No. _____

In The
Supreme Court of the United States

TAYLOR LOHMEYER LAW FIRM PLLC,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The IRS audited a taxpayer. During the audit, the taxpayer divulged tax planning legal advice he obtained from a law firm. The IRS disagreed with the advice and determined that it caused the taxpayer to underpay taxes. The IRS then issued a John Doe summons to the firm, requesting it to produce all documents that reflect the identities of its clients who sought the same services as the audited client. The firm refused because doing so would reveal its clients' confidential information, including their motive for seeking legal advice.

The district court recognized that this case presents a serious legal question with potentially far-reaching effects but overruled the firm's privilege objection. The Fifth Circuit affirmed in a published decision that conflicts with several other decisions on this issue. Eight out of seventeen Judges voted to grant the firm's motion for rehearing *en banc*, with six Judges joining in a dissenting opinion that emphasized the reasons the Court should have granted the firm's motion.

This case presents the following important question of federal law that has not been, but should be, settled by this Court: When the Government is aware of a citizen's confidential communication with legal counsel or the motive for seeking advice, but is unaware of the citizen's identity, are documents that reflect the client's identity protected by the attorney-client privilege?

PARTIES TO THE PROCEEDING

Petitioner Taylor Lohmeyer Law Firm PLLC was the Plaintiff/Petitioner in the United States District Court for the Western District of Texas and the Appellant in the United States Court of Appeals for the Fifth Circuit.

United States of America was the Defendant/Respondent in the district court and the Appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held company meeting the description of Rule 29.6 of the Rules of the Supreme Court of the United States.

RELATED CASES

- *In the matter of Tax and liabilities of John Does*; No. 5:18-mc-01046-XR; United States District Court for the Western District of Texas. The court entered an order permitting the Government to serve a John Doe summons to Taylor Lohmeyer on October 15, 2018.
- *Taylor Lohmeyer Law Firm PLLC v. United States*; No. 5-18-cv-01161; United States District Court for the Western District of Texas. The court entered an order granting the Government's counter-petition to enforce the John Doe summons on May 15, 2019.
- *Taylor Lohmeyer Law Firm PLLC v. United States*; No. 19-50506; United States Court of Appeal for the Fifth Circuit. The court affirmed the district court's order granting the Government's counter-petition to enforce the John Does summons on April 24, 2020. The court denied Taylor Lohmeyer's petition for rehearing *en banc* on December 14, 2020.

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On May 15, 2019, the United States District Court for the Western District of Texas granted the Government's counter-petition to enforce the John Doe summons over Taylor Lohmeyer Law Firm PLLC's objection that the attorney-client privilege protects responsive documents. Appendix at 17. On April 24, 2020, the United States Court of Appeals for the Fifth Circuit affirmed the district court's order. Appendix at 1. On December 14, 2020, the Fifth Circuit denied Taylor Lohmeyer Law Firm PLLC's motion for rehearing *en banc*, with six judges joining in a dissenting opinion. Appendix at 33.

JURISDICTION

As noted, the Fifth Circuit entered its judgment on April 24, 2020. Appendix at 1. Taylor Lohmeyer Law Firm PLLC timely petitioned for rehearing *en banc*, which the court denied on December 14, 2020. Appendix at 33. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

26 U.S.C. § 7609 ("Special procedures for third-party summonses"). Appendix at 39.

STATEMENT OF THE CASE

The IRS's examination of Taxpayer-1

The Internal Revenue Service investigated Taxpayer-1—a U.S. taxpayer and hedge fund manager it suspected was using offshore accounts and foreign entities to avoid paying income taxes. ROA.167. During its investigation, the IRS discovered that Taxpayer-1 had retained Taylor Lohmeyer Law Firm PLLC ("Taylor Lohmeyer")—a law firm that specialized in domestic and international tax law—for legal advice on how he could reduce or avoid tax liability. ROA.167, 170. According to the IRS, Taylor Lohmeyer helped Taxpayer-1 with offshore transactions and rendered legal advice that no income was reportable from the offshore arrangement. ROA.174-79. Ultimately, the IRS concluded that Taxpayer-1 failed to report income for the tax years in question in reliance on Taylor Lohmeyer's legal advice, resulting in liability for unpaid taxes and penalties. ROA.174, 185.

The IRS seeks the identities of Taylor Lohmeyer's other clients

Based on its investigation of Taxpayer-1, the IRS concluded that Taylor Lohmeyer gave similar legal advice to other clients who retained the firm for its tax expertise. ROA.185, 187, 198. Thereafter, the IRS opened an investigation to, as it explained, "develop information about other unknown clients of Taylor Lohmeyer . . . who may have failed to comply with the internal revenue laws by availing themselves of

similar services that Taylor Lohmeyer . . . provided to Taxpayer-1." ROA.191. To learn their identities, the IRS filed an *ex parte* petition for leave to serve a John Doe summons pursuant to 26 U.S.C. § 7609(f).

The IRS supported its petition with a detailed, 39-page declaration signed under oath by the revenue agent who investigated Taxpayer-1. ROA.162. In the declaration, the revenue agent swore, among other things, that:

- Taxpayers who use offshore structures to avoid or reduce taxes "relied on U.S. professionals to . . . provide legal advice." ROA.166.
- "Taylor Lohmeyer PLLC specializes in estate planning, tax law, and international tax law." ROA.167.
- "Taxpayer-1 hired Taylor Lohmeyer PLLC for tax planning." ROA.167.
- "Taxpayer-1 came to [Taylor Lohmeyer] seeking advice on how he could save some tax on his investment activities because Taxpayer-1 had heard that [Taylor Lohmeyer] was familiar with taxation matters involving foreign trusts." ROA.170.
- "[Taylor Lohmeyer] informed Taxpayer-1 that he could borrow money from the offshore structure without any U.S. tax obligations." ROA.177.
- "On the advice of [Taylor Lohmeyer], that no income was reportable from the

offshore arrangements, Taxpayer-1 never told his return preparer about the offshore structure or the incentives that were paid by the Offshore Fund-1 to Corporation-1 for his services. Therefore, neither the incentive fees nor the earnings from those fees were reported on his returns for the years in question." ROA.174.

