NO. 12-853

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The government's brief in opposition proceeds as if *Shapiro v. United States*, 335 U.S. 1 (1948), were a bedrock of this Court's modern Fifth Amendment jurisprudence. Nothing could be further from the truth. *Shapiro* is an anachronism. The Court's more recent act-of-production cases have eviscerated the doctrinal underpinnings of *Shapiro* and rendered the required records doctrine functionally obsolete. Commentators recognized *Shapiro*'s obsolescence decades ago, *see, e.g.*, Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. Pitt. L. Rev. 27 (1986), and for years prosecutors resisted the temptation to breathe new life into a moribund doctrine. No longer. In a spate of recent prosecutions, the government has combined *Shapiro* and the Bank Secrecy Act to compel individuals to prove the government's case through the act of production. That truly offends bedrock principles of the Court's modern Fifth Amendment jurisprudence.

Rather than grapple with the fundamental flaws in its theory that the required records doctrine somehow "trumps" the act-of-production privilege, the government construes the Bank Secrecy Act's record-keeping requirements presumptively imposed on every taxpayer as "implicit waivers" of otherwise-valid invocations of the privilege. That underscores the importance of this Court's review. It is one thing to apply the required records doctrine where the act of production will prove nothing more than that an open and notorious fruit wholesaler is indeed a fruit wholesaler. It is radically different when forced disclosure compels ordinary taxpayers to prove the

government's case against them. Even when the required records doctrine still served a purpose, the Court never allowed it to operate as that kind of mechanism for wholesale abrogation of the privilege by statute.

The government has convinced the lower courts that they must accept this expansive "exception" to the act-of-production privilege because it is compelled by *Shapiro*. Thus, only this Court can correct this error. The required records doctrine is defunct and should be laid to rest, not repurposed into an exception to the categorical Fifth Amendment privilege. This Court should grant review and make clear that there is no exception to the Fifth Amendment or the act-of-production privilege.

I. The Required Records Doctrine Is Functionally Obsolete And Cannot Override The Privilege Against Self-Incrimination.

1. The required records doctrine was developed 65 years ago for a specific reason: to distinguish between "'papers exclusively private and documents having public aspects,'" *Shapiro*, 335 U.S. at 34, at a time when that distinction determined whether their *contents* were protected by the Fifth Amendment. Decades later, in *Fisher v. United States*, 425 U.S. 391 (1976), and *United States v. Doe*, 465 U.S. 605, 612 (1984), this Court held that the *contents* of documents—whether public *or* private—are no longer protected by the privilege at all. Those decisions eliminated the *raison d'être* of the required records doctrine.

But equally important, at the same time, the Court made clear that "[a]lthough *the contents* of a

document may not be privileged, *the act of producing* the document may be." *Id.* at 612 (citing *Fisher*, 425 U.S. at 410) (emphasis added). It is therefore doubly anachronistic to conclude, as the court below did at the government's urging, that the fact that the contents of records would not have been protected under the obsolete required records doctrine somehow eliminates the distinct and more recently recognized privilege that arises when the act of producing a document is testimonial and incriminatory *wholly apart from its contents*. Indeed, that reasoning is fundamentally irreconcilable with the rule that the privilege against self-incrimination is "unequivocal and without exception." *In re Gault*, 387 U.S. 1, 47 (1967).

This case vividly illustrates the untenable consequences of that logic. Here, there is no dispute that the "act of producing documents in response to [the] subpoena" would "communicate information about the existence, custody, and authenticity of the documents," *United States v. Hubbell*, 530 U.S. 27, 36–37 (2000), and that the communicated information would have "an incriminating effect," *Doe*, 465 U.S. at 612. *See* Pet.App.3; Pet.App.16; Opp.8. "It appears that [Petitioner] did not file" FBARs in the years at issue in the subpoena. Pet.App.16. Yet the government sought to compel petitioner to produce documentation of any foreign bank accounts he had an interest in or authority over during that period. By the mere act of responding to the subpoena, petitioner would admit the very information the government seeks to discover—namely, whether he had any foreign bank accounts that he failed to report. *See* 26 U.S.C. § 7206(1);

31 U.S.C. § 5322; 31 C.F.R. § 1010.350(a). In other words, the government seeks to compel petitioner to prove the government's case against him through the act of production. *See* Pet.App.26 n.5. It is the functional equivalent of calling petitioner to the stand and compelling him to admit whether he committed the crime in question, and it is no more constitutional.

