No. 12-853

IN THE

Supreme Court of the United States

T.W.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE TAXATION COMMITTEE OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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United States v. Werdiger,
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12 U.S.C. § 3402 21

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12 U.S.C. §§ 3407-08 21

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H.R. Rep. No. 91-175, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4394 12-13

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Amendments to the Bank Secrecy Act Regulations – Reports of Foreign Financial Accounts, Federal Register, Vol. 76, No. 37 (Feb. 24, 2011) 11

Financial Crimes Enforcement Network (FinCEN)

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M. Sapirie, *International Tax Enforcement 3.0*, 134 Tax Notes 1359 (Mar. 12, 2012) 4

New York State Bar Ass'n Tax Section, *Report on the Rules Governing Reports on Transactions with Foreign Financial Agencies (FBARS)* (Oct. 30, 2009), *available at* http://www.nysba.org/AM/Template.cfm?Section=Tax_Section_Reports_2009&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=29&ContentID=24082 13

INTEREST OF *AMICUS CURIAE*

Amicus Curiae is a bar association committee whose members represent taxpayers who have received subpoenas like that here. *Amicus* supports the granting of certiorari because the Seventh Circuit's decision represents a revolution in Fifth Amendment jurisprudence, which has already been followed by at least one District Court in New York, and which, carried to its logical conclusion, eviscerates the Fifth Amendment act of production privilege as applied to citizens' personal records whenever *any* statute or regulation – essentially no matter its purpose – requires that records be maintained.[1]

SUMMARY OF ARGUMENT

The Court should grant the Petition for Writ of Certiorari because *In Re: Special February 2011-1 Grand Jury Subpoena Dated September 12, 2011*, 691 F.3d 903 (7th Cir. 2012), is one of an increasing number of decisions holding that a regulation requiring maintenance of private records of foreign bank accounts renders null the Fifth Amendment act of production privilege recognized in *United States v. Doe*, 465 U.S. 605, 612-13 (1984), and *United States v. Hubbell*, 530 U.S. 27, 36-37 (2000), and holding that an individual must produce such records

1. This amicus brief is filed with the consent of the parties who have both received the required notice. Consent letters have been submitted to the Clerk of the Court. No counsel for any party authored any part of this brief. No persons or entities made any monetary contribution to the preparation or submission of this brief other than the *Amicus* and its attorneys.

in response to a grand jury subpoena, no matter how testimonial and incriminating that act of production may be.

We agree with the Petition for Writ of Certiorari that the required records doctrine is due for wholesale re-examination. That doctrine originated in *Shapiro v. United States*, 335 U.S. 1 (1948) (*before* this court ever recognized the act of production privilege), under exigent wartime conditions where the petitioner was licensed to engage in a public commercial activity – a situation entirely distinguishable from the present-day private owner of a foreign bank account. We also believe, however, that the Seventh Circuit's cursory discussion – relying on *In re Grand Jury Investigation M.H.*, 648 F.3d 1067 (9th Cir. 2011), *cert denied*, No. 11-1026 (June 25, 2012) ("*In re M.H.*")[2] – misapplied the three-prong test described in *Grosso v. United States*, 390 U.S. 62 (1968), to determine *if* the *Shapiro* required records doctrine applies, i.e., first, that "the purposes of the United States' inquiry must be essentially regulatory"; second, that the information sought must be "of a kind which the regulated party has customarily kept"; and third, that "the records themselves must have assumed 'public aspects' which render them at least analogous to public documents." *Id.* at 67-68. The Seventh Circuit, via the Ninth Circuit, collapsed this three-prong test into one, holding, tautologically, that, if the government's inquiry is essentially regulatory, records required by the regulation are *necessarily* customarily kept by those regulated; and

2. Because the Seventh Circuit abdicated so much of its reasoning to *In re M.H.*, we will necessarily refer to that decision herein.

the records *necessarily* assume public aspects simply by reason of the regulation's requirement that they be kept. Moreover, the Seventh Circuit was carelessly erroneous in its underlying determination that the governmental inquiry here is "essentially regulatory" in the first place.

The regulation in question is 31 C.F.R. § 1010.420, promulgated under the Bank Secrecy Act, 31 U.S.C. § 5311 *et seq.* (the "BSA"). It requires anyone having "a financial interest in or signatory authority over" a foreign bank account to maintain for five years, and keep available for inspection, records containing the "name," "number or other designation," and "type" of account; the "name and address of the foreign bank or other person with whom such account is maintained"; and "the maximum value of each such account during [each year]." *Id.* Thus, the regulation may require that individuals *create* rather than simply maintain records. It operates hand in hand with 31 C.F.R. § 1010.350, under which an interest in or authority over a foreign bank account must be reported annually to the Secretary of the Treasury on Form TD F 90-22.1, "Report of Foreign Bank and Financial Accounts," known as an FBAR.

