No. 20-1596

In the Supreme Court of the United States

TAYLOR LOHMEYER LAW FIRM P.L.L.C., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below erred in rejecting petitioner's blanket assertion of the attorney-client privilege over documents responsive to an Internal Revenue Service summons.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 957 F.3d 505. The order of the district court (Pet. App. 17-32) is reported at 385 F. Supp. 3d 548.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2020. A petition for rehearing was denied on December 14, 2020 (Pet. App. 33-38). The petition for a writ of certiorari was filed on May 13, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a law firm that provides a mixture of business and legal services, focusing on what it characterizes as tax planning, estate planning, and probate law. See C.A. ROA 149. An Internal Revenue Service

(IRS) investigation determined that one of petitioner's clients (Taxpayer-1) employed those services to create structures of offshore entities that helped him conceal his income, which he underreported by $5 million over a period of five years. *Id.* at 167-185. The investigation also revealed that petitioner performed a wide variety of apparently non-legal, business services for Taxpayer-1 and other clients. Those services included buying and selling real estate; bidding on artwork; structuring loans; identifying strawmen to serve as nominal owners of trusts; arranging fund and asset transfers; and passing on investment "suggestions" to trustees. *Id.* at 176-177, 181-184, 187.

Based on that investigation, the IRS concluded that certain of petitioner's other clients may have also violated the internal revenue laws. See C.A. ROA 187-191. The government accordingly prepared a "John Doe" summons to petitioner concerning the services petitioner provided to those unknown clients (collectively referred to as "the Does"). *Id.* at 84, 94-100. The summons sought information regarding individuals who used petitioner's services to create and maintain foreign accounts and entities, *id.* at 94-100, including, for example, "[a]ll books, papers, records, or other data in your possession, custody, or control concerning the provision of services to U.S. clients relating to the acquisition, establishment or maintenance of offshore entities or structures of entities," *id.* at 96. Although the summons targeted business rather than legal communications, it requested a privilege log in the event any materials warranted withholding on privilege grounds. *Id.* at 98-99.

The government sought *ex parte* district court approval of the summons pursuant to 26 U.S.C. 7609(f).

In support of its application, the IRS submitted a declaration from Revenue Agent Joy Russell-Hendrick setting forth the government's basis for the summons, including information obtained through voluntary interviews of Taxpayer-1 and Robert Taylor, one of petitioner's two principals. C.A. ROA 162-200. The declaration summarized the IRS's investigation into Taxpayer-1 and its reasons for believing that petitioner's other clients may similarly have used offshore entities and accounts to evade U.S. taxes, recounting (among other things) Taylor's admission that he structured offshore entities for tax purposes for 20 to 30 clients. *Id.* at 167-185, 187-191, 196-199; see 18-mc-1046 D. Ct. Doc. (D. Ct. Doc.) 1-3, at 221 (W.D. Tex. Oct. 4, 2018).

The district court approved the summons. D. Ct. Doc. 3 (Oct. 15, 2018). The court concluded, consistent with 26 U.S.C. 7609(f), that the government had demonstrated that the summons related to the investigation of an "ascertainable group or class of persons"; that there was "a reasonable basis for believing" that such persons "may have failed to comply with any internal revenue law"; and that the information sought was "not readily available from other sources." *Ibid.*

2. On November 6, 2018, petitioner filed a petition in district court to quash the summons, and the government responded by moving to dismiss the petition and filing its own counter-petition to enforce the summons. Petitioner asserted a blanket privilege claim over all responsive documents (totaling roughly 32,000 pages) on the ground that the identities of its clients were protected by the attorney-client privilege. Petitioner contended that the government was already aware of the content of its communications with the Does based on the investigation of Taxpayer-1, and that revelation of

the Does' identities would accordingly amount to disclosure of confidential client communications. See, *e.g.*, C.A. ROA 141-147. Petitioner declined to produce a privilege log. Pet. App. 30.

In support of its assertion of privilege, petitioner submitted a 22-page sample of billing records. C.A. ROA 202-223. That sample confirmed that petitioner performed various business-oriented services for the Does, including reviewing loan information and financial statements; selling a home; overseeing fund transfers; discussing potential asset sales; reviewing trust arrangements; and managing debt payments. *Id.* at 202, 205-207, 211, 216-217, 219. Although petitioner maintained that the sample was sufficient to establish the applicability of the privilege, it offered to submit additional billing records or all 32,000 pages to the district court for an *in camera* review. *Id.* at 147.

