No. 19-50506

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TAYLOR LOHMEYER LAW FIRM, PLLC,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

On Appeal from Cause No. 5:18CV1161
United States District Court for the Western District of Texas

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those already listed in the parties' briefs, have an interest in the outcome of this case.[1]

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Undersigned counsel further certifies, respectively, pursuant to Federal Rule of Appellate Procedure 26.1(a), that *amicus curiae* National Association of Criminal Defense Lawyers, are not publicly held corporations, do not have any parent corporations, and that no publicly held corporation owns 10 percent or more of their stock.

Dated: June 15, 2020 */s/ Gerald H. Goldstein*

[1] See panel opinion attached as appendix A.

INTEREST OF *AMICUS CURIAE*[2]

The National Association of Criminal Defense Lawyers ("NACDL") is a professional association founded in 1958 with a current membership of 40,000 including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges; dedicated to advancing the efficient, and just administration of justice.

NACDL has an abiding interest in preserving the attorney-client privilege, which serves to encourage clients to seek and obtain competent, ethical legal advice.

Amicus shares a deep concern that the panel's opinion, allowing the IRS to compel a law firm to disclose the identities of all clients who sought advice from counsel, will have a profoundly adverse impact upon the attorney-client privilege, overturning long-standing precedent which has guided attorneys in this Circuit for almost half a century.

REASONS FOR GRANTING REHEARING *EN BANC*

MOTIVE FOR SEEKING LEGAL ADVICE

This Circuit has long recognized that while a client's identity is not generally protected by the attorney-client privilege, "an attorney ***must conceal even the identity of a client***," where disclosure would reveal the client's "ultimate motive for

[2] No person who authored this brief contributed money to fund preparing or submitting this brief. Pursuant to Rule 29(1), counsel for *amicus* states that counsel for all parties consented to the filing of this brief.

seeking legal advice." *See In re Grand Jury Proceedings (Jones),* 517 F.2d 666, 671 (5th Cir. 1975). *See also In re Grand Jury Proceedings (Reyes-Requena),* 926 F.2d 1423, 1431-32 (5th Cir. 1991) (the attorney-client privilege protects the identity of a client where disclosure would reveal the client's "***confidential motive***" for retaining an attorney).

> "The attorney-client privilege protects the ***motive itself*** from compelled disclosure, and the exception to the general rule protects the ***client's identities*** when such protection is necessary in order to preserve the privileged motive." *Jones,* at pp. 674-5(emphasis supplied).

This principle has long been the law in other Circuits. *See Tillotson v. Boughner,* 350 F.2d 663, 666 (7th Cir. 1965) ("The identity of the client… would lead ultimately to the disclosure of the ***taxpayer's motive*** for seeking legal advice," which is "subject to the privilege."); *U.S. v. Liebman*, 742 F.2d 807 (3rd Cir. 1984); *Matter of Grand Jury Proceeding, Cherney*, 898 F.2d 565, 568 (7th Cir. 1990) ("The client's identity …is privileged because its disclosure would be tantamount to revealing the premise of a confidential communication: ***the very substantive reason that the client sought legal advice in the first place***").

The Court in *Jones* took considerable pain to emphasize that where, as here, the Government's inquiry relates to complicated tax matters, the law firm's clients will have a "strong independent motive" to both seek competent, ethical legal advice and "reasonably anticipate that their names would be kept confidential." *Jones,* at 674-5.

> "[T]he income tax aspects of the government's inquiry demonstrate a strong independent motive for why the unidentified clients could be expected to (1) seek legal advice, and (2) ***reasonably anticipate that their names would be kept confidential***. 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***." *Jones,* at 674-5.

Yet the Panel's Opinion in *Taylor Lohmeyer v. U.S.*, 957 F.3d 505 (5th Cir. 2020), relies upon a distinguishable sister-circuit's opinion,[3] concerning non-lawyers and a limited statutory privilege for accountant tax-preparers.[4] In effect, the Panel's Opinion turns the *Jones* Rule on its head, holding that a client's "motive" for seeking legal advice, rather than bringing a client's identity under the protective umbrella of the attorney-client privilege; constitutes justification for compelling disclosure of a law firm's clients. *See Jones,* at 674.

THE 7TH CIRCUIT CASE RELIED UPON BY THE PANEL IS INAPPOSITE

BDO Seidman, 337 F.3d 802 (7th Cir. 2003), the case heavily relied upon by the Panel, [5] is inapposite in several important respects, all critical to the issue of whether the attorney-client privilege protects the identity of the law firm's clients in this case.