The decision below obliterates petitioner's act-of-production privilege by subordinating it to a 65-year-old doctrine that has outlived its usefulness by decades. This Court crafted the required records doctrine to distinguish between public and private records, back when the Court's Fifth Amendment decisions protected the latter but not the former. *See Shapiro*, 335 U.S. at 32–34; *Boyd v. United States*, 116 U.S. 616 (1886). The sole purpose of that distinction was to determine whether the Fifth Amendment applied to the *contents* of records. Now that the contents of documents are not protected at all, it is common sense that the required records doctrine is no longer relevant. Indeed, precisely because the contents of private documents are no longer protected, the government can now obtain documentary evidence through other means, such as search warrants or third-party subpoenas. The privilege against self-incrimination poses an obstacle only when, as here, the government attempts to take a short-cut by requiring the accused to prove its case for it. That is precisely the sort of compulsion the Fifth Amendment protects against.

The required records doctrine is at best an inexact proxy for the kind of records that often can be

produced without running afoul of the act-of-production privilege. For example, the witness in *Shapiro* surely could not have invoked the act-of-production privilege, for it was no secret that he was a licensed fruit wholesaler. But the proxy is inexact in cases like this, where the record-keeping requirement is widely imposed based on activities not otherwise public. And there is no coherent reason to rely on an inexact proxy, rather than simply applying the test required by this Court's modern Fifth Amendment jurisprudence. After all, it is indisputable that the required records doctrine "was developed without any consideration of the act of production" privilege at all. Alito, 48 U. Pitt. L. Rev. at 71–72.

2. Given this history, it should come as little surprise that the government's attempt to revitalize the required records doctrine seeks to convert it into something this Court never intended it to be. In the government's view, *Shapiro* stands for the sweeping proposition that the mere existence of a record-keeping requirement is sufficient to "waive" the Fifth Amendment privilege of anyone who engages in an activity for which records must be kept. But conceptualizing *Shapiro* as a waiver doctrine does not somehow save it from obsolescence. In an era when Fifth Amendment protection turned on the contents of documents, it was possible to think of the compilation of required records pursuant to a regulatory command as a "waiver" of any Fifth Amendment privilege in the documents. But in an era when the Fifth Amendment protects the later act of production if, but only if, it is compelled, incriminating, and testimonial, the idea that a

statutory directive to compile the documents is a prospective implied waiver of the constitutional privilege that attaches to a later act of production makes no sense at all. Even in the context of contemporaneous waivers, "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and … do not presume acquiescence in the loss of fundamental rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (internal quotation marks and citation omitted). Surely a prospective waiver of a constitutional right must be every bit as "knowing, voluntary, and intelligent." *Iowa v. Tovar*, 541 U.S. 77, 88 (2004).

Indeed, even during the pre-*Fisher* era, this Court balked at an "implicit waiver" as broad as the government has sold to the lower courts. *Marchetti v. United States*, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968), thoroughly rejected government efforts to invoke an implied waiver theory to justify forced disclosure of the defendants' participation in activities that were *not* open and notorious. In that context, the Court had little difficulty recognizing that any suggestion that the Fifth Amendment privilege had been "waived" was a complete fallacy. *See Marchetti*, 390 U.S. at 57 (rejecting notion that "privilege could be entirely abrogated by an[] Act of Congress").

Contrary to the government's contentions, this Court's decisions in *Hubbell* and *Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549 (1990), do not support its attempt to repurpose the required records doctrine into an exception to the act-of-production privilege. *Hubbell*, of course,

reaffirmed and applied the *act-of-production* privilege, and reiterated that "[w]hether the constitutional privilege … protects the act of production itself, is a question that is distinct from the question whether the unprotected contents of the documents themselves are incriminating." 530 U.S. at 37. In the course of doing so, the Court referenced *Shapiro* only for the unremarkable notion that, where there is no valid act-of-production privilege, the fact that the contents of required records are incriminatory does not provide a defense against their production. *Id.* at 35 & n.15. *Hubbell* said nothing about the distinct question whether an individual may assert a Fifth Amendment privilege when, as here, the act of producing required records is incriminatory in and of itself.

Bouknight is no aid to the government either. That case involved a highly unusual situation in which a parent refused to produce her missing child after *expressly* agreeing to cooperate with the child welfare agency as a condition of a court order granting her custody. 493 U.S. at 552–53. Furthermore, although the Court compelled production of the child even though doing so "might aid the State in prosecuting Bouknight," it went out of its way to reserve the question whether "limitations … may exist upon the State's ability to use the testimonial aspects of Bouknight's act of production in subsequent criminal proceedings." *Id.* at 555, 561. Thus, even as it recognized that those extraordinary circumstances demanded exigent action, and even in the face of Bouknight's *explicit* waiver of her right against compelled production, the Court *still* recognized that the validity of the underlying court order did not necessarily deprive

petitioner of her act-of-production privilege. If anything, therefore, *Bouknight* undermines the government's theory that a valid invocation of the required records doctrine can eliminate an otherwise-valid act-of-production privilege.