- "Taxpayer-1 provided the IRS with a statement of reliance upon [Taylor Lohmeyer] with respect to Taxpayer-1's creation and use of the offshore structures, for purposes of the potential tax and penalties the IRS might assert regarding Taxpayer-1's use of those offshore structures." ROA.168.

- "The evidence described above gives me a reasonable basis for concluding that the clients of Taylor Lohmeyer PLLC are of interest to the Internal Revenue Service because of the law firm's services directed at concealing its clients' beneficial ownership of offshore assets." ROA.191.

- "[T]he IRS is pursuing an investigation to develop information about other unknown clients of Taylor Lohmeyer PLLC who may have failed to comply with the internal revenue laws by availing themselves of similar services to those that Taylor Lohmeyer PLLC provided to Taxpayer-1." ROA.191.

The district court granted the IRS's *ex parte* petition, and the IRS served Taylor Lohmeyer with a broad

summons, seeking extensive documents that would reveal the identities of its clients who the IRS concluded hired Taylor Lohmeyer for the same purposes as Taxpayer-1. Its broad summons sought, among other things:

- "Documents, including . . . client account records and client billing records reflecting any U.S. clients at whose request . . . you . . . acquired or formed any foreign entity . . . foreign financial account, or assisted in the conduct of any foreign financial transaction."
- "All . . . data . . . concerning the provision of services to U.S. clients relating to setting up offshore financial accounts . . . including . . . client forms . . . invoices and statements . . . all records of communications with clients . . . and billing statements and records of payments remitted by clients."
- "All . . . data . . . concerning the provision of services to U.S. clients relating to the acquisition, establishment or maintenance of offshore entities or structures of entities, including . . . documents describing the service . . . all records of communications with clients . . . and billing statements and records of payments remitted by clients."
- "The names of all persons or entities acting as advisors and the names of all

> persons or entities acting as clients on the subject matter covered by the document."

ROA.96-100.

According to the revenue agent, "[s]uch documents will contain substantial evidence regarding the identity of the U.S. taxpayers with offshore structures used to avoid or evade taxes." ROA.192.

Taylor Lohmeyer challenges the summons

Taylor Lohmeyer filed a petition to quash the summons because the attorney-client privilege protects clients' identities when responsive documents would confirm the Government's knowledge of a confidential communication or the clients' motive for retaining the firm, which is plainly the case here. *See* ROA.5, 8. The Government filed a counter-petition to enforce the summons, arguing that the attorney-client privilege should not apply since it is not requesting documents that actually contain confidential legal advice. ROA.68, 80. Thereafter, the parties submitted additional briefing in support of their respective positions, including Taylor Lohmeyer's response to the Government's counter-petition, ROA.103; the Government's reply, ROA.124; Taylor Lohmeyer's memorandum of law,[1]

[1] That memorandum included several exhibits, including a chart showing there are approximately 32,140 pages of documents at issue. *See* ROA.160. Another exhibit was Fred Lohmeyer's affidavit, in which he attested that the clients sought the firm's confidential legal advice in connection with the offshore structures, the substance of which the Government knows based on the

ROA.139; and the Government's response to Taylor Lohmeyer's memorandum of law. ROA.234.

The district court granted the Government's counter-petition to enforce the summons. ROA.255. The court reasoned that the attorney-client privilege did not apply because the record did not show that the IRS had sufficient knowledge of privileged disclosures. ROA.265. The court disregarded the fact that the revenue agent explained in detail the IRS's awareness of Taylor Lohmeyer's legal advice to Taxpayer-1 and its conclusion that it was for the same advice and motive its other clients retained the firm, which is what triggered the Government's desire to learn their identities in the first place.

The Appeal

A Panel of three Judges at the United States Court of Appeals for the Fifth Circuit recognized that the Government issued the summons to ascertain the identities of Taylor Lohmeyer's clients who the Government concluded had the same motive as Taxpayer-1 and "employed [Taylor Lohmeyer] to conceal unreported taxable income in foreign countries." *Taylor Lohmeyer Law Firm P.L.L.C. v. United States*, 975 F.3d 505, 508 (5th Cir. 2020). The Panel held, however, that the attorney-client privilege does not apply to their identities because the revenue agent who signed the declaration "did *not* state the Government *knows* the

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revenue agent's declaration and her investigation of Taxpayer-1. ROA.149-153.

substance of the legal advice the Firm provided the Does" or "the content of any specific legal advice the Firm gave particular Does." *Id.* at 512 (emphasis in original). The Panel's published opinion is problematic for many reasons.

Foremost, it ignores that, in seeking permission to serve the summons, the revenue agent described in detail the specific legal advice the IRS found Taylor Lohmeyer provided Taxpayer-1 and the agent's conclusion that other clients who retained the firm sought the same advice to avoid or reduce tax liability. That advice and the unknown clients' motive to avoid or reduce tax liability by retaining Taylor Lohmeyer forms the basis for which the IRS seeks to unmask the client identities and investigate them. Moreover, contrary to the Panel's opinion, there is no requirement in the Fifth Circuit or any other circuit that the Government must declare that it knows the complete substance and content of the specific legal advice for the attorney-client privilege to apply. It is sufficient if the Government is aware of the unknown client's confidential communication with legal counsel or the motive for retaining the firm. The Panel's opinion conflicts with several Fifth Circuit decisions on this subject matter, as well as authoritative decisions of other United States courts of appeals.

Taylor Lohmeyer filed a motion for rehearing *en banc*, addressing how the Panel's opinion has caused significant disunity in this area of the law within and outside of the Fifth Circuit. Eight Judges voted to grant rehearing *en banc*, and nine Judges voted

against it. Of the eight, six wrote a published dissenting opinion, aptly pointing out that "[w]e have previously held that client identities are privileged where disclosure would reveal the client's confidential motive for retaining an attorney" and that "[o]ur enduring precedent . . . aligns with the long-established case law of other circuits." *Taylor Lohmeyer Law Firm P.L.L.C. v. United States*, 982 F.3d 409, 411 (5th Cir. 2020). "Hearing this case *en banc*," the six Judges urged, "would have helped clarify the boundaries of attorney-client privilege in this precarious area." *Id.* at 410.