Petitioner also submitted declarations from Fred Lohmeyer, its other principal. C.A. ROA 26-27, 149-153. Based on his reading of Russell-Hendrick's declaration, Lohmeyer opined that the government was "already aware of the general nature" of petitioner's communications with the Does. *Id.* at 152-153 & n.2. But he also volunteered that petitioner's other clients "ha[d] facts that are distinguishable from the client named 'Taxpayer-1' * * * because * * * [petitioner] never advised any other client with respect to the treatment of earned income as income earned by a foreign corporation." *Id.* at 26.

The district court rejected petitioner's arguments and granted the government's cross-petition to enforce the summons. Pet. App. 17-32. Nevertheless, the court indicated that petitioner could still attempt to establish its privilege claims on a document-by-document basis

through a privilege log. *Id.* at 31. The court initially retained jurisdiction "pending any challenges by the Government of [petitioner's] privilege log, should [petitioner] produce one." *Ibid.* After petitioner appealed and moved for a stay of the order to enforce rather than produce a privilege log, however, the court granted petitioner's motion for a stay and closed the case. See *id.* at 6.

3. The court of appeals affirmed. Pet. App. 1-16. The court explained that client identities generally are not protected by the attorney-client privilege. *Id.* at 8. But it acknowledged that a "limited" and "narrow" exception exists where "revealing the identity of the client * * * would itself reveal a confidential communication." *Ibid.* (quoting *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 926 F.2d 1423, 1431 (5th Cir. 1991), and *United States* v. *Jones (In re Grand Jury Proceedings)*, 517 F.2d 666, 671 (5th Cir. 1975)). This may occur, for example, when the government knows the content of a particular communication but not the recipient, such that revelation of the recipient would enable the government to deduce the legal advice provided to a particular client. *Id.* at 11. The court noted that the exception extends to those situations where disclosure of client identity would reveal the client's "confidential motive for retention" of the attorney. *Id.* at 9 (quoting *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 913 F.2d 1118, 1125 (5th Cir. 1990), cert. denied, 499 U.S. 959 (1991)).

The court of appeals held that petitioner had failed to show the exception applied on the facts of this case, concluding that disclosure of the Does' identities would

not necessarily permit the government to infer the content of a particular client communication or a particular client's motive for seeking legal advice. Pet. App. 16. The court explained that Russell-Hendrick's declaration "did *not* state the Government *knows* the substance of the legal advice the Firm provided the Does." *Id.* at 13. And the summons did not identify individuals as targets based on the specific legal advice they received; instead, the summons sought "relevant information about *any* U.S. client who engaged in *any one of a number* of the Firm's services." *Id.* at 14. Finally, the court noted Lohmeyer's own representation that petitioner's other clients had "distinguishable" circumstances from those of Taxpayer-1, further undermining the notion that the government already knew the content of petitioner's communications to the Does based merely on its investigation of Taxpayer-1. *Ibid.*

4. The court of appeals denied petitioner's request for rehearing en banc by a vote of nine to eight. Pet. App. 33-34. Judge Elrod wrote an opinion, joined by five of her colleagues, dissenting from the denial. *Id.* at 34-38. Judge Elrod contended that rehearing "would have helped clarify the boundaries of the attorney-client privilege in this precarious area." *Id.* at 35. But she contended that the court's "opinion can and should be read—consistently with our existing precedent," which "aligns with the long-established case law of other circuits"—"not to impose any new standard with respect to what is required for the attorney-client privilege to protect client identity." *Id.* at 35, 37. Judge Elrod also observed that, on remand, in the event the "case is reopened and the stay lifted," petitioner would "have the opportunity to produce a privilege log, asserting privilege on particular responsive documents." *Id.*

at 38. She expressed her expectation that the district court would sustain any claim of privilege where "the disclosure of the client's identity will also reveal the confidential purpose for which he consulted an attorney." *Ibid.* (quoting Pet. App. 10).

ARGUMENT

Petitioner renews its contention (Pet. 26-30) that the summons at issue in this case is facially unenforceable because the identity of the Does is protected by the attorney-client privilege. It further contends (Pet. 27-34) that the decision below conflicts with prior decisions from the Fifth Circuit itself and with decisions from other circuits. Petitioner is mistaken. The decision below is correct and neither departs from existing Fifth Circuit precedent nor conflicts with the law of any other circuit. In any event, this case is a poor vehicle for resolving the question presented because petitioner may well press individualized claims of privilege on remand. The Court should deny the petition for a writ of certiorari.

