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 Case No. 5:18CV1161
United States District Court for the Western District of Texas

BRIEF OF AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the American College of Tax Counsel, as *Amicus Curiae*, makes the following disclosure: The ACTC is a nonprofit corporation that has no parent corporation and there are no publicly held companies that hold 10% or more of its stock.

The undersigned counsel of record also certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

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Defendant - Appellee: United States of America

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The American College of Tax Counsel (the "College") respectfully submits this brief as *amicus curiae* in support of the petition for rehearing en banc of appellant Taylor Lohmeyer Law Firm P.L.L.C. ("Taylor Lohmeyer" or the "Firm").[1]

I. STATEMENT OF INTEREST

The College is a nonprofit professional association of approximately 700 tax lawyers in private practice, law school teaching positions, and government, recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. As part of its mission to improve the tax system, the College provides recommendations for improving the nation's tax laws and provides input into the judicial system by filing "friend of the court" briefs in selected tax cases.

This amicus brief is submitted by the College's Board of Regents and does not necessarily reflect the views of all members of the College, including those who are government employees.[2]

[1] Pursuant to Fed. R. App. P. 29, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

[2] Larry A. Campagna, the College's Regent for the 5th Circuit, abstained from the decision of the Board of Regents to prepare and file this brief, and did not participate in the preparation or review of this brief.

Effective tax administration requires that taxpayers be able to seek the advice of tax counsel in confidence. The College is concerned that the panel's decision, which allows the Internal Revenue Service (the "IRS") to use a John Doe summons to obtain the identities of clients who have consulted with counsel on a specific matter, invades the protection of the attorney-client privilege counter to established precedent.

The College recognizes the importance of tax enforcement on the nation's voluntary tax compliance system, and has repeatedly voiced its support for the government's efforts to enforce the tax law. However, the need for powerful enforcement tools, such as the John Doe summons at issue here, does not justify a frontal attack on the attorney-client privilege.

II. DISCUSSION

A. The Role of John Doe Summonses in Tax Administration

In furtherance of the IRS's responsibility to administer and enforce the internal revenue laws, Congress conferred broad authority on the IRS to make accurate determinations of tax liability and to conduct investigations for that purpose. As the Supreme Court made clear 45 years ago, "The IRS' broad power to investigate possible violations of the tax laws is understood to be vital to the efficacy of the federal tax system, 'which seeks to assure that taxpayers pay what Congress has mandated and to prevent dishonest persons from escaping taxation thus shifting

heavier burdens to honest taxpayers.'" *United States v. Bisceglia*, 420 U.S. 141, 146 (1975). This broad authority, which includes summons authority, is not absolute, *United States v. Arthur Young & Co.*, 465 U.S. 805, 816 (1984); rather, the IRS's summons power is "subject to the traditional privileges and limitations." *United States v. Euge*, 444 U.S. 707, 714 (1980).

An important investigative tool, a John Doe summons is a summons issued to a third party to surrender information concerning taxpayers whose identity is currently unknown to the IRS. *Matter of Does*, 671 F.2d 977, 979 (6th Cir. 1982). To avoid "fishing expeditions," Congress required the IRS to have "specific facts concerning a specific situation" to present to a court to obtain authorization to serve a John Doe summons. *Id.* (citing H.Rep.No. 94-658, 94th Cong., 1st Sess. p. 311, U.S. Code Cong. & Admin. News 1976, pp. 2897, 3207).

It is precisely because of this specific information requirement that the attorney-client privilege issue is triggered in *Taylor Lohmeyer*. By defining the John Does as clients who have used the Firm's services for certain specified purposes, disclosure of the identity of those clients would breach confidential communications that are inextricably intertwined with the clients' confidential motives for seeking out the advice of the Firm.

B. The John Doe Summons Provisions Are Limited by the Attorney-Client Privilege

The protection of the attorney-client privilege is essential if tax counsel are to be able to assist their clients in complying with the tax laws, advise their clients on how to structure their transactions in a manner that achieves the most favorable tax result in accordance with the law, and represent their clients effectively before the Internal Revenue Service and in federal tax cases. As the "oldest of the privileges for confidential communications known to the common law," the attorney-client privilege is meant to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *United States v. Fisher*, 425 U.S. 391, 403 (1976). Protection of the privilege is essential for the proper administration of the internal revenue laws.

