No. 13-301

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
MICHAEL CLARKE, *et al.*,
Respondents.

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

BRIEF FOR RESPONDENTS

EDWARD A. MAROD
Counsel of Record
JACK J. AIELLO
MARTIN R. PRESS
GUNSTER, YOAKLEY & STEWART, P.A.
777 S. Flagler Dr.
Suite 500 East
West Palm Beach, FL 33401
(561) 655-1980
EMarod@gunster.com

SETH P. WAXMAN
PAUL R.Q. WOLFSON
JOSHUA M. SALZMAN
CHRISTINA MANFREDI MCKINLEY
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

CARLEEN M. ZUBRZYCKI
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

QUESTION PRESENTED

Under *United States* v. *Powell*, 379 U.S. 48 (1964), an individual or entity that receives an IRS summons is entitled to the opportunity to show, at an adversary hearing, that the summons should be quashed because judicial enforcement of the summons would constitute an abuse of the court's processes—including, for example, if the summons was issued by the IRS for an improper purpose.

The question presented is whether the court of appeals erred in ruling, on the facts of this case, that in light of respondents' substantial allegations that the IRS had issued summonses to them for an improper purpose, respondents should have a limited evidentiary hearing at which they may examine IRS officials about the purpose for which the summonses were issued.

CORPORATE DISCLOSURE STATEMENT

Dynamo Holdings Limited Partnership is a limited partnership whose general partner is Dynamo Holdings, Inc. No publicly held company holds 10% or more of the stock in Dynamo Holdings, Inc.

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BRIEF FOR RESPONDENTS

INTRODUCTION

This Court has repeatedly recognized that a party summoned by the Internal Revenue Service to produce documents or testimony is entitled to an adversary hearing before a federal district court at which it can challenge enforcement of the summons on the ground that it is being used for an improper purpose.[1] *See, e.g.*,

[1] In investigating a taxpayer's liability, the IRS is authorized to issue summonses to parties other than the taxpayer as well; for simplicity, this brief refers to all summoned parties as "the taxpayer." The government has never suggested that the standard for an evidentiary hearing differs depending on the identity of the summoned party.

United States v. *Powell*, 379 U.S. 48, 58 (1964). The government, however, would reduce this important safeguard against abuse of the summons process to an empty formality. In the government's view, as long the IRS submits a *pro forma* affidavit to the court asserting that it is acting properly, the court should enforce the summons—unless the taxpayer manages to produce its own affirmative evidence that refutes the government's attestation of good faith. In the government's view, a taxpayer generally has no right even to question the IRS about the purpose of the summons, even where (as here) it can point to circumstances that raise a substantial inference that the IRS is proceeding improperly.

The government's approach would render the right to an adversary hearing meaningless. Evidence of bad faith will almost always be exclusively in the possession of the government. For that reason, several courts of appeals have concluded that a taxpayer that makes a plausible allegation of IRS bad faith should have the opportunity for a limited evidentiary hearing—likely to last no more than a couple of hours—at which it can examine an IRS representative about the purpose of the summons. This approach—which originates in a proposal first made by the IRS itself—properly balances the taxpayer's rights against the government's legitimate interest in expeditious enforcement of its investigative summonses and ensures that summons enforcement proceedings are meaningful, while remaining summary in cases where the taxpayer fails to raise questions as to the IRS's good faith.

Under this standard, the judgment should be affirmed. Respondents have made a substantial allegation, bolstered by the evidence they were able to muster, that the IRS was using the summonses to gain an

unfair advantage in Tax Court litigation in circumvention of Tax Court rules and to retaliate against the taxpayer for refusing to extend the statute of limitations a *third* time. That was sufficient for an evidentiary hearing to allow respondents to make their case. Indeed, even under the more demanding standard applied in some circuits, respondents' showing was sufficient for an evidentiary hearing. And this is not a case in which a taxpayer or summoned party seeks a hearing based on unsupported, implausible, or speculative assertions of IRS mistreatment. Nor did the court of appeals purport to rule that hearings would be required in such circumstances. Rather, under *Powell*, where a taxpayer makes a plausible allegation of an improper purpose or bad faith on the part of the IRS, it should have the opportunity to establish those claims at an adversary hearing at which an IRS representative can be questioned.

