CONSTITUTIONAL LAW — The Required Records Exception Includes Regulatory Foreign Banking Records but Reflects the Fifth Amendment's Purpose — *United States v. Chabot*, 793 F.3d 338 (3d Cir. 2015).

Fifth Amendment Privilege has guaranteed citizens individual liberties throughout history and that expectation is maintained through the required records exception, which establishes that the production of records to courts or governmental entities that provide regulatory information about businesses is not a violation of the self-incrimination clause.[1] Under 31 C.F.R. section 1010.420 (section 1010.420), the Commissioner of the

1. *See* U.S. Const. amend. V (noting Amendment's overall purpose). The Fifth Amendment to the Constitution of the United States was designed to provide citizens with liberties. *See id.* *See also* Kirke D. Weaver, *The Clash Between Rights: Can the Fifth Amendment Overcome the Work Product Doctrine?*, 73 Temp. L. Rev. 123, 125-26 (2000) (tracing history of Fifth Amendment). The Amendment states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V; *see also* Weaver, *supra*. Kirke D. Weaver highlights:

> The Fifth Amendment to the United States Constitution, found in the heart of the Bill of Rights, contains many concepts crucial to our present understanding of the individual liberties protected by the Constitution: the right to due process, the right to equal protection, the right to a grand jury, the prohibition against double jeopardy, the Takings Clause, and, most relevant to this Article, the right against self-incrimination. Within the realm of criminal procedure and law, one of the most important of these protections—both in popular and legal culture—is the right against self-incrimination. In fact, commentators have described it as "an unsolved riddle of vast proportions, a Gordian knot in the middle of our Bill of Rights." Never has the clause been fully understood or a clear rationale for it been universally accepted, and countless articles continue to be written attempting to decipher its meaning and to develop a comprehensive view of it . . . . In spite of these controversies, the language of the clause can be distilled into five basic component parts: (1) the prohibition of self-incriminating disclosures; (2) relating to criminal proceedings; (3) by natural persons; (4) which were obtained through compulsion; and (5) which are testimonial in nature. Once these factors have been met, the Fifth Amendment provides complete protection to the testimony at issue.

Internal Revenue Service (IRS) may request records of general account information for those having financial interest in foreign bank accounts.[2] In *United States v. Chabot*,[3] the United States Court of Appeals for the Third Circuit had to determine whether the respondents had to produce documents under section 1010.420 considering this determination could result in an

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Weaver, *supra* (footnotes omitted); *see also* Grosso v. United States, 390 U.S. 62, 67-68 (1968) (explaining three-prong test for required records exception). The Supreme Court of the United States explained the three prong test that must be met in order to fall within the required records exception: (1) the reporting or record keeping scheme must have an essentially regulatory purpose; (2) a person must customarily keep the records that the scheme requires him to keep; (3) the records must have public aspects. *Id.* The *Grosso* test has become the standard for determining whether scenarios are appropriate to apply the required records exception because it was able to successfully separate cases that concentrate on criminal activity. *Id.* *See* U.S. CONST. amend. V (highlighting self-incrimination). "[N]or shall be compelled in any criminal case to be a witness against himself." *Id.* *See also In re* Grand Subpoena Duces Tecum Served upon Underhill, 781 F.2d 64, 70 (6th Cir. 1986) (finding Fifth Amendment privilege does not bar production of records for governmental regulatory schemes). "Regulatory schemes" are those that serve a governmental function other than reporting instances to the federal prosecutors, such as collecting information with regards to taxes, industry or the economy. *Id.* at 68. *See also* Thomas J. Koffer, Note, *All Quiet on the Paper Front: Asserting a Fifth Amendment Privilege to Avoid Production of Corporate Documents in* In Re Three Grand Jury Subpeonas Duces Tecum Dated January 29, 1999, 46 VILL. L. REV. 547, 549-50 (2001) (dictating privilege requisites). "The Court has held that because a corporation is not a natural person, it has no Fifth Amendment privilege to refuse to comply with a subpoena . . . . Over time, scholars have labeled this holding the 'collective entity doctrine.'" *Id.* at 549-50 (footnote omitted). *See also* Michael Edmund O'Neill, *The Fifth Amendment in Congress: Revisiting the Privilege Against Compelled Self-Incrimination*, 90 GEO. L.J. 2445, 2445 (2002) (highlighting societal relevance). "The Fifth Amendment's privilege against compelled self-incrimination is to the American criminal justice system [as] Mom, baseball, and apple pie, are to the American ideal." *Id.* *See generally Fifth Amendment at Trial*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 591 (2006) (discussing importance of Amendment).