1. The court of appeals correctly rejected petitioner's blanket assertion that all of the documents responsive to the IRS summons are protected by the attorney-client privilege. Petitioner's arguments to the contrary are unavailing.

a. The IRS's summons power under 26 U.S.C. 7602 "reflects * * * a congressional policy choice in favor of disclosure of all information relevant to a legitimate IRS inquiry." *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 816 (1984) (emphasis omitted). This Court has explained that "courts should be chary in recognizing exceptions to the broad summons authority of the IRS or in fashioning new privileges that would curtail disclo-

sure under § 7602." *Id.* at 816-817. Nevertheless, Section "7602 is 'subject to the traditional privileges and limitations,'" *id.* at 816 (citations omitted), including the attorney-client privilege.

The attorney-client privilege is designed "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). "The privilege covers both (i) those communications in which an attorney gives legal advice; and (ii) those communications in which the client informs the attorney of facts that the attorney needs to understand the problem and provide legal advice." *Federal Trade Comm'n* v. *Boehringer Ingelheim Pharms., Inc.*, 892 F.3d 1264, 1267 (D.C. Cir. 2018) (Kavanaugh, J.); see *Fisher* v. *United States*, 425 U.S. 391, 403 (1976).

Because "the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose." *Fisher*, 425 U.S. at 403. As this Court has observed, evidentiary privileges "must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Trammel* v. *United States*, 445 U.S. 40, 50 (1980) (citation omitted). "The burden is on the proponent of the privilege to demonstrate that it applies," *Boehringer Ingelheim Pharms.*, 892 F.3d at 1267, and the claimant's mere "say-so" is insufficient, *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951) (addressing privilege against self-incrimination).

Consistent with those principles, the privilege is subject to important limitations. "'The mere fact that an attorney was involved in a communication does not automatically render the communication subject to the attorney-client privilege'; rather, the 'communication between a lawyer and client must relate to legal advice or strategy sought by the client.'" *In re Grand Jury Proceedings*, 616 F.3d 1172, 1182 (10th Cir. 2010) (brackets and citations omitted). Moreover, the privilege usually does not protect the "general subject matter" of an attorney's work standing alone, *Avgoustis* v. *Shinseki*, 639 F.3d 1340, 1344 (Fed. Cir. 2011) (citing *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 n.12 (1983)), because "the general purpose of a client's representation" does not "necessarily divulge a confidential professional communication," *United States* v. *Legal Servs. for New York City*, 249 F.3d 1077, 1081 (D.C. Cir. 2001).

As relevant here, a client's identity also typically falls outside the privilege. See, *e.g.*, Edward J. Imwinkelried, *The New Wigmore: Evidentiary Privileges* § 6.7.2 (3d ed. 2021); *People ex rel. Vogelstein* v. *Warden of Cnty. Jail*, 270 N.Y.S. 362, 369 (N.Y. Sup. Ct. 1934) (observing that "[t]he great weight of authority in England and in this country is that the client's identity does not come within the scope of the privilege") (collecting cases). In *Chirac* v. *Reinicker*, 24 U.S. (11 Wheat.) 280 (1826), for example, this Court suggested that a defendant's former attorneys could be compelled to testify about whether the defendant hired them to represent him in a lawsuit. *Id.* at 294. The Court explained that "[t]he fact is preliminary in its own nature, and establishes only the existence of the relation of client and counsel, and, therefore, might not necessarily involve

the disclosure of any communication arising from that relation after it was created." *Id.* at 294-295.

That approach makes sense in light of the privilege's purpose of facilitating attorney-client communications: "[i]f the client is troubled enough about a potential problem to sense a need to consult an attorney, in many cases the client will do so even absent a privilege for his or her statements about personal identity." *New Wigmore* § 6.7.2. In other words, absent "special circumstances," information that merely identifies a client is "not the kind[ ] of disclosure[ ] that would not have been made absent the privilege and [its] disclosure does not incapacitate the attorney from rendering legal advice." *Vingelli* v. *United States (Drug Enforcement Agency)*, 992 F.2d 449, 452 (2d Cir. 1993).