An inquiry under the BSA is not "essentially regulatory"; it seeks records "in support of law enforcement and intelligence efforts to deter, identify and investigate crimes[.]" FinCEN, *Support to Law Enforcement*, http://www.fincen.gov/law_enforcement/les/. FinCEN, the federal Financial Crimes Enforcement Network, is charged with enforcing the BSA, and analyzing BSA data, including that provided by FBARs. *See, e.g.*, http://www.fincen.gov/about_fincen/wwd/ ("FinCEN's mission is to enhance the integrity of financial systems

by facilitating the detection and deterrence of financial crime.") (FinCEN has delegated to the IRS enforcement authority over certain BSA provisions, including 31 C.F.R. 1010.420.)

Despite the fact that the first *Grosso* prong is thus *not* met by 31 C.F.R. § 1010.420, this Court's confirmation in *Hubbell* that the Fifth Amendment affords the *same* protection to the testimonial aspects of a person's act of producing documents as it does to any other compelled testimony, 530 U.S. at 43, has been crippled by the Seventh Circuit here, the Ninth Circuit, the Fifth Circuit,[3] and the Eleventh Circuit,[4] which have all now held that personal records of foreign bank accounts lose the protection of the act of production privilege *solely* by reason of that regulation. Yet this Court has long warned against a regime under which "the constitutional [Fifth Amendment] privilege could be entirely abrogated by any Act of Congress." *Marchetti v. United States*, 390 U.S. 39, 57 (1968). And here we have no Act, but a mere regulation, which is now being allowed to *define* the contours of Fifth Amendment protections. Because the government has issued or is issuing hundreds of these subpoenas,[5] it is vital that this Court stem lower courts' willingness to countenance this end run around a bedrock constitutional privilege.

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3. *In re Grand Jury Subpoena,* 696 F.3d 428 (5th Cir. 2012).

4. *In re Grand Jury Proceedings, No. 4-10,* No. 12-13131 (11th Cir. Feb. 7, 2013).

5. M. Sapirie, *International Tax Enforcement 3.0*, 134 Tax Notes 1359 (Mar. 12, 2012) (estimating that around 150 subpoenas had then been issued).

ARGUMENT

The Seventh Circuit held that the mere existence of 31 C.F.R. § 1010.420 effects a waiver of the Fifth Amendment act of production privilege, and converts documents concerning a personal foreign bank account into public documents subject to compelled production. Simply to state these propositions demonstrates how alien they are to this Court's and Circuit Courts' prior Fifth Amendment jurisprudence.

Failure to maintain records under 31 C.F.R. § 1010.420, or to file FBARs under 31 C.F.R. § 1010.350, are both felonies. 31 U.S.C. § 5322. The government seeks, through a subpoena like this, to call before the grand jury a respondent who holds an undisclosed foreign account to testify, via production of documents, that he commited the crime of failing to report the account, or else to admit to criminal failure to maintain records. Any response is thus testimonial and protected by the act of production privilege articulated in *Hubbell* and *Doe*. This privilege should not be overridden by the required records doctrine in the context of this BSA regulation, since no prong of the *Grosso* test is met.[6]

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6. The government's argument in *In re: M.H.* and its progeny, including in the Seventh Circuit here, boils down to an insupportable assertion that, when the legislature may regulate or forbid an activity, the Fifth Amendment evaporates, relying on *Shapiro*'s one-sentence statement that there is no Fifth Amendment violation "when there is a sufficient relation between the activity sought to be regulated and the public concern so that the government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records[.]" 350 U.S. at 32. First, it is unclear whether

I. ESSENTIALLY REGULATORY

Far from being "*essentially* regulatory," the BSA's *principal* purpose is to provide evidence of criminal financial transactions that foreign bank secrecy laws previously kept hidden. *See post*.

A. Seventh Circuit Applied The Wrong Test

As a prefatory matter, however, the Seventh Circuit, via its reliance on the Ninth Circuit, conflated an individual's assertion of the Fifth Amendment privilege in response to a grand jury subpoena *duces tecum* with a facial challenge to the constitutionality of a reporting requirement. The petitioner here did not challenge the validity of the BSA regulations. Even if the regulations are facially constitutional, however, they do not give the government *carte blanche* to compel an individual to "testify" via the act of producing personal bank records.