2. 31 C.F.R. § 1010.420 (2015) (specifying account regulations). The Commissioner of the Internal Revenue Service (IRS) requires compliance with production of records that contain: (1) the name of the account; (2) the number of the account; (3) the name and address of the foreign bank; (4) the type of account; (5) the maximum value of each account within the reporting period; and (6) five years of records shall be retained at all times. *Id.* This act is a part of the Currency and Transaction Reporting Act, which has an intended purpose of preventing and detecting money laundering, tax evasion, and other criminal activity. *Id.* *See also* United States v. Under Seal, 737 F.3d 330, 334-36 (4th Cir. 2013) (highlighting 31 C.F.R. section 1010.420 (section 1010.420)). *But see* M.H. v. United States, 648 F.3d 1067, 1074 (9th Cir. 2011) (clarifying dual purpose of regulation). "Congress aimed to use the BSA [Banking Security Act] as a tool to combat certain criminal activity [which] is insufficient to render the BSA [Banking Security Act] essentially criminal as opposed to essentially regulatory." *Id.*

3. 793 F.3d 338 (3d Cir. 2015).

"abrogation of their Fifth Amendment privilege against self-incrimination."[4] The Court ruled that the account records met the required records exception standard and thus, the records were to be turned over to the IRS.[5]

In April of 2010, the IRS was notified about an undisclosed HSBC bank account, in France, held under the name Pelsa Business Inc.[6] The IRS proceeded to summons Pelsa Business Inc.'s owners, Eli and Renee Chabot (Chabots), requesting they produce documents and give testimony regarding their foreign bank accounts from January 1, 2006 through December 31, 2009.[7] In response, the Chabots asserted their Fifth Amendment privilege against self-incrimination, refusing to produce the requested documents, and the IRS filed a petition to enforce the summons.[8] The district court held that the required records doctrine

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4. *See id.* at 344 (noting issue of constitutionality). *See also* Wilson v. United States, 221 U.S. 361, 380 (1911) (explaining issue of self-incrimination). The required records exception has evolved into a "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. See generally Chabot*, 793 F.3d 338 (establishing issue within case). The crux of this case was determining whether the information requested complied with the *Grosso* three-prong test; if so, the required records exception would apply. *Id.*

5. *See Chabot*, 793 F.3d at 349 (holding constitutionality of IRS summons while further justifying required records exception). *See generally* United States v. Chen, 952 F. Supp. 2d 321 (D. Mass. 2013) (reinforcing similar holding).

6. *See Chabot*, 793 F.3d at 341 (identifying parties). Eli Chabot is the beneficial owner of Pelsa Business Inc. *Id.* The IRS alleged that they knew this to be fact because they had records of Pelsa Business Inc. from 2005-2007 that stated the aforementioned information to be fact. *Id.*

7. *See id.* at 341 (explaining reasons for inquiry). *See also* I.R.C. § 7604a (2012) (explaining any person summonsed under Internal Revenue Code will appear in district court); I.R.C. § 7402b (1972) (continuing district courts shall have appropriate process to compel such attendance).

8. *Chabot*, 793 F.3d at 341 (addressing crux of respondents' argument). Eli and Rene Chabot (the Chabots) were under the impression they would commit self-incrimination "for their failure to file the same information in an annual report of Foreign Financial Accounts." *Id.* Furthermore, the summons requested the missing link necessary for the federal government to charge the Chabots with felony failure to willfully report an overseas account. *Id. See generally* Fisher v. United States, 425 U.S. 391 (1976) (emphasizing importance of upholding Fifth Amendment privilege against self-incrimination when applied with required records doctrine); Robert P. Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 VA. L. REV. 1 (1987) (detailing *Fisher v. United States*). Robert P. Mosteller (Mosteller) explained:

> In *Fisher v. United States* the Court formulated a new mode of analysis for documentary subpoenas. Under that analysis, the validity of a subpoena no longer turned on the contents of the documents demanded,

was applicable, negating the defense of Fifth Amendment privilege, and the district court granted the petition for the summons.[9] The Chabots vehemently appealed that the granting of the IRS summons violated their privilege against self-incrimination because the required records doctrine would lead to the production of records that could subject them to further criminal prosecution.[10] The Third Circuit held that this was not a vio-

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> but rather on the testimonial and incriminating nature of the act of producing them. The *Fisher* decision represented a major watershed, signaling a fundamental departure from earlier fifth amendment doctrines. Yet it left unanswered several critical questions—the degree to which the act of production must be testimonial and incriminating to invoke fifth amendment protection, the meaning of the 'foregone conclusion' concept, and the application and effect of use immunity.

Mosteller, *supra*, at 3. *But see id.* (contrasting United States v. Doe, 741 F.3d 339, 339-45 (2d Cir. 2013) with *Fisher*). Mosteller has questioned the stability of the Court's definition:

> [Where] the Supreme Court reconsidered these principles [creating a definition and principle that] remains unclear, and the Court has offered little guidance on how to apply the testimonial and incriminating inquiries to the act of production. Subsequent lower court decisions have provided some refinements of these ideas, but they have often substituted conclusory labels for considered analysis.