Such special circumstances may exist "when revealing the identity of the client and fee arrangements would itself reveal a confidential communication." Pet. App. 8 (quoting *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 926 F.2d 1423, 1431 (5th Cir. 1991) (*Reyes-Requena II*)). Identity may therefore be privileged when it is "*connected inextricably* with a privileged communication," such as "the confidential purpose for which the client sought legal advice." *Id.* at 9 (quoting *Reyes-Requena II*, 926 F.2d at 1431) (brackets omitted). But that is a "limited and rarely available sanctuary, which by virtue of its very nature must be considered on a case-to-case basis." *Id.* at 8-9 (quoting *United States* v. *Jones (In re Grand Jury Proceedings)*, 517 F.2d 666, 671 (5th Cir. 1975) (*Jones*)).

b. The court of appeals correctly held that the identities of the Does are not privileged on this record. The

court properly articulated the governing legal principles, recognizing that client identities may be privileged "when revealing the identity of the client and fee arrangements would itself reveal a confidential communication." Pet. App. 8 (quoting *Reyes-Requena II*, 926 F.2d at 1431). Applying that standard here, the court observed that "Agent Russell-Hendrick's 2018 declaration did *not* state the Government *knows* the substance of the legal advice the Firm provided the Does." *Id.* at 13. As a result, the record indicated that disclosure would do no more than "inform the IRS that the Does participated in at least one of the numerous transactions described in the John Doe summons issued to the Firm." *Id.* at 16.

The court of appeals' conclusion was amply supported by the factual record. One of petitioner's principals testified that the circumstances of petitioner's other clients were "distinguishable" from those of Taxpayer-1, thereby undermining any claim that the government knew the content of the advice proffered to other parties based merely on its investigation of Taxpayer-1. C.A. ROA 26. And the sample billing records that petitioner submitted for the court's review indicate that it provided numerous non-legal, business-oriented services to its clients. See p. 4, *supra*. Non-legal communications generally fall outside the privilege altogether. See, *e.g.*, *In re Grand Jury Proceedings*, 616 F.3d at 1182.[1]

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[1] Russell-Hendrick's declaration describes her interview with one of petitioner's principals, in which the principal alludes to services performed for certain other clients in connection with foreign entities. See C.A. ROA 187-189. Even if those general allusions were sufficient to show that the government is aware of the content of specific, legal communications—a point the government contests—

As the court of appeals recognized, its decision also finds support in *United States* v. *BDO Seidman*, 337 F.3d 802 (7th Cir. 2003), cert. denied, 540 U.S. 1178 (2004). There, the Seventh Circuit acknowledged that disclosure of clients' identities would necessarily reveal that the clients "participated in one of the 20 types of tax shelters described in [the] summonses." *Id.* at 812. But the court rejected the application of an analogous statutory privilege, reasoning in part that it was "less than clear * * * what motive, or other confidential communication of tax advice, can be inferred from that information alone." *Ibid.*

Rather than attack the actual decision below, petitioner criticizes a straw man, contending (Pet. 26) that the court of appeals adopted the "unprecedented" rule that "the Government must know the full substance and content of the specific legal advice for the privilege to apply." The court held no such thing. To the contrary, it rejected application of the privilege based on its conclusion that the government was aware only of the *general category* of services that the anonymous clients received, which was supported by the assertion of petitioner's principal that petitioner's other clients were differently situated from Taxpayer-1. See Pet. App. 14, 16.

At bottom, petitioner's fundamental disagreement with the decision below appears to be over the factual question of whether the government's knowledge of the legal advice petitioner provided to the Does is sufficiently detailed that "merely identifying the client will

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the proper response would be for petitioner to assert the privilege over the identities of clients who received *those communications*, not on a blanket basis as to all responsive documents.

effectively disclose that communication." *BDO Seidman*, 337 F.3d at 811. The court of appeals' factbound conclusion that petitioner failed to carry its burden under a well-established legal standard does not warrant this Court's review.

Petitioner suggests (Pet. 28-29) in the alternative that, even if no confidential communications are directly at stake, its "clients have a federal common law right to seek out [petitioner's] legal services, including tax advice, and keep the fact of that consultation private." But that standard would invert the general rule and render virtually *all* client identities privileged. Petitioner offers no support for such an expansive approach. See *Doe* v. *United States (In re Shargel)*, 742 F.2d 61, 64 n.4 (2d Cir. 1984) (rejecting "out of hand the argument that a confidential communication about criminal activity may be inferred from consultation with a criminal law specialist").