Cases like *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974), and *United States v. Des Jardins*, 747 F.2d

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this sentence is conjunctive or disjunctive. Second, if the fact that Congress may forbid an activity *in and of itself* overrides the Fifth Amendment, there would have been no need for the analyses of *Marchetti* and *Grosso* (wagering may be forbidden), and no need for Circuit Courts, as they have, to apply the *Grosso* test when the legislature may forbid an activity. *See e.g., In re: Two Grand Jury Subpoenas Duces Tecum Dated August 21, 1985*, 793 F.2d 69 (2d Cir. 1986) (analyzing requirement that attorneys file contingency fee arrangements with court administration, although legislature could undoubtedly forbid such arrangements); *In re Grand Jury Subpoena Duces Tecum Served Upon Underhill*, 781 F.2d 64 (6th Cir. 1986) (analyzing requirement that car dealer maintain odometer records, although legislature could surely forbid used-car sales).

499 (9th Cir. 1984), *vacated in part*, 772 F.2d 578 (9th Cir. 1985) – which form the foundation of *In re M.H.*, 648 F.3d at 1073-74 (the progenitor of the current wrongly-decided line of cases, including the Seventh Circuit decision) – do *not* analyze an individual's assertion of the Fifth Amendment act of production privilege in response to a subpoena. Instead, they examine a facial challenge to a BSA reporting requirement, analyzing whether the conduct required to be reported is *per se* illegal, and balancing the government's interests against the individual's, in a classic facial-challenge analysis. *Des Jardins*, 747 F.2d at 508-09; *cf. Shultz*, 416 U.S. at 76-77. Nowhere do *Shultz* or *Des Jardins* mention *Grosso*'s "essentially regulatory" requirement; *Shultz* cites *Shapiro* only in connection with a due process analysis; and *Des Jardins* mentions neither *Shapiro* nor "required records." And *Shultz* did not reach the required records issue because there was no allegation that the information required to be reported was incriminating: "It will be time enough for us to determine what, if any, relief from the reporting requirement [the plaintiffs] may obtain in a judicial proceeding when they have properly and specifically raised a claim of privilege with respect to particular items of information . . . ." *Id.* at 73. That time has come in this case. Thus, *Shultz* and *Des Jardins*, the backbone of the Seventh Circuit decision, simply do not analyze the fundamental issue here, i.e., whether the required records doctrine applies, under *Grosso*, to override the act of production privilege.

The Court in *Marchetti* emphasized that:

> [W]e do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who

> properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements.

390 U.S. at 61. Thus, *Marchetti* and *Grosso*, decided the same day with respect to the same wagering reporting statutes, involved an admixture of facial challenge and an individual's assertion of privilege (and possibly therein lies the source of the current confusion). Because the wagering required to be reported there *was per se* illegal, any reporting operated as the equivalent of responding to the grand jury subpoena here, i.e., any response was, of necessity, incriminating.

Demonstrating its confusion between a facial Fifth Amendment challenge and an assertion of the Fifth Amendment privilege in response to a subpoena, *In re M.H.* deemed it conclusive that the BSA is a "valid regulatory scheme." 648 F.3d at 1077. But, as *Marchetti* made clear, 390 U.S. at 61, a reporting requirement may be "valid," i.e., it may survive a facial Fifth Amendment challenge, yet an individual may still assert the Fifth Amendment in response to incriminatory questions posed under that requirement. *Cf. United States v. Sullivan*, 274 U.S. 259, 263-64 (1927) (requirement to file tax returns is not unconstitutional, but taxpayer may assert the Fifth Amendment in response to individual questions on a return). Or, as a corollary, a reporting requirement may survive facial Fifth Amendment challenge, yet the required records doctrine may not apply. *See United States v. San Juan*, 405 F. Supp. 686, 693-94 (D. Vt. 1975) (upholding against facial challenge the BSA's currency reporting requirements, but nevertheless stating unequivocally that the required records doctrine would *not* apply to those *facially-valid* provisions).

Recent courts' failure to distinguish between a challenge to the facial validity of a regulation (not raised here) and the assertion of the Fifth Amendment in response to a subpoena – including the Seventh Circuit's failure here – leads to a wrong turn in applying the first *Grosso* prong, with courts transforming the "*per se* illegal" inquiry of a facial challenge into a baseless requirement that the BSA essentially focus *solely* on criminal conduct in order to meet this prong. *In re M.H.*, 648 F.3d at 1073-75. Instead, *Marchetti* characterized the first *Grosso* prong as requiring that reporting provisions be "imposed in 'an essentially non-criminal and regulatory area of inquiry[.]'" 390 U.S. at 57 (quoting *Shapiro*). As discussed *post*, under no reasonable interpretation can the BSA – which is *largely* criminally-focused – fit this description.