Generally, the privilege does not protect the identity of the client. *United States v. Ponder*, 475 F.2d 37, 39 (5th Cir.1970). Where, however, disclosure of the client's identity would reveal attorney-client communications, including the "confidential motive for retention of the attorney," the identity of the client is privileged. *In re Grand Jury Subpoena for Attorney Representing Reyes-Requena*, 926 F.2d 1423, 1431-32 (5th Cir. 1991) (hereafter "*Reyes-Requena*"); *accord, Baird v. Koerner*, 279 F.2d 623, 631-632 (9th Cir. 1960) ("If the identification of the client conveys information which ordinarily would be conceded to be part of the usual

privileged communication between attorney and client, then the privilege should extend to such identification….").[3] While the summons power of the IRS has been interpreted expansively to allow it to carry out its responsibility of ensuring compliance with the tax laws (*see United States v. Powell*, 379 U.S. 48 (1964)), the power is "limited principally by relevance and privilege." *United States v. Euge*, 444 U.S. 707, 712 (1980). As the court recognized in *Cherney*, "the government's interests in this instance must give way to those served by the attorney-client privilege." *Cherney*, 898 F.2d at 569.

[3] *See also, Tillotson v Boughner*, 350 F.2d 663, 666 (7th Cir. 1965) ("The identity of the client ... would lead ultimately to disclosure of the taxpayer's motive for seeking legal advice …."); *N.L.R.B. v. Harvey*, 349 F.2d 900, 905 (4th Cir. 1965) ("The privilege may be recognized when so much of the actual communication has been disclosed that identification of the client amounts to disclosure of a confidential communication."); *United States v. Jones*, 517 F.2d 666, 673-674, 674-675 (5th Cir. 1975) ("The attorney-client privilege protects the motive itself from compelled disclosure, and the exception ... protects the clients' identities when ... necessary in order to preserve the privileged motive."); *United States v. Liebman*, 742 F.2d 807 (3rd Cir. 1984) (the identity of the client is privileged "where so much of the actual attorney-client communication has already been disclosed that identifying the client amounts to full disclosure of the communication."); *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.").

C. The Panel's Narrowing of the Attorney-Client Privilege Departs from Established Precedent

The IRS has, over the past several decades, become increasingly aggressive in its use of summonses to circumvent the attorney-client privilege. *See* William Volz and Theresa Ellis, *An Attorney-Client Privilege for Embattled Tax Practitioners*, 38 Hofstra L. Rev. 213 (2002). The effort to circumvent the attorney-client privilege in this case has the potential to vitiate the attorney-client privilege in the practice of tax law.

The IRS issued the John Doe summons to learn the identity of Taylor Lohmeyer clients who used the Firm's legal services "to acquire, establish, maintain, operate, or control (1) any foreign account or other asset; (2) any foreign corporation, trust, foundation, or other legal entity; or (3) any foreign or domestic financial account or other asset in the name of such foreign entity." *Taylor Lohmeyer*, 957 F.3d at 507. Taylor Lohmeyer "specializes in estate planning, tax law, and international tax law" and "has played a key role in helping individuals operate offshore." Russell-Hendrick Decl. 9/17/2018 ¶ 9, ROA.167.

The John Doe summons here is premised upon the IRS's purportedly knowing the motive of clients in engaging Taylor Lohmeyer. This Court has made clear that where the "confidential motive for retention of the attorney" is known, disclosure of the identity of the client violates the privilege. *Reyes-Requena*, 926 F.2d at 1431-

32. As this Court emphasized in *Jones*, "[t]he 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*, 517 F.2d at 674-75.[4]

While summons enforcement proceedings generally are "summary in nature," *United States v. Stuart*, 489 U.S. 353, 369 (1989), taxpayers are entitled to adduce facts in a district court proceeding challenging a summons. *See United States v. Clarke*, 113 S. Ct. 2361 (2014). Because the summons at issue requires the Firm to provide documents that connect specific clients with specific advice provided by the Firm, compliance with the summons effectively requires testimony by the Firm regarding that advice. *See, e.g.*, *United States v. Hubbell*, 530 U.S. 27 (2000). If the Firm's advice was legal advice, then compliance with the summons necessarily invades the attorney-client privilege.

