No. 13-301

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL CLARKE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondents do not defend the broad rule applied by the Eleventh Circuit, under which a district court must provide an objector to an Internal Revenue Service (IRS) summons with an opportunity to examine IRS agents whenever the objector makes an unsupported allegation of bad faith. Respondents now agree that a district court may deny a request to examine IRS agents when the summons objector makes only "conclusory" or "speculative" allegations of improper purpose. Resp. Br. 19. Although respondents attempt to recharacterize the court of appeals' decision as consistent with that concession, their efforts are unavailing. The Eleventh Circuit stated that a summons opponent is *not* required "to provide factual support for an allegation of an improper purpose" in order to question IRS agents at an evidentiary hearing. Pet. App. 5a. That holding conflicts with numerous deci-

sions of other circuits, and it warrants reversal by this Court.

Respondents explain that a summons opponent is entitled to a fair opportunity to contest the summons, and that districts courts have occasionally allowed examination of IRS officials. Those arguments are correct as far as they go, but neither is responsive to the government's criticisms of the court of appeals' decision. The government has consistently recognized that a summons opponent is entitled to challenge the enforcement of an IRS summons on any appropriate ground, and that a district court may allow examination of IRS officials when the court finds reason to infer that the government's purpose may be improper. The only issue before this Court, however, is whether a summons opponent is *always* entitled to examine IRS officials based on a conclusory allegation of bad faith. The Court should answer that question in the negative.

A. Respondents Mischaracterize The Court Of Appeals' Holding

1. The court of appeals squarely held that a district court may not deny a summons objector's request to examine IRS officials about their purpose in issuing a summons, even when the objector's request is based on nothing more than unsupported and conclusory allegations. The district court in this case refused respondents' request to examine IRS officials, concluding that their allegations of improper purpose were "mere conjecture unsupported by evidence." Pet. App. 14a; see *id.* at 17a-19a. In reversing that decision, the court of appeals did not disagree with the district court's assessment of the factual support (or lack thereof) for respondents' allegations. The court

of appeals instead held that, notwithstanding respondents' failure to identify pre-existing evidence of improper IRS motives, respondents were entitled to examine IRS officials in order "to obtain * * * facts" supporting their allegations. *Id.* at 5a.

Respondents do not defend that holding. On the contrary, respondents now concede that a district court may deny a request for a hearing to examine IRS officials when a summons objector "assert[s] conclusory, implausible, or speculative grounds that the government is acting in bad faith." Resp. Br. 19. Respondents suggest, however, that the court of appeals ruled in their favor because it found their allegations of improper purpose to be "substantial." *Id.* at i. Nothing in the court of appeals' opinion supports that characterization. Indeed, the court of appeals specifically rejected a substantiality requirement as unduly restrictive, holding that district courts may not "requir[e] the taxpayer to provide factual support for an allegation of an improper purpose" before allowing the summons opponent to examine IRS officials. Pet. App. 5a.[1]

Respondents similarly mischaracterize (Br. 24-25 & n.17) the Eleventh Circuit's previous holding in *Nero Trading, LLC* v. *U.S. Dep't of Treasury, IRS*, 570 F.3d 1244, 1249 (2009). Respondents emphasize (see

[1] Respondents also fail to grapple with the court of appeals' separate holding that they were not entitled to discovery because "the full 'panoply of expensive and time-consuming pretrial discovery devices may not be resorted to as a matter of course and on a mere allegation of improper purpose.'" Pet. App. 5a n.3 (quoting *Nero Trading, LLC* v. *U.S. Dep't of Treasury, IRS*, 570 F.3d 1244, 1249 (11th Cir. 2009)). That explanation for denying respondents' discovery request would make no sense if respondents had made a substantial showing of an improper IRS purpose.

Br. 24) the statement in *Nero Trading* that "the scope of any adversarial hearing in this area is left to the discretion of the district court." 570 F.3d at 1249. But respondents ignore the context in which that statement appeared.