REASONS FOR GRANTING THE PETITION

I. This Court has never decided the circumstances under which attorneys are required to withhold requests for information concerning the identities of their clients.

A. Introduction.

The attorney-client privilege "is the oldest of the privileges for confidential communications known to the common law."[2] *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) (citing 8 J. Wigmore, Evidence § 2290 (J. McNaughton rev. 1961)). Its purpose is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the

[2] *See* FED. R. EVID. 501 ("The common law—as interpreted by United States courts in light of reason and experience—governs a claim of privilege" unless certain exceptions inapplicable in this case provide otherwise).

observance of law and administration of justice." *Id.*; *see also Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (recognizing that an attorney's legal assistance "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"). The issue presented here is the scope of that privilege; more particularly, the circumstances under which the privilege applies with respect to documents sought by the Government that would reveal the identity of an attorney's client. The majority of the circuits recognize that there are, indeed, circumstances under which the attorney has a duty to protect the client's identity, but cases describe and apply the rules and standards inconsistently. This Court has never weighed in on this subject, and, as the Fifth Circuit's six dissenting Judges pointed out, clarification is necessary—particularly in the context of a John Doe summons directed at a law firm to compel legal counsel to aid Government investigations that are contrary to their clients' interests.

B. Most of the circuits recognize that the attorney-client privilege extends to client identities in certain circumstances, but they apply inconsistent tests and rationales.

1. The Ninth Circuit's decision in *Baird*.

Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960), is one of the earliest and perhaps more frequently cited opinions describing the application of the attorney-client privilege to client identities. In that case, Baird,

an attorney known to represent taxpayers accused of violating Internal Revenue laws, issued anonymous payments to the IRS on behalf of undisclosed clients who owed additional taxes. *Id*. at 626. The IRS did not know the precise legal advice the attorney provided but knew that their motive for seeking legal advice had to do with their unpaid taxes, hence the payments. Wanting to investigate those taxpayers, the IRS issued a summons to Baird for information leading to their identities. *Id*. at 627. Baird refused, citing the attorney-client privilege, and the district court held him in contempt. *Id.*

The Ninth Circuit reversed and held that if the revelation of a client's identity would enable the Government to connect a known confidential communication or the client's motive for retaining the attorney to a particular client, the attorney-client privilege applies to protect the client's identity. As the court explained: "The names of the clients are useful to the government for but one purpose—to ascertain which taxpayers they think were delinquent so that it may check the records for that one year or several years. . . . Certainly the payment and the feeling of guilt are the reasons the attorney here involved was employed—to advise his clients what, under the circumstances, should be done." *Id*. at 634. The court also observed, in what some courts have described as a secondary "last link" rationale, that revelation of the identities "may well be the link that could form the chain of testimony necessary to convict an individual of a federal crime." *Id.*

2. Other circuits' description of the privilege.

The Fourth Circuit applied *Baird* in *National Labor Relations Board v. Harvey*, 349 F.2d 900, 905 (4th Cir. 1965), though not the alternative last link concept. In that case, the Labor Board investigated whether American Furniture Company arranged to have union representative Shrader placed under surveillance by a private detective, which may be a labor rule violation. *Id*. at 901. The detective revealed that attorney Harvey retained him. *Id.* In its attempt to ascertain whether American Furniture Company retained Harvey, the Board issued a subpoena to Harvey for documents pertaining to the retention of the detective. *Id*. The district court granted Harvey's motion to quash the subpoena, and the Board appealed.

On appeal, the Fourth Circuit held that "[t]he privilege may be recognized when so much of the actual communication has already been disclosed that identification of the client amounts to disclosure of a confidential communication." *Id.* at 905. The court determined that the "so much of the actual communication" standard was satisfied because "upon identification of the client, it will be known that the client wanted information about Shrader." *Id*. at 905. In other words, "[m]ore than the identity of the client will be disclosed by naming the client." *Id*.

The Seventh Circuit reached a similar result in *Tillotson v. Boughner*, 350 F.2d 663 (7th Cir. 1965), making it clear that the privilege applies when the

Government is aware of a client's general motive for hiring the attorney, not the full substance and content of the legal advice. In that case, similar to *Baird*, tax attorney Boughner issued a payment to the IRS on behalf of an anonymous client. *Id.* at 664. The IRS issued a subpoena to Boughner for information that would lead to the client's identity so it could investigate the client for unpaid taxes. *Id.* Boughner refused to comply, and the district court held him in contempt. *Id.* Citing *Baird*, the Seventh Circuit reversed because "[t]he disclosure of the identity of the client in the instant case would lead ultimately to disclosure of the taxpayer's motive for seeking legal advice." *Id*. at 666.

The Seventh Circuit revisited this issue in *In re Grand Jury Proceeding (Cherney)*, 898 F.2d 565 (7th Cir. 1990), where criminal defense attorney Cherney handled a conspiracy-narcotics trial on behalf of his client. *Id*. at 566. The Government discovered that an unknown client was paying for Cherney's legal fees, and, suspecting that individual was involved in the conspiracy as well, issued a subpoena to Cherney for information that would lead to the anonymous payer's identity. *Id*. The district court granted Cherney's motion to quash, and the Government appealed. *Id*. at 567. Recognizing that "the privilege protects an unknown client's motive for seeking legal advice," the Seventh Circuit affirmed because "[d]isclosure of the fee payer's identity would necessarily reveal the client's involvement in that crime and thus reveal his motive for seeking legal advice in the first place." *Id*. at 568.

