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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Panel's decision marks a shift in federal law that will disincentive citizens to seek legal advice 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." *Taylor Lohmeyer Law Firm P.L.L.C. v. United States*, 982 F.3d 409, 411 (5th Cir. 2020). Petitioner urges this Court to exercise that role. The Petition for Writ of Certiorari should be GRANTED.

ARGUMENT

I. Respondent fails to address the lack of uniformity among the Circuits.

Petitioner analyzed the Circuits' varying standards for assessing the attorney-client privilege as it applies to client identities, demonstrating discord. *See* Petition at 9-26. Respondent does not address this lead issue until page 19 of its 22-page Brief, and even then, it devotes it only four sentences. What Respondent does not say in those sentences is more revealing than what it does say. Indeed, Respondent offers no suggestion as to how the Circuits' iterations of the exception can be reconciled. Instead, Respondent implies, but makes no attempt to show, that the incongruent standards are the product of "distinct fact patterns." Brief in Opposition at 19. But that is not so.

In fact, the cases Petitioner analyzed all have a common fact pattern—one that is shared here: The government suspects it knows the person's motive for retaining an attorney, and it wants to discover the person's identity to investigate them for some suspected wrongdoing. *See Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960) (The IRS suspected that individuals retained an attorney concerning unpaid taxes, and it wanted to learn their identities to investigate.); *National Labor Relations Board v. Harvey*, 349 F.2d 900 (4th Cir. 1965) (The Labor Board suspected that a person retained an attorney to conduct an improper surveillance, and it wanted to learn the person's identity to investigate.); *Tillotson v. Boughner*, 350 F.2d 663 (7th Cir. 1965) (The government suspected that a person retained an attorney concerning unpaid taxes, and it wanted to learn the person's identity to investigate.); *In re Grand Jury Proceeding (Cherney)*, 898 F.2d 565 (7th Cir. 1990) (The government suspected that a person retained an attorney concerning a criminal conspiracy, and it wanted to learn the person's identity to investigate.); *United States v. Liebman*, 742 F.2d 807 (3d Cir. 1984) (The government suspected individuals received erroneous tax advice from their attorneys, and it wanted to learn their identities to investigate.); *United States v. Jones*, 517 F.2d 666 (5th Cir. 1975) (The government suspected individuals retained an attorney in connection with unpaid taxes, and it wanted to learn their identities to investigate.); and *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 926 F.2d 1423 (5th Cir. 1991) ("*Reyes-Requena II*") (The government suspected

that a person retained an attorney concerning a criminal conspiracy, and it wanted to learn the person's identity to investigate.).

The courts recognize that the attorney-client privilege shields information that would reveal client identities in these circumstances. However, in explaining why the attorney-client privilege applies, differing standards have emerged.

In *Baird*, the Ninth Circuit discussed the government's desire to confirm its suspicion about the client's motive for retaining the attorney, also mentioning the last link rationale. *Baird*, 279 F.2d at 634. In *Tillotson*, the Seventh Circuit emphasized the suspected motive standard, holding that "[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." *Tillotson*, 350 F.2d at 666.

In *Harvey*, 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." *Harvey*, 349 F.2d at 905. The Third Circuit also applies this standard. *See Liebman*, 742 F.2d at 809 (citing *Harvey*, 349 F.2d at 905). This standard does not require the government to know the substance and content of the specific legal advice. In *Harvey*, there was no discussion of the legal advice; the court, instead, focused on the suspected motive: "[U]pon identification of the client, it will be known

that the client wanted information about Shrader." *Harvey*, 349 F.2d at 905.

In *Cherney*, the Seventh Circuit applied the suspected motive standard, explaining that "the privilege protects an unknown client's motive for seeking legal advice." *Cherney*, 898 F.2d at 568. The Fifth Circuit follows this approach. *See Jones*, 517 F.2d at 674-75 ("The attorney-client privilege protects the motive itself from compelled disclosure"); *Reyes-Requena II*, 926 F.2d at 1431 ("We protect the client's identity . . . because they are connected inextricably with . . . the confidential purpose for which he sought legal advice.").

Other Circuits reviewing cases in this area have come up with different ways to describe the various standards. *See*, *e.g.*, *In re Grand Jury Investigation No. 82-2-35*, 723 F.2d 447, 452-55 (6th Cir. 1983) (describing the "legal advice exception," the "so much of the actual communication" exception, and the "last link" exception); *see also United States v. Anderson*, 906 F.2d 1485, 1488 (10th Cir. 1990).

Here, Respondent determined that Petitioner's clients retained it for the same purpose as Taxpayer-1—to obtain legal advice on tax reduction in connection with offshore accounts. Respondent disagrees with Petitioner's advice, and it wants to learn Petitioner's clients' identities so it can investigate them for suspected tax deficiencies. The fact pattern is the same as the cases described above. Despite this, the Panel determined that the privilege does not apply because Respondent did not know the "substance of the legal

advice" or "the content of any specific legal advice." *Taylor Lohmeyer Law Firm P.L.L.C. v. United States*, 975 F.3d 505, 512 (5th Cir. 2020). No other case requires such a showing.