STATEMENT

1. The IRS conducted an examination of the tax returns of respondent Dynamo Holdings Limited Partnership ("DHLP") for the tax years 2005-2007. Pet. App. 11a. Although the IRS normally has three years in which to examine and definitively fix a taxpayer's tax liability, *see* 26 U.S.C. §§ 6229, 6501, the IRS's examination of DHLP continued well into 2010, aided by DHLP's agreement to extend that limitations period twice so that the IRS's investigation of tax years 2005 and 2006 remained timely.

On August 11, 2010, as the extended limitations period drew to a close, the investigating IRS agent, Mary Fierfelder, signed a Final Partnership Administrative Adjustment ("FPAA") which set forth the IRS's position as to DHLP's tax liability for 2005-2007. JA 68. As

the name suggests, an FPAA represents the IRS's "final" position as to the taxpayer's liability. *See Sealy Power, Ltd.* v. *Commissioner*, 46 F.3d 382, 385-386 (5th Cir. 1995) ("[T]he FPAA … serve[s] to notify affected taxpayers that the Commissioner has made a final administrative determination of their liability for particular tax years."); *see also* 26 U.S.C. §§ 6221-6223 (discussing partnership returns, and identifying the FPAA as marking the "completion" of administrative proceedings). Once the IRS issues an FPAA, the taxpayer can seek judicial review of the IRS's determination in Tax Court, and the matter then shifts from the administrative sphere to the courtroom. The IRS's own Summons Handbook makes clear that, once a taxpayer's liability has been finally determined, "the examination has been concluded," and "[t]he Service should no longer be in the process of gathering the data to support a determination[.]" JA 119 (Handbook § 25.5.4.4.8).[2]

When the IRS requested that DHLP agree to extend the limitations period for tax years 2005-2007 for a *third* time, DHLP declined. JA 51.[3] Shortly thereafter, in September and October 2010—and despite having signed the FPAA and not having asked for additional information for some time—Agent Fierfelder issued

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[2] The quoted passage of the Handbook discusses statutory notices of deficiency ("SND"), not FPAAs. But as the government acknowledges, an FPAA serves the same purpose for partnerships as the SND does for individuals. Pet. 5; *see also Sealy Power*, 46 F.3d at 385-386 (noting the functional equivalence of FPAAs and SNDs).

[3] Docket Entry ("DE") refers to the district court's docket in the lead case, *United States* v. *Clarke*, No. 11-mc-80456 (S.D. Fla.), unless otherwise noted. *See* JA 9 (designating *Clarke* as lead case and requiring motions and other papers to be filed in lead case only).

investigative summonses pursuant to 26 U.S.C. § 7602 to six additional people connected to DHLP, five of whom are respondents here. JA 35-36, 45; *see also* Pet. App. 11a, 21a, 32a, 43a, 54a.[4] Those summonses called for the production of documents and testimony regarding DHLP's 2005-2007 tax returns. The summonses had return dates of October 25, 2010, for four of the summoned respondents (JA 35-36; Pet. App. 11a, 21a, 32a, 43a) and December 3, 2010, for respondent Robert Julien (Pet. App. 54a). Those five respondents declined to comply with the summonses. Pet. App. 11a-12a, 21a-22a, 32a-33a, 43a-44a, 54a-55a. The sixth summoned person, Christine Moog, initially refused to comply with her summons, but ultimately complied and was interviewed in September 2011. JA 98-99 ¶ 7.

On December 28, 2010, with three days remaining in the statutory limitations period, the IRS issued—unaltered—the FPAA signed by Agent Fierfelder in August 2010. JA 60.