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[3] *See U.S. v. BDO Seidman*, 337 F.3d 802 (7th Cir. 2003).
[4] *See* 26 U.S.C. § 7525.
[5] In fact, the panel's opinion relies almost exclusively on the 7th Circuit's opinion in *BDO,* distinguishing almost all other authority, despite it having more in common with this Circuit's opinions in *Jones* and *Reyes-Requena* than the disparate facts presented in *BDO*.

First, *BDO* is an accounting firm. No lawyers were involved and the privilege at issue was not the attorney-client privilege. Rather the privilege at issue in BDO was a statutory creature, created out of the whole cloth to provide limited protection for non-lawyer tax-preparers,[6] prior to its enactment there was no accountant-client privilege comparable to that between attorneys and their clients.[7]

Second, while the tax-preparer non-lawyer privilege at issue in *BDO* was based upon and has many similarities to the ancient attorney client privilege,[8] there are important differences, critical to this case.

For example, unlike the attorney-client privilege it does *not* apply in any criminal matter or criminal proceedings.[9] Nor does this limited tax-preparer privilege cover advice regarding "tax shelters."[10]

In fact, the 7th Circuit makes clear in their opinion that, regardless of any tax-preparer privilege created by §7525, because of the listing and reporting requirements for the tax shelters in that case, [11] the unidentified clients of BDO had

[6] *See* 26 U.S.C. § 7525, *et seq.*
[7] *See:*"[N]o confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases." *U.S. v. Arthur Young*, 465 U.S. 496, 500 (1984)
[8] "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981).
[9] *See* 26 U.S.C. § 7525(a)(2)(A) and (B).
[10] *See* 26 U.S.C. § 7525(b)."
[11] *See* 26 U.S.C §§ 6111 and 6112.

no reasonable expectation that their identities "would not be disclosed."[12] *See BDO,* at 812.

> "BDO's affirmative duty to disclose its clients' participation in potentially abusive tax shelters renders the Does' situation easily distinguishable from the limited circumstances in which we have determined that a client's identity was information subject to the attorney-client privilege." *See BDO,* at 812-13.

While it may be true that because of the reporting and listing requirements of § 6111 and § 6112 the unidentified clients of the accounting firm in *BDO* "cannot credibly argue that they expected that their participation in such transactions would not be disclosed,"[13] the same is not true here.

Here the IRS seeks to compel the identities of the clients of a law firm that have nothing to do with any "reportable transactions," required "list-keeping," or "tax shelters." The Government has never claimed this and neither the District Court nor the panel found same.[14]

Here, as in *Jones*, it can be said that "the income tax aspects of the government's inquiry demonstrate a strong independent motive for why the

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[12] The Court in *BDO* holds that because the unidentified clients there were involved in setting up tax shelters, they were required to file returns and maintain lists, and that regardless of any § 7525 tax-preparer privilege, "this list-keeping provision precludes the Does from establishing an expectation of confidentiality in their communications with the BDO." That is not the case here; the John Doe summons addressed to the Taylor law firm have nothing to do with tax shelters, required lists, or reporting.

[13] *See BDO,* at 812.

[14] Here the IRS sought compelled production of the identities of clients who were seeking advice relating to a blunderbuss assortment of foreign accounts, assets, corporations and trusts, but nothing regarding any "tax shelters."

unidentified clients could be expected to (1) seek legal advice, and (2) ***reasonably anticipate that their names would be kept confidential***." *Jones,* at 674.

It is that same "strong independent motive" that this Honorable Court held in *Jones* would be revealed if the clients' identities were disclosed, and the same "strong independent motive" that would cause the unidentified clients in *Jones*, just as the unidentified clients here, to "reasonably anticipate that their names would be kept confidential." *Jones,* at 674. It is the same circumstance under which this Court held in *Jones* that "an attorney must conceal even the identity of a client." Id.

THE PANEL APPLIED THE WRONG TEST

The Panel Opinion stresses that the IRS agent here "did *not* state that the Government *knows* the substance of the legal advice the Firm provided the Does," and that "unlike the declaration in *Liebman*, neither of the Agent's declarations in this case identified specific, substantive legal advice the IRS considered improper." *See Taylor*, at 511.