The Sixth Circuit construed *Baird* as recognizing the privilege in three separate situations, only two of which it adopted. In *In re Grand Jury Investigation No. 82-2-35*, 723 F.2d 447 (6th Cir. 1983), the FBI was investigating the theft of checks that were made payable to IBM but deposited into bank accounts in the name of fictitious entities. *Id.* at 448. A check from one of the bank accounts had been made payable to attorney Durant's law firm by a client whose identity was unknown to the FBI. *Id.* Wanting to investigate the client, the FBI issued a subpoena to Durant to learn the client's identity. *Id.* The attorney acknowledged that his services for the client were unrelated to the theft investigation but refused to reveal his client's identity, claiming that the attorney-client privilege protects his client's identity under the last link rationale. *Id*. at 449. Later, the attorney contradicted himself and claimed that revealing his client's identity "would implicate his client in the very criminal activity for which legal advice had been sought." *Id*. at 450. The district court held Durant in contempt.

Attempting to synthesize the law from multiple circuits as it construed it, the Sixth Circuit explained that "[t]he Circuits have embraced various 'exceptions' to the general rule" which "appear to be firmly grounded in the Ninth Circuit's seminal decision in *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960)." *Id*. at 452. First, the court described and adopted what it called the "legal advice exception" as applying when "the person invoking the privilege is able to show that a strong possibility exists that disclosure of the

information would implicate the client in the very matter for which legal advice was sought in the first case." *Id.* at 452. The court held that the record did not support this rationale, particularly since Durant disclaimed knowledge about the theft investigation. *Id*. at 455.

Second, the court described and adopted the following rationale for the privilege: "If the identification of the client conveys information which ordinarily would be conceded to be part of the usual privileged communication between attorney and client, then the privilege should extend to such identification in the absence of other factors." *Id.* at 453. This rule applies "where so much of the actual communication has already been disclosed that identification of the client amounts to disclosure of a confidential communication."[3] *Id*. at 453. The court determined that this rationale did not apply because Durant did not advance this argument in the district court. *Id*. at 455.

Third, the court stated that "[a]nother exception, articulated in the Fifth Circuit's *en banc* decision of *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026 (5th Cir. 1982) (*en banc*), is recognized when disclosure of the identity of the client would provide the 'last link' of evidence." *Id.* at 453. The court observed that the Eleventh Circuit adopted the "last link" rationale in *In re Grand Jury Proceedings (Twist)*, 689 F.2d 1351,

[3] Similarly, in *Colton v. United States*, 306 F.2d 633, 637 (2d Cir. 1962), the Second Circuit held that the privilege applies to a client's identity when "the substance of a disclosure has already been revealed but not its source."

1352-53 (11th Cir. 1982); *In re Grand Jury Subpoena (Slaughter)*, 694 F.2d 1258, 1260 (11th Cir. 1982); and *Bonner v. City of Princhard*, 661 F.2d 1206 (11th Cir. 1981).[4] *See id*. at 453 n.8. Unlike the Eleventh Circuit and the Fifth Circuit, however, the Sixth Circuit rejected the last link rationale. *Id.* at 454.

The leading case on this issue in the Tenth Circuit is *United States v. Anderson*, 906 F.2d 1485 (10th Cir. 1990), which involved an appeal of an order holding attorneys in contempt for not revealing the identity of an individual who paid legal fees for their representation of other criminal defendants. *Id.* at 1488. The attorneys never claimed that the anonymous payer was also a client, but still refused to disclose the payer's identity, citing the attorney-client privilege. *Id.*

Similar to the Sixth Circuit, the court described the various rules and standards that have emerged among the circuits and referred to them as the "legal advice exception," the "last link" exception, and the "confidential communication exception." *Id.* In describing the legal advice exception, the court stated, "Several circuit courts have created an exception to the

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[4] *See also In re Grand Jury Proceedings 88-9 (Newton)*, 899 F.2d 1039 (11th Cir. 1990) ("In essence, the last link doctrine extends the protection of the attorney-client privilege to non-privileged information—the identity of the client—when 'disclosure of that identity could disclose other, privileged communications (e.g., motive or strategy) and when the incriminating nature of the privileged communications has created in the client a reasonable expectation that the information would be kept confidential.'" *Id.* at 1043 (quoting *Rabin v. United States*, 896 F.2d 1267, 1273 (11th Cir. 1990)).

general rule that client identity and fee information are not protected by the attorney-client privilege where there is a strong probability that disclosure would implicate the client in the very criminal activity for which legal advice was sought." *Id*. at 1488. The Tenth Circuit declined to adopt this exception because the record did not establish that the anonymous payer was a client. *See id.* at 1489 ("The facts of this case dictate that we refuse to adopt the legal advice exception in this case.").

With respect to the last link rationale, the court observed that there is "a split among the circuits" as to the applicability of this rationale. *Id*. at 1489-90. According to the court, the Fifth Circuit adopted the last link rationale, the Sixth Circuit "explicitly rejected" it, and the Second, Third, and Ninth Circuits "implicitly rejected" it. *Id.* Ultimately, the court determined that it did not need to decide whether the last link rationale applied in the Tenth Circuit. *Id*.at 1490. However, later in the opinion, the court observed, "We wish to clarify, however, that we do not reject what we consider to be the underlying principle supporting the last link exception." *Id*. at 1491.

With respect to the confidential communication exception, the court adopted it but added requirements not discussed in the Sixth Circuit's *In re Grand Jury Investigation* decision. Specifically, the Tenth Circuit explained, "We hold that in order to invoke the attorney-client privilege . . . the advice sought must have been *Baird*-like. In other words, the advice sought must have concerned the case then under investigation

and disclosure of the client's identity would now be, in substance, the disclosure of a confidential communication by the client, such as establishing the identity of the client as the perpetrator of the alleged crime at issue." *Id*. at 1492. Because the record did not demonstrate that the anonymous payer was a client, the exception did not apply.[5] *Id.*

The Third Circuit applied the attorney-client privilege to client identities in *United States v. Liebman*, 742 F.2d 807 (3d Cir. 1984), the facts of which most closely mirrors the facts here. The IRS discovered that some law firm clients claimed tax deductions for legal fees they paid to the firm based on the firm's legal advice. *Id.* at 808. Upon learning this, "the agency sought to ascertain the names of others who might have done the same." *Id.* at 808. The IRS issued a summons to the firm, seeking all "books, records, papers, billing ledgers and any other data which contains, reflects, or evidences the names, addresses and/or social security numbers of clients who paid fees in connection with the acquisition of real estate partnership interests in 1978, 1979, and/or 1980." *Id*. The district court rejected the firm's privilege objection and entered an enforcement order.