B. BSA's Language and Context

The BSA's "declaration of purpose" proclaims an aim "to require certain reports or records where they have a high degree of usefulness in *criminal*, tax, or regulatory investigations or proceedings . . . ." 31 U.S.C. § 5311 (emphasis added). The Seventh Circuit's holding that the BSA is therefore *essentially*, i.e., *in essence*, regulatory, is insupportable, ignoring as it does a *primary* purpose of the BSA.

It is crucial to recognize that, in *Grosso*, the Court noted that, even though the "principal" United States' interest underlying the wagering statutes there was revenue collection, a civil purpose, nevertheless, because of "Congress' apparent wish that any information obtained as a consequence of the wagering taxes be made available to prosecuting authorities," the statutory scheme did not fall under *Shapiro*, 390 U.S. at 68, and so necessarily was

not essentially regulatory. Thus, in contradistinction to the Seventh Circuit's position that a statute with *any* civil purpose is *ipso facto* essentially regulatory, a statute may have a *principal* civil purpose, but yet *not* be essentially regulatory because it *also* has a prosecutorial purpose. And the BSA's "declaration of purpose" specifies criminal law enforcement as one of its primary aims. 31 U.S.C. § 5311.

Thus, to find, as did the Seventh Circuit, that the BSA is essentially regulatory because it does not focus solely on crimes renders the word "essentially" meaningless. Rather, under *Grosso*, the very essence of the legislation, as a whole, unlike the BSA, must serve non-prosecutorial ends; there must be a "valid *civil* regulatory regime." *Rajah v. Mukasey*, 544 F.3d 427, 442 (2d Cir. 2008) (emphasis added). This requirement prevents Congress from circumventing the Fifth Amendment act of production privilege by enacting record-retention legislation, and then allowing the government to prosecute those who possess the specified records, after requiring their production via subpoena (precisely what the Seventh Circuit allowed here). *See, e.g., In re Doe*, 711 F.2d 1187, 1192 (2d Cir. 1983) (recognizing "constitutional limits on the government's power to compel record keeping which might circumvent the privilege contained in the Fifth Amendment" under the guise of the required records doctrine).

FinCEN characterizes the BSA as "the nation's first and most comprehensive Federal anti-money laundering and counter-terrorism financing . . . statute," http://www.fincen.gov/about_fincen/wwd/, and describes its own purpose as being:

> [T]o build a system to combat organized crime and white-collar crime and to deter and prevent the use of secret foreign bank accounts for tax fraud and their use to screen from view a wide variety of criminally related financial activities, and to conceal and cleanse criminal wealth.

History of the Financial Crimes Enforcement Network, http://www.fincen.gov/about_fincen/pdf/FincenOurStory.pdf. *See also* FinCEN, *Amendments to the Bank Secrecy Act Regulations – Reports of Foreign Financial Accounts*, Federal Register, Vol. 76, No. 37 at 10234 (Feb. 24, 2011) (referring to FBARs' usefulness to "law enforcement").

31 C.F.R. § 1010.420's requirement that records be maintained for five years coincides with the criminal statute of limitations for willfully failing to maintain such records, or willfully failing to file an FBAR, 18 U.S.C. § 3282, rather than the three-year statute of limitations for civil tax adjustments, 26 U.S.C. § 6501, an overt reference to criminal prosecution that also refutes that the BSA's character is essentially regulatory.

The government has never pointed to a "regulatory" act that FinCEN performs with FBAR data. And these very kinds of subpoenas – issued to targets of grand jury investigations – exemplify the true purpose of the government's inquiry under 31 C.F.R. § 1010.420, i.e., criminal law enforcement. We are unaware of any formal governmental request to a specific individual for 31 C.F.R. § 1010.420 information that has been issued *other* than via a grand jury subpoena.[7]

7. Except perhaps under the IRS's voluntary disclosure initiative where holders of secret foreign bank accounts come forward to avoid *prosecution*.

