No. 12-853

In the Supreme Court of the United States

T.W., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was properly ordered 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).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 691 F.3d 903. The opinion of the district court (Pet. App. 14-28) is reported at 852 F. Supp. 2d 1020.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 2012. A petition for rehearing was denied on October 24, 2012 (Pet. App. 13). The petition for a writ of certiorari was filed on January 9, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner moved to quash 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.*, invoking his Fifth Amendment privilege

against compelled self-incrimination. The district court granted petitioner's motion to quash. Pet. App. 14-28. The court of appeals reversed, concluding that petitioner could not invoke his Fifth Amendment privilege because the records demanded by the subpoena fell within the "required records" doctrine recognized in *Shapiro* v. *United States*, 335 U.S. 1 (1948). Pet. App. 1-12.

1. Under the BSA, a United States citizen or 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(a). 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. The records must be maintained for five years and "shall be kept at all times available for inspection as authorized by law." *Ibid.* A person who willfully fails to maintain such records may be criminally prosecuted under 31 U.S.C. 5322(a).

2. Petitioner is the target of a grand-jury investigation seeking to determine whether he used secret offshore bank accounts to evade his federal income taxes. A federal grand jury sitting in the Northern District of Illinois issued a subpoena to petitioner for any foreign-account records that he was required to maintain under

the Treasury regulations. The subpoena, dated September 12, 2011, 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. 2. Petitioner moved to quash the subpoena, invoking his Fifth Amendment privilege against compelled self-incrimination. *Ibid.* The government countered that under the required-records doctrine recognized in *Shapiro*, *supra*, petitioner had no Fifth Amendment privilege to withhold the subpoenaed documents because he had voluntarily engaged in an activity (the holding of foreign bank accounts) that subjected him to regulatory recordkeeping requirements—including a requirement that he keep and allow inspection of the subpoenaed records. In making this argument, the government assumed, *arguendo*, that petitioner's act of responding to the subpoena might tend to incriminate him. *Id.* at 16-17.

3. The district court granted petitioner's motion to quash. Pet. App. 14-28. The court explained that there was "no dispute * * * that the contents of the subpoenaed documents enjoy no Fifth Amendment privilege[] [b]ecause the foreign banks holding [petitioner's] accounts created the documents that the government seeks," and the documents therefore "do not include [petitioner's] testimony, much less his compelled testi-

mony." *Id.* at 16. The court further explained, however, that in *Fisher* v. *United States*, 425 U.S. 391 (1976), this Court held that although the Fifth Amendment does not protect the contents of subpoenaed documents, it protects the compelled production of a document if "the act of producing the document * * * [has] testimonial aspects, such as an admission that the document is authentic." Pet. App. 20-21.

The court acknowledged the required-records doctrine recognized in *Shapiro*, but concluded that the doctrine was applicable only to individuals "engage[d] in * * * regulated activity in public" where "[t]he individual's participation in the regulated activity is obvious." Pet. App. 25. The court observed that individuals subject to regulation under the BSA "have not necessarily engaged in activities with the public or in the public sphere," and that forcing petitioner to produce his foreign bank account records "would compel him to admit that he has a foreign bank account, a compelled admission that the Fifth Amendment protects him from having to make." *Id.* at 26.

4. The court of appeals reversed. Pet. App. 1-12.

a. The court explained that "[o]ne of the rationales, if not the main rationale," behind the required-records doctrine "is that the government or a regulatory agency should have the means, over an assertion of the Fifth Amendment [p]rivilege, to inspect the records it requires an individual to keep as a condition of voluntarily participating in that regulated activity." Pet. App. 11. The court observed that "[t]hat goal would be easily frustrated" if the required-records doctrine "were inapplicable whenever the act of production privilege was invoked." *Ibid.* The court further explained:

> The voluntary choice to engage in an activity that imposes record-keeping requirements under a valid civil regulatory scheme carries consequences, perhaps the most significant of which, is the possibility that those records might have to be turned over upon demand, notwithstanding any Fifth Amendment privilege. That is true whether the privilege arises by virtue of the contents of the documents or by the act of producing them. The district court erred to the extent that it held that the Required Records Doctrine was not applicable because [petitioner's] compelled production was incriminating and thus protected under the Fifth Amendment.