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[5] Ultimately, the Tenth Circuit determined that the attorney-client privilege did not apply with respect to documents that would reveal the identity of the anonymous non-client payer with the exception of the fee contracts, which could potentially contain privileged communications between the attorney and the actual clients. Thus, the court remanded the case to determine whether the fee contracts contain privileged information. *Id*. at 1493.

The Third Circuit reversed under a test that considers whether "so much of the actual attorney-client communication has already been disclosed that identifying the client amounts to full disclosure of the communication." *Id.* at 809 (citing *Harvey*, 349 F.2d at 905). Under this test, the court held that all responsive documents were categorically privileged because the "identity, when combined with the substance of the communication as to deductibility that is already known, would provide all there is to know about a confidential communication between the taxpayer-client and the attorney." *Id*. at 810. "If appellants were required to identify their clients as requested," the court further explained, "that identity, when combined with the substance of the communication as to deductibility that is already known, would provide all there is to know about a confidential communication between the taxpayer-client and the attorney." *Id*. at 810. Notably, the court rejected the Government's argument that the privilege only applies "when disclosure of a client's identity would implicate the client in the matter for which he or she sought advice." *Id*.

3. The Fifth Circuit's adaptation.

The Fifth Circuit has consistently held that the attorney-client privilege applies to client identities when the Government knows or suspects it knows the unknown client's motive for hiring the attorney and it wants to investigate the client for some suspected wrongdoing. In its leading case, *United States v. Jones*, 517 F.2d 666 (5th Cir. 1975), a grand jury was

investigating certain individuals ("the known clients") suspected of drug and tax offenses. *Id.* at 668. Other firm clients ("the unknown clients"), who the Government suspected consulted with the attorneys over unpaid taxes, were paying for the known clients' legal representation. *Id.* at 673. To learn the identities of the unknown clients, the Government issued a subpoena to the attorneys, seeking "all records, retainer agreements, books, records, and/or receipts showing payment of attorneys' fees" for the known clients. *Id.* The attorneys refused, and the district court held them in contempt. *Id*. at 669.

On appeal, the Fifth Circuit emphasized that "[t]he exception announced in *Baird*, where applicable, is as much a part of this circuit's federal law of evidence as is the normal rule of no privilege." *Id*. at 672. In reversing the district court, the Fifth Circuit held that when the Government suspects it knows an unknown client's motive for hiring an attorney and wants to discover the client's identity for investigative purposes, the attorney-client privilege protects the client's identity. As the court explained: "[T]he income tax aspects of the Government's inquiry demonstrate a strong independent motive for why the unidentified clients could be expected to seek legal advice, and reasonably anticipate that their names would be kept confidential. The attorney-client privilege protects the motive itself from compelled disclosure, and the exception to the general rule protects the clients' identities when such protection is necessary in order to preserve the privileged motive." *Id.* at 674-75. Under those

circumstances, the Fifth Circuit further declared, "an attorney *must* conceal even the identity of a client, not merely his communications."[6] *Id*. at 671 (emphasis added). In *dicta*, the court also alluded to *Baird's* last link rationale. *See id*. at 674 ("If relators were compelled to disclose the sought-after items before the grand jury, the unidentified clients having been linked by their lawyers to payments in excess of reported income . . . might very well be indicted."). *Id.* at 674.

In *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 913 F.2d 1118 (5th Cir. 1990) *("Reyes-Requena I")*, and *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 926 F.2d 1423, 1431 (5th Cir. 1991) *("Reyes-Requena II")*, the Fifth Circuit again stressed the importance of protecting the client's identity when the Government knows or suspects it knows the client's motive for hiring the attorney. In *Reyes-Requena I*, the Government issued a subpoena to attorney DeGeurin for information leading to the identity of the anonymous person paying for DeGeurin's representation of criminal defendant Reyes-Requena. *Id.* at 1120. DeGeurin filed a motion to quash the subpoena, citing the attorney-client privilege. *Id.* The district court granted DeGeurin's motion to quash even though there was no claim or evidence that the

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[6] *See also In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 180 (4th Cir. 2019) ("By asking the Law Firm to furnish the [government] with a client list . . . the government demonstrated a lack of respect for the attorney-client privilege and the Firm's duty of confidentiality to its clients.").

anonymous payer was a client. *Id*. The district court was apparently persuaded by portions of *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026 (5th Cir. 1982), where the court seemingly interpreted *Jones* as applying the last link rationale. *Id*. at 1027.

On appeal, the Fifth Circuit clarified that *Pavlick* cannot "be said to endorse even the 'last link' concept that it attributes to *Jones*." *Reyes-Requena I*, 913 F.2d 1125. Rather, the court explained, "*Jones* seems reconcilable with, if perhaps a modest extension of, the now-settled principle that the attorney-client privilege shields the identity of a client or fee information only where revelation of such information would disclose other privileged communications such as the confidential motive for retention." *Id.* at 1126. The Court held that the privilege did not apply, however, "[b]ecause DeGeurin has never averred that the anonymous benefactor of Reyes-Requena . . . was his client." *Id.* at 1124.

On remand, the Government again sought the anonymous payer's identity to charge in a conspiracy. *Reyes-Requena II*, 926 F.2d at 1431. DeGeurin and the anonymous payer submitted sealed affidavits to establish that the payer was indeed a client who also retained DeGeurin in connection with the same criminal matter for which DeGeurin represented Reyes-Requena. *Id.* at 1432. The district court determined that the payer's identity was privileged under *Jones* because "[i]f DeGeurin reveals the identity of [the unknown client], the confidential motive of [the client's] retention of DeGeurin will be exposed as

apparent." *Reyes-Requena*, 752 F.Supp. 239, 242 (S.D. Tex. 1990).