[4] The district court implicitly recognized that Taylor Lohmeyer was providing legal services. Accordingly, we respectfully submit that the en banc court grant a rehearing and reversal. If there is ambiguity in this regard, then we respectfully submit that the case be remanded to the district court to make specific factual findings as to whether the clients engaged Taylor Lohmeyer to provide legal services.

D. The Panel's Reliance on the *BDO* Decision Is Misplaced

We respectfully submit that the Panel ignored a key fact that distinguishes *United States v. BDO Seidman*, 337 F.3d 802 (7th Cir. 2003), from the instant case, making it inapposite and the panel's reliance thereon misplaced. Specifically, BDO Seidman's clients had no reasonable expectation that their identities would be confidential. As a seller or organizer of tax shelters, BDO Seidman was required by statute to maintain a list identifying each person to whom an interest in the tax shelter was sold. The Seventh Circuit emphasized the importance of this to the court's holding:

> [T]he Does' participation in potentially abusive tax shelters is information ordinarily subject to full disclosure under the federal tax law. Congress has determined that tax shelters are subject to special scrutiny, and anyone who organizes or sells an interest in tax shelters is required, pursuant to I.R.C. § 6112, to maintain a list identifying each person to whom such an interest was sold. This list-keeping provision precludes the Does from establishing an *expectation of confidentiality* in their communications with BDO, an essential element of the attorney-client privilege and, by extension, the § 7525 privilege. … Because the Does cannot credibly argue that they expected that their participation in such transactions would not be disclosed, they cannot now establish that the documents responsive to the summonses…reveal a *confidential* communication.

BDO Seidman, 337 F.3d at 812-813 (internal citations omitted). The court explained that it was BDO's affirmative duty to disclose its clients' participation in potentially abusive tax shelters that renders the Does' situation "easily distinguishable" from

cases finding a client's identity to be information subject to the attorney-client privilege. *Id.*

There is no basis in the instant case to make such a distinction. There is no statute or regulation imposing upon Taylor Lohmeyer a duty to disclose the identity of clients for whom it provided legal services relating to offshore planning. As a result, and unlike in *BDO Seidman*, Taylor Lohmeyer's clients had an expectation that their identities and motives for seeking the Firm's legal services would remain confidential.

E. The Panel's Decision Will Impair the Ability of Tax Counsel to Provide Informed Advice

The panel's decision requiring Taylor Lohmeyer to disclose the identity of the Firm's clients will impose a discernible chill over the attorney-client relationship between taxpayers and tax counsel. It is well settled that anyone may so arrange his affairs so that his taxes shall be as low as possible, and there is not even a patriotic duty to increase one's taxes. *Gregory v. Helvering*, 69 F.2d 809, 819 (2d Cir. 1934). If taxpayers knew the IRS could learn their identities in response to a summons issued to their attorney, they might forgo seeking legal advice from a tax attorney or might be less than candid in doing so. Thus, for example, the College is concerned that the panel's decision could facilitate the issuance of John Doe summons to a law firm seeking documents identifying any companies who retained the firm for legal advice regarding structuring their business so that intellectual property assets were

located in low tax jurisdictions, or identifying any individuals who engaged the firm for legal advice regarding structuring a family limited partnership or annuity trust.

Departing from longstanding and established precedent in this and other circuits, the panel's decision subjects the John Doe summons power to abuse by allowing the IRS to make broad requests to law firms to circumvent the privilege.

III. CONCLUSION

Because the panel's decision departs from established precedent, invades the attorney-client privilege and undermines the trust that taxpayers have that tax counsel will keep confidential their privileged communications, the College, as *amicus curiae*, respectfully requests that the en banc Court grant a rehearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(b) because it contains 2,294 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font size 14.

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2020, I served the foregoing *Brief of American College of Tax Counsel as Amicus Curiae in Support of Appellant's Petition for Rehearing En Banc* by electronic filing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by operation of the Court's CM/ECF system. All counsel of record in this case, indicated below, are registered CM/ECF users and will be served by the CM/ECF system.

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