However, it is the motive of the clients seeking legal advice, not the "substance of the legal advice" provided by the Firm or its lawyers that is controlling. For example, in *Jones* it was the Government's presumption that an unidentified third party paying legal fees and posting bonds for an indigent defendant had a confidential motive for hiring counsel. There was no issue regarding the attorney's "motives" or "the substance" of any legal advice provided to the lawyers' clients.

Nor was there any issue regarding the "substance of the legal advice" provided by lawyer DeGuerin in *Reyes-Requena*.[15]

Returning to that same theme, the Panel notes that that compelling the identity of the law firm's clients seeking advice about the foreign entities enumerated in the John Doe summons, "is not the same as the Government's knowing whether any Does engaged in allegedly fraudulent conduct, or the content of any specific legal advice the Firm gave a particular Doe, and then requesting their identities." *See Taylor,* at 511.

However, as Judge King, speaking for this Court in *Reyes-Requena* made clear:

> "Clients often consult with attorneys concerning matter that they wish to keep confidential. The matter may or may not involve misconduct… For example, a client may wish to consult an attorney concerning adopting a child but not wish the matter to be made public… If the disclosure of the client's identity will also reveal the confidential purpose for which he consulted an attorney, we protect both…as privileged." *See Reyes-Requena,* at 1431.

Again, it is the motive of the client, not "the content of any specific legal advice" given by the lawyer that is controlling here, and as for specific advice given to "a particular Doe," one would think that if the Government was aware of the particular

[15] While the panel noted that the parties in *Reyes-Requena* "submitted sealed documents," *See Reyes-Requena,* at1433, as counsel for this same *amicus* before this Honorable Court in that case, undersigned would respectfully represent that there was nothing in that record regarding "the substance" of any legal advice provided by attorney DeGuerin. It was the client's motive for seeking advice and retaining counsel that was at issue there, as it should be here.

Doe, there would be no need to seek their identity. As this Court noted some 45 years ago, it is not the substance of any particular communication, but rather the "motive itself" that is privileged. *See Jones,* at 674-5 .

In any event, the Government here served John Doe summons on the Firm, claiming that unidentified clients were of interest to the IRS because of its "services [were] directed at concealing its client's beneficial ownership of offshore assets."[16] True or not, that "evidence" which the IRS Agent claims to possess,[17] goes directly to the unidentified clients' "motive" or "purpose" for seeking the advice of this Firm, and the Government seeks to compel the firm to disclose their clients' identities for the obvious purpose of conducting an audit or prosecuting the firm's clients. Any client would be motivated to avoid either.[18]

RULE OF UNINTENDED CONSEQUENCES

The panel opinion in this cause turns the well-settled and long-standing rule in this Circuit on its head. On the one hand, in order to avoid fishing expeditions,

[16] The IRS acknowledged that it was seeking the identity of "persons who employed [the firm] to conceal unreported taxable income in foreign countries" as well as "U.S. taxpayers for whom [the Firm] created and maintained foreign bank accounts and foreign entities that may not be properly disclosed on tax returns," as well as evidence the Firm provided "services directed at concealing its client's beneficial ownership of offshore assets." *See Taylor,* at 511.

[17] *See Taylor*, at 509.

[18] Of note with respect to the issue of clients' motives, Justice Ginsberg, who reportedly practiced some tax law with her husband, noted in her majority opinion in *Ratzlaff v. U.S.,* 510 U.S. 135, 144(1994) that a citizen might legitimately seek to structure financial transactions in order "[t]o reduce the risk of an IRS audit," something the Justice apparently felt any red-blooded American would want to avoid.

Congress requires the IRS to demonstrate *ex parte* "specific facts concerning a specific situation" sufficient to establish a "reasonable basis for believing" that the group or class of unidentified John Does "have failed to comply with any provision of any internal revenue law." *See* 26 U.S.C. § 7609. On the other hand, this requirement that the Government have "specific facts" demonstrating a reasonable basis to believe that these unidentified clients have failed to comply with tax laws, creates a conundrum, between what is required in order to issue a John Doe subpoena to compel disclosure of the identity of the suspect taxpayer and, the fact that by definition, this very information demonstrates knowledge by the agency of the very "motive" the unidentified client had for seeking legal advice or retaining the attorney in the first place.[19]

Perhaps this quagmire exists because John Doe summons were not intended for attorneys.[20] However, when a John Doe summons is served on an attorney, seeking to compel him to surrender the identity of unidentified clients, who sought counsel with the realistic expectation that their identity and the reason they sought legal advice would remain confidential, serious and perhaps unintended tension is

[19]A quagmire reminiscent of the lyric: "The very thing that makes her rich will make you poor," by Ry Cooder, from the Album, Bop Till You Drop, Warner Bros. (1979).

