13-403-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE: GRAND JURY SUBPOENA DATED FEBRUARY 2, 2012,

UNITED STATES OF AMERICA,

Movant-Appellee,

v.

JOHN DOE,

Respondent-Appellant.

On Appeal from the United States District Court
for the Eastern District of New York (Central Islip)

BRIEF FOR *AMICUS CURIAE* NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF RESPONDENT-APPELLANT

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STATEMENT OF INTEREST

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 240 lawyers (including many former federal prosecutors) whose principal area of practice is the defense of criminal cases in the New York federal courts.[1] NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, and promoting the proper administration of criminal justice. NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. NYCDL has submitted *amicus* briefs in Second Circuit cases involving important criminal defense issues, including the right of the accused to the assistance of counsel, *see United States v. Stein*, 541 F.3d 130 (2d Cir. 2008), and the right of a criminal defendant, represented by counsel, to be heard on issues of juror conduct, *see United States v. Collins*, 665 F.3d 454 (2d Cir. 2012); Br. for *Amicus Curiae* NYCDL, *United States v. Fazio*, No. 12-3786 (2d Cir. Feb. 4, 2013). NYCDL's *amicus* briefs have been cited by the Supreme Court or concurring Justices in cases including *Rita v. United States*, 551

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[1] Pursuant to Fed. R. App. P. 29(c)(5) and 2d Cir. R. 29.1(b), NYCDL states that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and other than NYCDL and its members, no person contributed money that was intended to fund preparing or submitting this brief.

Pursuant to Fed. R. App. P. 29(a), NYCDL states that all parties have consented to the filing of this brief.

U.S. 338, 373 n.3 (2007) (Scalia, J., concurring), and *United States v. Booker*, 543 U.S. 220, 266 (2005), and by this Court in *United States v. Awadallah*, 436 F.3d 125, 135 & n.9 (2d Cir. 2006).

NYCDL has an interest in protecting the Fifth Amendment right of the targets of criminal investigations not to be compelled to incriminate themselves. It believes that scrupulous protection of the privilege against compulsory self-incrimination, including by way of tacit admissions made in the course of responding to a grand jury subpoena for production of documents, is vital to the just operation of the criminal adjudicatory process.

SUMMARY OF ARGUMENT

The Fifth Amendment absolutely and without exception prohibits the government from compelling any criminal suspect to make a testimonial, incriminating communication, including where such a communication occurs tacitly in the course of responding to a grand jury subpoena. While the Supreme Court has held that the privilege does not attach to the *contents* of private documents, it is undisputed in this case that the *act of responding* to the grand jury's subpoena would fulfill all three criteria to claim the act-of-production privilege: Mr. Doe's compliance is compelled by the district court's contempt power; the act would be a testimonial communication by which Mr. Doe would have to admit either that the subpoenaed records exist and are authentic, or that they do not exist; and a response would be

incriminating in that it would subject Mr. Doe to prosecution for failure either to maintain required records or to file required reports. Just as Mr. Doe could invoke the Fifth Amendment to refuse to testify as to whether the subpoenaed documents exist or what they contain, he also has the right not to inculpate himself by revealing the same information through the act of responding to the subpoena.

Faced with this result and the prospect of having to investigate certain crimes without the coerced assistance of the accused, the government has turned to the "required records" doctrine as an end-run around the Constitution's absolute prohibition on the sort of compulsion in which it wishes to engage. But that outmoded legal theory hails from the long-expired era in which the Fifth Amendment was held to protect the *contents* of a document if it was considered "private" rather than "public." In that setting, the "required records" rule offered a way to distinguish privileged documents from unprotected ones: A record that the government required a party to maintain in order to facilitate effective regulation was considered "public," and its contents were therefore not covered by the Fifth Amendment. Modern Fifth Amendment jurisprudence, however, has erased the relevance of the public-document/private-document dichotomy and replaced it with a universally applicable inquiry into whether a given communication is testimonial and incriminating. One consequence of this shift is to eliminate the relevance of the "required records" doctrine: *No* voluntarily produced document, "public" or "private," is privileged

under current law, meaning that whether a record is "required" does not speak to any aspect of the now-controlling legal standard. The Fifth Amendment does not admit of exceptions to the rule against compelled self-incrimination, and a requirement that a record be kept does not in and of itself negate the fact that in many cases (including this one) the act of producing such a record on command will be both testimonial and incriminatory.