2. On February 1, 2011, DHLP commenced a proceeding in the United States Tax Court challenging the FPAA. JA 57; *see also* 26 U.S.C. § 6226(a). The Tax Court imposes significant limitations on the scope of discovery available to both the taxpayer and the government. *See* Tax Court Rule 70(a) ("Discovery is not available under these Rules through depositions except

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[4] The respondents who received IRS summonses in 2010 are Michael Clarke, as Chief Financial Officer of Beekman Vista, Inc.; Michael Clarke, as Chief Financial Officer of Dynamo GP, Inc.; Rita Holloway, as trustee for the 2005 Christine Moog Family Delaware Dynasty Trust; Marc Julien, as trustee for the 2005 Robert Julien Delaware Dynasty Trust; and Robert Julien. *See* Pet. App. 10a, 20a, 31a, 42a, 53a. The sixth respondent in this Court is DHLP itself, which was permitted to intervene in the summons enforcement proceeding. JA 8.

to the limited extent provided in Rule 74."). In particular, the Tax Court treats non-consensual depositions as "an extraordinary method of discovery." Tax Court Rule 74(c)(B).

3. On April 28, 2011, six months after the return date for most of the summonses, and almost three months after DHLP commenced its suit in Tax Court, the IRS instituted a proceeding in district court for enforcement of the summonses. JA 19; *see also* Pet. App. 10a, 20a, 31a, 42a, 53a; 26 U.S.C. § 7402 (authorizing district courts to hear summons enforcement proceedings). Respondents contended that, under *United States* v. *Powell*, 379 U.S. 48 (1964), enforcement should be denied and the summonses quashed because they had not been issued and were not being enforced for a proper investigative purpose.[5] Consistent with Eleventh Circuit precedent, respondents requested an evidentiary hearing at which they could inquire into and make a record about the government's purpose in issuing and enforcing the summonses.[6] They also asked for pre-hearing discovery.[7]

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[5] *See* JA 46-56; *United States* v. *Clarke*, No. 11-mc-80457 (S.D. Fla.), DE 14; *United States* v. *Holloway*, No. 11-mc-80459 (S.D. Fla.), DE 10; *United States* v. *Julien*, No. 11-mc-80460 (S.D. Fla.), DE 12; *United States* v. *Julien*, No. 11-mc-80461 (S.D. Fla.), DE 7 (responses to motion to enforce); Pet. App. 64a-84a (motion for summary dismissal).

[6] JA 54; *Clarke*, No. 11-mc-80457, DE 14, at 7; *Holloway*, No. 11-mc-80459, DE 10, at 9; *Julien*, No. 11-mc-80460, DE 12, at 9; *Julien*, No. 11-mc-80461, DE 7, at 7; Pet. App. 65a, 71a-75a.

[7] JA 54; *Clarke*, No. 11-mc-80457, DE 14, at 7; *Holloway*, No. 11-mc-80459, DE 10, at 9; *Julien*, No. 11-mc-80460, DE 12, at 9; *Julien*, No. 11-mc-80461, DE 7, at 7; Pet. App. 65a, 71a-75a.

Respondents offered several specific and substantial allegations suggesting that the IRS may have issued and sought enforcement of the summonses for improper reasons. They alleged that the summonses had been issued as retribution for DHLP's refusal to grant a third extension of the applicable statute of limitations.[8] Respondents also alleged that the IRS was abusing the district court's processes by enforcing the summonses for the purpose of circumventing the Tax Court restrictions on discovery.[9] Respondents did not rest on bare allegations, but rather supported these allegations with the competent evidence available to them in the absence of an evidentiary hearing or discovery. For example, they submitted a declaration from respondent Michael Clarke, who confirmed that the summonses were issued "immediately" after DHLP refused to extend the limitations period. JA 95 ¶ 9; *Clarke*, No. 11-mc-80457, DE 15 ¶ 9; *Julien*, No. 11-mc-80461, DE 8 ¶ 9; Pet. App. 73a. And they submitted a declaration from attorney Richard Sapinski, who represented Christine Moog when she appeared in compliance with her IRS summons, and who stated that Moog's interview by the IRS was conducted exclusively

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[8] JA 51-52; *Clarke*, No. 11-mc-80457, DE 14, at 5; *Holloway*, No. 11-mc-80459, DE 10, at 6; *Julien*, No. 11-mc-80460, DE 12, at 6; *Julien*, No. 11-mc-80461, DE 7, at 5; Pet. App. 72a-75a.