On appeal, the Fifth Circuit upheld the privilege, further emphasizing the privileged nature of a client's motive for consulting with an attorney. *Reyes-Requena II*, 926 F.2d at 1431. "We protect the client's identity . . . in such circumstances," the Court explained, "not because they might be incriminating but because they are connected inextricably with a privileged communication—the confidential purpose for which he sought legal advice." *Id*. The court offered the following important example to illustrate the privilege:

> [A] client may wish to consult an attorney concerning adopting a child but not wish the matter to be made public. Such an individual normally will reveal the nature of his problem as well as his identity, and reasonably expects both to remain confidential. If the disclosure of the client's identity will also reveal the confidential purpose for which he consulted an attorney, we protect both the confidential communication and the client's identity as privileged.

Id. at 1431.

Because the record was clear that the unknown payer was a client, and because the Government was pursuing his identity to confirm its belief about the client's motive for hiring the attorney, the identity information was off limits. As the court explained: "The Government clearly sought [the client's] identity in hopes of broadening their investigation by . . .

obtaining more defendants to charge in a conspiracy. In these circumstances, the Government cannot credibly argue that it seeks merely neutral facts." *Id.* at 1432.

Consistent with *Baird* and *Jones*, in *Reyes-Requena II*, the Government did not know the substance or content of DeGeurin's specific legal advice. The reason the attorney-client privilege applied was that an attorney-client relationship existed and the Government wanted to investigate the client to explore his motive for retaining the attorney, which the Government believed it already knew. Protecting the client's identity under these circumstances is so important that it overrides the Government's competing interest in obtaining information. "At times," the court explained, "this privilege may prevent the Government from obtaining useful information, but this is the price we pay for a system that encourages individuals to seek legal advice and make full disclosure to the attorney so that the attorney can render informed advice." *Id.* at 1432.

4. This Court should reconcile the circuits' inconsistent treatment of the attorney-client privilege as it applies to client identities.

In the sixty-one years since the Ninth Circuit decided *Baird*, the circuits have applied the attorney-client privilege to client identities while emphasizing different machinations of the test(s). Some circuits

have emphasized the "last link" rationale while other circuits have rejected it or passed on deciding whether to apply it. Some circuits have adopted a "legal advice exception" which analyzes whether disclosure would implicate the client in connection with the matter for which the client sought advice, while other circuits find this requirement too restrictive. A number of circuits follow the "confidential communication exception," emphasizing a test that considers whether "so much of an attorney-client communication has already been disclosed" though never really saying how much of the communication constitutes "so much." Other circuits have emphasized an additional requirement that communication must relate to the matter currently under investigation. Still other circuits do not use these labels and simply focus on whether the Government suspects an unknown client's motive for seeking advice and wants to learn the client's identity to conduct a further investigation.

What is clear is that Congress intended the Federal Rules of Evidence, including the attorney-client privilege, to have a uniform and nationwide application. *See* FED. R. EVID. 101 ("These rules apply to proceedings in the United States courts"); *see also Lippay v. Christos*, 996 F.2d 1490, 1497 (3d Cir. 1993) (discussing "Congress' intent that the Federal Rules of Evidence have uniform nationwide application"). Likewise, federal common law should not vary from circuit to circuit. *McCarty v. Southern Farm Bureau Cas. Inc. Co*., 758 F.3d 969 (8th Cir. 2014) (recognizing that "federal common law should be uniform."). The circuits are not

uniform, calling into question whether a citizen's consultation with counsel will remain confidential. This Court should weigh in on which of the multiple iterations of the attorney-client privilege as it relates to client identities is the federal common law in the United States courts.

II. The Fifth Circuit's decision in this case is incorrect, misapplies the exception, and conflicts with other Fifth Circuit decisions.

As noted, in this case, the Fifth Circuit recognized that the Government issued the summons to ascertain the identities of Taylor Lohmeyer's clients who the Government suspects underpaid their taxes after consulting with the firm. It held, however, that the attorney-client privilege does not apply to their identities because the revenue agent who signed the declaration in support of the John Doe summons did not state that the Government actually knows the "substance of the legal advice" or "the content of any specific legal advice." *Taylor Lohmeyer Law Firm*, 957 F.3d at 512. The court's holding that the Government must know the full substance and content of the specific legal advice for the privilege to apply is unprecedented. Under Fifth Circuit decisions, where there exists an attorney-client relationship (which is undisputed in this case) and the Government is aware of the unknown client's *motive* or purpose for seeking legal advice and wants to learn the client's identity to investigate suspected wrongdoing, documents reflecting the client's identity are privileged. There is no requirement that the

Government must know the actual substance and content of the specific legal advice for the attorney-client privilege to apply.[7] *Jones*, *Reyes-Requena I*, *Reyes-Requena II* make these points abundantly clear.

In *Jones*, the Government suspected that the unknown clients' motive in hiring the attorneys related to tax issues, and it wanted to learn their identities to investigate them. The Government did not know the substance and content of the specific legal advice the attorneys gave them. Yet, the Fifth Circuit held that the attorney-client privilege protected their identities. *Jones*, 517 F.2d at 674-75 ("[T]he income tax aspects of the Government's inquiry demonstrate a strong independent motive for why the unidentified clients could be expected to seek legal advice, and reasonably anticipate that their names would be kept confidential. The attorney-client privilege protects the motive itself from compelled disclosure, and the exception to the general rule protects the clients' identities when such protection is necessary in order to preserve the privileged motive.").