Some courts, including this one, have tried to shoehorn the "required records" doctrine into the governing legal framework by re-casting it as a waiver rule, or one justified by a presumption that the act of revealing a "required record" does not admit any material incriminating fact. But neither of those rationales suffices to justify a broadly applicable "required records" rule, because both the validity of a waiver and the question whether a communication is testimonial and incriminatory depend on the particular facts of each case. Neither can be decided universally and in advance, and indeed the facts of this case are such that neither rationale is applicable.

The "required records" doctrine does not strip Mr. Doe of his right to remain silent. The Court should give effect to Mr. Doe's valid invocation of the Fifth Amendment by reversing the district court's judgment.

ARGUMENT

I. THE FIFTH AMENDMENT ACT-OF-PRODUCTION PRIVILEGE IS *PRIMA FACIE* APPLICABLE AGAINST THE SUBPOENA

There is no dispute in this case that the communications that the government seeks to compel satisfy the prerequisites to invocation of the constitutional privilege against self-incrimination. Specifically, Mr. Doe claims the right not to respond to a subpoena for certain documents alleged to be in his possession, because (while the *contents* of the documents themselves are not privileged) the very *act of responding* would communicate incriminating information. *See United States v. Hubbell*, 530 U.S. 27, 37 (2000) ("*Hubbell II*") ("Whether the constitutional privilege protects the answers to [questions regarding the existence and authenticity of certain documents], or protects the act of production itself, is a question that is distinct from the question whether the unprotected contents of the documents themselves are incriminating."). The Supreme Court has held that such an act of production is privileged where it would constitute a tacit "Testimonial Communication that is incriminating." *Fisher v. United States*, 425 U.S. 391, 408 (1976); *see also Hubbell II*, 530 U.S. at 36 ("[W]e have … made it clear that the act of producing documents in response to a subpoena may have a compelled testimonial aspect."); *United States v. Doe*, 465 U.S. 605, 612 (1984). Thus, as this Court has explained, "it is now settled that an individual may claim an act of production privilege to decline to produce documents, the contents of which are not privileged, where the act of production is, itself, (1) compelled, (2)

testimonial, and (3) incriminating." *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d 173, 178 (2d Cir. 1999).

Each of these three criteria is met here. ***First***, action taken in response to a subpoena is "compelled" as a matter of law. *See, e.g.*, *Fisher*, 425 U.S. at 410 ("The elements of compulsion are clearly present" in such a situation.); *United States v. Hubbell*, 167 F.3d 552, 567 (D.C. Cir. 1999) ("*Hubbell I*") ("The enforcement authority that rests behind the issuance of any subpoena provides the requisite compulsion."), *aff'd*, 530 U.S. 27 (2000). ***Second***, the act of responding to the subpoena would require testimonial assertions of fact or belief—here, that Mr. Doe possesses or does not possess the documents. *See United States v. Greer*, 631 F.3d 608, 612 (2d Cir. 2011) ("In order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.") (quotation mark and brackets omitted) (quoting *Doe v. United States*, 487 U.S. 201, 210 (1988)).

Third, these compelled admissions would incriminate Mr. Doe, separate and apart from the contents of the records themselves: The existence and authenticity of documents responsive to the subpoena would enable the government to prosecute Mr. Doe under the Bank Secrecy Act for failure to report a foreign bank account, *see* 31 U.S.C. § 5322; 31 C.F.R. § 1010.350, while a statement that that no records exist would support charges that he failed to retain records of his foreign accounts, *see* 31