Id. (footnote omitted).

9. United States v. Chabot, No. 14-3055 (FLW), 2014 U.S. Dist. LEXIS 140656, at *5-12 (D.N.J. Oct. 3, 2014) (emphasizing *Grosso*'s three-prong test). The district court applied the aforementioned *Grosso* test to determine if this situation fell within the scope of the required records exception. *Id.* at *5. After concluding this was a valid "regulatory scheme," with records "customarily kept," and the "public aspect," voluntary foreign banking, met, the court decided to utilize the exception. *Id.* at *10. *But see Grosso*, 390 U.S. at 63-64 (displaying example of case law where required records doctrine does not apply). In *Grosso*, the petitioner was charged with "15 counts of willful failure to pay excise tax imposed on wagering . . . ." *Id.* at 63. Wagering, however, is a criminal activity and this tax imposition carried a clear connection to targeting a "suspect group" of criminals with the purpose of forcing self-incrimination. *Id.* Further, Congress has not imposed "explicit restrictions upon the use of the information obtained" other than bringing it to the Federal Prosecutor's Office. *Id.* at 66. Since the application of this exception would be an abandonment of the Fifth Amendment required records exception, it was deemed inapplicable to this case. *Id.* *See supra* note 2 and accompanying text (alluding to section 1010.420).

10. *Chabot*, 793 F.3d at 345 (fortifying their argument). Respondents "contend[ed section] 1010.420 is a record-keeping scheme with an essentially criminal purpose," targeting "an inherently suspicious class of persons." *Id.* *See also* Marchetti v. United States, 390 U.S. 39, 57 (1968) (quoting Shapiro v. United States, 335 U.S. 1 (1948)). In order to determine this, the question arises as to whether the activity is "an essentially non-criminal and regulatory area . . . ." *Id.* Additionally, in *Marchetti*, the Supreme Court held that "it can scarcely be denied that the obligations to register and to pay the occupational tax created for petitioner 'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination." *Id.* at 48. The Court reasoned in this fashion because there is a "direct and unmistakable conse-

lation of the Fifth Amendment privilege, but rather an application of the required records exception's intended purpose, and granted the IRS's summons.[11]

The Currency and Foreign Transactions Act of 1970 (the Banking Security Act) established regulations for legal offshore banking and contains a number of record-keeping and inspection provisions regarding tax evasion and money laundering.[12] One regulation within the Banking Security Act is section 1010.420, which establishes that records are to be retained by persons having financial interest in foreign accounts.[13] If privy material is requested through the Banking Security Act, the required records doctrine, an exception to the Fifth Amendment privilege against self-incrimination, grants the federal government access to potentially self-incriminatory documents if they

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quence of incriminating the petitioner . . . ." *Id.* at 57. Continuing, the Court explained, "[i]n these circumstances, we cannot conclude that his failure to assert the privilege to Treasury officials at the moment the tax payments were due irretrievably abandoned his constitutional protection." *Id.* at 50-51. *See Shapiro*, 335 U.S. at 8 (reinforcing reasoning for obtaining records). "[R]ecord-keeping and inspection requirements were designed not merely to 'obtain information' . . . but also to aid 'in the administration and enforcement of this Act and regulations, orders, and price schedules . . . .'" *Id.* The Court showed that the intended purpose of the legislation is to aid administrative agencies and perform governmental functions far beyond collecting mundane information or simply handing material to federal prosecutors. *Id. See also Chabot*, 2014 U.S. Dist. LEXIS 140656, at *7 (noting reasons for respondents' appeal). The respondents contended, in response to the summons' similarity with the necessary elements of the felony, "the required records doctrine should not be extended to a situation such as the present one, in which 'the nexus between the record-keeping requirement and the potential crime is so connected.'" *Id.*

11. *Chabot*, 793 F.3d at 341 (exemplifying Fifth Amendment Privilege's purpose).

12. *See Tax Evasion*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/tax_evasion (last visited Oct. 30, 2015) (explaining definition of tax evasion). "Tax evasion is using illegal means to avoid paying taxes. Typically, tax evasion schemes involve an individual or corporation misrepresenting their income to the Internal Revenue Service." *Id. Money Laundering*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/money_laundering (last visited Oct. 30, 2015) (explaining definition of money laundering). "Money laundering refers to a financial transaction scheme that aims to conceal the identity, source, and destination of illicitly-obtained money." *Id. See also In re* Grand Jury Subpoena, 696 F.3d 428, 432 (5th Cir. 2012) (quoting *M.H.*, 648 F.3d at 1074) (emphasizing legitimate offshore banking practices). "There is nothing inherently illegal about having or being [the] beneficiary of an offshore foreign bank account," and "nothing about having a foreign bank account on its own suggests a person is engaged in illegal activity." *Id.* Offshore bank accounts can provide operating rates, loans, and idiosyncratic policies that could provide a legal advantage to the account holder. *Id.*