Likewise, in *Reyes-Requena II*, the Government suspected that the unknown client's motive in hiring the attorneys related to a drug offence, and it wanted to learn his identity to bring charges. Nothing in the opinion suggested that the Government knew or even suspected it knew the specific substance and content of

[7] Even if Fifth Circuit decisions imposed such a heightened requirement, it would be met in this case given the revenue agent's awareness of Taylor Lohmeyer's advice.

the legal advice. Nevertheless, the Fifth Circuit again held that the attorney-client privilege protected the client's identity. *Reyes-Requena II*, 926 F.2d at 1431 ("We protect the client's identity . . . in such circumstances not because they might be incriminating but because they are connected inextricably with a privileged communication—the confidential purpose for which he sought legal advice.").

Here, after learning the confidential advice Taylor Lohmeyer gave Taxpayer-1, the Government concluded that the unknown clients sought Taylor Lohmeyer's legal services and advice for the same motive as Taxpayer-1 aimed at reducing or avoiding tax liability. The Government disagrees with the advice and seeks to investigate the unknown clients for potential tax deficiencies resulting from the advice. ROA.174, 177, 191. Documents that are responsive to the summons necessarily link unknown clients' identities to the confidential information of which the Government is aware as well as the clients' motive for hiring the firm, rendering their identities privileged under binding Fifth Circuit authority.

Applying the attorney-client privilege in this case is consistent with the important adoption example offered in *Reyes-Requena II*. Persons who consult with a law firm about adoptions have a federal common law right to keep the fact of that consultation private from the Government even if the Government wants to investigate them for suspected wrongdoing in connection with the adoptions. Likewise, Taylor Lohmeyer's clients have a federal common law right to seek out

Taylor Lohmeyer's legal services, including tax advice, and keep the fact of that consultation private, despite the Government's suspicion that the firm offered erroneous advice. The attorney-client privilege must be upheld even when doing so "may prevent the Government from obtaining useful information." *Reyes-Requena II*, 926 F.2d at 1432.

Although *Jones* is the Fifth Circuit's leading opinion in this area of the law, the court mentioned it just once in passing and offered no analysis. *Taylor Lohmeyer*, 957 F.3d at 510. As for *Reyes-Requena II*, the court said it is distinguishable because (i) the anonymous client in that case intervened, and (ii) the court considered sealed evidence that established the existence of an attorney-client relationship that pertained to the same criminal issue for which DeGeurin represented Reyes-Requena. *Id.* at 511. Neither observation renders *Reyes-Requena II* inapplicable.

With respect to the former, there is no requirement that the unknown client must intervene for the attorney-client privilege to apply; otherwise, *Jones* would have been decided differently. With respect to the latter, if the court is suggesting that Taylor Lohmeyer did not offer evidence of the existence and nature of the attorney-client relationship, then it is mistaken. Fred Lohmeyer addressed those details in his affidavit. *See* ROA.149-153. Specifically, Lohmeyer attested that the clients all "sought estate planning and tax advice with the primary goals of asset protection and tax reduction." He attested that "the substance of the communications with the [clients] is already known to the

Government." He attested that "the disclosure of the identity of the [clients] would yield substantially probative links respecting the advice given." He also attested that "the mere disclosure of the clients' identities would reveal the substance of the ongoing legal advice to the clients, including the confidential reasons our clients sought our legal advice in the first place." ROA.149-153. Taylor Lohmeyer also offered to submit the entire un-redacted client files for an *in-camera* review. ROA.147.

But even if Taylor Lohmeyer had not presented this evidence, the attorney-client privilege would still apply. In *Reyes-Requena II*, the only reason the evidence became necessary was that DeGeurin did not claim that the anonymous payer was a client in *Reyes-Requena I*. Here, the Government does not dispute that each United States citizen who it wants to investigate was a law firm client. Nor does it dispute knowing their motive for hiring the firm; it simply wants to use the summons to link that motive to their identities so it can investigate them for suspected tax deficiencies. Under *Jones*, *Reyes-Requena I*, and *Reyes-Requena II*, the attorney-client privilege precludes the Government from compelling a law firm to disclose its clients' identities under these circumstances. The court's contrary opinion undermines the attorney-client privilege and conflicts with established Fifth Circuit case law.

III. The Fifth Circuit's decision conflicts with decisions of other United States courts of appeals.

Taylor Lohmeyer maintains that *Liebman* further demonstrates in a factually analogous situation that the privilege applies to its clients' identities under these circumstances. In that case, "so much of the actual attorney-client communication has already been disclosed" because the Government was already aware of the tax advice that the firm provided but needed the client identities to connect the advice to the individuals so that it could audit them. *Liebman*, 742 F.2d at 905. Here, based on the revenue agent's declaration, the Government learned that Taylor Lohmeyer advised its clients about tax treatment in connection with various offshore accounts, and it issued the summons to learn their identities to connect the advice to the individuals so that it could audit them. The Government not only knows the clients' motives for hiring the firm, it discovered the substantive type of advice the firm provided. Clearly, this case also "falls within the situation where so much of the actual communication had already been established, that to disclose the client's name would disclose the essence of a confidential communication." *Id*. at 809.

The court held that *Liebman* is distinguishable because, in the revenue agent's sworn declaration the Government used during the *ex parte* proceeding, the agent "did not state the Government knows the substance of the legal advice" but instead outlined her "reasonable basis" for believing the client's motives for

hiring the firm. *Taylor Lohmeyer*, 957 F.3d at 512. However, *Jones* and *Reyes-Requena II* make it clear that there is no requirement that the Government has to know the substance or content of the specific legal advice for the privilege to apply. As noted, in *Jones*, there was no mention of *any* legal advice. Moreover, the Court cautioned the Government that being vague about the extent of its knowledge or objectives would not undermine the privilege. *Jones*, 517 F.2d at 675 ("the government should not read this opinion as an invitation to tighten the web of secrecy surrounding its objectives and the nature and extent of information already in its hands"). In *Reyes-Requena II*, the fact that the nature of the attorney-client engagement had to be explained to the court in sealed filings (*i.e.*, unavailable to the Government) underscores that the Government had no knowledge of the advice, yet the privilege applied.

