No. 11-1026

In the Supreme Court of the United States

M. H., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
KATHRYN KENEALLY
Assistant Attorney General
FRANK P. CIHLAR
S. ROBERT LYONS
GREGORY VICTOR DAVIS
ALEXANDER P. ROBBINS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner was properly held in contempt for failure to comply with a grand-jury subpoena for records of his offshore bank accounts based on the required-records doctrine recognized in *Shapiro* v. *United States*, 335 U.S. 1 (1948).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and regulations:

Miscellaneous: Page

In the Supreme Court of the United States

No. 11-1026

M. H., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 648 F.3d 1067. The opinion of the district court (Pet. App. 27-45) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2011. A petition for rehearing was denied on October 3, 2011 (Pet. App. 50). The petition for a writ of certiorari was filed on January 3, 2012 (Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After petitioner refused to comply with a grand jury subpoena for foreign bank-account records required to

be maintained under the Bank Secrecy Act (BSA or Act), 31 U.S.C. 5311 *et seq.*, the government moved to compel petitioner's compliance with the subpoena. The district court granted the government's motion, concluding that petitioner could not invoke his Fifth Amendment privilege against compelled self-incrimination because the records fell within the "required records" doctrine recognized in *Shapiro* v. *United States*, 335 U.S. 1 (1948). Pet. App. 27-45. The court of appeals affirmed. *Id.* at 1-26.

1. Under the BSA, a United States resident must keep records when he "makes a transaction or maintains a relation for any person with a foreign financial agency," as prescribed by the Secretary of the Treasury. 31 U.S.C. 5314. According to Treasury regulations, records "shall be retained by each person having a financial interest in or signature or other authority over any [foreign] account," and the records must contain:

> the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each such account during the reporting period.

31 C.F.R. 1010.420.[1] The records must be maintained for five years. *Ibid.* A person who willfully fails to maintain such records may be criminally prosecuted under 31 U.S.C. 5322(a).

2. Petitioner is a non-citizen permanent resident of the United States and the target of a grand-jury investigation seeking to determine whether he used secret

[1] At the time the subpoena was issued in this case, the Treasury regulation was located at 31 C.F.R. 103.32. See Pet. App. 4 n.1.

Swiss bank accounts to evade his federal income taxes. In February 2009, after a lengthy government investigation of its cross-border banking business, the Swiss bank UBS AG (UBS) entered into a deferred-prosecution agreement with the Department of Justice. Under that agreement, UBS admitted that it conspired to defraud the United States government by helping United States taxpayers commit tax evasion. Pursuant to the agreement, UBS provided the government with the account records of approximately 250 taxpayers, including petitioner. Pet. App. 3, 27-28.

In addition to obtaining records from UBS, a federal grand jury sitting in the Southern District of California issued a subpoena to petitioner for any foreign-account records that he was required to maintain under the Treasury regulations. The subpoena, dated June 29, 2010, demanded production of:

> Any and all records required to be maintained pursuant to 31 C.F.R. § [1010.420] relating to foreign financial accounts that you had/have a financial interest in, or signature authority over, including records reflecting the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each such account during each specified year.

Pet. App. 29. Petitioner refused to comply with the subpoena, invoking his Fifth Amendment privilege against compelled self-incrimination. *Ibid.* The government filed a motion to compel petitioner's compliance with the subpoena. *Ibid.*

3. The district court granted the government's motion to compel. Pet. App. 27-45. The court concluded that, under the "required records" doctrine recognized in *Shapiro*, *supra*, petitioner had no Fifth Amendment right to withhold the subpoenaed documents because he had voluntarily engaged in activity (the holding of foreign bank accounts) that subjected him to regulatory recordkeeping requirements. *Id.* at 32-44.

The court ordered petitioner to comply with the grand-jury subpoena within 30 days. Pet. App. 44. After petitioner continued to refuse to comply with the subpoena, the district court held him in contempt. *Id.* at 2, 4. The court ordered petitioner confined but stayed its order pending petitioner's appeal of the contempt order. *Id.* at 4.

4. a. The court of appeals affirmed. Pet. App. 1-26. The court observed that, in certain circumstances, the Fifth Amendment privilege against compelled self-incrimination "does not extend to records required to be kept as a result of an individual's voluntary participation in a regulated activity." *Id.* at 8. The court concluded that the three basic prerequisites to invocation of the "required records" doctrine were satisfied in this case.