Finally, petitioner quibbles (Pet. 34-35) with the court of appeals' reliance on *BDO Seidman* as persuasive authority. Petitioner notes (*ibid.*) that the accounting firm itself, not the clients, was under investigation in *BDO Seidman*, and that the case involved a statutory privilege and disclosure regime not applicable here. The decision below similarly acknowledged that *BDO Seidman* "differ[s] in some respects from this case." Pet. App. 15. But it recognized that the statutory privilege at issue there "was modeled after the attorney-client privilege," and it accordingly concluded that the *BDO Seidman* court's "rationale" was "instructive." *Id.* at 15-16; see *BDO Seidman*, 337 F.3d at 810-812. Petitioner's disagreement with that modest proposition, and about how analogous a nonbinding opinion should be, does not support this Court's review.

2. Petitioner asserts (Pet. 26-35) that the decision below conflicts with prior decisions from the Fifth Circuit as well as decisions from other courts of appeals. The existence of an intra-circuit conflict would not be a reason to grant the petition. In any event, petitioner is mistaken on both counts. The differing outcomes in the cases it cites are a natural consequence of different fact patterns and the application of the privilege on a "case-by-case basis." *Upjohn*, 449 U.S. at 396.

a. Petitioner asserts (Pet. 27-30) that the panel's decision departs *sub silentio* from previous Fifth Circuit decisions evaluating the scope of the attorney-client privilege. At the outset, any such intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Regardless, petitioner's assertion of internal tension is misplaced. As Judge Elrod explained in her dissent from denial of rehearing en banc, the opinion below "can and should be read—consistently with our existing precedent—not to impose any new standard with respect to what is required for the attorney-client privilege to protect client identity." Pet. App. 35. Judge Elrod observed that "the opinion assures us, in its citations to *Jones* and *Reyes-Requena II*, that it does not diverge from our settled precedent." *Id.* at 37. She stated: "I take the opinion at its word." *Ibid.* This Court should do the same.

In seeking to establish the existence of an intra-circuit conflict, petitioner relies on *Reyes-Requena II*, which concerned whether a defense attorney was required to reveal the identity of an anonymous benefactor who paid the attorney's fees for a drug defendant.

926 F.2d at 1425. Both the attorney and the benefactor (who had intervened in the case) presented evidence demonstrating that the benefactor had jointly retained the attorney to represent himself and the defendant for a confidential purpose. *Id.* at 1428. The court of appeals recognized that "[a]s a general rule, client identity and fee arrangements are not protected," but "a narrow exception" exists "when revealing the identity of the client and fee arrangements would itself reveal a confidential communication." *Id.* at 1431. Given that "Intervenor retained '[the attorney] to represent [the defendant] and Intervenor jointly for a confidential purpose,'" the court concluded "that if [the attorney] were to reveal Intervenor's identity, 'the confidential motive for Intervenor's retention of [the attorney] would be exposed as apparent.'" *Id.* at 1432 (emphasis omitted).

As the decisions below explained, this case is "distinguishable" because those "specific circumstances" are "not present here." Pet. App. 11-12. Petitioner does not assert that the Does and Taxpayer-1 were represented for the same "confidential purpose," or that its communications with the Does were otherwise "inextricably intertwined" with its representation of Taxpayer-1. *Reyes-Requena II*, 926 F.2d at 1432.

Petitioner also invokes *Jones*, which similarly involved grand-jury subpoenas seeking information from attorneys about the benefactors who paid the attorneys' fees for known drug defendants. 517 F.2d at 668, 675. The government sought the identity of the benefactors and their fee arrangements to determine whether they paid bonds and legal fees in excess of their reported income, for the purpose of conducting a tax investigation to determine whether the benefactors were underreporting income. *Id.* at 674. Although *Jones* found that

the privilege was applicable, petitioner has not shown that revelation of the Does' identities in this case would enable the government to connect the dots on a legal violation in any comparable fashion. And the *Jones* court went out of its way to note that "our decision should not be taken as any indication of how we would decide a similar question if the inculpatory value of sought-after testimony were less obvious or largely attenuated," as "[e]ach of these cases must turn on its own facts." *Id.* at 675; see p. 18 n.2, *infra* (noting that Fifth Circuit has since moved away from focus on inculpatory value of information as relevant criterion in privilege analysis).