In re M.H.'s pronouncement that "[t]here is nothing inherently illegal about having or being a beneficiary of an offshore foreign banking account," 648 F.3d 1074, is too facile given the realities of foreign bank accounts. The BSA represents Congress's "*presumption*" that secret foreign bank accounts are "*inevitably linked to criminal activity*," *United States v. Hajecate*, 683 F.2d 894, 901 (5th Cir. 1982) (emphases added), and *half* of all foreign bank accounts are still held secretly.[8]

31 C.F.R. § 1010.420 is part of a statutory scheme whose main aim is law enforcement.

C. BSA's Legislative History

The BSA's legislative history abundantly confirms that the statute is essentially criminally focused. The House Report explained that the BSA addressed the "proliferation of white collar crime" aided by secret foreign bank accounts. *See* H.R. Rep. No. 91-175, 91st Cong., 2d

8. In 2002, the Department of the Treasury estimated that a million taxpayers controlled foreign bank accounts, and that FBAR compliance was less than 20%. *A Report to Congress in Accordance with § 361(b) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act)* (April 26, 2002) at p.6, available at http://www.fincen.gov/news_room/rp/files/ReportToCongress361.PDF. In 2009, 543,043 FBARs were filed. Treasury Inspector General for Tax Administration, *New Legislation Could Affect Filers of the Report of Foreign Bank and Financial Accounts, but Potential Issues Are Being Addressed* (Sept. 29, 2010) ("TIGTA Report") at p.7, available at http://www.treasury.gov/tigta/auditreports/2010reports/201030125fr.pdf. This increase is likely because of the IRS's voluntary disclosure initiative. Yet, still only half of foreign bank accountholders file FBARs.

Sess., at 10 (1970), reprinted in 1970 U.S.C.C.A.N. 4394, 4404. It bemoaned that, "United States law enforcement agencies are often delayed or totally frustrated when wrongdoers cloak their activities in the shield of foreign financial secrecy." *Id.*

The Senate was equally concerned with the "growing use of secret foreign bank accounts for a wide variety of illegal purposes by U.S. citizens and residents . . . ." *See* S. Rep. No. 91-1139, 91st Cong., 2d Sess., at 3-4 (1970).[9]

More recently, the Treasury Inspector General for Tax Administration ("TIGTA") acknowledged the criminal purpose behind the FBAR requirements:

> The legislative history of the FBAR stresses that its broad, primary purpose is intended to be a resource to combat white-collar crime and not just the narrower objectives of the Internal Revenue Code.[10]

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9. The BSA's foreign account reporting requirements are in Title 31, rather than Title 26, the Tax Code, in order to enhance law enforcement's ability to share information about taxpayers' interests in foreign accounts. Title 26 information would be limited to use by the IRS. *See* 26 U.S.C. § 6103 (generally prohibiting disclosure of taxpayer information outside the IRS); *see also* New York State Bar Ass'n Tax Section, *Report on the Rules Governing Reports on Transactions with Foreign Financial Agencies (FBARS)* at 13-14 (Oct. 30, 2009), available at http://www.nysba.org/AM/Template.cfm?Section=Tax_Section_Reports_2009&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=29&ContentID=24082.

10. TIGTA Report, *supra* n.8, at pp.2-3.

In re M.H.'s (and hence the Seventh Circuit's) misplaced reliance on *Shultz*'s observation that Congress was also concerned with undetected civil liability in enacting the BSA, s*ee* 648 F.3d at 1074, fails to recognize that this statement was made in the context of a facial challenge to a reporting provision, not a *Grosso* analysis. What *is* significant for the first prong of the *Grosso* test, however, is *Shultz*'s recognition that "concern for the enforcement of the criminal law was undoubtedly prominant [sic] in the minds of the legislators who considered the [BSA]." 416 U.S. at 76-77. "We do not think it is strange or irrational that Congress, having its attention called to what appeared to be serious and organized efforts to avoid detection of criminal activity, should have legislated [via the BSA] to rectify the situation." *Id.* at 77. The Court termed the BSA overall "a legislative enactment [that] *manifests a concern for the enforcement of the criminal law*[.]" *Id.* (emphasis added). Of necessity, if a *prominent* purpose of the BSA is criminal law enforcement, and it was enacted to rectify serious, organized efforts to avoid detection of *criminal activity*, the BSA does not have as its *essence* a regulatory goal. That there were some civil concerns behind the BSA cannot render it essentially regulatory within the meaning of *Grosso*. It does not represent "'an *essentially* non-criminal and regulatory area of inquiry[.]'" *Marchetti*, 390 U.S. at 57 (quoting *Shapiro*) (emphasis added).