[9] JA 48, 52-53; *Clarke*, No. 11-mc-80457, DE 14, at 6-7; *Holloway*, No. 11-mc-80459, DE 10, at 7-8; *Julien*, No. 11-mc-80460, DE 12, at 7-8; *Julien*, No. 11-mc-80461, DE 7, at 6-7; Pet. App. 72a-75a. Respondents further alleged that the summonses had been issued as a subterfuge to gather information about another entity, for which the IRS had already completed the examination process for the pertinent years. JA 51; *Clarke*, No. 11-mc-80457, DE 14, at 4-5; *Holloway*, No. 11-mc-80459, DE 10, at 5-6; *Julien*, No. 11-mc-80460, DE 12, at 5-6; *Julien*, No. 11-mc-80461, DE 7, at 4-5; Pet. App. 72a-75a.

by the two attorneys representing the IRS in the Tax-Court proceeding and that Agent Fierfelder did not even attend. JA 100 ¶¶ 11-13.

Respondents also submitted several filings from the Tax Court case supporting their contention that the IRS was using the summonses not to assist the IRS in the administrative process of determining DHLP's tax liability, but rather as an improper form of discovery for the Tax Court litigation. For instance, the IRS refused to consent to referral of the Tax Court proceeding to IRS Appeals (a process similar to mediation) on the ground that the case is not "fully factually developed" due to respondents' noncompliance with the summonses "issued during the exam of [DHLP]." JA 102. The IRS also opposed DHLP's motion for a protective order in Tax Court, in part because the respondents had declined to comply with the summonses. DE 20-4 (Ex. D) ¶ 8. And the IRS sought a continuance of the Tax Court case on the ground that the summonses were outstanding. JA 105-106 ¶ 6.

Respondents further pointed to the IRS's own Summons Handbook, which, as noted, disapproves of the issuance of summonses once a final determination of tax liability has been made. JA 119 ¶ 3. Respondents argued that the IRS's conduct in this case constituted a departure from the principles recognized in the Handbook and that this departure was suggestive of the IRS's improper purpose in issuing the summonses. Pet. App. 68a-72a.

4. The district court denied the motions to quash the summonses and ordered enforcement. Pet. App. 19a, 29a, 40a, 51a, 62a. The court concluded that the respondents had made only a "naked assertion" that the summonses had been issued in retaliation for

DHLP's refusal to extend the limitations period. *Id.* 14a; 24a; 35a; 46a; 57a. It further concluded that even if the IRS was retaliating against respondents, that had "no bearing" on whether the summonses should be enforced. *Id.* 14a-15a; 24a-25a; 35a-36a; 46a-47a; 57a-58a. The district court also held, primarily on the basis of an out-of-circuit case, that as a matter of law, use of the summons process to avoid limits on discovery in Tax Court would not constitute grounds for quashing a summons. *Id.* 15a, 25a, 36a, 47a, 58a.

5. The court of appeals reversed in part, in a per curiam, unpublished decision. Applying the controlling Eleventh Circuit standard from *Nero Trading, LLC* v. *U.S. Department of Treasury, IRS*, 570 F.3d 1244, 1249 (11th Cir. 2009), the court concluded that respondents should have a limited evidentiary hearing at which they can seek to establish the IRS's bad faith. Pet. App. 5a. The court reached this conclusion after a "careful review of the record" revealed that the respondents had plausibly alleged an improper purpose behind the issuance of the summonses. *Id.* 3a. On that basis, the court directed that the respondents should be afforded an opportunity to examine IRS officials regarding the IRS's purpose in issuing the summonses. *See id.* 6a. The court denied, however, respondents' request for pre-hearing discovery. *Id.* 5a n.3.