U.S.C. § 5322; 31 C.F.R. § 1010.420; *see generally* Br. for Respondent-Appellant 14-15 (discussing incriminatory nature of any response to the subpoena in this case). The government accordingly has never disputed that a response to the subpoena in this case satisfies the requirements for invocation of the act-of-production privilege, nor did the district court question that they are met, *see* A-11-13 (turning to what it called the required records "exception" without addressing whether the Fifth Amendment's prerequisites are met in the case of Mr. Doe's response to the subpoena). The prosecution could not call Mr. Doe to testify before the grand jury as to the existence of the documents covered by the subpoena, and it cannot compel him to communicate the very same information implicitly through the act of production. *See Hubbell II*, 530 U.S. at 43 ("[W]e have no doubt that the constitutional privilege against self-incrimination protects the target of a grand jury investigation from being compelled to answer questions designed to elicit information about the existence of sources of potentially incriminating evidence. That constitutional privilege has the same application to the testimonial aspect of a response to a subpoena seeking discovery of those sources.")

Because the prerequisites to invocation of the privilege are met, the sole issue in this appeal is whether an "exception" applies to override the Fifth Amendment in this case. The district court held that the "required records" doctrine is such an exception. A-11. As explained below, this holding rests on an erroneous and outdated

understanding of the privilege against self-incrimination. This Court should correct the district court's error and reverse its judgment.

II. THE "REQUIRED RECORDS" DOCTRINE DOES NOT NEGATE APPELLANT'S FIFTH AMENDMENT PRIVILEGE

The government's and the district court's reliance on the "required records" doctrine is misplaced.[2] Contrary to the district court's characterization (A-11), the doctrine has never been an "exception" to the Fifth Amendment—indeed, the text of the Amendment and a long history of Supreme Court jurisprudence makes clear that the privilege against self-incrimination admits of *no* exceptions. Rather, the Supreme Court developed the "required records" rule as an attempt to draw a line between

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[2] This Court has held that documents are subject to the "required records" doctrine if a three-part test is satisfied: "(1) the requirement that they be kept must be essentially regulatory, (2) the records must be of a kind which the regulated party has customarily kept, and (3) the records themselves must have assumed 'public aspects' which render them analogous to public documents." *In re Doe*, 711 F.2d 1187, 1191 (2d Cir. 1983) (citing *Grosso v. United States*, 390 U.S. 62, 67-68 (1968)). The district court concluded, following the lead of several other Courts of Appeals, that these three requirements are met where the documents subject to a grand jury subpoena are required to be maintained under the Bank Secrecy Act, 31 U.S.C. §§ 5311 *et seq.* *See* A-13-14 (citing *In re Grand Jury Subpoena*, 696 F.3d 428 (5th Cir. 2012); *In re Special February 2011-1 Grand Jury Subpoena Dated September 12, 2011*, 691 F.3d 903 (7th Cir. 2012); *In re Grand Jury Investigation M.H.*, 648 F.3d 1067 (9th Cir. 2011)); *see also In re Grand Jury Proceedings, No. 4-10*, 707 F.3d 1262 (11th Cir. 2013) (reaching same conclusion).

NYCDL concurs with Mr. Doe's explanation that those cases are wrongly decided and that the "required records" test is not in fact met in the case at bar. *See* Br. for Respondent-Appellant 26-53. But for purposes of this brief, *amicus* assumes *arguendo* that the elements of the "required records" test are satisfied: As explained in the text, even if that were the case, the doctrine is inapplicable in the circumstances here.

"public" records and "private" documents, at a time when that distinction made a difference to the analysis of whether the Fifth Amendment privilege would attach to the *contents* of a document. That era is over: The Fifth Amendment no longer covers the contents of *any* voluntarily produced document. Instead, as explained above, what matters under current law is whether a communication (including a tacit one made through the act of production) is compelled, testimonial, and incriminating. Whether a document is "public" or "private" has no bearing on those questions, and the "required records" doctrine's original purpose has thus expired.[3]

While subsequent decisions have attempted to justify the doctrine as either a waiver rule or on the basis that disclosure of a record required to be kept by law does not reveal any material information, neither of those rationales is so broadly applicable as to warrant creation of an "exception" to the Fifth Amendment. Instead, the relevance of either of these *post hoc* justifications depends on the particular facts of each individual case. And on the facts of this case, neither of them applies: There is no evidence from which the district court or this Court could conclude that Mr. Doe ever knowingly and voluntarily waived his Fifth Amendment rights, and the government correctly concedes that the act of producing Mr. Doe's bank records

[3] To be sure, government compulsion to *create* an incriminating record might be viewed as a violation of the Fifth Amendment such that an individual could invoke the privilege and refuse to create the document. *See* Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. Pitt. L. Rev. 27, 76 (1986). But that form of privilege is not at issue in this case.

would be testimonial and incriminating. There is therefore no basis for applying any version of the "required records" rule in this case, and the district court's erroneous decision should be reversed.