First, the court concluded that federal recordkeeping requirements governing foreign-account information were not primarily directed to enforcement of the criminal law, but instead had an "essentially regulatory" purpose. Pet. App. 12-15. The court relied in part on this Court's observation in *California Bankers Ass'n* v. *Schultz*, 416 U.S. 21 (1974), that, although the BSA serves in part to facilitate enforcement of criminal laws, "Congress seems to have been equally concerned with civil liability which might go undetected by reason of transactions of the type required to be recorded or re-

ported." Pet. App. 13 (quoting *Schultz*, 416 U.S. at 76). The court further explained that, because "[t]here is nothing inherently illegal about having or being a beneficiary of an offshore foreign banking account," this situation differs from prior cases in which "the activity being regulated—gambling—was almost universally illegal, so that paying a tax on gambling wagers necessarily implicated a person in criminal activity." *Id.* at 15; see *id.* at 15-16 (describing the account-related information petitioner was required to maintain and concluding that "[b]ecause the information * * * is not inherently criminal, being required to provide that information would generally not establish a significant link in a chain of evidence tending to prove guilt").

Second, the court concluded that the information requested by the subpoena was information "customarily kept" by persons in petitioner's position. Pet. App. 19-20. The court explained that "[t]he information that [31 C.F.R.] § 1010.420 requires to be kept is basic account information that bank customers would customarily keep, in part because they must report it to the [Internal Revenue Service (IRS)] every year as part of the IRS's regulation of offshore banking, and in part because they need the information to access their foreign bank accounts." Pet. App. 19-20. While acknowledging that petitioner's "bank keeps the records on his behalf," the court emphasized that "[a] bank account's beneficiary necessarily has access to such essential information as the bank's name, the maximum amount held in the account each year, and the account number." *Id.* at 20. The court stated that "[b]oth common sense and the records reviewed in camera support this assessment." *Ibid.*

Third, the court concluded that the information covered by the subpoena satisfied the "public aspects" prerequisite of the required-records doctrine. Pet. App. 20-25. The court explained that, "[w]here personal information is compelled in furtherance of a valid regulatory scheme, as is the case here, that information assumes a public aspect." *Id.* at 21. The court further observed that "disclosure of basic account information is an 'essentially neutral' act necessary for effective regulation of offshore banking." *Ibid.*

b. On October 7, 2011, the court of appeals granted petitioner's motion for a stay of the mandate pending the filing and disposition of a petition for a writ of certiorari. Pet. App. 46. On October 17, however, the court granted the government's motion for reconsideration of that stay order and issued the mandate. *Id.* at 47. Petitioner filed a motion to recall the mandate, which the court of appeals denied, noting the government's "overriding concerns about the ability of the grand jury to complete its inquiries before it expires." *Id.* at 48-49. This Court denied petitioner's application for an emergency stay. See 132 S. Ct. 474.

5. In December 2011 and January 2012, petitioner responded to the subpoena, producing records of various offshore bank accounts to either the government or to the district court for *in camera* review. Following litigation in the district court, the records submitted to the district court for *in camera* review were produced to the government. On January 28, 2012, the term of the grand jury that issued the subpoena expired.

ARGUMENT

Petitioner contends (Pet. 18-41) that he should not have been held in contempt for failing to produce

foreign-account records in response to a grand-jury subpoena because he properly invoked his Fifth Amendment privilege against compelled self-incrimination. The court of appeals correctly rejected petitioner's Fifth Amendment argument, and its decision does not conflict with any decision of this Court or another court of appeals. Furthermore, this case would be an unsuitable vehicle in which to review petitioner's claim because the contempt order that is the subject of petitioner's appeal has expired, petitioner has already produced the documents, and no final judgment has been entered. Further review is not warranted.

1. The Fifth Amendment provides that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. Because the privilege against self-incrimination "protects a person only against being incriminated by his own compelled testimonial communications," it does not protect private financial papers that the person prepared voluntarily or that were prepared by someone else. See *United States* v. *Doe*, 465 U.S. 605, 611-612 (1984); *United States* v. *Hubbell*, 530 U.S. 27, 35-36 (2000).

In some circumstances, the act of producing documents in response to a subpoena may constitute "testimony" within the meaning of the Fifth Amendment. *Fisher* v. *United States*, 425 U.S. 391, 410 (1976) (responding to a subpoena may implicitly assert that the documents exist, are in the person's possession, and are authentic). In those circumstances, a witness may generally invoke his Fifth Amendment privilege in refusing to respond. But this Court has held that the Fifth Amendment privilege does not extend to records required to be kept as a result of an individual's voluntary participation in a regulated activity. See *Shapiro* v.