13. *See supra* note 2 and accompanying text (emphasizing all six requirements of section 1010.420).

are regulatory by nature and provide benefit to "public aspects."[14]

The required records exception to the Fifth Amendment was established so that governmental entities could regulate otherwise private record-keeping information, to fulfill a governmental entity's legitimate purpose.[15] In order to maintain the integrity of the Fifth Amendment, the Supreme Court of the United States, in *Grosso v. United States*,[16] established a three-prong test to determine if "the required records exception should be applied" to a defendant who has refused to produce documents.[17] The *Grosso* test's three prongs are as follows: "(1)

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14. *See Under Seal*, 737 F.3d at 331 (upholding *Grosso* test). In regards to the *Grosso* test's third prong, information was "shared for public purposes, giving them public aspects." *Id.* at 332. *See M.H.*, 648 F.3d at 1077-78 (noting public aspect). Banking is a voluntary aspect and foreign banking is an optional activity, but once a foreign account is opened the voluntary adherence to current banking law allows the federal government to fulfill its purpose of a legitimate "regulatory scheme." *Id. See also* Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823, 825 (2014) (expanding on public aspects). "If law and legal institutions do not respond seriously to wrongdoing in business firms, they will fail to protect the public and may produce or harden inequities in the administration of justice." *Id.*

15. *See M.H.*, 648 F.3d at 1075 (noting record-keeping requirement's regulatory, noncriminal, nature). Appellant allegedly held a Swiss bank account to avoid taxes. *Id.* The United States Court of Appeals for the Ninth Circuit ruled that the required records exception met the *Grosso* standard, through its regulatory nature, general bank account information that would be "customarily kept", and "disclosure of the account information was an essential neutral act that was necessary for regulation offshore banking." *Id.*

16. 390 U.S. 62 (1968).

17. *See Chabot*, 793 F.3d at 346 (emphasizing three-prong test); *see also Grosso*, 390 U.S. at 62-69 (highlighting distinctions with case-in-chief while referring to three-prong test). Defendant was convicted for "willful failure to pay the [wagering excise] tax[,] . . . willful failure to pay the special occupational tax[,] . . . and [conspiring] to defraud the United States by evading the payment of both taxes." *Grosso*, 390 U.S. at 63. On appeal, the now petitioner claimed the only way to have paid the taxes was through the process of self-incrimination. *Id.* at 64. The Supreme Court determined that the required records exception was inapplicable in this setting because the petitioner was indeed targeted as a "suspicious class" of persons. *Id.* at 68. In this case, "the statutory obligations are directed almost exclusively to individuals inherently suspect of criminal class." *Id.* It is noted, however, that Treasury regulations seem similar to those that ought to be utilized through this exception. *Id.* at 69. By requiring the federal government to have an essentially regulatory purpose behind their inquiry the federal government establishes a check to ensure it is not targeting suspicious in nature groups. *Id. See In re Grand Jury Subpoena*, 696 F.3d at 432 (justifying court's logic). "[T]he BSA's [Banking Security Act's] record-keeping requirement is 'essentially regulatory,' the records sought are 'customarily kept,' and thus the records have assumed 'public aspects' . . . the Required Records Doctrine applies." *Id. See also In re* Grand Jury Proceedings, No. 4-10, 707 F.3d 1262, 1274 (11th Cir. 2013);

the reporting or record keeping scheme must have an essentially regulatory purpose; (2) a person must customarily keep the records that the scheme requires him to keep; and (3) the records must have public aspects."[18] If the required record exception is met, then the subpoenaed documents are required to be produced.[19]

For the account holder, this situation can force self-incrimination by simply acknowledging the missing documents because it would lead to the production of documents that would become a paper trail of their criminal activity.[20] The recording requirements within section 1010.420 do not target "inherently suspicious" groups of people to force self-convictions; rather, the recording requirements are in place to aid the IRS in their normal regulation of foreign banking.[21] Offshore banking is a legal activity and when documents are maintained correctly, no

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Smith v. Richert, 35 F.3d 300, 303 (7th Cir. 1994) (affirming logic in *Grosso* test); *Fisher*, 425 U.S. at 408 (1976) (referencing Bellis v. United States, 417 U.S. 85 (1974)) (discussing production). "Neither a partnership nor the individual partners are shielded from compelled production of partnership records on self-incrimination grounds." *Fisher*, 425 U.S. at 408 (citing *Bellis*, 417 U.S. 85).

