No. 20-1596

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

BRIEF OF THE AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American College of Tax Counsel (the "College") respectfully submits this brief as amicus curiae in support of petitioner Taylor Lohmeyer Law Firm, PLLC.[1]

STATEMENT OF INTEREST

The College is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. The purposes of the College are:

- To foster and recognize the excellence of its members and to elevate standards in the practice of the profession of tax law;
- To stimulate development of skills and knowledge through participation in continuing legal education programs and seminars;

[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae,* its members, or its counsel made a monetary contribution to its preparation or submission. Counsel for the College provided timely notice of the College's intent to file this brief, and all parties have consented to its filing.

- To provide additional mechanisms for input by tax professionals in development of tax laws and policy; and
- To facilitate scholarly discussion and examination of tax policy issues.

The College is composed of approximately 700 Fellows recognized for their outstanding reputations and contributions to the field of tax law and is governed by a Board of Regents consisting of one Regent from each federal judicial circuit, two Regents at large, the Officers of the College, and the last retiring President of the College.

This *amicus* brief is submitted by the College's Board of Regents and does not necessarily reflect the views of all members of the College, including those who are government employees.

Effective tax administration and enforcement require that taxpayers be able to seek advice from tax counsel and disclose to counsel all needed information, in confidence, in order to be correctly advised and effectively assisted by counsel. A client's motive for seeking legal advice "is undeniably a confidential communication." *Matter of Grand Jury Proceeding, Cherney*, 898 F.2d 565, 569 (7th Cir. 1990). The College submits this brief in support of Taylor Lohmeyer Law Firm PLLC's Petition for a Writ of Certiorari, because of its interest in the fundamental issue at the heart of this case: the effect

that enforcement of a John Doe summons issued to a law firm may have upon the attorney-client privilege.

The College is concerned that the Fifth Circuit's decision, which allows the Internal Revenue Service (the "IRS") to use a John Doe summons to obtain the identities of all clients who have consulted with counsel on a specific matter, creates uncertainty regarding established precedent in the Fifth Circuit, runs counter to other sister circuits and creates uncertainty in the scope of the protections of the attorney-client privilege, which could result in an erosion of the privilege that will have a "grave effect on our justice system." *Id.*

Fundamental and historical protections of the attorney-client privilege will be adversely affected by the uncertainty created by the Fifth Circuit's decision, potentially subjecting clients' confidential motives for seeking legal advice to disclosure. This will lead to taxpayers being less candid with their attorneys or foregoing legal advice altogether. As this Court recognized, "[a]s a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *United States v. Fisher*, 425 U.S. 391, 403 (1976).

SUMMARY OF ARGUMENT

The Fifth Circuit's decision in this case calls into question the scope of "the oldest privilege for confidential communications known to the common law," *Upjohn v. United States*, 449 U.S. 388, 389 (1981), the attorney-client privilege. While the identity of an attorney's client is generally not privileged, the majority of circuits recognize an exception to this general rule: under certain circumstances, the privilege will extend to a client's identity when disclosure would enable the Government to connect the client to a known confidential communication or to the client's confidential motive for retaining the attorney.

The issue here arises in the context of an IRS John Doe summons directed to a law firm seeking the names of clients who sought legal services relating to offshore tax planning. This is the purpose of a John Doe summons — seeking a list of client names — and the applicability of the privilege to those client names is precisely the issue at stake.

The Fifth Circuit decided that the "John Does'" client names were not privileged because the Government did not *know* "the substance of the legal advice the Firm provided the Does" but had only a "reasonable basis" for concluding that the firm's clients may have used its services "for concealing" their "beneficial ownership in offshore assets." *Taylor Lohmeyer L. Firm PLLC v. United States*, 957 F.3d 505, 512 (5th

Cir. 2020). The Fifth Circuit held this sufficed to place the case within the contours of the general rule that client identities are not privileged, rather than trigger the exception that applies where the Government knows the specific confidential communications between client and lawyer or the client's confidential motive in securing legal advice.