United States, 335 U.S. 1, 17 (1948). In such circumstances, the Court has explained, the principle that "the custodian has voluntarily assumed a duty which overrides his claim of privilege * * * applies * * * to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established." *Ibid.* (emphasis omitted) (quoting *Davis* v. *United States*, 328 U.S. 582, 589-590 (1946)).

In *Shapiro*, the Court held that the Fifth Amendment did not protect a fruit-and-produce wholesaler against prosecution based on documents that he was required to keep and make available for inspection under the Emergency Price Control Act of 1942, 50 U.S.C. App. 901 *et seq*. See 335 U.S. at 34-35. The Court explained that Congress can legitimately impose recordkeeping inspection requirements on activity that is within its power to prohibit entirely. *Id.* at 32-33.

In subsequent cases, the Court has explained that records falling within the required-records doctrine must have three essential characteristics: (1) the purpose of the government's inquiry must be essentially regulatory; (2) the information is obtained by requiring the preservation of records that are customarily kept; and (3) the records must have "public aspects." *Grosso* v. *United States*, 390 U.S. 62, 67-68 (1968). Applying those prerequisites, the Court has held that where a recordkeeping requirement is "directed almost exclusively to individuals inherently suspect of criminal activities," *id.* at 68, such as persons engaged in illegal gambling, see *ibid.*; *Marchetti* v. *United States*, 390 U.S. 39 (1968); and persons possessing illegal firearms, see *Haynes* v. *United States*, 390 U.S. 85 (1968), the

required-records doctrine does not apply. In those situations, the doctrine would not be justified because "in almost every conceivable situation[,] compliance with the statutory * * * requirements would have been incriminating." *California* v. *Byers*, 402 U.S. 424, 430 (1971).

a. The court of appeals correctly held that petitioner could not invoke his Fifth Amendment privilege to avoid producing foreign-account records required to be kept under the BSA because those documents fall within the required-records doctrine. Congress has express power to "regulate Commerce with foreign Nations." U.S. Const. Art. I, § 8, Cl. 3. This Court has explained, in discussing the BSA, that "Congress could have closed the channels of commerce entirely to negotiable instruments, had it thought that so drastic a solution were warranted." *California Bankers Ass'n* v. *Schultz*, 416 U.S. 21, 46-47 (1974). Accordingly, as in *Shapiro*, foreign banking is activity upon which Congress can legitimately impose recordkeeping and inspection requirements. *Shapiro*, 335 U.S. at 32.

Furthermore, the court of appeals correctly concluded that the prerequisites of the required-records doctrine had been met. Petitioner's contention (Pet. 30-41) that there "is disagreement in the lower courts" about how to apply each prerequisite of that doctrine is misconceived.

i. The foreign-account recordkeeping requirements have an essentially regulatory purpose and are not primarily directed at criminal law enforcement. This Court has recognized that the BSA was intended in part to facilitate "enforcement of the criminal laws." *Schultz*, 416 U.S. at 76. The Court has also explained, however, that Congress "seems to have been equally concerned

with civil liability which might go undetected by reason of transactions of the type required to be recorded or reported." *Ibid.* The Act expressly states that its purpose is "to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 31 U.S.C. 5311. See *Shapiro*, 335 U.S. at 8 (listing the express purposes of recordkeeping requirements as being "not merely to 'obtain information' for assistance in prescribing regulations or orders under the statute, but also to aid 'in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder'") (emphasis omitted). And the Court in *Schultz* further observed that "the fact that a legislative enactment manifests a concern for the enforcement of the criminal law does not cast any generalized pall of constitutional suspicion over it." 416 U.S. at 77.[2]

The BSA thus differs fundamentally from the legal regime at issue in *Marchetti* and *Grosso*, on which petitioner relies (Pet. 30-31, 35-36). While the recordkeeping requirements in those cases were aimed almost exclusively at inherently criminal gambling activity, "[t]here is nothing inherently illegal about having or being a beneficiary of an offshore foreign banking account." Pet. App. 15. As with the recordkeeping requirements under the Emergency Price Control Act

---

[2] Petitioner contends (Pet. 35) that the court of appeals erred in relying on *Schultz* and other "cases which considered the constitutionality of *reporting requirements*." But as the court of appeals explained (Pet. App. 22), this Court has explicitly held that there is "no meaningful difference between an obligation to maintain records for inspection, and such an obligation supplemented by a requirement that those records be filed periodically with officers of the United States." *Marchetti*, 390 U.S. at 56 n.14.

in *Shapiro*, particular foreign-account records may be incriminating in particular circumstances, but "[n]othing about having a foreign bank account on its own suggests a person is engaged in illegal activity." *Ibid.* Indeed, in 2009, more than 500,000 reports disclosing foreign accounts were filed pursuant to the BSA's reporting requirement. See *ibid.*; Gov't C.A. Br. 20 & n.16.