The court in *Nero Trading* "refuse[d] to create a rule that would require [a] taxpayer to allege a factual background" for a charge of improper purpose "before he is entitled to" "question the Service concerning its reasons for issuing the summonses." 570 F.3d at 1250; see *id.* at 1249 ("[A]n allegation of improper purpose is sufficient to trigger a limited adversary hearing where the taxpayer may question IRS officials concerning the Service's reasons for issuing the summons.") (quoting *United States* v. *Southeast First Nat'l Bank*, 655 F.2d 661, 667 (5th Cir. 1981)). The statement on which respondents rely simply recognized that the district court at such a hearing may constrain the *scope* of an objector's questioning of IRS officials. The court in *Nero Trading* made clear, however, that a summons opponent is entitled to question those officials about their motives for issuing the summons, even if the opponent has proffered no factual support for his allegation of improper purpose.

2. As discussed in the government's certiorari-stage filings, the Eleventh Circuit's rule conflicts with the rules adopted by every other court of appeals with jurisdiction over IRS summons-enforcement proceedings. See Pet. 15-19; Cert. Reply Br. 5-8. Respondents contend that the First, Fifth, and Ninth Circuits "follow a similar approach," Resp. Br. 19-20, to that applied below. That is incorrect.

Respondents rely (Br. 22) on the First Circuit's decision in *United States* v. *Salter*, 432 F.2d 697 (1970).

But, as discussed in the government's certiorari-stage reply brief (at 6-7), the decision in *Salter* no longer states the applicable rule in the First Circuit. *Salter* involved an allegation that the IRS had issued a summons for an improper criminal-investigation purpose. 432 F.2d at 698. As our opening brief explains (at 17-18), however, Congress's subsequent enactment of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324, made irrelevant any objection that a summons was issued for the purpose of investigating possible criminal liability. In post-TEFRA decisions, the First Circuit has clarified that a district court may deny a summons objector's request to examine IRS officials when the objector alleges an improper purpose but provides no evidentiary support. *Sugarloaf Funding, LLC* v. *U.S. Dep't of Treasury*, 584 F.3d 340, 351 (2009); *Copp* v. *United States*, 968 F.2d 1435, 1438 n.1 (1992), cert. denied, 507 U.S. 910 (1993).

The Fifth Circuit has taken the same approach. Compare *Southeast First Nat'l Bank*, 655 F.2d at 664-668 (holding pre-TEFRA that a summons objector was entitled to examine IRS agents based on an allegation of an improper criminal-investigation motive) with *Zugerese Trading LLC* v. *IRS*, 336 Fed. Appx. 416, 418 (2009) (holding that the district court did not abuse its discretion by forgoing an evidentiary hearing despite summons objectors' claim that a hearing was necessary to support their assertion that the IRS had issued the summons for an improper purpose), and with *Mitchell* v. *Thomas*, 239 Fed. Appx. 56, 57 (2007) (holding post-TEFRA that a summons objector who had "provided no support for his claim that the summons was issued in bad faith" was not entitled to

examine IRS officials); see also *In re EEOC*, 709 F.2d 392, 397-399 (1983) (noting that pre-TEFRA Fifth Circuit rule granting opportunity to examine IRS agents based on bare allegation of bad faith had been "legislatively modified"). Indeed, the Eleventh Circuit has acknowledged the Fifth Circuit's understanding that TEFRA changed the legal landscape with respect to this question, while noting its own disagreement with the Fifth Circuit's conclusion. *Nero Trading*, 570 F.3d at 1250 n.4 (citing *In re EEOC*, 709 F.2d at 398-399). The Ninth Circuit's pre-TEFRA approach, see *United States* v. *Church of Scientology*, 520 F.2d 818, 824-825 (1975), likewise no longer applies, see *Fortney* v. *United States*, 59 F.3d 117, 121 (9th Cir. 1995) (holding that "[a] taxpayer is not entitled to an evidentiary hearing" "at which he could examine witnesses and inquire into the IRS' good faith" "unless he or she presents some 'minimal amount of evidence' to support a contention of a lack of good faith") (quoting *United States* v. *Stuckey*, 646 F.2d 1369, 1372 (9th Cir. 1981), cert. denied, 455 U.S. 942 (1982)).

B. Respondents Were Provided A Sufficient Opportunity To Challenge The Summonses As Required By *United States* v. *Powell*

Rather than defend the court of appeals' holding, respondents argue that (1) a summons objector is entitled to *some* opportunity to challenge a summons at an adversary hearing, and (2) a district court may *sometimes* allow a summons objector to examine IRS officials about their motives for issuing a summons. The government agrees with both of those propositions. Neither singly nor in combination, however, do

they support the broad rule adopted by the court below.