D. Courts' Interpretation

Pre-*In re M.H.* cases recognized that the BSA's reporting requirements are aimed at criminal law enforcement. As noted, *United States v. Hajecate* held that the foreign account reporting provisions evidence a "*presumption by Congress that secret foreign bank*

accounts and secret foreign financial institutions are inevitably linked to criminal activity in the United States," 683 F.2d at 901 (emphasis added),[11] and half of all foreign bank accounts are still "secret." *See also United States v. San Juan*, 405 F. Supp. at 693 (the "underlying purposes of Congress in promulgating [the BSA's] foreign reporting requirements ... were fundamentally prosecutorial"); *cf. United States v. Gimbel*, 632 F. Supp. 713, 726 (E.D. Wis. 1984) (the BSA is "an enforcement tool which is meant to be used in the investigation of other crimes").

II. CUSTOMARILY KEPT

The bank account records here do not meet the second *Grosso* prong – that records be of a type that the regulated party would ordinarily maintain. *Marchetti*, 390 U.S. at 57. The Seventh Circuit, via *In re M.H.*, 648 F.3d at 1076, constructed a tautological premise that, because the BSA requires that information be reported, the information must *therefore* be of a kind that is customarily kept by an accountholder. This reasoning cavalierly sweeps away the requisite *separate* analysis under *Grosso*'s second prong.

The significance of the fact that the records are of *foreign* bank accounts cannot be overstated in this regard. Foreign banks, especially in the "secrecy" jurisdictions that the BSA targets, are notorious for failing to provide customers with records; as a practical matter, individuals regulated by 31 C.F.R. § 1010.420 may

11. The Fifth Circuit ignored its *Hajecate* precedent in its recent incorrectly-decided decision, *In re Grand Jury Subpoena*, 696 F.3d 428 (5th Cir. 2012).

well not possess, much less maintain, records required by that regulation.

Indeed, recent indictments in multiple District Courts charge that Swiss bankers and other facilitators advised customers *not* to maintain records of undeclared foreign accounts, and ensured that such records did *not* reach the United States. *See, e.g., United States v. Silva*, 10-cr-00044 (E.D. Va., filed Feb. 6, 2012, at ¶ 22) ("the Zurich Attorney would and did advise defendant . . . that he should not be in possession of account statements or other documentation relating to his undeclared Swiss account in order to maintain secrecy"); *United States v. Lack*, 11-cr-60184 (S.D. Fla., filed Aug. 2, 2011, at ¶ 27) (similar allegation); *United States v. Werdiger*, 10-cr-00325 (S.D.N.Y., filed April 13, 2010, at ¶ 7c) ("Among the means by which UBS assisted . . . in concealing the existence of UBS accounts . . . [was] . . . [f]ailing to send to the United States account statements"); *United States v. Sternfeld*, 10-cr-00328 (S.D.N.Y., filed April 13, 2010, at ¶ 7c) (same); *United States v. Wegelin & Co. et al.*, S1 12 Cr. 02 (S.D.N.Y., filed Feb. 2, 2012 at ¶ 16.d) ("Wegelin . . . ensured that account statements and related documents were not mailed to their U.S. taxpayer-clients in the United States"); *United States v. Singenberger*, 11 Crim. 620 (S.D.N.Y., filing date unknown, at ¶ 22.h.) (similar allegation).

Since only half of foreign bank accountholders file FBARs, it cannot plausibly be held – as the Ninth Circuit, adopted by the Seventh Circuit, did, without any supporting evidence, *In re M.H.*, 648 F.3d at 1076 – that accountholders must customarily maintain account records simply *because* of the FBAR reporting requirement.

The five-year period of required recordkeeping under 31 C.F.R. § 1010.420 is two years beyond the statute of limitations for civil tax adjustments, 26 U.S.C. § 6501; thus, one would not expect accountholders "customarily" to keep records relating to foreign accounts for this extended period, absent the regulation.

In re M.H., 648 F.3d at 1076, also concluded that 31 C.F.R. § 1010.420 information is "customarily kept" because an accountholder can access it from the foreign bank. But, if an accountholder who does not keep foreign bank records is nevertheless deemed to have custody over the records, then no one could be convicted of failing to maintain records; this interpretation renders the statute meaningless.