[20] *See* History of §7609, *U.S. v. Bisceglia,* 420 U.S. 141 (1975); Saltzman & Book, ¶13.05 (Rev. 2nd ed. 2020).

created between the Government's interest in pursuing investigations and the attorney-client privilege.

> "An attorney could not expect a client to fully disclose the nature of his difficulty…if the attorney may have to reveal the client's identity…At times this privilege may prevent the Government from obtaining useful information, but 'this is the price we pay for a system that encourages individuals to seek legal advice and to make full disclosure to the attorney so that the attorney can render informed advice." *Reyes-Requena,* at 1431-32.

CONCLUSION

The Panel Opinion overturns nearly half a century of well-settled precedent, opening the door to summons to law offices compelling the production of a large slice of their client base that the Government has reason to believe have violated the infinitely complex Internal Revenue Code, pursuant to a statute and caselaw intended for non-lawyers.

If potential clients were aware that their names and the fact that they sought legal advice for a particular purpose could be compelled from the attorneys they sought to consult, this would have a profound chilling effect on anyone seeking to contact or retain an attorney. If that is to become the law in this Circuit, perhaps in the spirit of full disclosure, any ethical lawyer should hang this plaque over their office door.

ATTORNEY GENERAL'S WARNING:
Consulting or Retaining an Attorney Can and Will be Used as Evidence Against You in a Court of Law.

The NACDL, as *amicus curiae* would respectfully urge the full Court to grant the Petition for Rehearing *en banc* in this cause.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limits because of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 2,598 words, as determined by the word-count function of Microsoft Office Word 365, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

2. This brief document complies with the typeface and type style requirements because of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of the Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 365 in 14-pount Times New Roman font.

/s/ *Gerald H. Goldstein*
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2020 an electronic copy of the foregoing Brief of *Amicus Curiae* was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ *Gerald H. Goldstein*
Counsel for Amicus Curiae

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
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Lyle W. Cayce
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No. 19-50506

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

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA,

Defendant - Appellee

Appeal from the United States District Court
for the Western District of Texas

Before BARKSDALE, HIGGINSON, and DUNCAN, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

At issue is whether the district court erred by granting the Government's counter petition to enforce a summons issued to Taylor Lohmeyer Law Firm P.L.L.C. (Firm), notwithstanding the Firm's blanket claim that all documents responsive to the summons are protected by the attorney-client privilege. AFFIRMED.

I.

The Firm, located in Kerrville, Texas, provides estate- and tax-planning advice to its clients. In October 2018, the Internal Revenue Service (IRS) served a John Doe summons on the Firm, seeking documents for "John Does", U.S. taxpayers,

> who, at any time during the years ended December 31, 1995[,] through December 31, 2017, used the services of [the Firm] . . . to acquire, establish, maintain, operate, or control (1) any foreign financial account or other asset; (2) any foreign corporation, company, trust, foundation or other legal entity; or (3) any foreign or domestic financial account or other asset in the name of such foreign entity.

A John Doe summons is "[a]ny summons described in [26 U.S.C. § 7609(c)(1) (covered summonses)] which does not identify the person with respect to whose liability the summons is issued". 26 U.S.C. § 7609(f) (Internal Revenue Code's special procedures for John Doe summonses). Issuing a John Doe summons first requires an *ex parte* court proceeding, in which the Government establishes: "(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons"; "(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law"; and "(3) the information sought to be obtained from the examination of the records or testimony (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources". *Id.*; *see also id.* § 7609(h)(2) (requiring the proceeding be *ex parte*). The Government successfully made this showing at an October 2018 hearing, prior to issuing the summons to the Firm.

The Government sought documents from the Firm based on the 2018 declaration of IRS Agent Russell-Hendrick, "an Offshore Special Matters Expert in the [IRS'] Special Enforcement Program", which "identifies and examines [U.S.] taxpayers involved in abusive transactions and other financial arrangements for the purpose of avoiding U.S. taxes". Agent Russell-Hendrick has submitted two supporting declarations for the Government in this case: the above-described declaration in 2018, prior to the *ex parte* proceeding; and

the other in 2019, attached to the Government's counter petition. The following is from the Agent's 2019 declaration.