Like "the requirements at issue in *Shapiro*," the recordkeeping requirements involved in this case are "imposed in 'an essentially non-criminal and regulatory area of inquiry.'" *Marchetti*, 390 U.S. at 57 (citation omitted). Maintaining a foreign bank account is at least as legally innocuous as two activities to which this Court has applied the required-records doctrine: getting in an automobile accident, see *Byers*, 402 U.S. at 430-431, and being adjudged incompetent to care for one's own child without state supervision, see *Baltimore City Dep't of Soc. Servs.* v. *Bouknight*, 493 U.S. 549, 559-560 (1990). And holding a foreign account is far afield from the types of inherently illegal activities to which the doctrine does not apply, such as illegal gambling, see *Marchetti*, 390 U.S. at 44-45, membership in an organization advocating the violent overthrow of the United States government, see *Albertson* v. *Subversive Activities Control Bd.*, 382 U.S. 70, 77-79 (1965), possessing illegal firearms, see *Haynes*, 390 U.S. at 96-97, and possessing marijuana, see *Leary* v. *United States*, 395 U.S. 6, 16-18 (1969).

Petitioner contends (Pet. 30-36) that the court of appeals' decision conflicts with the Fifth Circuit's decision in *United States* v. *Hajecate*, 683 F.2d 894 (1982), cert. denied, 461 U.S. 927 (1983), in which the court stated that the legislative history of the BSA reflects "a presumption by Congress that secret foreign bank accounts

and secret foreign financial institutions are inevitably linked to criminal activity in the United States." *Id.* at 901. That single sentence of dictum will not bear the weight petitioner seeks to place upon it. In the preceding sentence of its opinion, the Fifth Circuit quoted this Court's observation that "[t]he express purpose of the Act is to require the maintenance of records, and the making of certain reports, which have a high degree of usefulness in criminal, tax or regulatory investigations." *Ibid.* (quoting *Schultz*, 416 U.S. at 26) (internal quotation marks omitted). That statement reflects the court's awareness that facilitation of criminal investigations was simply one of the BSA's purposes. Moreover, *Hajecate* did not present any Fifth Amendment issue, and that decision thus could not create a conflict with the decision in this case.

ii. Records of a foreign bank account are also "customarily kept" by account holders. Account holders keep such records not only to comply with the requirement that they report the accounts to the IRS each year, but also to track and maintain access to the money in those accounts. Petitioner contends (Pet. 36-38) that to "customarily keep" a record means to *personally* keep it, excluding records held by a third party on one's behalf. Pet. 37. Petitioner cites no authority for that contention, and, as the court of appeals explained, it is "common sense" that a bank-account holder would have records showing the name and number of his bank accounts. Pet. App. 20.

iii. Foreign-account records also have "public aspects" as part of a valid regulatory enforcement requirement. As the Court explained in *Shapiro*, the inquiry under this prong turns not on the nature of the records, but on whether the government may legitimately regu-

late the activity in question and thus require that records be kept. 335 U.S. at 33.

Petitioner's contention (Pet. 27-30) that he did not voluntarily submit to the BSA's reporting requirement therefore lacks merit. Although petitioner's obligation to pay taxes is not voluntary, his decision to hold foreign bank accounts is voluntary and subject to regulatory requirements. Where a person "enters upon a regulated activity knowing that the maintenance of extensive records available for inspection by the regulatory agency is one of the conditions of engaging in the activity," the required-records doctrine applies. Pet. App. 24; *Shapiro*, 335 U.S. at 32.

b. Petitioner further contends (Pet. 26-30) that the required-records doctrine applies only to industries that provide goods and services and operate pursuant to licensing requirements. See also Br. for John and Jane Does As Amici Curiae In Supp. of Pet'rs 11-14 (Doe Amici Br.). That is incorrect.