However, because the John Doe summons here was framed in such a way that compliance with the summons would reveal the clients' confidential motives for seeking the services of Taylor Lohmeyer,[2] the Fifth Circuit's decision creates uncertainty in the application of the privilege, where certainty in the application of the privilege is paramount. This uncertainty risks undermining the protections of the attorney-client privilege and may lead to inconsistent application of the privilege among similarly situated taxpayers residing in different circuits. The assistance of tax counsel is critical to helping taxpayers comply with the complexity of the Internal Revenue Code, Treasury Regulations, and IRS rulings and to navigate investigations by the IRS. To render meaningful assistance and help their clients comply, tax attorneys need full disclosure from their

[2] It was implicit in the lower court's decision that Taylor Lohmeyer was providing legal services. The College recognizes the importance in such cases of a thorough factual investigation by the District Court to determine whether the services provided to clients fall under the scope of the attorney-client privilege. The College would suggest the case be remanded for further factual development to the extent the record is not clear that legal advice was provided.

clients, disclosure that will be hampered if the client believes that the fact that they are seeking tax counsel could be subject to routine discovery by the IRS.

The College believes that John Doe summonses are an important investigative tool for the IRS in its efforts to enforce this country's tax laws and has repeatedly voiced its support for the Government's efforts to ensure compliance with the tax laws. Yet, as the dissent from the Fifth Circuit's denial of *en banc* review recognized, the use of John Doe summonses to law firms raises "serious tensions" and "the boundaries of attorney-client privilege in this precarious area" should be clear. The College encourages the Court to grant the Petition for a Writ of Certiorari, to ensure a uniform standard exists for all federal courts to determine when divulging a client's identity would breach the attorney-client privilege.

ARGUMENT

I. The Fifth Circuit's Decision Creates Uncertainty in the Application of the Attorney-Client Privilege in the Enforcement of John Doe Summonses

A. The IRS Summons Power Must Be Balanced with the Attorney-Client Privilege

While the John Doe summons is an important investigative tool, the use of such a summons to identify clients of a specific law firm, even for the purpose of investigating them for potential underpayment of tax, triggers important issues regarding the attorney-client privilege. *Taylor Lohmeyer Law Firm PLLC v. United States*, 982 F.3d 409, 410 (5th Cir. 2020) (dissent to denial of rehearing *en banc*).

In furtherance of the IRS's responsibility to administer and enforce the internal revenue laws, Congress conferred authority on the IRS to make accurate determinations of tax liability and to conduct investigations for that purpose. A John Doe summons is a summons issued to a third party to surrender information concerning taxpayers whose identity is currently unknown to the IRS. *Matter of Does*, 671 F.2d 977, 979 (6th Cir. 1982).

While the summons power of the IRS has been interpreted expansively to allow it to carry out its important role of ensuring compliance with the tax laws (*see United States v. Powell*, 379 U.S. 48 (1964)), the Government's enforcement interest must be balanced with the importance of protecting the attorney-client privilege. Intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice," the attorney-client privilege is an essential part of our justice system. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Such full and frank communication is essential "if the professional mission is to be carried out." *Trammel v. United States*, 445 U.S. 40, 51 (1980).

The summons power is "limited principally by relevance and privilege." *United States v. Euge*, 444 U.S. 707, 712 (1980). While recognizing the importance of the government's investigatory role in the judicial system, the court held in *Matter of Grand Jury Proceeding, Cherney*, 898 F.2d 565 (7th Cir. 1990), that "[n]evertheless, the government's interests in this instance must give way to those served by the attorney-client privilege." *Cherney*, 898 F.2d at 569; *see also In re Grand Jury Proceedings (Jones)*, 517 F.2d 666, 674 (5th Cir. 1975) ("The purpose of the [attorney-client] privilege would be undermined if people were required to confide in

lawyers at the peril of compulsory disclosure every time the government decided to subpoena attorneys it believed represented particular suspected individuals.").

The Fifth Circuit's decision in *Taylor Lohmeyer* risks upsetting the balance between these competing interests, by creating uncertainty regarding the application of the attorney-client privilege to protect client identities, where disclosure of the identity would reveal the client's privileged confidential motive for seeking the attorney's advice. This uncertainty has the potential to lead to inconsistent application of the attorney-client privilege across taxpayers and should be addressed by the Court.