The court also reasoned that *Liebman* does not apply because, here, the revenue agent's declaration targeted clients who "*may have failed* to comply" which is "not the same as the Government's knowing whether any Does engaged in allegedly fraudulent conduct"—suggesting that the declaration in *Liebman* targeted clients who the Government knew violated the law. *Id.* However, in *Liebman*, the Third Circuit stated, "it is by no means clear that all the clients whose identities would be revealed did take the deduction." *Liebman*, 742 F.2d at 810 n.4. Despite this, the Government's summons in *Liebman* broadly requested all "books, records, papers, billing ledgers and any other data

which contains, reflects, or evidences the names, addresses and/or social security numbers of clients who paid fees in connection with the acquisition of real estate partnership interests in 1978, 1979, or 1980." *Id.* at 808. The summons in this case seeks the same type of information.

Ultimately, *Liebman* applies the rule from *Jones*, *Reyes-Requena I*, and *Reyes-Requena II* under an analogous set of facts. The Fifth Circuit's attempt to distinguish *Liebman* has caused the Fifth Circuit to adopt its new requirement that the Government must have confessed that it knows the substance or content of the specific legal advice (which the Government can simply avoid doing) for the attorney-client privilege to apply. That sets a bar that is too high and has caused disunity between the Fifth Circuit and the Third Circuit.

The Fifth Circuit's opinion also conflicts with *Baird*. Consistent with *Jones*, *Reyes-Requena I*, *Reyes-Requena II*, and *Liebman*,[8] the clients' identities in *Baird* were privileged, not because the Government knew the substance or content of the specific legal advice, but because there existed an attorney-client relationship and the Government wanted to learn clients'

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[8] *See also Cherney*, 898 F.2d at 568 (holding that "the privilege protects an unknown client's identity where its disclosure would reveal a client's motive for seeking legal advice"); *Tillotson*, 350 F.2d at 666 ("The disclosure of the identity of the client . . . would lead ultimately to disclosure of the taxpayer's motive for seeking legal advice"); *Harvey*, 349 F.2d at 905 ("More than the identity of the client will be disclosed by naming the client").

identities to investigate suspected tax deficiencies. In *Jones*, the Fifth Circuit recognized that "[t]he exception announced in *Baird* . . . is as much part of this circuit's federal law of evidence as is the normal rule of no privilege. We so hold." *Jones* 517 F.2d at 671. Here, the Fifth Circuit did not mention *Baird*, and its opinion conflicts with this important Ninth Circuit case.

IV. The Fifth Circuit's reliance on the Seventh Circuit's *United States v. BDO Seidman* decision is misplaced.

Instead of following *Jones*, *Reyes-Requena I*, *Reyes-Requena II*, *Liebman* and *Baird*, the Fifth Circuit relied on *United States v. BDO Seidman*, 337 F.3d 802 (7th Cir. 2003), which it stated presents similar circumstances. *Taylor Lohmeyer*, 957 F.3d at 513. The circumstances in *BDO* were anything but similar. In *BDO*, the IRS issued summonses to BDO, an accounting firm, to investigate whether it complied with 26 U.S.C. §§ 6111 and 6112, which required it to register tax shelters with the IRS and "keep a list identifying each person to whom an interest of the tax shelter was sold." *Id*. at 806. "The statutory registration and list-keeping provisions allow the IRS to identify . . . all of the participants in related tax-shelter investments." *BDO*, 337 F.3d at 809. Several BDO clients intervened in the case, arguing that documents revealing their identities are privileged under 26 U.S.C. § 7525. *Id*. at 806-07. The Seventh Circuit held that because the accounting firm was statutorily required to disclose its clients' identities to the IRS, there was no expectation

that those clients' identities would receive the protection of the attorney-client privilege. *Id*. at 812.

This case is not similar to *BDO*. First, in *BDO*, the target of the investigation was the accounting firm, not its clients. The Government was trying to determine whether BDO had disclosed all of the tax shelters it had sold and assess penalties against the accounting firm for any failures in disclosure. Second, the Seventh Circuit's basis for rejecting identity privilege was that BDO's clients had no expectation of privacy due to the accounting firm's requirements to report sales of tax shelters to the IRS. By contrast, Taylor Lohmeyer had no obligation to report its clients to the IRS because they were not engaged in IRS listed transactions. ROA.149-153. Third, *BDO* involved a limited statutory privilege (§ 7525) that does not share the same import or historical footing as the attorney-client privilege. Moreover, the current version of that statute makes clear that the more limited privilege was never intended to apply "in connection with . . . any tax shelter." 26 U.S.C. § 7525(b). The court's reliance on *BDO* in lieu of on-point authority from the Fifth Circuit and other circuits that recognize that the attorney-client privilege protects client identities under these circumstances, further underscores the need for this Court to address the boundaries of the privilege.

V. The question presented is important and should be decided in this case.

As the six dissenting Judges point out, "[t]he IRS has traditionally served [John Doe] summonses on financial institutions and commercial couriers. Not lawyers. There is good reason to be wary of investigations that exert pressure on lawyers." *Taylor Lohmeyer*, 982 F.3d at 410. Indeed, there is. If the federal common law were what the Fifth Circuit has embraced here—that the Government can enforce a broad John Doe summons to seek out law firm clients' identities by simply downplaying in its supporting affidavit the extent of its actual knowledge about the legal advice given—law firms' and clients' privileged and confidential consultations will be in peril. This will surely disincentivize citizens to seek out legal advice about important and sensitive problems for fear that if they follow advice that the Government believes may have been incorrect, they will be the target of the next investigation. It is well established that "[c]ourts play a crucial role in moderating the executive power with respect to a John Doe summons." *Id.* (citing *United States v. Bisceglia*, 420 U.S. 141, 146 (1975)). So far, in this case, the courts have not fulfilled that role and a troubling new precedent emerged—a precedent that this Court should strike down as contrary to federal common law.

CONCLUSION

The Fifth Circuit's decision in this case conflicts with other Fifth Circuit decisions as well as decisions of other United States courts of appeals on an important subject matter. That subject matter—the application of the attorney-client privilege to client identities—is one that this Court has not settled. The petition for writ of certiorari should be granted.

Respectfully submitted,

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