That leaves the government with little to say for itself, other than that the courts of appeals have repeatedly accepted its erroneous arguments. But the government has repeatedly told the lower courts that its counterintuitive "exception" to the act-of-production privilege is compelled by *Shapiro*. And this Court has repeatedly told the lower courts that they are not to anticipate the overruling of Supreme Court precedents even when the writing is already on the wall. *See, e.g.*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Under these circumstances, the fact that lower courts are taking this Court's advice is a reason for this Court to intervene and inter *Shapiro* itself.

In truth, the writing has been on the wall with respect to *Shapiro* ever since *Fisher* and *Doe*. But even prosecutors seemed to recognize as much, *see* Br. *Amici Curiae* of Former Officials with the Dep't of Justice, Tax Div., and IRS, and so *Shapiro* seemed to be a relatively harmless doctrinal loose end. Now that the government has seized on this loose end with a vengeance and convinced the lower courts that this anachronism is binding on them, the need for this Court's intervention is imperative.

II. This Case Is An Ideal Vehicle For Resolving This Important Question.

Contrary to the government's contentions, this case is an ideal vehicle for this Court to confront this

pressing question. Most important, the legal issue is cleanly and squarely presented. The government forthrightly admits that, but for the required records doctrine, petitioner could assert an act-of-production privilege and could not be compelled to comply with the subpoena. *See* Pet.App.6; Pet.App.16. Consequently, the *sole* basis for the lower court's decision was its conclusion that the required records doctrine operates as an exception to the absolute privilege against self-incrimination. *See* Pet.App.6; Pet.App.12. There is thus no distraction from the central issue: If the Court agrees with petitioner, the subpoena will be quashed and petitioner's documents returned. If the Court agrees with the government, the issuance of similar subpoenas will proliferate, and recipients will know to comply and (likely) plead guilty.*

Moreover, while the question presented is a recurring one, it is a question that, as a practical matter, will rarely find its way to this Court. In cases where the district court denies a motion to quash, the target is not entitled to an immediate appeal unless and until he is held in contempt or

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* The government suggests in passing that it "knew that petitioner had offshore bank accounts before the subpoena was issued." Opp.15. To be clear, the government has never asserted that the existence of the subpoenaed information was a "foregone conclusion," such that the act of production would "add[] little or nothing to the sum total of the Government's information." *Fisher*, 425 U.S. at 411. It instead contended only that it *inferred from petitioner's assertion of a Fifth Amendment privilege on an FBAR filing* that he must have had foreign bank accounts in the years in question. That utterly circular logic would defeat the act-of-production privilege in every case.

indicted, prosecuted, and convicted. *See Cobbledick v. United States*, 309 U.S. 323 (1940). More often than not, individuals faced with such circumstances will forego defense, produce the documents, and plead guilty. Indeed, statistics indicate that the vast majority of similar subpoenas that have issued over the past few years have resulted in guilty pleas. *See* John A. Townsend, *Offshore Charges/Convictions Spreadsheet*, Fed. Tax Crimes Blog (Mar. 16, 2013), http://federaltaxcrimes.blogspot.com/p/offshore-charges-convictions.html (follow download instructions link to access Excel spreadsheet). That trend is certainly likely to continue now that four of the Nation's most populous circuits have accepted the government's theory, and other courts may consider themselves bound by *Shapiro* to do the same unless and until this Court makes clear that it has not survived subsequent doctrinal developments.

Petitioner avoided the procedural dilemma individuals in this situation typically face because the district court granted his motion to quash, thereby entitling the government to an immediate appeal and providing this Court with jurisdiction to review the decision below. Although he has since complied with the subpoena while continuing to assert his Fifth Amendment privilege (and only after the government refused to stay its investigation pending an expedited petition for certiorari), the government readily concedes that this compliance under protest creates no Article III problem, *see* Opp.18; Pet.34 n.6, and offers no practical reason to await indictment and conviction before reviewing a dispositive legal question that requires no further factual development and is presented just as

squarely and cleanly now as it will be then. Nor does the government provide any compelling basis to accept its seeming suggestion (at 18) that petitioner is less entitled to this Court's review now because he did not take contempt just to produce a *second* appealable order and a *second* Seventh Circuit decision from which to seek certiorari.

In sum, this muddled area of law plainly warrants this Court's review. The government has successfully convinced multiple courts to depart from this Court's more recent Fifth Amendment jurisprudence and rely on a now-defunct doctrine to override concededly valid assertions of the act-of-production privilege. And this string of recent victories has only emboldened the government. In the decades following *Shapiro*, courts were "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. No trace of that commendable discretion remains. With the lower courts' blessing, the government has revived and repurposed the doctrine to advance the extraordinarily broad view that a citizen's decision to engage in a regulated activity automatically and entirely waives his constitutional right to object to the compelled production of required documentation. *See* Opp.13. This view is fundamentally incompatible with the Fifth Amendment's absolute privilege and, worse yet, has no logical stopping point. The need for this Court's intervention is paramount.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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