18. *See Chabot*, 793 F.3d at 343; *Grosso*, 390 U.S. at 62 (explaining three-prong test.

19. *See In re Grand Jury Subpoena*, 696 F.3d at 432 (noting procedure); *see also In re Grand Jury Proceedings, No. 4-10*, 707 F.3d at 1268 (explaining importance of subpoena). "A government subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect." *In re Grand Jury Proceedings, No. 4-10*, 707 F.3d at 1268 (quoting United States v. Doe, 465 U.S. 605, 612 (1984)).

20. *See Doe*, 741 F.3d at 342-45 (discussing *Fisher*, 425 U.S. at 343). "In *Fisher*, the only incriminating aspects of the documents was the content not the existence." *Id.* at 343. This reiterates the point that offshore banking is not an inherently illegal activity, but the activity can become illegal, based on a bank account owner's actions. *Id.*

21. *See Marchetti*, 390 U.S. at 39 (deciding marijuana tax recordings not constitutional thus, required records exception not upheld); Leary v. United States, 395 U.S. 6, 14 (1969) (emphasizing conclusion in *Marchetti*). This is because the federal government was using the guise of a tax law to specifically target criminals by taxing the already illegal activity. *See Leary*, 395 U.S. at 14. Concluding that if the action is self-reported, the person will be arrested for criminal activity. *Id.* If the person did not report the activity, however, they were charged with a violation of the tax law as well as the original crime. *Id.* *See also* United States v. Dichne, 612 F.2d 632, 633 (2d Cir. 1979) (discussing juxtaposition of offshore banking not inherently violating laws with potential to bolster legitimate social interests). The statute cannot be said to aim at a protected "suspicious class" because conducting transactions using offshore accounts is legal. *Id.*

significant link to crime is created.[22] Further, section 1010.420 focuses on information that should be readily available, and "customarily kept," by bank account owners or beneficiaries, based on the standard bank account operator.[23] Moreover, there is a trend amongst circuit courts that offshore banking is inherently a "public activity" because it is a voluntary action that possesses rules, regulations, and procedures.[24]

In *United States v. Chabot*, the Third Circuit Court held that the required records exception to the Fifth Amendment was applicable because section 1010.420 did not violate the three-prong *Grosso* test, requiring the Chabots to comply with the IRS's request.[25] In accordance with the first prong, this Court reasoned that the IRS requested the documents in accordance with an "essentially regulatory scheme" and did not target a "suspicious class of persons."[26] Secondly, this Court maintained that the records section 1010.420 requires are those that are "customarily

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22. *See M.H.*, 648 F.3d at 1074-75 (quoting logic behind holding). "Admitting to having a foreign bank account carries no such risk [of criminal activity]." *Id.* "The act of not maintaining for inspection the information that suggests criminality, not the information itself . . . [and] that information would generally not establish a significant link in a chain of evidence tending to prove guilt." *Id.*

23. *See Doe*, 741 F.3d at 349 (quoting *M.H.*, 648 F.3d at 1074 and bolstering "customarily kept" logic). "Common sense dictates that beneficiaries keep these records in part because they need the information to access their foreign bank accounts." *Id.* The court in *Doe* stated:

> The amount of money in the account is relevant to most foreign bank account holders in that many people are regularly forced to assess prospective purchases against the balance of their accounts. Most people check a bank account before making a major purchase . . . even a person of great wealth.

Id. at 350.

24. *See supra* notes 1, 14 and accompanying text (addressing public aspects); *see also Chabot*, 793 F.3d at 349 (quoting *Smith*, 35 F.3d 300 at 303) (clarifying term voluntary). "A statute that merely requires a taxpayer to maintain records necessary to determine his liability for personal income tax is not within the scope of the required-records doctrine . . . . [because] the decision to become a taxpayer cannot be thought voluntary . . . [as] almost anyone who works is a taxpayer, along with many who do not." *Smith*, 35 F.3d at 303.

25. *Chabot*, 793 F.3d at 349 (stating Court's holding). "[Section] 1010.420 is essentially regulatory, requires account owners to retain records that they customarily keep, and requires of retention of records that have public aspects, we will affirm the District Court's grant of the IRS's petition." *Id.*

26. *Id.* at 346 (emphasizing Court's reasoning). "'[B]ank records can be very important . . . for a lot of things [that] you might want to investigate about a person.'" *Id.* (agreeing with part of federal government's oral argument) (final alteration in original). Further, the Court proclaimed, "Just because some of these things have criminal aspects does not mean that § 1010.420's purpose is essentially criminal." *Id.*

kept."[27] Lastly, this Court agreed with several other circuits that proclaimed civil "regulatory schemes" automatically have "public aspects."[28] It emphasized, however, that the voluntary action of opening a foreign bank account also effectively constitutes a waiving of their Fifth Amendment rights.[29]

This Court was correct to apply the *Grosso* test to this case to determine whether the required records exception should apply.[30] The Fifth Amendment's required records exception is

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27. *Id.* at 347 (quoting procedure). The Court stated:

> Section 1010.420 mandates that owners and beneficiaries of foreign accounts keep the following information accessible for five years: (1) the name on the account; (2) the account number; (3) the name and address of the bank or person with whom the account is maintained; (4) the account type; and (5) the maximum annual account value.