Ibid. The court noted that several courts, including this Court, had applied the required-records doctrine notwithstanding the invocation of the act-of-production doctrine. *Id.* at 8 (citing, *inter alia*, *Baltimore City Dep't of Soc. Servs.* v. *Bouknight*, 493 U.S. 549 (1990); *In re Grand Jury Subpoena (Spano)*, 21 F.3d 226 (8th Cir. 1994); *In re Grand Jury Subpoena Duces Tecum (Underhill)*, 781 F.2d 64 (6th Cir.), cert. denied, 479 U.S. 813 (1986)).

The court of appeals further concluded that the requirements of the required-records doctrine were satisfied. The court noted that the Ninth Circuit had recently concluded "in a case nearly identical to this one" that foreign-account records required to be kept and made available for inspection under the BSA fell within the required-records doctrine. Pet. App. 12 (citing *In re Grand Jury Investigation M.H.*, 648 F.3d 1067 (9th Cir. 2011), cert. denied, 133 S. Ct. 26 (2012) (*M.H.*)). The court stated that it "need not repeat the Ninth Circuit's thorough analysis." *Ibid.*

b. In *M.H.*, the Ninth Circuit described the three basic prerequisites for invocation of the required-records doctrine and concluded that they were satisfied in a case involving foreign-account records. 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. 648 F.3d at 1073-1076. The court relied in part on this Court's observation in *California Bankers Ass'n* v. *Shultz*, 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 reported." *M.H.*, 648 F.3d at 1074 (quoting *Shultz*, 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." *Ibid.*; see *id.* at 1075 (describing the account-related information required to be maintained under the BSA 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 Ninth Circuit concluded that the information requested by the subpoena was information "customarily kept" by persons in petitioner's position. *M.H.*, 648 F.3d at 1076. 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." *Ibid.* While acknowledging that M.H.'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." *Ibid.* The court stated that "[b]oth common sense and * * * records reviewed in camera support this assessment." *Ibid.*

Third, the Ninth Circuit concluded that the information covered by the subpoena satisfied the "public aspects" prerequisite of the required-records doctrine. *M.H.*, 648 F.3d at 1076-1079. 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 1077. The court further observed that "disclosure of basic account information is an 'essentially neutral' act necessary for effective regulation of offshore banking." *Ibid.*

5. After the court of appeals denied petitioner's request for rehearing and rehearing en banc (Pet. App. 13), a new grand jury re-issued the subpoena, because the term of the grand jury that had issued the original subpoena had expired. Petitioner complied with this new subpoena and produced the records it demanded. Pet. 13.

ARGUMENT

Petitioner contends (Pet. 13-31) that he should not have been required 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 petitioner has already produced the documents demanded by the subpoena, and petitioner has received no final judgment of conviction. Further review is not warranted.

1. a. 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) (quoting *Fisher* v. *United States*, 425 U.S. 391, 409 (1976)); *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*, 425 U.S. at 410 (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, ch. 26, 56 Stat. 23 (50 U.S.C. App. 901 *et seq.*). See 335 U.S. at 34-35. The Court explained that Congress can legitimately impose recordkeeping and inspection requirements on activity that is within its power to prohibit entirely. *Id.* at 32-33.

In subsequent cases, the Court has explained that the required-records doctrine has three premises: (1) the purpose of the recordkeeping requirement must be "essentially regulatory"; (2) 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 factors, 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 [be] incriminating." *California* v. *Byers*, 402 U.S. 424, 430 (1971).

b. 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. *Shultz*, 416 U.S. 21, 47 (1974). Accordingly, foreign banking, like the activity in *Shapiro*, 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.

i. The foreign-account recordkeeping requirements have an essentially regulatory purpose and are not primarily directed at criminal law enforcement. Petitioner contends (Pet. 29) that "the BSA requires individuals to keep information to facilitate criminal investigation, pure and simple." See also John & Jane Does Amicus Br. 3; Taxation Comm. Amicus Br. 10-12. That is incorrect.

This Court has recognized that the BSA was intended in part to facilitate "enforcement of the criminal laws." *Shultz*, 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, which is similar to the Emergency Price Control Act in *Shapiro*, see 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 as the Court in *Shultz* further observed, "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.

The BSA thus differs fundamentally from the legal regime at issue in *Marchetti* and *Grosso*, on which petitioner relies. See Pet. 26-31. 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." *In re Grand Jury Investigation M.H.*, 648 F.3d 1067, 1074 (9th Cir. 2011), cert. denied, 133 S. Ct. 26 (2012). As with the recordkeeping requirements under the Emergency Price Control Act in *Shapiro*, particular foreign-account records may be incriminating in particular cir-

cumstances, 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. 19 & n.11.