1. Respondents argue "that a taxpayer should have the opportunity for an 'adversary hearing' to test whether the IRS is seeking to abuse the district court's process through improper enforcement of a summons." Resp. Br. 14-15. That proposition is not in dispute. As the government has explained (*e.g.*, Pet. Br. 18-22), "[i]n any IRS summons-enforcement proceeding, an objector is entitled to an adversary hearing where it 'may challenge the summons on any appropriate ground.'" *Id.* at 20 (quoting *United States* v. *Powell*, 379 U.S. 48, 58 (1964)).

As respondents explain (see Br. 12-15), the IRS may enforce a contested summons only by invoking the power of a district court. Respondents are also correct (Br. 13-14) that a district court should not enforce a summons if doing so would be an abuse of the court's process. Those principles are consistent with the applicable statutory provisions, see 26 U.S.C. 7402(b), 7604(a); with this Court's holding in *Powell*, 379 U.S. at 51-52, 57-58; and with the government's arguments in this case, see Pet. 11; Cert. Reply Br. 4-5; Pet. Br. 18-22. Respondents' hyperbolic assertion that the government seeks "unchecked latitude to require taxpayers [to] submit to intrusive demands," Resp. Br. 28, is therefore baseless.

The judiciary's check on the IRS's summons authority is governed by this Court's decision in *Powell*. In order to obtain enforcement of a summons, the IRS must establish that the summons was issued in good faith and in compliance with applicable statutory re-

quirements. *Powell*, 379 U.S. at 57-58.[2] That is precisely the type of "check against Executive Branch overreach" that is contemplated by the decisions on which respondents rely. Resp. Br. 13-14 (citing *SEC* v. *Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 128 (3d Cir. 1981) (noting that a request for enforcement of a Securities and Exchange Commission subpoena should comply with the standards announced in *Powell*), and *United States* v. *Security State Bank & Trust*, 473 F.2d 638, 642 (5th Cir. 1973) (noting that, in order to obtain enforcement of a Department of Agriculture subpoena, the government must sustain a minimum burden akin to that established in *Powell* of demonstrating that the subpoena was issued for a lawful purpose)). When the IRS establishes that "the summons meets statutory requirements and [was] issued in good faith, as [the Court] defined that term in [*Powell*], compliance [with the summons] is required," *United States* v. *Stuart*, 489 U.S. 353, 356 (1989), unless the summons objector satisfies its "burden of showing an abuse of the court's process," *Powell*, 379 U.S. at 58.

Respondents argue that the government seeks to "transform summons enforcement into an *ex parte* affair." Resp. Br. 10; see *id.* at 15-18. That assertion is also baseless. An "ex parte" action is one undertaken on behalf of one party "without notice to or argument from the adverse party." *Black's Law Diction-*

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[2] Under *Powell*, the IRS must establish that the investigation will be conducted pursuant to a legitimate purpose, that the summons inquiry may be relevant to that purpose, that the information sought is not already in the possession of the IRS, and that the administrative steps required by the Internal Revenue Code have been followed. 379 U.S. at 57-58.

ary 657 (9th ed. 2009). Respondents received notice of the summonses and (when they refused to comply) subsequently received notice of the IRS's enforcement action. Respondents filed two pleadings arguing that the summonses should not be enforced. Pet. App. 64a-84a; J.A. 46-56. Nothing about the summons-enforcement proceedings in this case was ex parte.

Respondents could have requested an adversary hearing at which they could have argued the legal positions set forth in their pleadings and presented any evidence in their possession. Respondents never requested that type of hearing, instead insisting that, in order for such a "proceeding to be meaningful," respondents must have an opportunity to examine IRS agents and obtain discovery from the IRS. See Respondents' and Intervenors' Reply in Supp. of Mot. for Summ. Dismissal or Scheduling of Pretrial Conf., No. 11-mc-80456, Docket entry No. 22, at 8 (S.D. Fla. Nov. 17, 2011). In this Court, respondents repeat their contention that an adversary hearing is "meaningless" if it does not include examination of IRS officials. Resp. Br. 2, 17-18.

In defining the criteria used to establish the IRS's good faith, the Court in *Powell* specifically rejected the argument that such an approach would "make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered." 379 U.S. at 58. The Court emphasized that a taxpayer is entitled at an adversary hearing to "challenge [a] summons on any appropriate ground." *Ibid.* (quoting *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964)). Nothing in *Powell* suggests, however, that a summons objector is entitled to engage in a fishing expedition about the

motives of IRS agents in the absence of pre-existing evidence that raises an inference of improper purpose.