There is, accordingly, no intra-circuit conflict.

b. Petitioner also asserts (Pet. 31-34) a conflict among the circuits on the question presented. Petitioner relies principally on *United States* v. *Liebman*, 742 F.2d 807 (3d Cir. 1984). There, the IRS sought the names of clients that a law firm had advised could deduct their legal fees on their tax returns. *Id.* at 808. The court recognized that despite the general rule against protection of client identities, an exception applies "where 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. It found the exception satisfied on the facts of that case, explaining that "[t]he affidavit of the IRS agent supporting the request for the summons not only identifies the subject matter of the attorney-client communication, but also describes its substance." *Ibid.* Specifically, the affidavit did "more than identify the communications as relating to the deductibility of legal fees paid to [the firm] in connection with the acquisition of a real estate partnership interest," but went "on to

reveal the content of the communication, namely that 'taxpayers . . . were advised by [the firm] that the fee was deductible for income tax purposes.'" *Ibid.* (citation omitted). As a result, disclosure of the client's identities, "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.

As the panel explained, *Liebman* has no application here. The IRS declaration in this case, unlike the affidavit in *Liebman*, does not identify "specific, substantive legal advice" that petitioner provided to clients other than Taxpayer-1. Pet. App. 13. Indeed, as noted, one of petitioner's principals averred that petitioner's other clients "ha[d] facts that are distinguishable from the client named 'Taxpayer-1' * * * because * * * [petitioner] never advised any other client with respect to the treatment of earned income as income earned by a foreign corporation." C.A. ROA 26. Tellingly, despite its repeated assertions that *Liebman* is on point, see, *e.g.*, Pet. 31, petitioner never identifies the content of the specific legal communications of which the government is supposedly aware.

Petitioner contends (Pet. 33-34) that the decision below conflicts with *Baird* v. *Koerner*, 279 F.2d 623 (9th Cir. 1960). In that case, the IRS issued a summons ordering an attorney to identify the clients on whose behalf he had delivered an anonymous check to the IRS for unpaid taxes in prior years. *Id.* at 626. The court of appeals held that "[i]f 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 632. The court found the identities privileged given what the government already knew, namely, that "money was received by the government, paid by persons who thereby admitted they had not paid a sufficient amount in income taxes some one or more years in the past." *Id.* at 633.

Petitioner contends (Pet. 11) that *Baird* broadly established an independent exception to the rule that client identities fall outside the scope of the privilege. This additional exception, termed the "last link" doctrine, *ibid.*, purportedly authorizes attorneys to withhold client identities based on the disclosure's potential for incrimination, rather than by showing that disclosure would reveal confidential communications seeking or conveying legal advice. In comparison to *Baird*, however, this case lacks any similar tangible connection between the Does and known wrongdoing. The "last link" doctrine is therefore inapplicable on these facts.[2]

In any event, petitioner's broad reading of *Baird* has been widely discredited. *Baird* has been described as one of "the notorious 'bag man' cases," which stand for the proposition that a "client can confer a privilege on his delivery boy by hiring a licensed attorney to do the job." 24 Charles Alan Wright & Kenneth W. Graham,

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[2] The inapplicability of the "last link" doctrine on its own terms dispels petitioner's claim (Pet. 34) that the panel departed from circuit precedent in failing to apply that doctrine. Moreover, regardless of any arguable embrace of the "last link" exception in the Fifth Circuit's decision in *Jones*, see *ibid.*, the court of appeals has since explained that "a proper reading" of its precedents "demonstrates that [they] did not fashion a 'last link' * * * attorney-client privilege independent of the privileged communications between an attorney and his client." *In re Grand Jury Subpoena*, 913 F.2d 1118, 1124 (5th Cir. 1990), cert. denied, 499 U.S. 959 (1991).

Jr., *Federal Practice and Procedure* § 5473, at 108 (1986) (footnote omitted). Such a doctrine perversely enables wrongdoers to "rent[] the privilege" by hiring lawyers to perform nonlegal tasks, *id.* § 5478, at 225, and its focus on the potential for incrimination—rather than confidential communications—does little to enhance the administration of justice consistent with the privilege's rationale, 3 Jack B. Weinstein et al., *Weinstein's Federal Evidence* § 503.14[5][a]-[b] (2d ed. 2019).