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).

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. It is "common sense" that a bank-account holder would have records showing the name

and number of his bank accounts, *M.H.*, 648 F.3d at 1076, and petitioner does not contend otherwise.

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 regulate the activity in question and thus require that records be kept. 335 U.S. at 33. 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. *M.H.*, 648 F.3d at 1078; see *Shapiro*, 335 U.S. at 17 (explaining that one may "voluntarily assume[] a duty which overrides his claim of privilege" (quoting *Davis*, 328 U.S. at 589-590)). Petitioner acknowledges that his decision to maintain a foreign bank account was voluntary. Pet. App. 24.

2. a. Petitioner contends (Pet. 17-24) that the required-records doctrine does not apply, because responding to the subpoena would cause him to incriminate himself and that the required-records doctrine is not an "exception" to the act-of-production doctrine announced in *Fisher* and applied in cases such as *Hubbell*. Petitioner contends (Pet. 17-24) that the required-records doctrine was developed when the Fifth Amendment privilege against compelled self-incrimination applied only to documents that were private in character and that more recent decisions of this Court have made the required-records doctrine obsolete by redefining the scope of the Fifth Amendment to focus on the testimonial act associated with the production of evidence. See

also John & Jane Does Amicus Br. 10-13. 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 regulatory 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. Tellingly, petitioner does not even cite *Bouknight*, despite the court of appeals' reliance on it (Pet. App. 6, 8), and he ignores the critical language in *Hubbell*.

The tension petitioner perceives between the required-records and the act-of-production doctrines has also found no support in the lower courts. In cases involving a variety of other regulatory regimes, the courts of appeals have rejected petitioner's argument that this Court's act-of-production cases made the required-records doctrine obsolete. See, *e.g.*, *In re Grand Jury Subpoena (Spano)*, 21 F.3d 226, 230 (8th Cir. 1994); *United States* v. *Lehman*, 887 F.2d 1328, 1332 (7th Cir. 1989); *In re Grand Jury Proceedings*, 801 F.2d 1164, 1168-1169 (9th Cir. 1986); *In re Two Grand Jury Subpoenae Duces Tecum*, 793 F.2d 69, 73 (2d Cir. 1986); *In re Grand Jury Subpoena Duces Tecum (Underhill)*, 781 F.2d 64, 70 (6th Cir.), cert. denied, 479 U.S. 813

(1986); *In re Grand Jury Proceedings (McCoy & Sussman)*, 601 F.2d 162, 168 (5th Cir. 1979).

b. Petitioner further contends (Pet. 25-31) that the required-records doctrine only applies to individuals who participate "open[ly] * * * in heavily regulated activities, where the act of production itself is not protected because it reveals nothing that is not otherwise publicly known." But petitioner's argument that the required-records doctrine applies only to "open and notorious" businesses and not a "private" decision to maintain a foreign bank account (Pet. 11, 27) would effectively exempt any black-marketeer from both the recordkeeping and the reporting requirements that apply to the rest of his regulated industry. By voluntarily participating in an activity that is highly regulated, an individual assumes a duty to keep records and report them that "overrides his claim of privilege." *Shapiro*, 335 U.S. at 17 (citation omitted).

Moreover, the factual premise of petitioner's distinction between himself and businesses operating "open[ly]" in regulated industries (where, according to petitioner, the act of producing documents does not reveal any information that is not already known) is also incorrect. The government in this case knew that petitioner had offshore bank accounts before the subpoena was issued. Gov't C.A. Br. 42-43. And, more generally, the required-records doctrine would also apply if an individual were covertly carrying on a highly regulated activity under the cover of an otherwise legitimate and not highly regulated enterprise.

c. Petitioner's amici point out (John & Jane Does Amicus Br. 13-17; Taxation Comm. Amicus Br. 19-20) that taxpayers cannot be required to produce tax documents in violation of their Fifth Amendment privilege

against compelled self-incrimination, and they contend that "having a foreign bank account is no more of a regulated activity than paying taxes." The cases 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 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.

Those 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, those decisions were appropriately

grounded in an analysis of the core rationale of the required-records doctrine. As the Ninth Circuit recognized in *M.H.*, 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 approach of the cases that amici cite. 648 F.3d at 1078 (emphasis in original).