Id. The name on the account, the number, the address, and the type of account are all "customarily kept" for normal regulatory reasons. *Id.* Further, the Court noted that the maximum annual account balance is another way of phrasing regular account balances, which is essential for taxation purposes. *Id.* Thus, the compliance with these 5 elements is necessary for the "accountholder . . . to access funds" and "account owners typically keep these numbers on record." *Id.*

28. *Id.* at 348 (emphasizing public aspects). "Records kept . . . automatically have 'public aspects' . . . ." *Id.*

29. *Id.* at 348 (adopting other circuit court holdings and placing emphasis on voluntary actions). "The voluntary choice to engage in an activity that imposes record-keeping requirements under a valid civil regulatory scheme carries consequences, perhaps the most significant of which . . . is the possibility that those records might have to be turned over upon demand, notwithstanding any Fifth Amendment Privilege." *Id.* at 345 (noting decisions by United States Court of Appeals for Second, Fourth, Fifth, Seventh, Ninth, Eleventh Circuits). Six circuits have adopted the *Grosso* test for section 1010.420. *Id.*

30. *See Grosso*, 390 U.S. at 67-68 (citing Supreme Court); 31 C.F.R. § 1010.420 (2015) (noting all five elements to section 1010.420); *see also* United States v. Chen, 952 F. Supp. 2d at 329 (employing similar reasoning and citing *Grosso*). Another circuit court application of the *Grosso* test:

> The premises of the doctrine, as it is described in *Shapiro*, are evidently three: first, the purposes of the United States' inquiry must be essentially regulatory; second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and third, the records themselves must have assumed 'public aspects' which render them at least analogous to public documents.

Chen, 952 F. Supp. 2d at 329 (quoting *Grosso*, 390 U.S. 67-68) (emphasis omitted) (internal quotation marks omitted). *See also id.* at 330 (reinforcing similar reasoning in other district). The *Chen* court used current trends and other court applications reaching logical conclusions:

> The recordkeeping provisions of the Bank Secrecy Act, 31 U.S.C. § 5311, fall within the required records exception to the Fifth Amendment. *United States v. Miller*, 425 U.S. 435, 439, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976); *accord In re Special Feb. 2011–1 Grand Jury Sub-*

used to protect a "suspect group of individuals" from the federal government's targeting them; thus, preventing or ceasing alleged 'suspicious' criminal activity.[31] Actively, many circuit courts are hearing cases of this nature and utilizing the *Grosso* test to determine the applicability of the exception; applying similar tests across circuits provides accurate and consistent results across the country.[32]

The Third Circuit correctly concluded, through use of the *Grosso* test, that a "regulatory scheme" was established, proving that the Chabots were not targeted as members of a "suspect group."[33] Under the final two prongs, requesting 'customarily

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> *poena Dated Sept. 12, 2011*, 691 F.3d 903, 909 (7th Cir.2012) ("We need not repeat the Ninth Circuit's thorough analysis [in *In re M.H.*, 648 F.3d 1067 (9th Cir.2011), *cert. denied sub nom. M.H. v. United States*, ––– U.S. ––––, 133 S.Ct. 26, 183 L.Ed.2d 676 (2012)], determining that records under the Bank Secrecy Act fall within the exception."); *In re M.H.*, 648 F.3d 1067 (noting that a witness may not invoke the Fifth Amendment in support of her refusal to hand over subpoenaed documents where those documents fall within the required records exception). In *United States v. Miller*, 425 U.S. 435, 96 S.Ct. 1619, the Supreme Court affirmed that "the recordkeeping requirements of the Bank Secrecy Act had been held to be constitutional on their face in [*California Bankers Ass'n v. Shultz*, 416 U.S. 21, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974)]." *Miller*, 425 U.S. at 439, 96 S.Ct. 1619.