This new standard is virtually impossible to prove short of the government confessing such knowledge, which is not in its interest. The Panel's new standard conflicts with Circuit decisions spanning decades.

II. Respondent's attempt to bolster the Panel's decision is unpersuasive.

Respondent acknowledges—at least initially—that documents revealing client identities are privileged when the government is aware of the "confidential purpose for which the client sought legal advice." Response Brief at 10. This standard was met. The IRS discovered that Taxpayer-1 retained Petitioner for legal advice on how to reduce or avoid tax liability. ROA.167, 170. It discovered that Petitioner set up offshore transactions for its client and advised him that income generated was not reportable. ROA.174-79. It discovered that Taxpayer-1 failed to pay taxes based on this advice. ROA.174, 185. The IRS concluded that Petitioner's other clients retained Petitioner for the same purpose as Taxpayer-1. ROA.185, 187, 198.[1] So

[1] Mr. Lohmeyer attested that the clients all "sought . . . advice with the primary goals of . . . tax reduction"; "the substance of the communications . . . is already known to the Government"; and "the mere disclosure of the clients' identities would reveal the substance of the ongoing legal advice . . . [and] the confidential reasons our clients sought our legal advice. . . ." ROA.149-153.

confident in its findings and conclusions, Respondent's revenue agent declared under oath that documents responsive to its summons "will," not could, "contain substantial evidence regarding the identity of the U.S. taxpayers with offshore structures used to avoid or evade taxes." ROA.192. Plainly, Respondent was aware of the confidential purpose for which the clients sought legal advice.

Respondent thus abandons any further discussion about the suspected motive standard. Substituted in its place is the argument that Petitioner did not prove that Respondent had actual knowledge of "the substance of the legal advice the Firm provided." Respondent's Brief at 11. Setting aside the fact that Respondent's revenue agent described the advice in her declaration, *see* Petition at 3-5, the issue is not one of factual sufficiency. The issue is whether this new standard the Panel adopted—knowledge of the substance and content of the specific legal advice—is valid under federal law. The Panel is the first to say it is.

Respondent maintains, however, that the Panel's decision did not actually rest on its determination that the proof fell short of this heightened standard, claiming instead that the Panel did not uphold the privilege because Respondent "was aware only of the general category of services" Petitioner provided. Response Brief at 12. Respondent began developing this theme earlier in its Brief, claiming that its investigation revealed certain innocuous services like buying artwork and structuring loans, and that it was the fruits of "*that* investigation" that prompted it to seek out the

identities. *Id.* at 2. But there is nothing suspicious about buying artwork, structuring loans, or setting up offshore accounts (they are legal) that would spark a governmental investigation. Respondent wants to investigate the clients for one reason—to confirm its foundational determination that they engaged Petitioner for legal advice on ways to reduce or avoid paying taxes though offshore structures.

The Government knows the motive and the advice, which explains why the summons followed. Under cases like *Jones* and *Reyes-Requena II*, Petitioner's clients' identities are privileged. The only explanation for the Panel's contrary determination is its adoption of the heightened standard that Respondent describes as a straw man argument. But it is not a straw man argument. *See Taylor Lohmeyer*, 975 F.3d at 512 (finding that the privilege does not apply because Respondent "did *not* state the Government *knows* the substance of the legal advice the Firm provided the Does" or "the content of any specific legal advice the Firm gave particular Does.").

Respondent takes issue with Petitioner's argument that 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." Response Brief at 13. According to Respondent, "that standard would invert the general rule and render virtually all client identities privileged." *Id.* In *Reyes-Requena II*, however, the court recognized that an individual who consulted with an attorney concerning a legal matter "will reveal the nature of his problem as

well as his identity, and reasonably expects both to remain confidential." *Reyes-Requena II*, 926 F.2d at 1431. When the government suspects it knows the purpose or motive for the consultation and wants to investigate, identities are protected by the attorney-client privilege, and the law firm has a duty to protect the confidential consultation. *Id.; see also Jones*, 517 F.2d at 671 ("Under certain circumstances an attorney *must* conceal even the identity of a client, not merely his communications."). Petitioner's argument aligns with these principles.

Respondent argues that the decision does not conflict with *Jones* and *Reyes-Requena II*, citing the dissenting judges' comment that "the opinion assures us, in its citation to *Jones* and *Reyes-Requena II* that it does not diverge from our settled precedent." *Taylor Lohmeyer Law Firm P.L.L.C. v. United States*, 982 F.3d 409, 411 (5th Cir. 2020). However, the Panel's citation to *Jones* and *Reyes-Requena II* in passing, without applying their lessons, is of little value. Indeed the dissenting judges' statement, read in context, seems more like an expression of concern over the precedential effect of the Panel's heightened knowledge requirement, which motivated the six of them—and two additional judges—to vote in favor of granting rehearing *en banc*. While the Panel's passing reference to *Jones* may offer those dissenting judges some hope, it is clear that had Respondent confessed, in greater detail, its awareness of the substance and content of the specific legal advice, the Panel would have held that Petitioner's clients' identities are protected by the attorney-client

privilege. However, as the dissenting judges emphasized: "This protection may obtain even if the government does not know the specific, substantive legal advice that was provided to the client." *Id.* at 411-12. That is indeed so; but that is not what the Panel held.