The Government "is conducting an investigation to determine the identity and correct federal income tax liability of U.S. taxpayers for whom [the Firm] acquired or formed any foreign entity, opened or maintained any foreign financial account, or assisted in the conduct of any foreign financial transaction". The investigation arose because, during the IRS' audit of one U.S. taxpayer (Taxpayer-1), its investigation "revealed that Taxpayer-1 hired [the Firm] for tax planning, which [the Firm] accomplished by (1) establishing foreign accounts and entities, and (2) executing subsequent transactions relating to said foreign accounts and entities". Additionally, "[f]rom 1995 to 2009, Taxpayer-1 engaged [the Firm] to form 8 offshore entities in the Isle of Man and in the British Virgin Islands" and "established at least 5 offshore accounts so [Taxpayer-1] could assign income to them and, thus, avoid U.S. income tax on the earnings". "In June 2017, [however,] Taxpayer-1 and his wife executed a closing agreement with the IRS in which they admitted that Taxpayer-1 . . . earned unreported income of over $5 million for the 1996 through 2000 tax years, resulting in an unpaid income tax liability of over $2 [m]illion."

"Ultimately, Taxpayer-1 paid almost $4 million to the IRS to resolve his unpaid federal tax, interest, and penalties for those tax years." Consequently, the John Doe summons at issue here

> seeks records that may reveal the identity and international activities of certain clients of [the Firm], from January 1, 1995, through December 31, 2017. This information may be relevant to the underlying IRS investigation into the identity and correct federal income tax liability of U.S. persons who employed [the Firm] to conceal unreported taxable income in foreign countries. In particular, the IRS is seeking information on U.S. taxpayers for whom [the Firm] created and maintained foreign bank accounts

and foreign entities that may not be properly disclosed on tax returns.

After receiving the Government's summons, the Firm filed in federal district court a petition to quash the summons on various grounds, asserting "the summons is overbroad and represents an unprecedented intrusion into the attorney-client relationship and is plainly abusive". Regarding attorney-client privilege, the Firm claimed that, despite the general rule a lawyer's clients' identities are not covered by the privilege, an exception to that rule exists whereby "a client's identity is protected by the attorney-client privilege if its disclosure would result in the disclosure of a confidential communication". Accordingly, the Firm asserted the exception applies here, rendering all documents requested in the summons protected by the privilege.

The Government responded by filing a motion to dismiss the petition to quash and a counter petition to enforce the summons. Although the Government contended the Firm's petition was "jurisdictionally deficient", which supported the petition's dismissal, it highlighted that the petition itself "indicate[d] an unwillingness to comply with the summons" and supported enforcing it. As relevant here, the Firm responded to the Government's motion and counter petition, and the Government filed a reply.

At an April 2019 status hearing to discuss the pending filings, the court, with the parties' agreement, proceeded directly with the Government's counter petition. The counter petition was granted on 15 May 2019, with the court's ruling, *inter alia*: "blanket assertions of privilege are disfavored, the Firm bears a heavy burden at this stage, and the Firm relies only on a narrowly defined exception to the general rule that identities are not privileged[; therefore,] the Firm does not carry its burden". Moreover, the court noted in its order that, "if [the Firm] wishes to assert any claims of privilege as to any responsive documents, it may . . . do so, provided that any such claim of

privilege is supported by a privilege log which details the foundation for each claim on a document-by-document basis". Finally, the court stated it would "retain jurisdiction in th[e] case pending any challenges by the Government of the Firm's privilege log, should the Firm produce one".

II.

In challenging the court's ruling, the Firm presents only its contentions as to attorney-client privilege. The district court, upon the Firm's motion, has stayed its proceedings pending this appeal. In doing so, the court stated: "The Firm produced no privilege log, so there is no longer a need for this Court to retain jurisdiction. Accordingly, the Clerk's office is directed to CLOSE this case".

"[A] district court order enforcing an IRS summons is an appealable final order". *Church of Scientology v. United States*, 506 U.S. 9, 18 n.11 (1992) (citation omitted). The party challenging the summons may do so "on any appropriate ground", including because the information sought "is protected by the attorney-client privilege". *Reisman v. Caplin*, 375 U.S. 440, 449 (1964) (citation omitted).