Finally, respondents assert that the Eleventh Circuit requires examination of IRS officials only when such examination "would provide the sole realistic opportunity for a taxpayer to acquire evidence in support of his allegation of bad faith." Resp. Br. 24 n.17. No such limitation appears in the court of appeals' decision. Nor would such a limitation be consistent with either the statutory scheme governing IRS summons enforcement or the rules generally governing enforcement of analogous administrative subpoenas. In any event, under respondents' overall view of the case, such a limitation would in practice impose no constraint at all, since respondents also assert that "[e]vidence of bad faith will almost always be exclusively in the possession of the government." *Id.* at 2.

2. Respondents argue that "[t]he government's proposed rule" would never "allow[]" a summons opponent to question IRS officials unless the objector first "produce[d] its own significant affirmative evidence." Resp. Br. 16. The issue presented in this case is whether a summons objector is *entitled* to question IRS officials based on an unsupported allegation of bad faith, so that a district court's refusal to allow such questioning can be reversed as an abuse of discretion. Under the government's proposed rule (adopted in every court of appeals with jurisdiction over summons-enforcement proceedings except the Eleventh Circuit), a district court may deny an objector's request for examination when the district court finds no basis to infer the possibility of an improper purpose. The government has consistently acknowl-

edged (Pet. 13; Cert. Reply Br. 9; Pet. Br. 21), however, that a district court has discretion to allow a summons opponent to question IRS agents when it believes that a legitimate dispute exists and views such questioning as an appropriate means of clarifying the agency's motives.

Thus, while respondents cite cases outside the Eleventh Circuit in which district courts have permitted examination of IRS officials (see Resp. Br. 21-24), those decisions actually support the government's position. District courts in those other circuits have proved "amply capable" (*id.* at 23) of protecting the rights of taxpayers who "develop facts from which a court might *infer* a *possibility* of some wrongful conduct by the Government." *United States* v. *Kis*, 658 F.2d 526, 540 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982). It is the Eleventh Circuit, not the government, that gives "insufficient credit to the management capabilities of the district courts." Resp. Br. 22.

C. The Court Of Appeals' Expansive Rule Is Inconsistent With This Court's Treatment Of IRS Summonses

As the government's opening brief explains (at 16-18, 21-26), the Eleventh Circuit's rule is inconsistent in a number of ways with this Court's treatment of IRS summonses.

1. Congress intended summons-enforcement proceedings to "be summary in nature." *Stuart*, 489 U.S. at 369 (quoting S. Rep. No. 494, 97th Cong., 2d Sess. 285 (1982)). The purpose of issuing and enforcing a summons is "to inquire," not to accuse a taxpayer of wrongdoing or to determine any taxpayer's liability. *United States* v. *Bisceglia*, 420 U.S. 141, 146 (1975). By requiring the IRS to apply to a federal court for

enforcement of a summons, Congress gave summons recipients "[s]ubstantial protection" against abuse of the IRS's broad investigative authority. *Ibid.*; see *Reisman*, 375 U.S. at 449. The Court has made clear, however, that a district court's role does not include "oversee[ing] the [IRS's] determinations to investigate" beyond verifying that the summons was issued in good faith and in compliance with statutory requirements. *Powell*, 379 U.S. at 56; *id.*at 57-58. So long as the district court is satisfied that the IRS has established its compliance with the *Powell* factors, the court need not allow further examination of IRS agents in order to fulfill its oversight role.

2. The court of appeals' approach to IRS summons enforcement subverts the presumption of regularity afforded to official action. So long as the IRS makes the threshold showing that *Powell* requires (see note 2, *supra*), the summons is entitled to the same "presumption of regularity" that "supports the official acts of public officers" in other contexts. *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926); see *United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 10 (2001). "[I]n the absence of clear evidence to the contrary, courts presume that [government officials] have properly discharged their official duties." *Chemical Found.*, 272 U.S. at 14-15. The logical implication of that presumption is that, once the IRS makes the affirmative showing that the statute and this Court's decisions require, and a summons objector identifies no evidence that supports his allegation of bad faith, the summons may be enforced without further inquiry. The Eleventh Circuit, by contrast, treats an objector's *un*supported allegation of bad faith as suffi-

cient in every case to impose upon the IRS a duty of further explanation.