III. PUBLIC ASPECTS

The Seventh Circuit, via *In re M.H.*, did away with *Grosso*'s third prong by holding that records of an unreported offshore bank account assume "public aspects" simply by virtue of the requirement that they be kept. *In re M.H.*, 648 F.3d at 1077. *Marchetti*, however, rejected any suggestion that records are rendered "public" merely because a statute requires them to be kept. 390 U.S. at 57.[12]

A distinct analysis of the third *Grosso* prong is therefore required. In *Shapiro*, because the petitioner

12. As Justice Frankfurter warned in dissent in *Shapiro*, "If records merely because required to be kept by law ipso facto become public records, we are indeed living in glass houses. Virtually every major public law . . . has record-keeping provisions." 335 U.S. at 50. (Frankfurter, J., dissenting).

engaged in commerce with the public, and was able to do so "solely" because of a license that obligated him to maintain related records, 335 U.S. at 35, the records assumed the character of public records. There is, in contrast, nothing public about the unlicensed activity of owning a private foreign bank account.

Courts have held that records acquire "public aspects" in what may be defined as three, somewhat-overlapping, ways: (1) when the records are a direct mainstay of a regulatory scheme that promotes the public welfare, *see, e.g., In re Doe*, 711 F.2d at 1192 (requirement that physicians maintain prescription records and forward copies to the state served to regulate dissemination of dangerous drugs and rendered the records "public"); *In re: Two Grand Jury Subpoenas Duces Tecum Dated August 21, 1985*, 793 F.2d 69, 73 (2d Cir. 1986) (requirement that attorneys file contingency fee arrangements with court administration made records "sufficiently 'public'"); *In re Grand Jury Subpoena Duces Tecum Served Upon Underhill*, 781 F.2d 64, 68-69 (6th Cir. 1986) (under requirement that car dealers maintain odometer records, and sellers provide signed copies to purchasers, records assumed public aspects); (2) when the records are vital to a regulatory regime promulgated in response to emergency or other exigent conditions, *see, e.g., Shapiro*, 335 U.S. at 12*; Rajah v. Mukasey*, 544 F.3d at 442, 433 n.3 (production of immigration documents was essential to enforcement of immigration laws promulgated after 2001 terrorist attacks to ensure status of immigrants from specified countries, such as Iran, Iraq, Libya and Sudan); or (3) when the records are *routinely* forwarded to a regulatory or licensing body, *see In re Doe*, 711 F.2d at 1291-92 (prescription records forwarded to state were

imbued with public aspects). An individual's personal bank records fall under none of these categories.

The Seventh Circuit's decision is in derogation of its prior decisions, *Smith v. Richert*, 35 F.3d 300 (7th Cir. 1994), and *United States v. Porter*, 711 F.2d 1397 (7th Cir. 1983). Both cases examined a statutory requirement that taxpayers maintain and keep available for inspection financial records sufficient to determine their tax liability, and held that this did not suffice to bring the records under the required records doctrine. Judge Posner in *Smith v. Richert* distinguished *Shapiro*: "A statute that merely requires a taxpayer to maintain records necessary to determine his liability for personal income tax is not within the scope of the required-records doctrine." 35 F.3d at 303. "It is enough to point out that in a case in which the production of personal (not business) tax records of the character of W-2's and 1099's would have testimonial force and incriminate the taxpayer, the principles of . . . *Doe* establish that the required-records doctrine is inapplicable and that production is excused by the self-incrimination clause." *Id.* at 304.

In *Porter*, the court rejected the government's argument that the required records doctrine negates the act of production privilege because 26 U.S.C. § 6001 requires taxpayers to "keep such records . . . as the [IRS] may from time to time prescribe." 711 F.2d at 1405. It reasoned that "[the] taxpayer-IRS relationship is [in contrast to the government/business relationship under *Shapiro*'s "comprehensive government regulatory scheme"], instead, a more limited one which creates an imperative for access to records only in rare cases" such as "the unusual situation of an audit," and hence that

"the taxpayer's substantive activities are not positively 'regulated' by the IRS sufficient to create a *Shapiro*-type interest in unconditional access to those records." *Id.*

Here, the relationship between FinCEN and a taxpayer with a foreign bank account is, by analogy, like the relationship between the IRS and a taxpayer with a domestic bank account. As with tax records and IRS audits, FBAR records are inspected only rarely.[13] In 2009, there were 534,043 FBAR filings, yet only 656 "FBAR-related examinations."[14] Both relationships are infinitely more circumscribed than that between the government and businesses operating under the pervasive wartime regulatory scheme in *Shapiro*. Records required by 31 C.F.R. 1010.420 thus do not have public aspects within the meaning of *Grosso*.