But "[r]eview of a district court's determination with respect to the attorney-client privilege, even on direct appeal, . . . is limited". *In re Avantel, S.A.*, 343 F.3d 311, 318 (5th Cir. 2003). "The application of the attorney-client privilege is a question of fact, to be determined in the light of the purpose of the privilege and guided by judicial precedents." *EEOC v. BDO USA, L.L.P.*, 876 F.3d 690, 695 (5th Cir. 2017) (internal quotation marks and citations omitted). "In evaluating a claim of attorney-client privilege, [our court] review[s] factual findings for clear error and the application of the controlling law *de novo*." *In re Itron, Inc.*, 883 F.3d 553, 557 (5th Cir. 2018) (italics added) (internal quotation marks and citation omitted).

In this instance, of course, federal privilege-law applies. *See, e.g.*, *Avantel*, 343 F.3d at 323 (citation omitted). In that regard, for the attorney-client privilege to protect from disclosure, either in whole or in part, a document responsive to the Government's summons in this case, the Firm must establish that the document contains a confidential communication, between it and a client, made with the client's "primary purpose" having been "securing either a legal opinion or legal services, or assistance in some legal proceeding". *BDO USA*, 876 F.3d at 695 (citation omitted). "Because the attorney-client privilege has the effect of withholding relevant information from the fact-finder, it is interpreted narrowly so as to apply only where necessary to achieve its purpose." *Id.* (alteration, internal quotation marks, and citation omitted). Construing the privilege narrowly is particularly important with IRS investigations because of the "congressional policy choice *in favor of disclosure* of all information relevant to a legitimate IRS inquiry". *United States v. Arthur Young & Co.*, 465 U.S. 805, 816–17 (1984) (emphasis in original) (citations omitted).

As discussed in part, "[d]etermining the applicability of the privilege is a highly fact-specific inquiry, and the party asserting the privilege bears the burden of proof". *BDO USA*, 876 F.3d at 695 (internal quotation marks and citations omitted). In that regard, "[a]mbiguities as to whether the elements of a privilege claim have been met are construed against the proponent". *Id.* (citation omitted). Additionally, as a general rule, "the attorney-client privilege may not be tossed as a blanket over an undifferentiated group of documents". *United States v. El Paso Co.*, 682 F.2d 530, 539 (5th Cir. 1982) (citations omitted). Instead, "[t]he privilege must [generally] be specifically asserted with respect to particular documents". *Id.*; *see also United States v. Davis*, 636 F.2d 1028, 1038–39 (5th Cir. 1981) ("It is generally agreed that the recipient of a summons properly should appear before the issuing agent and

claim privileges on a question-by-question and document-by-document basis." (citations omitted)).

Moreover, "[a]s [another] general rule, client identit[ies] and fee arrangements are not protected as privileged". *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 926 F.2d 1423, 1431 (5th Cir. 1991) (*Reyes-Requena II*) (citation omitted). That said, a "narrow exception" exists "when revealing the identity of the client and fee arrangements would itself reveal a confidential communication". *Id.* (citation omitted). This "limited and rarely available sanctuary, which by virtue of its very nature must be considered on a case-to-case basis", recognizes that "[u]nder certain circumstances, an attorney must conceal even the identity of a client, not merely his communications, from inquiry". *United States v. Jones (In re Grand Jury Proceedings)*, 517 F.2d 666, 671 (5th Cir. 1975) (citation omitted).

The exception, however, does not expand the scope of the privilege; it does not apply "*independent of* the privileged communications between an attorney and his client". *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 913 F.2d 1118, 1124 (5th Cir. 1990) (emphasis added). Rather, a client's identity is shielded "only where revelation of such information would disclose other privileged communications such as the confidential motive for retention". *Id.* at 1125 (citation omitted). In that regard, the privilege "protect[s] the client's identity and fee arrangements in such circumstances not because they might be incriminating but because they are *connected inextricably* with a privileged communication—the confidential purpose for which [the client] sought legal advice". *Reyes-Requena II*, 926 F.2d at 1431 (emphasis added).

Because the Firm contends this case falls within this exception to the general rule that a law firm's clients' identities are not protected by the

attorney-client privilege, it asserts: "[a]s a matter of law, all documents responsive to the summons are privileged"; and the district court erred in concluding otherwise. To support its position, the Firm relies on, *inter alia*, *Reyes-Requena II* and *United States v. Liebman*, 742 F.2d 807 (3d Cir. 1984).