SUMMARY OF ARGUMENT

While the IRS has broad authority to issue investigative summonses, it does not have unilateral authority to enforce those summonses. Rather, Congress has decided to interpose the judiciary as a check on potential abuse of the IRS's summons power, giving the district courts exclusive jurisdiction over summons enforcement. Because it is the courts' process that is invoked

to enforce a summons, courts have an independent duty to assure themselves that IRS summonses are issued and enforced in good faith. The courts have long recognized that the adversary process plays an essential role in helping the courts fulfill their function as a judicial bulwark against abusive summons processes. Thus, as this Court observed in *Powell*, 379 U.S. at 58, the adversary hearing to which the taxpayer is entitled must be meaningful, even though the summons enforcement proceeding itself should be streamlined.

Despite this Court's repeated recognition that the taxpayer is entitled to a meaningful adversary hearing, the government now seeks to transform summons enforcement into an *ex parte* affair, in which the IRS need only make a *pro forma* showing of its good faith. Under the IRS's preferred approach, the taxpayer would not receive an evidentiary hearing at which it could challenge the IRS's attestations of its good faith unless the taxpayer first could provide evidence of its own of the IRS's bad faith. The circular burden the IRS would impose on the taxpayer is inconsistent with a meaningful right to an adversary hearing.

The limited evidentiary hearing that was granted to respondents by the Eleventh Circuit is consistent with both this Court's guidance as to the type of hearing required and the recognition that summons enforcement proceedings should remain summary. If the taxpayer makes a plausible allegation of bad faith, it should be entitled to an evidentiary hearing at which it can question an IRS representative about the purposes underlying the summons. This approach is flexible enough to alleviate any concerns that taxpayers might allege frivolous claims in an effort to engage in a fishing expedition; that the IRS will be subjected to burdensome or intrusive inquiries; or that protracted proceed-

ings will thwart the tax collection process. In fact, in the circuits that have implemented such an approach (including the Eleventh Circuit), there is no suggestion that district courts are not entirely capable of managing these truncated adversary hearings. This procedure does not speak to whether the government is presumed to have acted properly; it simply allows the taxpayer an opportunity to overcome that presumption. And it is consistent with the procedures that have been adopted to address circumstances when grand juries are alleged to have issued a subpoena for an improper purpose.

In any event, the respondents here did not rely on speculative assertions, but instead compiled evidence at least suggesting that the IRS was acting improperly. That evidence indicated that the government pursued the summonses not to further an administrative *investigation* into tax liability, but to gain an advantage in *litigation* against the taxpayer, in circumvention of Tax Court discovery rules. And there is likewise circumstantial and affidavit evidence suggesting that the summonses were issued with retaliatory intent. In light of the evidence respondents submitted, the Eleventh Circuit properly required the district court to provide them with the limited relief of an adversary hearing.

ARGUMENT

I. A TAXPAYER CHALLENGING A SUMMONS IS ENTITLED TO A LIMITED EVIDENTIARY HEARING UPON MAKING PLAUSIBLE ALLEGATIONS THAT ENFORCEMENT WOULD CONSTITUTE AN ABUSE OF THE COURT'S PROCESS

A. Taxpayers Are Entitled To A Meaningful Check Against Abusive Summons Enforcement, Including An Adversary Hearing

Although Congress has authorized the IRS to issue investigative summonses, it has never allowed the IRS to enforce its own demands that taxpayers produce documents and testimony. Rather, in recognition of the fact that the summons power can be abused for harassment and other improper purposes, Congress has interposed the judiciary as a check against misuse of the summons process. *See* 26 U.S.C. § 7604; *see also United States* v. *Bisceglia*, 420 U.S. 141, 146 (1975) ("[T]he authority vested in tax collectors may be abused, as all power is subject to abuse."); *cf. Oklahoma Press Publ'g Corp.* v. *Walling*, 327 U.S. 186, 213 (1946) ("Officious examination can be expensive, so much so that it eats up men's substance. It can be time consuming, clogging the processes of business. It can become persecution when carried beyond reason."). To obtain enforcement of a summons, the IRS must establish before an impartial judge that the summons process is being used for a proper purpose. *See United States* v. *Powell*, 379 U.S. 48, 57-58 (1964).