In light of its weak analytical foundation, the "last link" doctrine "receives little support from current case law." *Doe 1* v. *Under Seal (In re Grand Jury Matter)*, 926 F.2d 348, 352 (4th Cir. 1991). Even the Ninth Circuit, which originated the doctrine, has largely disavowed it. As that court has explained, *Baird*'s suggestion that "identity information is privileged where it tends to 'implicate'" the client has "since been discredited within our circuit," *United States* v. *Blackman*, 72 F.3d 1418, 1424 (9th Cir. 1995), cert. denied, 519 U.S. 911 (1996), and a "close examination of subsequent cases[] indicates that *Baird* applies only when * * * disclosure of the client's identity * * * would reveal information that is tantamount to a confidential professional communication," *Tornay* v. *United States*, 840 F.2d 1424, 1428 (9th Cir. 1988).

Finally, petitioner alleges (Pet. 10-26) longstanding differences in the ways that different courts of appeals describe the exception to the general rule that client identities are not privileged. But petitioner does not attempt to show that those courts have produced meaningfully different results that are not explainable on the basis of distinct fact patterns. Nor does petitioner assert that the various articulations supposedly applied

by the other courts of appeals are implicated here or that this case would give this Court an opportunity to adopt a uniform standard. Any abstract disagreement in the courts of appeals does not merit this Court's review.

3. The interlocutory posture of this case makes immediate review unnecessary. In the district court, the government suggested that petitioner be given the opportunity to submit a privilege log detailing its objections on a document-by-document basis. See Pet. App. 31. Although petitioner declined the invitation at that time, *id.* at 6, Judge Elrod noted in her dissent that "[o]nce our mandate issues, it may be that the case is reopened and the stay lifted," *id.* at 38. "If so, the [district court's] enforcement order provides that [petitioner] will have the opportunity to produce a privilege log, asserting privilege on particular responsive documents." *Ibid.* And "[i]f [petitioner] does so, the district court may choose then to conduct an *in camera* review of those documents." *Ibid.*

This Court and its members have repeatedly observed that the interlocutory posture of a case "of itself alone furnishe[s] sufficient ground" for denying certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); accord *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."); *National Football League* v. *Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (statement of Kavanaugh, J., respecting the denial of certiorari); *Abbott* v. *Veasey*, 137 S. Ct. 612, 613 (2017) (statement of Roberts, C.J., respecting the denial of certiorari); *Virginia Mil. Inst.* v. *United States*, 508 U.S. 946 (1993)

(opinion of Scalia, J., respecting the denial of the petition for a writ of certiorari). The practice of denying interlocutory review promotes judicial efficiency because remand proceedings frequently affect, in a material way, the issues presented in a petition. It also enables issues raised at different stages of lower-court proceedings to be consolidated in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

This case presents compelling reasons for the Court to adhere to its traditional practice. An *in camera* review would sharpen the parties' dispute by clarifying the factual record underlying petitioner's claim of privilege. For example, it would enable the courts below to determine whether communications are legal communications (which could be privileged) or business communications. See Am. College of Tax Counsels Amicus Br. 5 n.2 ("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."). And even if the communications were legal in nature, remand would permit the courts below to ascertain whether they implicate another exception to the attorney-client privilege, such as waiver or the crime-fraud exception. See, *e.g.*, *United States* v. *Zolin*, 491 U.S. 554, 562-563 (1989).

The remand proceedings might also shed critical light on the practical and legal significance of the dispute. If the district court accepts all (or the bulk) of petitioner's particularized assertions of privilege, it could moot the controversy or dramatically diminish its importance. The court's analysis on remand would also serve as a barometer regarding whether the panel opinion really does adopt an "unprecedented" deviation

from existing case law (as petitioner claims), Pet. 26, or instead "can and should be read—consistently with * * * existing precedent—not to impose any new standard" (as Judge Elrod concluded), Pet. App. 35.

Nor would delaying review until after remand meaningfully undermine the privilege. Petitioner could potentially obtain a stay or post hoc remedies for any disclosure ordered by the district court that it views as improper. See *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 109 (2009) (explaining that "deferring review [of attorney-client privilege disputes] until final judgment does not meaningfully reduce the *ex ante* incentives for full and frank consultations between clients and counsel"). In light of all these considerations, this Court's intervention at this time would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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