.S. 323 (1940), many individuals ultimately accept the inevitable pressure to plea bargain, thus eliminating the ability to obtain appellate review at all. That procedural complication is not present here because the District Court granted Petitioner's motion to quash, providing the government with a statutory right to appeal and this Court with jurisdiction to review the resulting decision. That clean procedural posture is increasingly less likely to arise now that Courts of Appeals in three of the most populous jurisdictions, comprising nearly 40% of the country's population, have sanctioned the government's recent burst of investigative activity. That is all the more true given that the Second, Third, Sixth, and Eighth Circuits may considered themselves compelled by their own earlier precedents in different contexts to do the same. *See supra* pp. 23–24. And other courts may feel themselves bound by *Shapiro*. Accordingly, this case provides the Court with a rare opportunity to resolve an important issue that has been brought to a head by the government's enforcement tactics.

The stakes presented by the questions here are high. The required records doctrine has its roots in unobjectionable efforts to require participants in certain highly regulated industries to keep records. In that context, the act of production itself does little more than confirm the obvious and already known fact that the subject of the subpoena is an industry participant. But when Congress imposes record-keeping requirements concerning inherently private matters on the whole populous, and the government asserts an obsolete doctrine to compel production in circumstances that are both testimonial and incriminating, the threat to the Fifth Amendment is grave indeed. The court below sanctioned that result on the ground that its hands were largely tied by *Shapiro*. Thus, the need for this Court to intervene to vindicate both its modern Fifth Amendment jurisprudence and the core protections of the Amendment is paramount.[6]

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[6] Although Petitioner complied with the subpoena after the Seventh Circuit's erroneous decision, that does not affect this Court's jurisdiction, as the Court may still provide Petitioner with "meaningful relief" by forcing the government to return or destroy the documents. *See Church of Scientology of California v. United States*, 506 U.S. 9, 12–13 (1992). Moreover, a decision in Petitioner's favor ultimately would preclude the government from using the information he produced, or any other information it obtains as a result of his production, in the prosecution that the government has made clear it intends to pursue. *Cf. Hubbell*, 530 U.S. at 38.

CONCLUSION

For all these reasons, the Court should grant the petition.

Respectfully submitted,

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January 9, 2013