3. The Eleventh Circuit's automatic-examination rule is inconsistent with this Court's treatment of analogous administrative and grand jury subpoenas. See Pet. Br. 23-26. The Court has long recognized that a federal agency may issue judicially enforceable subpoenas in order to obtain information relevant to their statutory responsibilities. See *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950); *Oklahoma Press Publ'g Co.* v. *Walling*, 327 U.S. 186, 217 (1946). The Court has also held that one who opposes a subpoena bears the burden of establishing a valid objection to its enforcement. See *Morton Salt Co.*, 338 U.S. at 653-654 (explaining that objector bore the burden of "present[ing] evidence" and "mak[ing] a record" that an administrative order imposed an unreasonable burden); *Oklahoma Press Publ'g Co.*, 327 U.S. at 218 (noting that objectors did not carry their burden because their pleadings did not "set forth" "sufficient reason" not to enforce subpoena).

With respect to grand jury subpoenas, respondents argue that district courts have sometimes "allowed challenges to grand jury subpoenas to go forward when it appears that the government is misusing the grand jury." Resp. Br. 28. That is certainly true, just as it is true that some district courts have appropriately permitted examination of IRS agents when it appeared that the IRS might be misusing its summons authority. Respondents identify no case, however, in which a court of appeals has held that a district court abused its discretion by denying a request to examine grand jurors (or prosecutors) based on a subpoena

recipient's bare allegation that the government had issued the subpoena for an improper purpose.

To be sure, district courts have discretion to "conduct hearings or review transcripts of the grand jury proceedings" in response to allegations of improper purpose. Resp. Br. 29 (citing cases). District courts also have discretion, however, to enforce grand jury subpoenas without examining grand jurors or prosecutors when the district court finds no reason to infer wrongdoing.[3] Respondents rely (Br. 29) on several court of appeals decisions that have nothing to do with quashing subpoenas. Those decisions instead addressed whether evidence obtained pursuant to a grand jury subpoena may be used in a later trial, and none of them considered a subpoena target's request to examine grand jurors or prosecutors. See *United States* v. *Badger*, 983 F.2d 1443, 1458 (7th Cir.), cert. denied, 508 U.S. 928, and 510 U.S 820 (1993); *United States* v. *Jenkins*, 904 F.2d 549, 559 (10th Cir.), cert. denied, 498 U.S. 962 (1990); *United States* v. *Sellaro*, 514 F.2d 114, 122 (8th Cir. 1973), cert. denied, 421 U.S. 1013 (1975).

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[3] In attempting to distinguish this Court's holding in *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292 (1991), respondents rely on the Court's statement that "a court may be justified in a case where unreasonableness is alleged in requiring the Government to reveal the general subject of the grand jury's investigation before requiring the challenging party to carry its burden of persuasion." Resp. Br. 29-30 n.19 (quoting *R. Enters.*, 498 U.S. at 302). That statement merely confirms the government's point that district courts have discretion to determine what steps are appropriate in response to an allegation of bad faith. The IRS is already required, moreover, to "reveal the general subject of [its] investigation," *ibid.*, before it is entitled to have a summons enforced.

The First Circuit's decision in *In re Grand Jury Proceedings*, 814 F.2d 61 (1987) (cited at Resp. Br. 30), supports the government's position in this case. That court noted both that "grand jury proceedings are granted a presumption of regularity," and that "courts have looked at the circumstances of particular cases" raising challenges to the use of grand jury evidence "in deciding the kind of showing that they would require either from the party challenging the grand jury or from the government." 814 F.2d at 71. In eschewing a bright-line rule like the one applied by the Eleventh Circuit in this case, the First Circuit relied on earlier decisions in which it had refused to require the government to make a special showing, or had declined to "open[] up the grand jury proceedings to the movant," based on "unsubstantiated" allegations or "generalized suspicion[s]." *Id.* at 71-72 (citing *In re Pantojas*, 628 F.2d 701 (1st Cir. 1980), and quoting *United States* v. *Doe*, 455 F.2d 1270, 1274-1275 (1st Cir. 1972)). The Eleventh Circuit should have applied a similar rule in the analogous context of this case.