Id. (italics in original). This current trend of analysis toward the Bank Secrecy Acts that possess regulatory purposes is to apply the required records doctrine. *Id.*

31. *See Grosso*, 390 U.S. at 68 (1968) (describing past precedent); *Shapiro*, 335 U.S. at 3 (explaining historical context). Past Supreme Court cases have dealt with gambling, illegal firearms, and direct violation of the Emergency Price Control Act. *Grosso*, 390 U.S. at 63. No Supreme Court case, however, has dealt with an activity that is not accepted as inherently criminal, such as offshore banking. *Id. See Chabot*, 793 F.3d at 345 (explaining application of suspect group classification). The Chabots were not members of a "suspect group" because they were not targeted for not specifically for evading taxes but rather for not complying with a regulatory record. *Id.*

32. See *Chabot*, 793 F.3d at 345 (noting decisions by Second, Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits). Six circuits have adopted the *Grosso* test for section 1010.420. *Id. See also Chen*, 952 F. Supp. 2d at 330 (explaining reasoning of different circuit court). "It is well established that the United States has the power to regulate offshore banking as part of its power to 'regulate Commerce with foreign Nations.' The recordkeeping requirements of the Bank Secrecy Act, moreover, fall within the required records doctrine, satisfying the three *Grosso* premises." *Id.*

33. *See Under Seal*, 737 F.3d at 334-36 (reiterating overarching purpose of section 1010.420). While records maintained under section 1010.420 are useful in aiding the IRS in criminal prosecutions, it does not negate the "essentially regulatory purpose" of keeping these records for maintenance. *Id. See also In re Grand Jury Subpoena*, 696 F.3d at 433 (quoting court's reasoning). "The Required Records Doctrine does not permit the government to require record keeping of 'wagering activities' as a

kept' information is reasonable for the IRS because it displays that their intent with the records is for governmental entities to benefit, not seek out criminal activity constituting an indisputable "public aspect."[34] Furthermore, this Court's emphasis on the voluntary nature of offshore banking and the acceptance of the terms and conditions it comes with, constitutes a waiver to the Fifth Amendment right vital to the upholding of this decision and was correctly applied.[35]

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part of a 'wagering excise tax' when generally illegal. Thus, the government may not make a run to end the Fifth Amendment and require criminals to self-report their offenses." *Id. See generally Shapiro*, 335 U.S. 1 (explaining ripple effect of self-reporting criminal activity versus regulatory activity).

34. 31 C.F.R. § 1010.420 (2015) (noting all five elements); *see M.H.*, 648 F.3d at 1076 (quoting importance of "customarily kept" prong). Circuit Judge Tallman provided:

> The information that § 1010.420 requires to be kept is basic account information that bank customers would customarily keep, in part because they must report it to the IRS every year as part of the IRS's regulation of offshore banking, and in part because they need the information to access their bank accounts. That [the] bank keeps the record on [the defendant's] behalf does not mean that [the defendant] lacks access to them or that they are records of offshore banking customers would not customarily keep. A bank account's beneficiary necessarily has access to such essential information as the bank's name, the maximum amount held in the account each year, and the account number. Both common sense and records of in camera support this assessment.

Id. See also In re Grand Jury Proceedings, No 4-10, 707 F.3d at 1274; *In re Grand Jury Subpoena*, 696 F.3d at 435-36; *Under Seal*, 737 F.3d at 337; *Smith*, 35 F.3d at 303 (utilizing parallel logic). When records directly lead to the federal government circulating data to other government agencies "for the purpose of implementing" public and economic policy the records inherently develop a "public aspect." *Smith*, 35 F.3d at 303. *But see Chabot*, 793 F.3d at 349 (addressing defendant's contention). "The Chabots contend that the absence of a licensing requirement for foreign banking necessarily means that their account records do not have public aspects." *Id.* "However . . . private activities that do not require licenses still may be subject to the required records exception." *Id.* Furthermore, the activity was already proven to possess a "public aspect" due to the inherent regulatory nature of the records and the economic necessity for their purpose. *Id.*

35. *See In re Grand Jury Subpoena*, 696 F.3d at 433 (separating voluntary and involuntary action). Circuit Judge Dennis further explained the dichotomy of voluntary and involuntary action:

> The hypothetical case in which every individual is required to maintain a record of everything he does that interests the government is remote from the case of the individual who enters upon a regulated activity knowing that the maintenance of extensive records available for inspection by the regulatory agency is one of the conditions of engaging in that activity.

If the Chabots' contention with the required records exception became good law, the precedent that would follow would instill a loophole within our current system.[36] If a defendant could use this precedent, arguing that the application of the required records exception would be an "abrogation of the Fifth Amendment," then a significant amount of evidence from bank records would become invisible to the law because those records could not be used in court because of a violation of the self-incrimination clause.[37] Had the Chabots' argument held, tax

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Id. (quoting Smith v. Richert, 35 F.3d 300, 303 (7th Cir. 1994). Furthermore, it has been established that these records are not extensive in nature but rather can be easily obtained and produced, strengthening the argument of the IRS. *Id.* "[T]he Required Records Doctrine permits 'the government . . . [to] have means over an assertion of the Fifth Amendment [privilege of self-incrimination] to inspect the records it requires an individual to keep as a condition of voluntarily participating . . . .'" *Id.* (quoting *In re* Special February 2011-1 Grand Jury Subpoena Dated September 12, 2011, 696 F.3d 903, 908-09 (7th Cir. 2012)) (alternations in original). *See also Under Seal*, 737 F.3d at 333 (finding voluntary action pivotal in decision). "The Court has determined that it does not shield production of private papers voluntarily prepared or prepared by a Third Party." *Id.*

36. *Chabot*, 793 F.3d at 342 (eliminating potential loophole). "[C]ontinued application of the required records exception is vital in order to protect the government's legitimate [public] interest . . . . [And the] State's public purposes unrelated to the enforcement of its criminal laws." *Id.* at 343 (citations omitted).