B. Under Longstanding Precedent, Client Identities Are Privileged Where Disclosure Would Reveal the Client's Confidential Motive for Retaining an Attorney

While the identity of a client is generally not privileged, the circuit courts — including up to now the Fifth Circuit — have consistently held that the attorney-client privilege protects disclosures of client identities when the Government knows or suspects it knows the unknown client's motive for hiring the

attorney.[3] *Jones*, 517 F.2d at 673-674, 674-675 ("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."); *In re Grand Jury Subpoena for Attorney Representing Reyes-Requena*, 926 F.2d 1423, 1431 (5th Cir. 1991) (explaining that where the "confidential motive for retention of the attorney" is known, disclosure of the identity of the client violates the privilege).

This protection applies even if the Government does not know the specific, substantive legal advice that was provided to the client. Prior Fifth Circuit decisions followed the holding of the seminal case on this issue, *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960), which held that "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." *Baird v. Koerner*, 279 F.2d

[3] The Fifth Circuit in this case relied on the Seventh Circuit's earlier decision in *United States v. BDO Seidman*, 337 F.3d 802 (7th Cir. 2003), which evaluated a federal statutory tax practitioner-client privilege. *Taylor Lohmeyer*, 957 F.3d at 513. While analogous in some respects to the attorney-client privilege, the tax practitioner-client privilege does not have the historic importance to the justice system that the attorney-client privilege has. Moreover, the decision in *BDO* relied on the court's finding in that case that the clients did not have an expectation of confidentiality, which is not the case here.

623, 631-632 (9th Cir. 1960). In *Baird*, the IRS issued a summons to an attorney known for representing taxpayers accused of violating internal revenue laws, to seek the identity of taxpayers on whose behalf the attorney had remitted payments to the IRS for additional taxes owed by those taxpayers. *Id.* at 626.

Although the IRS did not know the precise legal advice the attorney provided — only that the client's motive for seeking legal advice related to their unpaid taxes — the Ninth Circuit held that the identities were privileged, because the attorney-client privilege protects the client's identity where the revelation of that identity would enable the Government to link a known confidential communication or the client's motive for retaining the attorney to a particular client. Explaining that 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," the Ninth Circuit found that disclosure of the client's identity would enable the Government to connect the client's motive for retaining the attorney to the particular client, because "[c]ertainly 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.

C. The Fifth Circuit's Decision Is at Odds with Settled Precedent and Risks Eroding the Protections of the Attorney-Client Privilege

The declaration signed by the revenue agent supporting the IRS's petition for leave to serve the John Doe summons on Taylor Lohmeyer explained that "the 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. Through an investigation of Taxpayer-1, the agent had learned the details of the taxpayer's reliance on Taylor Lohmeyer with respect to the Taxpayer's creation and use of offshore structures and the tax consequences thereof. ROA.168, 174. This knowledge formed the basis of the John Doe summons issued in this case, which sought the identity of Taylor Lohmeyer's clients who sought the firm's services in connection with offshore tax planning.

Because the summons at issue requires the firm to provide documents that connect specific clients with specific services provided by the Firm, compliance with the summons effectively requires testimony by the firm regarding the client's motives for engaging the firm. *See, e.g., United States v. Hubbell*, 530 U.S.

27 (2000). This is the case regardless of whether the Government knew the specific advice provided by the firm or whether the Government had only a reasonable basis for suspecting the client's motive for seeking the attorney's services.

Notwithstanding Fifth Circuit precedent finding client identities to be privileged under these circumstances, the court below concluded otherwise and, in so doing, created uncertainty in the standard for determining when client identities are privileged. The Fifth Circuit held that the privilege did not apply here because it was not established that the IRS knew the "specific, substantive legal advice" that the firm provided to the taxpayers that the IRS found to be improper. *Taylor Lohmeyer*, 957 F.3d at 512. The result is a decision that fails to protect a client's identity where disclosure would reveal the client's confidential motive for seeking the attorney's services, allowing the Government to investigate the client for the very reason the client sought the attorney's assistance.