A. The Supreme Court Has Abandoned The "Required Records" Doctrine's Original Jurisprudential Basis

The district court erred by treating the "required records" doctrine as an "exception" to the Fifth Amendment, which provides in absolute terms that "No person … shall be compelled in any criminal case to be a witness against himself." Adhering to this plain language, the Supreme Court has long made clear that, where its prerequisites are met, the prohibition on compelled self-incrimination is "unequivocal and without exception." *In re Gault*, 387 U.S. 1, 47 (1967). Although the privilege may hinder a criminal investigation—even in ways that the government or a court might find unreasonable—a suspect's right not to incriminate himself can never be abrogated, because "the Fifth Amendment's strictures, unlike the Fourth's, are not removed by showing reasonableness." *Fisher*, 425 U.S. at 400; *see also, e.g.*, *New York v. Quarles*, 467 U.S. 649, 653-54 & n.3 (1984) (recognizing a "public safety" exception to *Miranda* because the warnings are not directly compelled by the Constitution's clear and absolute language, but are court-adopted prophylactic measures); *Dickerson v. United States*, 530 U.S. 428, 453 (2000) (Scalia, J., dissenting) (noting that "the Fifth Amendment's bar on compelled self-incrimination is absolute").

The Supreme Court has thus never held that the "required records" rule is an "exception" to the Fifth Amendment. Instead, and consistent with the Constitution's text and the Court's holdings in other cases, the doctrine was conceived as a means of determining whether the privilege's *prima facie* requirements were met. But those prerequisites have changed since the rule was introduced: As then-Deputy Assistant Attorney General Alito observed in a law review article, the "required records" doctrine "was developed without any consideration of the act of production" privilege or the modern analytic framework on which recognition of that privilege rests. Alito, *supra* note 3, 48 U. Pitt. L. Rev. at 72. This jurisprudential shift eliminated the basis for the "required records" rule.

When the Supreme Court originally held, in *Shapiro v. United States*, 335 U.S. 1, 33-34 (1948), that "required records" were not protected by the Fifth Amendment, the prevailing rule was that the privilege covered the *contents* of personal documents—but only if they were "private." *See, e.g.*, *Boyd v. United States*, 116 U.S. 616, 630 (1886). Under that regime, the crucial question in a case about a subpoena for documents was whether a given record was private and protected, or public and thus not subject to the Fifth Amendment's strictures at all. *See Shapiro*, 335 U.S. at 34 (drawing a distinction "between papers exclusively private and documents having public aspects") (quotation mark omitted).

Shapiro supplied an answer to the public-or-private question in a particular subset of cases—those in which a person voluntarily entered an industry in which generally applicable regulations required that the business's records be made available for inspection. In *Shapiro*, the defendant was a licensed and registered fruit wholesaler, whose business records were subject to inspection pursuant to the World-War-II-era Emergency Price Control Act. *See id.* at 4-5 & n.3. In that circumstance, the Court held, "the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established.'" *Id.* at 33 (quoting *Davis v. United States*, 328 U.S. 582, 589-90 (1946)). That is, records in the latter group were effectively "public" rather than "private" because they are available to agencies acting to ensure compliance with a valid economic regulation. And because they were public, under *Boyd* the Fifth Amendment simply did not apply. *See id.* at 33-34; *see also Marchetti v. United States*, 390 U.S. 39, 55 (1968) (noting *Shapiro*'s reliance on the rationale "that a custodian of public records may not assert the privilege as to those records").