As discussed, our court made clear in *Reyes-Requena II* that, "[i]f the disclosure of the client's identity will also reveal the confidential purpose for which he consulted an attorney, we protect both the confidential communication and the client's identity as privileged". *Reyes-Requena II*, 926 F.2d at 1431. And, as stated, "[w]e protect the client's identity and fee arrangements in such circumstances not because they might be incriminating but because they are connected inextricably with a privileged communication—the confidential purpose for which [the client] sought legal advice". *Id.* The Firm asserts such an inextricable connection is present here.

In *Liebman*, the third circuit, in applying the relevant exception to the general attorney-client privilege rule for client identities, determined:

> The affidavit of the IRS agent supporting the request for [a John Doe] summons not only identifies the subject matter of the attorney-client communication, but also describes its substance. That is, the affidavit does more than identify the communications as relating to the deductibility of legal fees paid to [the firm] in connection with the acquisition of a real estate partnership interest. It goes on to reveal the content of the communication, namely that "taxpayers . . . were advised by [the firm] that the fee was deductible for income tax purposes." Thus, this case 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 (alterations added) (citations omitted). Along that line, the Firm contends: Agent Russell-Hendrick's 2018 declaration, like that of the IRS agent in *Liebman*, establishes the Government already knows the content of the legal advice the Firm provided the Does; and, if the Firm is

"required to identify [its] clients as requested, that identity, when combined with the substance of the communication . . . that is already known, would provide all there is to know about a confidential communication between the taxpayer-client and the attorney", breaching the attorney-client privilege. *See id.* at 810.

Both cases, however, are distinguishable. In *Reyes-Requena II*, which involved whether a defense attorney was required "to reveal the identity of an anonymous third[-]party benefactor who paid the attorney's fees for [a] drug defendant", both the district court and our court, unlike in this case, inspected sealed documents relevant to the privilege claim. *Reyes-Requena II*, 926 F.2d at 1425, 1428, 1432 (citations omitted). Moreover, the benefactor whose identity was at issue intervened in the case, and the district court determined, "[r]elying upon the sealed affidavits presented *in camera*", that: "an attorney/client privilege existed between [the defense attorney] and Intervenor . . . and . . . the relationship was ongoing"; "Intervenor retained [the defense attorney] to represent [the criminal defendant] and Intervenor *jointly* for a confidential purpose"; and "if [the defense attorney] were to reveal the Intervenor's identity, Intervenor's confidential motive for retaining [the defense attorney] would be exposed as apparent". *Id.* at 1428 (emphasis in original) (citations omitted). It was under these specific circumstances, not present here, that the district court found, and our court agreed, the intervening client's "confidential motive for consulting [the defense attorney] was intertwined inextricably with his identity and fee arrangements". *Id.* at 1431 (citation omitted).

In *Liebman*, the IRS agent's declaration explicitly identified taxpayers' communications "as relating to the deductibility of legal fees paid to [the firm] in connection with the acquisition of a real estate partnership interest" and that, as the defendant firm conceded, "taxpayers . . . were advised by [the firm]

that the fee was deductible for income tax purposes". *Liebman*, 742 F.2d at 809 (alteration in original) (citations omitted). The IRS contended the fee was not deductible, and the John Doe summons at issue in that case, therefore, sought identity information explicitly for the discrete subset of clients "who paid fees in connection with the acquisition of real estate partnership interests". *Id.* at 808 (citation omitted). "Because the IRS request was limited to the group of persons who paid for *specific* investment advice, the IRS would automatically identify those who were told they could make the questionable deductions", and this "would [have] provide[d] all there [was] to know about a confidential communication between the taxpayer-client and the attorney[,] . . . breach[ing] the attorney-client privilege to which that communication [was] entitled". *Id.* at 809–10 (emphasis added).

Importantly, however, and contrary to the Firm's contention, Agent Russell-Hendrick's 2018 declaration did *not* state the Government *knows* the substance of the legal advice the Firm provided the Does. (Nor, for that matter, does her 2019 declaration.) Rather, it outlined evidence providing a "reasonable basis", as required by 26 U.S.C. § 7609(f), "for concluding that the clients of [the Firm] are of interest to the [IRS] because of the [Firm's] services directed at concealing its clients' beneficial ownership of offshore assets". The 2018 declaration also made clear that "the IRS is pursuing an investigation to develop information about other unknown clients of [the Firm] *who may have* failed to comply with the internal revenue laws by availing themselves of similar services to those that [the Firm] provided to Taxpayer-1". (Emphasis added.) Therefore, unlike the declaration in *Liebman*, neither of the Agent's declarations in this case identified specific, substantive legal advice the IRS considered improper and then supported the Government's effort to receive the identities of clients who received that advice. *See Liebman*, 742 F.2d at 809.