Eight judges on the Fifth Circuit out of seventeen voted in favor of a rehearing *en banc*. *Taylor Lohmeyer*, 982 F.3d at 410. The dissenting opinion to the Fifth Circuit's denial of a rehearing *en banc*, joined by six of the dissenting judges, recognized that such a holding may be interpreted as creating a new standard for when client identities are privileged, one that no longer protects the client's confidential motive for seeking legal advice. *See id.* The dissent

recommended that the Fifth Circuit grant rehearing to "clarify the boundaries of attorney-client privilege in this precarious area" and urged that the Fifth Circuit's decision be read "not to impose any new standard with respect to what is required for the attorney-client privilege to protect client identity." *Id.*

II. Uncertain Protection of the Attorney-Client Privilege Will Erode the Important Role of Tax Attorneys in the United States' Tax System

Over the past several decades, the IRS's use of summonses directed at attorneys representing targets of the IRS's investigation has become increasingly expansive. *See* William Volz and Theresa Ellis, *An Attorney-Client Privilege for Embattled Tax Practitioners*, 38 Hofstra L. Rev. 213 (2002). As the six judges dissenting from the Fifth Circuit's denial of a rehearing *en banc* recognized, traditionally, John Doe summonses were served on financial institutions and commercial couriers, not lawyers, and "[t]here is good reason to be wary of investigations that exert pressure on lawyers."

Protection of the attorney-client privilege is essential for the proper administration of the internal revenue laws. Our tax system is complex and relies on voluntary compliance, causing taxpayers to seek the assistance of tax attorneys to navigate the Internal Revenue Code. Tax attorneys assist clients with

complying with the tax laws and advise clients on how to structure their transactions for legal and favorable tax results. The decision in *Taylor Lohmeyer* risks deterring taxpayers from seeking out such legal advice, if in so doing the attorney can be compelled by the IRS to turn over the taxpayer's name to be investigated by the IRS in connection with the advice being provided by the attorney.

The IRS encourages taxpayers who have engaged in prior non-compliance to come forward and correct their non-compliance. *See, e.g.*, I.R.M. 9.5.11.9 (09-17-2020) (describing the IRS's Voluntary Disclosure Practice). As was the case in *Baird*, tax attorneys routinely advise taxpayers who have not complied with the tax laws and are looking for legal advice in connection with coming into compliance. This is a particularly sensitive issue since such taxpayers may face potential criminal penalties for past tax avoidance. The impact of the Fifth Circuit's decision as to these types of attorney-client consultations is acute — by seeking legal advice to address prior wrongdoing, such taxpayers would risk having their names turned over by their attorney to the IRS to be investigated for their noncompliance. The opinion below will thus deter taxpayers from seeking legal advice to correct past wrongdoing and deprive these taxpayers of the confidential legal counsel our justice system must encourage. The result will be that fewer taxpayers will decide to rectify prior noncompliance.

III. The Fifth Circuit's Decision Creates the Potential for Inconsistent Protection of the Attorney-Client Privilege Among Circuits

With the importance of confidentiality to the lawyer-client relationship in tax law, it is imperative that the protections of the attorney-client privilege apply consistently to all taxpayers. The Fifth Circuit's decision in *Taylor Lohmeyer* makes uncertain the scope of the privilege as to a client's identity.

Petitioner has detailed the standards applied by other circuits that have addressed this question, noting the variations between the standards applied for when a client's identity will be protected by the attorney-client privilege and demonstrating the need for clarity on the standard to be applied. That need is more critical now, with the Fifth Circuit's decision creating an inconsistency among the circuits regarding the standard to be applied in determining whether disclosure of a client's identity is privileged.

The College urges the Court to grant Taylor Lohmeyer Law Firm PLLC's Petition for a Writ of Certiorari, to resolve this uncertainty and clarify that the boundaries of the attorney-client privilege include the protection of a client's identity where disclosure of that identity would reveal the client's privileged motive or purpose for engaging the attorney.

CONCLUSION

For the foregoing reasons, the College respectfully requests that the Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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