The holding that a "required record" is not covered by the Fifth Amendment is thus inextricably tied to its origins in the *Boyd* regime: The *Shapiro* test is a means of answering the question that *Boyd* asked. But the *Boyd* era is now over, and the public-

private distinction is now irrelevant. The Supreme Court held in *Fisher* and *Doe* that the contents of voluntarily created records are not privileged *at all*, because the Fifth Amendment's protection is limited to communications that are compelled, testimonial, and incriminatory. *Fisher*, 425 U.S. at 397, 401; *Doe*, 465 U.S. at 612; *see also id.* at 618 (O'Connor, J., concurring) (explaining that *Fisher* "sounded the death-knell for *Boyd*" and that "the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind"). This change in the law rendered obsolete both the *Shapiro* test and the question it was meant to answer: A voluntarily created document's contents have no Fifth Amendment protection regardless of whether the document is "public" or "private." The availability of the privilege depends instead on whether a compelled communication is testimonial and incriminatory—questions that *Shapiro* does not answer.

The "required records" doctrine thus is not and never has been an "exception" to the privilege against self-incrimination—which, as explained above, admits of no exceptions. *See, e.g.*, *In re Gault*, 387 U.S. at 47. It is instead an outdated rule about how to determine whether the privilege's prerequisites are met, and this Court's suggestions that it "overrides the privilege" are so unfounded that they should be ignored or overturned. *See In re Doe*, 711 F.2d 1187, 1192 (2d Cir. 1983). In *In re Doe*, where the notion of an "exception" originated, this Court failed to acknowledge that *Shapiro* had depended on *Boyd*'s privacy-focused conception of the Fifth

Amendment, and thus failed to grasp the import of *Fisher* when it asserted that "nothing in [*Fisher*'s] analysis could be construed as weakening the required records exception." *Id.* at 1192-93. In fact, *Fisher* (and, subsequently, *Doe*) completely dismantled the underpinnings of the "required records" rule, as explained above: Privacy is no longer the Fifth Amendment's concern, and so *Shapiro*'s privacy-based analysis has no place anywhere in the analysis. This Court thus misapprehended the crucial legal issue.[4] Moreover, neither of the two out-of-circuit decisions on which *In re Doe* relied held that "required records" is an "exception." *See In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 336 n.15 (3d Cir. 1982) (citing *Shapiro* without analysis and noting that "the appellee does not even contest this point"), *aff'd in part & rev'd in part sub nom. United States v. Doe*, 465 U.S. 605 (1984); *In re Grand Jury Proceedings*, 601 F.2d 162, 171 (5th Cir. 1979) (describing the "required records" doctrine not as an exception but as a "consented to" (*i.e.*, waiver) rule).[5] In

[4] The Court appeared to recognize that *Fisher* and *Doe* had changed the landscape in *United States v. Edgerton*, 734 F.2d 913, 918 n.4 (2d Cir. 1984) ("Whether the required records exception, which was a response to the *Boyd* privacy rationale, is still viable after the shift away from the privacy rationale, remains to be decided."). The subsequent decision in *In re Two Grand Jury Subpoenae Duces Tecum Dated Aug. 21, 1985*, 793 F.2d 69, 73 (2d Cir. 1986), did not acknowledge *Edgerton*'s misgivings about the continued vitality of "required records" or independently analyze the effect of *Fisher* and *Doe*, but instead relied without hesitation on *In re Doe*'s mistaken assertions regarding the nature of the doctrine.

[5] On the latter suggestion, *see* Part II.B.1, *infra*.

sum, there is no "required records exception," and the doctrine that once existed has no continuing application after *Fisher* and *Doe*.[6]

It follows that the "required records" doctrine, as originally conceived, has no role in the analysis of whether the act-of-production privilege has properly been invoked in a given case. The Supreme Court's recognition of such a privilege was grounded in the fact that the *act of producing* a document—regardless of whether its contents are "public" or "private" under the discarded *Boyd* analysis—"has communicative aspects of its own, wholly aside from the contents of the papers produced," and that such a communication may be testimonial and incriminatory. *Fisher*, 425 U.S. at 410; *see also Hubbell II*, 530 U.S. at 36 ("[T]he act of producing documents in response to a subpoena may have a compelled testimonial aspect."); *Doe*, 465 U.S. at 612 (where the government seeks to uncover the existence or control of records, the act of production would "have testimonial aspects and an incriminating effect" and is therefore privileged); Part I, *supra*. That is, the act-of-production privilege is part and parcel of the modern analytic framework that supplanted *Boyd*.