Holding that wagering statutes' record-keeping provisions did not cloak the records with "public aspects," *Marchetti* pronounced:

> The Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did,

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13. The government has often cited a *Marchetti* footnote stating that, for purposes of *Shapiro*, requiring records to be kept for inspection is indistinguishable from requiring them to be filed, 390 U.S. at 56 n.14, but the more recent, nuanced analyses of *Richert* and *Porter* dispel the force of this passing statement; in the latter cases, IRS regulations *did* require taxpayer records to be held for inspection, but, unlike the *Shapiro* records, they were only *rarely* inspected.

14. TIGTA Report, *supra* n.8, at pp.7, 9.

> no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the Government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress.

390 U.S. at 57. This Court thus previously rejected the Seventh Circuit's current sophistry that a regulation requiring an individual to keep records magically converts those records into "public records." If this *ipso facto* transformation were legitimate, *Grosso* and subsequent cases discussed herein, defining the limits of what confers public aspects on records, are meaningless; the courts that grappled with this issue engaged in an empty exercise. This obviously cannot be so; those cases properly treated the third *Grosso* prong as requiring a distinct analysis, under which private foreign bank records are not public documents.[15]

IV. WAIVER

A final, fundamental error is the Seventh Circuit's determination that petitioner's opening a foreign bank account operated to waive the Fifth Amendment. 691 F.3d at 909. This Court rejected just this kind of specious

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15. The Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401 *et seq.*, prohibits government access to domestic bank records except by subpoena, which an accountholder may challenge, or by search warrant. 12 U.S.C. §§ 3402, 3405, 3407-08. Although the records here are of foreign bank accounts, this statute evinces Congress's recognition that an individual's personal bank records are private, not public.

reasoning in *Marchetti*: "To give credence to such 'waivers' without the most deliberate examination of the circumstances surrounding them would ultimately license widespread erosion of the privilege through 'ingeniously drawn legislation.'" 390 U.S. at 51-52. Here, there was no evidence that petitioner knew of 31 C.F.R. 1010.420 when he opened his foreign bank account, and thus no evidence that he thereby voluntarily waived the Fifth Amendment's protections.

In cases where the required records doctrine was applied, an individual's decision to participate in a regulated activity could supportably be found to operate as an implicit advance *knowing* waiver of Fifth Amendment protections. The petitioner in *Shapiro* could sell produce "solely by virtue of [a statutory] license," 335 U.S. at 35, and the license required him to maintain records; therefore he must have known of the record-keeping requirements when he decided to continue his business. The automobile salesman in *In re Underhill* necessarily agreed ahead of time to maintain odometer records when he purposefully chose to operate a used car business that was required to do so. 781 F.2d at 70. In *In re Doe*, 711 F.2d 1187, the physicians who maintained prescription records and forwarded copies to the state, and in *In re: Two Grand Jury Subpoenas Duces Tecum Dated August 21, 1985*, 793 F.3d 69, the attorneys who filed contingency fee arrangements with the court administration, necessarily knew ahead of time that they were required to do so. *See also Rajah v. Mukasey*, 544 F.3d at 442 (non-citizens who voluntarily *applied* to enter the United States under immigration laws thereby knowingly waived any right to refuse to produce passports or Forms I-94 to immigration authorities).

Thus, the difference between *Shapiro*, *Underhill* and like cases, and foreign account cases, is that individuals who open a foreign account do not knowingly and voluntarily choose to enter a regulated area. *Cf. Porter*, 711 F.2d at 1405 (implicitly recognizing that a taxpayer does not *voluntarily* submit to IRS regulations; and consequently holding that the required records doctrine does not apply to taxpayers' records). Most people who opened a foreign account in the past were surely unaware of any record-keeping rules when they made their initial deposit into the account; an accountholder likely only learned of those rules (if ever) if and when a knowledgeable accountant prepared the accountholder's annual income tax return, *i.e.*, *after* the accountholder had already engaged in the regulated activity and thereby *unknowingly* and *involuntarily* entered a regulated area. An FBAR and tax return may not be due for months after an account is opened.

Of course, Fifth Amendment rights may only be knowingly and intelligently waived. *Miranda v. Arizona*, 384 U.S. 436, 492 (1966). They cannot be *inadvertently* waived by engaging in conduct that one only learns after the fact requires one to keep records and provide information to the government. The case would be much different if one were required to obtain governmental permission before opening an offshore account; at that point the Fifth Amendment could validly be waived. Nevertheless, the Seventh Circuit found blindly that simply opening a foreign bank account operated as an advance, knowing waiver of fundamental Fifth Amendment rights. Such cannot be the case.

CONCLUSION

For all these reasons, the petition should be granted.

Respectfully submitted,

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