3. Contrary to petitioner's contention (Pet. 13, 24), no confusion exists in the lower courts on the question presented warranting intervention by this Court. Indeed, every court of appeals to have considered the specific issue in this case has held that the required-records doctrine prohibits an individual from invoking his Fifth Amendment privilege against compelled self-incrimination in response to a subpoena demanding the production of foreign-account records that a person is required to keep and make available for inspection under the BSA. In addition to the court of appeals' decision in this case and the Ninth Circuit's decision in *M.H.*, *supra*, the Fifth and Eleventh Circuits have reached the same conclusion. See *In re Grand Jury Proceedings*, 707 F.3d 1262 (11th Cir. 2013); *In re Grand Jury Subpoena*, 696 F.3d 428 (5th Cir. 2012).

Petitioner acknowledges (Pet. 23, 31-34) that the decisions of the courts of appeals are uniformly against him, but he nevertheless contends (Pet. 33) that this Court should grant certiorari because "other courts may feel themselves bound by *Shapiro*" and may erroneously (in petitioner's view) rule in favor of the government in future cases involving subpoenas for foreign-account records. Petitioner further contends that this case presents a "rare opportunity" to resolve this issue. *Ibid.* But this Court has previously denied review of the same

issue, *M.H.*, *supra*, (No. 11-1026), and the harmony in the lower courts, confirmed by this Court's decisions in *Bouknight* and *Hubbell*, attests to the lack of need for review. In light of the agreement in the courts of appeals on the question presented, intervention by this Court at this stage is unwarranted.

4. Furthermore, this case is in an unusual procedural posture that renders it an inappropriate and unsuitable vehicle for resolution of the issue presented. As petitioner acknowledges (Pet. 33), the usual routes for appellate review of a motion to quash a subpoena are for the subpoena recipient to go into contempt or for the recipient to preserve his claim for review after a final judgment of conviction. Here, however, petitioner has neither basis for review and, contrary to his suggestion (*ibid.*), this is not a virtue.

After this case was remanded to the district court by the court of appeals, petitioner chose not to go into contempt in order to preserve his Fifth Amendment challenge to the subpoena ordering him to produce foreign-account records. Cf. *Cobbledick* v. *United States*, 309 U.S. 323, 328 (1940) (motion to quash may not be appealed "until the witness chooses to disobey and is committed for contempt"); *United States* v. *Ryan*, 402 U.S. 530, 534 (1971). Instead, he produced the documents sought by the subpoena. *Cobbledick*, 309 U.S. at 328 (alternatives facing a grand jury witness who goes into contempt are "to abandon his claim or languish in jail"). Although it may be true (Pet. 34 n.6) that this does not "moot" the case in the Article III sense, it does place it in a highly anomalous posture. Petitioner cites no case in which the putative holder of a Fifth Amendment privilege was allowed to continue to assert the privilege in opposition to a grand jury subpoena after *producing* the

requested documents in response to the subpoena. Unlike in *Hubbell*, 530 U.S. at 34, the government and petitioner have no agreement that preserved his right to challenge the subpoena in these proceedings even after producing the records rather than going into contempt. Petitioner produced the documents without any agreement whatsoever.

Petitioner also has not received a final judgment of conviction. Indeed, he has not even been indicted, making his current claim of harm extremely abstract. Assuming that petitioner is indicted, assuming that his Fifth Amendment claim survives his decision to produce the documents (rather than taking a contempt citation), see *Maness* v. *Meyers*, 419 U.S. 449, 462 (1975) (noting potential waiver issue if witness produced subpoenaed material without going into contempt and then subsequently moved to suppress the evidence on Fifth Amendment grounds during a criminal trial), and assuming that he is ultimately convicted, he can present his Fifth Amendment claim (together with any other legal claims) in a petition for review from any direct appeal. See *Ryan*, 402 U.S. at 532 n.3. The possibility that this case may become moot because of a lack of prosecution or a plea agreement are reasons to refrain from review, not to accelerate it.

In short, petitioner should not be placed in a better position by virtue of the district court's mistaken quashing of the subpoena than he would have been by the correct decision—under *Shapiro* and the court of appeals' opinion—to deny that motion. This Court has often noted that "encouragement of delay is fatal to the vindication of the criminal law" and that intermediate appeals in criminal investigations and trials are for that reason particularly disfavored. *Cobbledick*, 309 U.S. at

325; see also *DiBella* v. *United States*, 369 U.S. 121, 126 (1962) ("[T]he delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law."). That policy fully applies in this case, and further review here is therefore especially unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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