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[6] In the event this Court views its prior characterizations of the "required records" doctrine as an "exception" to the Fifth Amendment as controlling notwithstanding the Supreme Court's decisions in *Fisher* and *Doe*, *amicus* respectfully submits that those cases should be overruled pursuant to this Court's "mini-*en-banc*" procedure. *See, e.g.*, *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 67 (2d Cir. 2009); *United States v. Parkes*, 497 F.3d 220, 230 n.7 (2d Cir. 2007); *United States v. Crosby*, 397 F.3d 103, 105 n.1 (2d Cir. 2005); *Jacobson v. Fireman's Fund Ins. Co.*, 111 F.3d 261, 268 n.9 (2d Cir. 1997); *see also Michel v. I.N.S.*, 206 F.3d 253, 268 n.2 (2d Cir. 2000) (Cabranes, J., concurring).

Under that framework, the sole issue to which the "required records" rule pertained—the public-private distinction—is irrelevant, and so is the doctrine itself.

Nothing about the act-of-production privilege suggests that it should be analyzed differently than any other assertion of the right to remain silent. As Justice Alito correctly observed shortly after *Doe* was decided, "the act of producing records may amount to testimonial self-incrimination, and this is no less true for required records than for records of any other type." Alito, *supra* note 3, 48 U. Pitt. L. Rev. at 76; *see also Hubbell II*, 530 U.S. at 43 (the "constitutional privilege has the same application to the testimonial aspect of a response to a subpoena" as to live grand jury testimony).[7] Just as the "privacy" of a document no longer controls the question whether that document is subject to the Fifth Amendment, whether a record is "required" does not *ipso facto* answer the controlling questions whether an act of production is compelled, testimonial, and incriminatory. Those determinative issues must be addressed independently on the facts of every individual claim of privilege. *See, e.g.*, *Fisher*, 425 U.S. at 410 (questions whether an act of production is testimonial and incriminating "perhaps do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular

[7] Indeed, *Hubbell II* held the privilege applicable to the act of responding to a subpoena for documents whose continued retention and subsequent production was required by the terms of a plea agreement, without any suggestion that *Shapiro* applied. *See* 530 U.S. at 30, 45.

cases"). And as explained above, there is no question in this case that each of the prerequisites to invocation of the act-of-production privilege is satisfied.

B. The Remaining *Post Hoc* Rationales Do Not Justify The "Required Records" Doctrine

Perhaps recognizing that *Shapiro*'s holding has no logical or doctrinal relationship to the modern compelled-incriminatory-testimony model of the Fifth Amendment, some courts (including this one) have sought to justify a generally-applicable "required records" rule on the basis of two considerations that *Shapiro* did not supply:

> First, if a person conducts an activity in which record-keeping is required by statute or rule, he may be deemed to have waived his privilege with respect to the act of production—at least in cases in which there is a nexus between the government's production request and the purpose of the record-keeping requirement.
>
> Second, because the records must be kept by law, the record-holder "admits" little in the way of control or authentication by producing them.

In re Two Grand Jury Subpoenae Duces Tecum, 793 F.2d at 73 (paragraph break added); *see also* A-12-13; *Rajah v. Mukasey*, 544 F.3d 427, 442 (2d Cir. 2008). Neither of these justifications supports an independent "required records" doctrine, because neither can be presumed applicable in every "required records" case—indeed, neither of them is established in this case.