37. *Id.* at 344 (delineating Chabots' argument). "These records serve legitimate noncriminal purposes because the government uses the data for tax collection, development of monetary policy, and conducting intelligence activities" *Id.* These policies are all vital to the foundation of the American economy and public policy. *Id.* Furthermore, it is "unlikely" based on precedent that the "government could abrogate the Fifth Amendment for any or all failure to report crimes." *Id. See also Fifth Amendment at Trial*, *supra* note 1, at 591 (emphasizing importance and process of self-incrimination). The standards for determining self-incrimination and the application of its use as a defense:

> In *Hoffman v. United States*, [341 U.S. 479, 486-87 (1951)] the Supreme Court held that compelled testimony is self-incriminating if reasonable cause exists to believe that the testimony would either support a conviction or provide a link in the chain of evidence leading to a conviction. To be self-incriminating, the compelled answers must pose a "substantial and 'real,' and not merely [a] trifling or imaginary, hazard" of criminal prosecution. The Fifth Amendment does not, however, protect testimony that might become incriminating through future conduct . . . . The Fifth Amendment guarantees criminal defendants an unqualified right to choose whether to testify at trial and at sentencing. If a defendant chooses not to testify, the Fifth Amendment generally prohibits the prosecutor, trial judge, and counsel for a codefendant from making direct adverse comments about the defendant's decision not to testify . . . . The prosecutor may comment on the defendant's failure to testify only if invited by the actions of the defense counsel . . . . A criminal defendant has a right to a jury instruc-

evasion and money laundering could become untraceable by using this newly created loophole of the Fifth Amendment privilege required records exception.[38] Providing the utilization of a Fifth Amendment argument to become excused from regulatory reporting requirements and to hide illegal activity circumvents the purpose of the American legal system.[39]

In *United States v. Chabot*, the Third Circuit Court of Appeals considered whether the account records, under section 1010.420, that the IRS requested met the standards for the required records exception to the Fifth Amendment. This Court correctly held that the records met the standard of review based on the three-prong *Grosso* test, and ultimately compelled the Chabots to produce these documents to the IRS. By stipulating that the standard had been met, this Court ultimately cured a potential loophole that could have exempted foreign bank account owners from reporting their records to the IRS. Had the Chabots' defense held, a plethora of white-collar crimes could

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> tion that no inference of guilt may be drawn from the choice not to testify. [A] court may give a "no inference of guilt" jury instruction even though the defendant objects to the instruction for strategic reasons.

Id. at 597-602 (emphasis in original) (second alteration in original) (footnotes omitted).

38. *Chabot*, 793 F.3d at 349 (disclaiming Chabots' claim). "The Chabots have failed to raise valid policy or other reasons as to why their accounts should not be included in the required records exception to the Fifth Amendment Privilege." *Id.* *See also M.H.*, 648 F.3d at 1069 (creating hypothetical example using facts of case). The facts presented are that the defendant held "Swiss bank accounts [allegedly] for evading taxes." *Id.* Further, the defendant refused to comply with the IRS's Bank Secrecy Act regulations and refused to submit subpoenaed documents, violating section 1010.420. *Id.* at 1071. The defendant was likewise worried that if the IRS received accurate bank statements, the defendant could face charges for past misreporting of documents or current tax evasion. *Id.* The defendant, however, claimed his Fifth Amendment right against self-incrimination. *Id.* If this Court had ruled in the defendant's favor and claimed the Fifth Amendment Privilege required records exception was not applicable and the documents were from being produced, the defendant would have successfully hidden the paper trail of evidence. *Id.* at 1078. This would create a situation where instead of protecting individual liberties for U.S. citizens, criminals could find a metaphorical black hole for their paper trail of criminal activity creating havoc for the public. *Id.*

39. Chabot, 793 F.3d at 349 (exposing defendants' argument). *See generally* O'Neill, *supra* note 1 (reinforcing pivotal role of Fifth Amendment); Weaver, *supra* note 1 (reiterating self-incrimination clause).

have been committed under the guise of the Fifth Amendment right to protect oneself from self-incrimination.

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