Respondent maintains that the Panel's decision does not conflict with *Reyes-Requena*, *II*, suggesting the court in that case found that the attorney-client privilege applies only in cases of joint representation. Response Brief at 15. Respondent misconstrues the holding. The government was pursuing the unknown client's identity to confirm its belief that he was paying the legal fees for the known client because he was involved in the same criminal conspiracy. The privilege applied, not because of the dual representation, but because "[t]he Government clearly sought [the client's] identity in hopes of broadening their investigation." *Reyes-Requena II*, 926 F.2d at 432. The same is true here. Respondent concluded that the unknown clients hired Petitioner for the same purpose as Taxpayer-1, and it wants to learn their identities to broaden its investigation.

As for *Jones*, Respondent argues that "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." *Id*. at 16. This argument, too, is misplaced. In *Jones*, the government was pursing the unknown clients' identities to confirm its suspicion that they failed to pay taxes. *Jones*, 517 F.2d 673. The attorney-client privilege applied, not because the revelation of their

identity "would enable the government to connect the dots on a legal violation," as Respondent maintains. Response Brief at 16. It applied because the government wanted to use the information to confirm its suspicion about the motive for the engagement. As the court explained: "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. Once again, the same is true here. Respondent concluded that the unknown clients hired Petitioner for the same purpose as Taxpayer-1, and it wants to learn their identities to broaden its investigation.

Turning to *Liebman*, Respondent argues that the case "has no application here" because "[t]he 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." Response Brief at 17. The Panel agreed with this argument, saddling Petitioner with the heightened burden to prove that the government knows the substance and content of the specific legal advice. This holding—which the dissenting judges hope will not take root—is why this Court should grant Certiorari. It is unprecedented and erroneous. And Respondent realizes this. It is why it labels the issue a straw man argument. Response Brief at 12. But if Respondent is correct about that, then this sole aspect of the *Liebman* decision that Respondent says renders it distinguishable would not matter.

Liebman is on all fours with this case, and the Panel should have followed its lead. In both cases, the government submitted an IRS agent's declaration to attempt to justify the summons; the declaration sets forth the agent's belief that the firm gave erroneous legal advice in connection with transactional work; the IRS is unaware of the identities of the firm's clients; and the IRS issued a summons for all documents that reveal the clients' identities. 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." *Liebman*, 742 F.2d at 809.

With respect to *Baird*, Respondent argues that the case "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." Response Brief at 18. Respondent argues that this "last link" standard does not apply because "this case lacks any similar tangible connection between the Does and known wrongdoing." *Id*. While Petitioner agrees there was no known wrongdoing in this case, Respondent's construction of *Baird* as resting solely on the last link standard is incorrect. It additionally stands for the proposition 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. *See Baird*, 279 F.2d at 634.

III. This is an ideal case to establish uniform standards in determining when the attorney-client privilege applies to client identities.

Respondent maintains that, because the Panel remanded the case, the court's order enforcing the IRS summons is interlocutory. Response Brief at 21. However, as this Court recognizes, "a district court order enforcing an IRS summons is an appealable final order." *Church of Scientology of California v. United States*, 113 S.Ct. 447, 452 (1992). In light of this, Respondent's discussion about interlocutory orders is misplaced.

Moreover, Respondent's position fails to appreciate the fact that documents responsive to Respondent's summons are responsive *because* they reveal client identities. Consequently, as the court determined in *Liebman*, all documents are categorically privileged, not only documents containing legal advice. There is no need for an in camera review or privilege log. And granting Certiorari now will enable this Court to provide meaningful guidance should any further proceedings be warranted in the district court. The Court's articulation of the federal rule standard governing the applicability of the attorney-client privilege as it pertains to documents revealing client identities is ripe for review.

Indeed, this case presents an ideal opportunity for this Court to decide this important issue of federal law that has nation-wide implications. While the Circuits all appear to recognize that the attorney-client privilege protects client identities when the government suspects it knows the motive for the engagement and wants to investigate the client, they have labeled and adopted standards and tests that vary. Perhaps because of this, the Panel found the attorney-client privilege did not apply because Petitioner's proof did not enable it to demonstrate Respondent's knowledge of the substance and content of the specific legal advice. This holding is in error.

CONCLUSION

Petitioner respectfully requests the Court to grant its Petition for Writ of Certiorari.

Respectfully submitted,

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