1. "Required Records" Is Not A Waiver Doctrine

Contrary to the district court, *In re Two Grand Jury Subpoenae Duces Tecum*, and the recent decisions of several other Courts of Appeals,[8] the "required records" rule does not effectuate a blanket waiver of Fifth Amendment rights by every participant in a regulated activity. A doctrine having such a universal effect would contravene the basic rule that "courts must indulge every reasonable presumption against waiver" of constitutional rights, and that such a waiver "is not lightly to be inferred." *DG Creditor Corp. v. Dabah* (*In re DG Acquisition Corp.*), 151 F.3d 75, 80 (2d Cir. 1998) (citations and quotation marks omitted); *see also, e.g.*, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *United States v. Purnett*, 910 F.2d 51, 55 (2d Cir. 1990). What is more, a general waiver rule would vitiate the requirement that the government establish through evidence that the accused relinquished his rights knowingly and voluntarily. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436, 475 (1966); *United States v. Murphy*, 703 F.3d 182, 192 (2d Cir. 2012). *Shapiro* and its progeny cannot be read to invalidate these fundamental constitutional guarantees on the sole basis that a defendant is required by law to keep certain records.

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[8] *See In re Grand Jury Proceedings, No. 4-10*, 707 F.3d at 1274-75; *In re Special February 2011-1 Grand Jury Subpoena Dated September 12, 2011*, 691 F.3d at 909; *In re Grand Jury Investigation M.H.*, 648 F.3d at 1071-72. In the fourth recently decided Bank Secrecy Act subpoena case, *In re Grand Jury Subpoena*, 696 F.3d 428, the Fifth Circuit offered no doctrinal justification at all for its application of the "required records" doctrine to defeat an assertion of the act-of-production privilege.

Indeed, the Supreme Court explicitly said as much in *Marchetti*. In that case, the defendant challenged federal obligations to register and pay income tax on gambling winnings—conduct which would have incriminated him for the underlying illegal wagers. 390 U.S. at 43, 48-49. The government argued that the defendant nevertheless could not refuse to register and pay on Fifth Amendment grounds, in part on the theory that he had waived the right to raise the privilege by embarking on a heavily regulated gambling career. *See id.* at 51-52. The Supreme Court rejected the contention that "an inference of antecedent choice [is] alone enough to abrogate the privilege's protection." *Id.* at 51. Such an inference, the Court explained, is "bottomed on what must ordinarily be a fiction"—the false notion that a choice to undertake an activity implicitly accepts every consequence that might follow from the decision. *Id.* What was more, "[t]o 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." *Id.* at 51-52 (emphasis added; citations and some quotation marks omitted). The point is that the government cannot require citizens to report their own crimes without violating the Fifth Amendment: Even where the government requires records to be kept, there is no automatic Fifth Amendment waiver.

Even the cases purporting to apply "required records" principles as a form of waiver are not to the contrary. The defendants in those cases abandoned their rights,

not by walking blindly into a regulated area, but by voluntarily and explicitly accepting conditions including a right of government inspection. For instance, the lawyer in *In re Two Grand Jury Subpoenae Duces Tecum* accepted the obligation to file certain records with the state as a condition of his license to practice, *see* 793 F.2d at 73, and the aliens in *Rajah* "voluntarily entered this country on the condition of maintaining the required documentation and thereby waived" the right not to produce it, 544 F.3d at 442. In each of these cases, "deliberate examination of the circumstances" revealed that the party claiming an act-of-production privilege had actively waived that privilege by affirmatively accepting an obligation to make the production. *See Marchetti*, 390 U.S. at 51-52. These cases do not stand for the proposition that every custodian of required records necessarily waives his privilege not to incriminate himself by the act of producing them. While such a waiver may be possible, *Marchetti* and the overarching presumption against implied waivers require that every case must be assessed on its own facts.

Likewise in *Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549 (1990), on which some recent "required records" decisions have relied,[9] the defendant had knowingly and effectively waived her privilege against producing a child of which she had custody: "By accepting care of [her child] subject to the

[9] *See In re Grand Jury Proceedings, No. 4-10*, 707 F.3d 1262 at 1274; *In re Special February 2011-1 Grand Jury Subpoena Dated September 12, 2011*, 691 F.3d at 906-07; *In re Grand Jury Investigation M.H.*, 648 F.3d at 1072-73.

custodial order's conditions[,]including requirements that she cooperate with [the Department of Social Services] …[,] Bouknight … agreed to hold [the child] in a manner consonant with the State's regulatory interests and subject to inspection…." *Id.* at 559. Bouknight could not contend that she was unaware of the contents of the custodial order, which were sufficient to establish that she had knowingly and voluntarily given up her right not to produce the child. *See id.* ("In assuming the obligations attending custody, Bouknight has accepted the incident obligation to permit inspection.") (citation and quotation marks omitted).