Petitioner cites no case imposing those requirements as prerequisites to application of the required-records doctrine. Congress could, of course, impose licensing requirements on foreign bank-account holders and impose further substantive restrictions on those accounts (in addition to reporting the accounts to the IRS and paying taxes on them). See p. 9, *supra*; *Schultz*, 416 U.S. at 46-47 (explaining that Congress could "close[] the channels of commerce entirely to negotiable instruments, had it thought that so drastic a solution were warranted"). Congress chose not to impose such requirements in the BSA, consistent with its express purpose "to avoid burdening unreasonably a person making a transaction with a foreign financial agency." 31 U.S.C. 5314. Petitioner points to no decision of this Court or

another court of appeals that would limit the required-records doctrine to regulatory regimes that impose licensing requirements on businesses that offer goods for sale.

c. Petitioner further contends (Pet. 18-24) that the required-records doctrine does not apply because responding to the subpoena would compel him to incriminate himself. In so arguing, petitioner mistakenly relies on the act-of-production doctrine announced in *Fisher* and applied in cases such as *Hubbell*. The act-of-production doctrine is founded on the proposition that a person who responds to a subpoena implicitly represents, through his response, that the documents he hands over exist, were in his possession, and are authentic. See *Fisher*, 425 U.S. at 410. Thus the relevant question under the act-of-production doctrine is whether a particular witness, under his particular factual circumstances, will be required to incriminate himself through the act of responding to a subpoena. In contrast, as the court of appeals explained, the relevant question under the required-record doctrine is whether a person has voluntarily submitted to a recordkeeping or reporting requirement as a condition of engaging in a regulated activity and thereby waived any Fifth Amendment argument he might otherwise have. Pet. App. 8 (citing *Shapiro*, 335 U.S. at 17).

Petitioner suggests (Pet. 18-24) that more recent decisions of this Court have called into question the required-records doctrine recognized in *Shapiro* by redefining the scope of the Fifth Amendment to focus on the testimonial act associated with the production of evidence. That is incorrect. In *Hubbell*, this Court cited *Shapiro* in observing that "the fact that incriminating evidence may be the byproduct of obedience to a regula-

tory requirement, such as * * * maintaining required records, * * * does not clothe such required conduct with the testimonial privilege." 530 U.S. at 35 & n.15. Similarly, in *Bouknight*, *supra*, the Court cited *Shapiro* in holding that a parent entrusted with custody of her child by a court order could not rely on the Fifth Amendment to resist producing the child in response to a proper request. 493 U.S. at 559. Thus, even after recognizing the act-of-production principle as an important component of the Fifth Amendment privilege, see *Hubbell*, 530 U.S. at 36-37, this Court has continued to accept the vitality of the "required records" doctrine.[3]

2. Petitioner does not identify any conflict in the courts of appeals on the issues he presents. Petitioner contends (Pet. 38-41) that the court of appeals' conclusion that foreign-account records have public aspects conflicts with prior Seventh Circuit cases holding that "records required to be maintained and produced under the federal tax code" are not public records. See also

[3] The petition contains two questions presented (Pet. i): "[w]hether the Required Records exception to the Fifth Amendment privilege against self-incrimination applies to bank records under the BSA" and "[w]hether the Required Records exception to the Fifth Amendment privilege against self-incrimination applies when an individual, without immunity, is compelled to respond to a subpoena where either the act of production or the admitted absence of required records has incriminating testimonial aspects." But if the required-records doctrine applies, the act-of-production doctrine does not. As petitioner acknowledges (Pet. 18), the required-records doctrine was not abrogated by this Court's act-of-production cases. In fact, the Court's most recent required-records decision makes that clear. See *Bouknight*, 493 U.S. at 555-559. Petitioner's production of his foreign-account records may be incriminating, but under the required-records doctrine, petitioner has waived any Fifth Amendment claim he may otherwise have had by voluntarily engaging in a regulated activity that requires him to keep those records.

Doe Amici Br. 11-14. The cases petitioner and his amici cite, however, deal with categories of documents that are readily distinguishable from the foreign account records here.

Smith v. *Richert*, 35 F.3d 300 (7th Cir. 1994), involved W-2s, 1099s, bank statements, and similar records needed to determine income-tax liability. *Id.* at 302. The Seventh Circuit distinguished specialized regulatory programs, to which the "required records" doctrine applies, from activity in which the general population engages. The court explained that the "required records" doctrine applies to "the individual who enters upon a regulated activity knowing that the maintenance of extensive records available for inspection by the regulatory agency is one of the conditions of engaging in the activity. The decision to become a taxpayer cannot be thought voluntary in the same sense." *Id.* at 303. In *United States* v. *Porter*, 711 F.2d 1397 (7th Cir. 1983), the court similarly observed that, with respect to records the IRS requires all taxpayers to keep, "the taxpayer is not, as in *Shapiro*, required to keep such records as an ongoing condition of operating his business under a comprehensive government regulatory scheme." *Id.* at 1405.