Respondents also miss the point in arguing that other agencies' subpoena powers are "quite different from that of the IRS," and that there are "structural distinctions between the grand jury and the IRS." Resp. Br. 28, 32. The government has never contended that an IRS summons must be treated exactly as those types of subpoenas would be. See Pet. Br. 25 ("To be sure, the IRS's summons authority is not directly governed by this Court's decisions addressing the subpoena power of grand juries or other federal agencies."). This Court has repeatedly stated, however, that the rules governing enforcement of adminis-

trative and grand jury subpoenas provide helpful analogues in determining what rules should govern enforcement of IRS summonses. *United States* v. *Euge*, 444 U.S. 707, 712 (1980); *Bisceglia*, 420 U.S. at 147-148; *Powell*, 379 U.S. at 57.

D. This Court Should Reverse The Judgment Of The Court Of Appeals And Remand For Application Of The Correct Legal Standard

1. Respondents argue at length (Br. 34-42) that their allegations of improper purpose were supported by sufficient evidence to warrant an opportunity to examine IRS officials. Because the court of appeals did not consider whether respondents had offered any evidentiary support for their allegations, see Pet. App. 4a-5a, those arguments are irrelevant to the question presented in this Court. The court of appeals' holding that no such evidentiary support is necessary should be reversed; respondents may then argue on remand that they are entitled to examine IRS officials under the appropriate legal standard.

Respondents contend (Br. 34-42) that the IRS had (or might have had) two improper purposes for issuing the summonses: (1) to circumvent Tax Court discovery rules in violation of the Internal Revenue Manual (IRM) and (2) to retaliate for respondents' refusal to extend the statute of limitations.[4] The district court correctly rejected those arguments. The court held

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[4] It is generally recognized that "[t]he Internal Revenue Manual does not have the force of law and does not confer rights on taxpayers." *Fargo* v. *Commissioner*, 447 F.3d 706, 713 (9th Cir. 2006); see *Matter of Carlson*, 126 F.3d 915, 922 (7th Cir. 1997), cert. denied, 523 U.S. 1060 (1998); *Tavano* v. *Commissioner*, 986 F.2d 1389, 1390 (11th Cir. 1993); *Marks* v. *Commissioner*, 947 F.2d 983, 986 n.1 (D.C. Cir. 1991).

that respondents' circumvention argument was "incorrect as a matter of law," and it explained that respondents had "offer[ed] no evidence to support [their] suspicions that this enforcement proceeding violates the IRM[]." Pet. App. 15a, 19a. The court also held that respondents' retaliation allegation was "mere conjecture unsupported by evidence" and "a naked assertion." *Id.* at 14a.

On appeal, the Eleventh Circuit noted respondents' allegation that "[o]ne of the reasons the IRS may have issued the summonses * * * was solely in retribution for [taxpayer] Dynamo's refusal to extend a statute of limitations deadline." Pet. App. 5a. The court stated that, "[i]f the IRS issued the summonses only to retaliate against Dynamo, that purpose 'reflect[s] on the good faith of the particular investigation,' and would be improper." *Ibid.* (brackets in original) (quoting *Powell*, 379 U.S. at 58). The court further held that, "[u]nder [its] precedents, [respondents] were entitled to a hearing to explore their allegation of an improper purpose." *Ibid.* The court of appeals did not address whether any evidence supported that allegation because (as discussed above) the court held that a taxpayer cannot be required "to provide factual support for an allegation of an improper purpose" before he is entitled to examine IRS officials. *Ibid.* The court of appeals did not mention respondents' separate allegation concerning possible circumvention of Tax Court discovery rules (beyond noting that respondents had alleged "at least four improper purposes," *id.* at 4a-5a).

In the Court, respondents offer a lengthy argument (Br. 34-41) in support of their circumvention allegation, and a more truncated argument (Br. 41-42) in

support of their retaliation theory. The government disagrees with the substance of those arguments, as explained in our pleadings in the district court and court of appeals (and as noted in our opening brief, see Pet. Br. 27-28 n.4). Those issues, however, are not properly presented for resolution by this Court. If the Court clarifies that a district court does not abuse its discretion by denying a summons opponent's request to examine IRS officials based on unsupported allegations of improper purpose, the court of appeals can consider on remand whether respondents offered sufficient evidence of improper motive to entitle them to examine the IRS agents under the correct standard.