What is more, while the *Bouknight* Court compelled production of the child, it made a special point to say that the government's "ability to use the testimonial aspects of Bouknight's act of production in subsequent criminal proceedings" would likely be subject to Fifth Amendment limitations—thus recognizing that even an explicit agreement to produce the child did not necessarily constitute a waiver of the right against self-incrimination. 493 U.S. at 561-62 (citing *Marchetti*, 309 U.S. at 58-59). And the Supreme Court reaffirmed this point in *Hubbell II*: Even though Hubbell had signed a plea agreement promising to provide the Whitewater Independent Counsel with "full, complete, accurate, and truthful information" concerning the investigation, 530 U.S. at 30, the Court held that the act of producing documents related to the investigation pursuant to a subsequent subpoena was subject to the Fifth Amendment privilege, *see id.* at 45. Thus even an *explicit* agreement to

produce documents does not automatically waive the privilege with respect to the act of producing them. In view of this holding, it cannot be said that a party waives his act-of-production privilege just by participating in an activity that is subject to regulation. The district court erred to the extent it held to the contrary.[10]

2. The Act Of Producing A Document May Be Incriminating And Testimonial Even If It Is A "Required Record"

Nor can a generally applicable "required records" rule be justified on the ground that "the record-holder 'admits' little in the way of control or authentication by producing them." *In re Two Grand Jury Subpoenae Duces Tecum*, 793 F.2d at 73; *see also* A-12. For one thing, the argument's relevance is doubtful: While it might have tended to show that a document was "public" and therefore unprotected under the *Boyd* regime, the public-private distinction does not come into play under current law. *See supra* Part II.A.

The question whether turning over a document would constitute a material admission might instead be read as a negation of the requirements that a putatively privileged communication be both testimonial and incriminatory. But that would

[10] As explained in the appellant's brief (at 54-58), the government put on no evidence establishing that Mr. Doe knew of the BSA's reporting requirement or of the possibility that opening a foreign bank account would by itself waive his right against self-incrimination. In contrast to the defendants in the waiver cases discussed above, Mr. Doe was not required to obtain a license or otherwise affirmatively to agree to waive the privilege as a condition of participating in the regulated activity. Given the presumption against waiver, it cannot be assumed from the silent record that he did in fact knowingly and voluntarily choose to give up his rights *ex ante*. *See, e.g.*, *DG Creditor Corp.*, 151 F.3d at 80.

point not to a broad, freestanding "required records" doctrine, but to highly individualized questions about the nature of particular communications, which "do not lend themselves to categorical answers[, and] may instead depend on the facts and circumstances of particular cases." *Fisher*, 425 U.S. at 410. Under this conception, the "required records" rule has no independent role to play, because the questions it would purport to answer are already part of the Fifth Amendment inquiry—a fact that only confirms that the abandonment of *Boyd* should be understood to have abrogated *Shapiro* as well. The district court erred as a matter of law to the extent it reached the contrary conclusion.[11]

CONCLUSION

The Court should hold that Mr. Doe's Fifth Amendment privilege against self-incrimination covers the act of producing the documents sought by the grand jury's subpoena. The Court should therefore reverse the judgment of contempt and remand the case to the district court with instructions to quash the subpoena.

[11] The district court also erred as a matter of fact to the extent its opinion can be read as concluding that responding to the subpoena in this case would not constitute an incriminating, testimonial communication. As explained above, the act of responding to the subpoena would incriminate Mr. Doe whether he reveals that the subpoenaed records exist or that they do not. *See* Part I, *supra*. The government has accordingly never disputed that the prerequisites to invocation of the privilege are met.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FRAP 29(d) and 32(a)(7)(B) because it contains 6,057 words (based on the Microsoft Word word-count function) excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman, 14-point type.

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