The relevant Seventh Circuit decisions thus draw a clear distinction between unconditional recordkeeping requirements that apply to the public at large, and recordkeeping requirements imposed as a condition of engaging in a relatively narrow sphere of activity legitimately subject to governmental oversight and regulation. In focusing on whether an individual's decision to subject himself to particular recordkeeping requirements can realistically be deemed voluntary, the Seventh Circuit appropriately grounded its analysis in the

core rationale for the "required records" doctrine. As the court of appeals recognized, because "no one is required" either legally or practically "to participate in the activity of offshore banking," the "required records doctrine *would* apply" to the circumstances presented here under the Seventh Circuit's approach. Pet. App. 24.

As petitioner points out (Pet. 20-21, 26-30, 34-35), two district courts have issued orders declining to compel individuals to produce foreign-account records in response to grand-jury subpoenas. See *In re Grand Jury Subpoena*, No. H-11-174 (under seal) (S.D. Tex. Sept. 21, 2011) (Pet. S. App. 1-7); *In re Special February 2011-1 Grand Jury Subpoena Dated September 12, 2011*, No. 11 GJ 792, 2011 WL 5903795 (N.D. Ill. Nov. 22, 2011) (Pet. S. App. 8-13).

In *In re Grand Jury Subpoena*, the court concluded that foreign-account records did not have public aspects and that the government's purpose in requiring recordkeeping under the BSA was not predominantly regulatory. Pet. S. App. 4-7. In *In re Special February 2011-1 Grand Jury Subpoena Dated September 12, 2011*, the court concluded that because the target of the subpoena had failed to report his foreign bank accounts, the act of producing the records would be incriminating and he could therefore invoke his Fifth Amendment privilege. The court limited the required-records doctrine in act-of-production cases to scenarios where "the individual's decision to participate in a regulated activity" is already known to the government. Pet. S. App. 9-12.

The government has appealed those district court decisions to the Fifth and Seventh Circuits, respectively. See *In re Grand Jury Subpoena*, No. 11-20750 (under seal) (5th Cir. filed Oct. 20, 2011); *Appellant* v. *Appellee* (under seal), No. 11-3799 (7th Cir. filed Dec. 16, 2011).

Although the court of appeals in this case disagrees with those opinions, those district court decisions set no precedent. The relevant courts of appeals will have an opportunity to review those decisions, and until such review has occurred, the claim of a conflict is premature.

3. Furthermore, this case would be an unsuitable vehicle in which to review the question presented for several reasons.

First, the contempt order from which petitioner appealed has expired. The term of the grand jury that issued the subpoena to petitioner expired on January 28, 2012. When a grand jury's term expires, so does any contempt order based on a witness's failure to comply with a subpoena issued by that grand jury. See *Shillitani* v. *United States*, 384 U.S. 364, 371 (1966). Accordingly, there is no underlying contempt order for this Court to review.

Second, petitioner has already produced the documents requested in the subpoena. Petitioner is therefore no longer in contempt of court and does not have "an ongoing interest in the dispute" over the propriety of the district court's contempt order, rendering this case moot. *Camreta* v. *Greene*, 131 S. Ct. 2020, 2023-2024 (2011).

Third, the absence of a final judgment is "a fact that of itself alone furnishe[s] sufficient ground for the denial" of the petition for certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdic-

tion."). This Court routinely denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of criminal proceedings. See Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 280-281 & n.63 (9th ed. 2007). The Court should not depart from that general practice here.

The absence of a final judgment is especially significant in petitioner's case because there is no way to know whether or how petitioner's production of foreign-account records in response to the subpoena might be used against him in criminal proceedings, if such proceedings are brought. Accordingly, it is unclear whether and to what extent the court of appeals' resolution of the question presented will have any practical bearing on petitioner's criminal liability.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
KATHRYN KENEALLY
Assistant Attorney General
FRANK P. CIHLAR
S. ROBERT LYONS
GREGORY VICTOR DAVIS
ALEXANDER P. ROBBINS
Attorneys

MAY 2012