2. Respondents discount (see Br. 22-24) the government's concern that the Eleventh Circuit's rule would undermine Congress's intent that summons-enforcement proceedings be summary in nature. Respondents contend that the government has "not point[ed] to anything to suggest that tax enforcement has been unduly hindered in those circuits" where a bare allegation of improper purpose can trigger a right to an evidentiary hearing. *Id.* at 22. As discussed above, however, the Eleventh Circuit is the *only* court of appeals to have adopted that approach. Extension of that rule to the rest of the country would have an evident potential to protract and impede summons-enforcement proceedings. The National Taxpayer Advocate's annual report to Congress identified 117 summons-enforcement cases decided during the one-year period from mid-2012 to mid-2013 alone. See 1 Nat'l Taxpayer Advocate, *2013 Annual Report to Congress* 362, 365-370 (Dec. 31, 2013), http://www.taxpayeradvocate.irs.gov/2013-annual-report/full-

2013-annual-report-to-congress/. Summons opponents should not be permitted to turn each such proceeding into a mini-trial on the basis of a conclusory allegation.

Respondents' circumvention theory illustrates the improper incentives the Eleventh Circuit's approach creates. The summonses in this case were issued before the IRS issued its Final Partnership Administrative Adjustment (FPAA).[5] See J.A. 25; Pet. App. 11a-12a, 21a-22a, 32a-33a, 43a-44a, 54a-55a). This Court has recognized that "[t]he rights and obligations of the parties bec[o]me fixed when [a] summons [i]s served." *Couch* v. *United States*, 409 U.S. 322, 329 n.9 (1973). As of the dates the summonses were issued, respondents had a legal obligation to provide the information requested.

Respondents' circumvention argument is premised on the fact that the IRS first sought judicial enforcement of the summonses after Dynamo filed its petition in the Tax Court in February 2011. See Resp. Br. 35. Respondents contend that, even if the summonses were originally issued for a permissible purpose, at a time when no pertinent litigation was pending, the district court could nevertheless treat the summonses as an improper effort to circumvent Tax Court discov-

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[5] Respondents argue (Br. 3, 40) that the real date of the FPAA should be viewed as August 11, 2010, rather than as December 28, 2010. That is incorrect. August 11, 2010, is the date when the examining agent signed her proposed changes to the partnership returns being examined. J.A. 68. That interim step did not complete the decision-making process of the IRS as a whole, however, and it therefore did not render the FPAA final. The FPAA ultimately was signed by the Territory Manager on December 28, 2010 (J.A. 66) and was mailed on that date (J.A. 59). Under the Internal Revenue Code, the legally significant FPAA date is its mailing date. See 26 U.S.C. 6225(a), 6226(a), 6229(d) and (f).

ery rules. See *id.* at 40-41. This Court has characterized the relevant inquiry, however, as whether the summons was *issued* for an improper purpose. See *Powell*, 379 U.S. at 58; see also *Ash* v. *Commissioner*, 96 T.C. 459, 468 (1991) (holding that administrative summonses issued by the IRS before the filing of a Tax Court petition "do not pose a threat to the integrity of [the Tax Court's] Rules").

Respondents' approach would create an incentive for a recalcitrant summons recipient to impede enforcement proceedings, either by filing his own petition in the Tax Court or (in the case of a third-party recipient) by resisting compliance with the summons long enough to allow the taxpayer to file such a petition. When the summonses were issued, there were no pending Tax Court proceedings, and respondents therefore had no basis for alleging a purpose of circumventing Tax Court discovery rules. Allowing summons opponents (or taxpayers aligned with those opponents) to manufacture their own grounds for opposition would create incentives for manipulative conduct, delay summons-enforcement proceedings, and erode Congress's streamlined enforcement scheme.

In any event, this Court should reject respondents' request (*e.g.*, Br. 2-3) to determine in the first instance whether, under the appropriate legal standard, respondents introduced sufficient evidence of improper purpose to entitle them to examine the IRS agents. Because the court below held that a bare *allegation* of improper purpose was enough, it did not evaluate respondents' supporting evidence (beyond holding that respondents were not entitled to additional discovery, see Pet. App. 5a n.3). This Court has often cautioned that it is "a court of review, not of first

view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Consistent with the Court's usual practice, the application of the correct legal standard to the facts of this case should be left to the court of appeals on remand.

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For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

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