Instead, the John Doe summons at issue seeks, *inter alia*: documents "reflecting *any* U.S. clients at whose request or on whose behalf [the Firm] ha[s] acquired or formed *any* foreign entity, opened or maintained *any* foreign financial account, or assisted in the conduct of *any* foreign financial transaction"; "[a]ll books, papers, records, or other data . . . concerning the provision of services to U.S. clients relating to setting up offshore financial accounts"; and "[a]ll books, papers, records, or other data . . . concerning the provision of services to U.S. clients relating to the acquisition, establishment or maintenance of offshore entities or structures of entities". (Emphasis added.) As the Government asserted, this broad request, seeking relevant information about *any* U.S. client who engaged in *any one of a number* of the Firm's services, is not the same as the Government's knowing whether any Does engaged in allegedly fraudulent conduct, or the content of any specific legal advice the Firm gave particular Does, and then requesting their identities.

This is particularly true given statements made by Fred Lohmeyer, one of the Firm's name partners, in his declaration attached to the Firm's memorandum supporting its petition to quash the summons. He stated the Firm's other clients "ha[ve] facts that are distinguishable from" those of Taxpayer-1 "because[,] to the best of [his] knowledge, [the Firm] never advised any other client with respect to the treatment of earned income as income earned by a foreign corporation". This undermines the Firm's contention that the Government knows the substantive content of legal advice the Firm gave the Does.

In that regard, the circumstances here, as contended by the Government, are more like those in *United States v. BDO Seidman*, 337 F.3d 802 (7th Cir. 2003). That case involved unnamed clients of a public accounting and consulting firm seeking to intervene in an IRS enforcement action against the

firm "to assert a confidentiality privilege regarding certain documents that [the firm] intended to produce in response to [IRS] summonses . . . because the[] documents reveal[ed] their identities as [firm] clients who sought advice regarding tax shelters and who subsequently invested in those shelters". *Id.* at 805–06. According to the clients, disclosing their identities "inevitably would violate the statutory privilege [26 U.S.C. § 7525] protecting confidential communications between a taxpayer and any federally authorized tax practitioner giving tax advice". *Id.* at 806 (citation omitted).

BDO Seidman, of course, does differ in some respects from this case. Namely, the clients sought to intervene in *BDO Seidman* (in which the IRS targeted the firm's, *not the clients'*, compliance with the Internal Revenue Code); and a statutory, not the attorney-client, privilege, was at issue. *See id.* at 805–06. Critically, however, the statutory privilege was modeled after the attorney-client privilege, including its rule that "ordinarily the identity of a client does not come within the scope of the privilege" and its "limited exception" allowing that "the identity of a client may be privileged in the rare circumstance when so much of an actual confidential communication has been disclosed already that merely identifying the client will effectively disclose that communication". *Id.* at 810–11 (citations omitted). Ultimately, the seventh circuit's rationale in analyzing the privilege claim on the facts of the case before it, and affirming the district court's denial of the clients' motions to intervene, is instructive: "[d]isclosure of the identities of the Does will disclose to the IRS that the Does participated in one of the 20 types of tax shelters described in its summonses"; but, "[i]t is less than clear . . . as to what motive, or other confidential communication of tax advice, can be inferred from that information alone". *See id.* at 812–13.

The same is true here: disclosure of the Does' identities would inform the IRS that the Does participated in at least one of the numerous transactions

described in the John Doe summons issued to the Firm, but "[i]t is less than clear . . . as to what motive, or other confidential communication of [legal] advice, can be inferred from that information alone". *See id.* at 812. Consequently, the Firm's clients' identities are not "connected inextricably with a privileged communication", and, therefore, the "narrow exception" to the general rule that client identities are not protected by the attorney-client privilege is inapplicable. *See Reyes Requena II*, 926 F.2d at 1431 (citations omitted).

III.

For the foregoing reasons, the 15 May 2019 enforcement order is AFFIRMED.