The judicial check against misuse of the IRS summons process accords with a deeply engrained tradition of denying Executive Branch agencies authority to enforce their own subpoenas. "Congress has consistently required that agencies and departments seek enforce-

ment of administrative subpoenas through a federal district court." Dep't of Justice, *Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities* ("*DOJ Report*") Part II.A.2, *available at* http://www.justice.gov/archive/olp/rpt_to_congress.htm (last visited Mar. 17, 2014). This requirement is rooted in the recognition that "[b]ifurcation of the power, on the one hand of the agency to issue subpoenas and on the other hand of the courts to enforce them, is an inherent protection against abuse of subpoena power." *Id.* (internal quotation marks omitted) (alteration in original); *see also FEC* v. *Florida for Kennedy Comm.*, 681 F.2d 1281, 1283-1284 (11th Cir. 1982) ("In granting the exclusive power to enforce administrative subpoenas to the federal courts, Congress manifested its intention that the courts exercise independent judgment in evaluating agency subpoenas."); *SEC* v. *Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 123-124 (3d Cir. 1981) ("Congress has entrusted the enforcement of the administrative process for the production of witnesses and papers to the courts.").

In keeping with Congress's intent that judicial review of summonses serve as a check against Executive Branch overreach, the courts have long recognized that "[t]he system of judicial enforcement is designed to provide a *meaningful* day in court for one resisting an administrative subpoena." *DOJ Report* Part II.A.2. (emphasis added, internal quotation marks omitted, alteration in original); *see Wheeling-Pittsburgh Steel Corp.*, 648 F.2d at 123-124 ("[F]ederal courts have never lent their enforcement machinery to an executive branch investigative body in the manner of a rubber stamp." (internal quotation marks omitted)); *Wearly* v. *FTC*, 616 F.2d 662, 665 (3d Cir. 1980) ("We start with

the basic premise that a subpoena from the FTC is not self-enforcing.… In acting on that petition the district court's role is not that of a mere rubber stamp, but of an independent reviewing authority called upon to insure the integrity of the proceeding."); *United States* v. *Security State Bank & Trust*, 473 F.2d 638, 642 (5th Cir. 1973) ("[U]nless the district court measures the Secretary's subpoena against the two statutory standards and declines to enforce the subpoena if it is in excess of the Secretary's statutory power, the enforcement proceeding will become an empty form; and the court, a rubber stamp[.]"). As this Court recognized in *Powell*, because "[i]t is the court's process which is invoked to enforce the administrative summons," the court has a duty to deny enforcement that would "permit its process to be abused." 379 U.S. at 58; *see also* U.S. Br. 18 ("Before enforcing an IRS summons, a district court must *assure itself* that the summons" is proper. (emphasis added)).

For the judiciary to fulfill its function of safeguarding against abusive summonses, it cannot be entirely dependent on one-sided submissions by the government attesting in conclusory fashion that its summons is being pursued for a proper purpose. Rather, as this Court has long recognized, the adversarial process plays an essential role in bringing facts to light—and when that process is not meaningfully employed, there is an "increased chance of error." *Lankford* v. *Idaho*, 500 U.S. 110, 127 (1991); *see United States* v. *Nobles*, 422 U.S. 225, 230 (1975) ("[W]e have placed our confidence in the adversary system, entrusting to it the primary responsibility for developing relevant facts[.]").

Accordingly, this Court has repeatedly emphasized that a taxpayer should have the opportunity for an "ad-

versary hearing" to test whether the IRS is seeking to abuse the district court's process through improper enforcement of a summons. *See Donaldson* v. *United States*, 400 U.S. 517, 527 (1971) (referring to "the adversary hearing to which the taxpayer is entitled before enforcement is ordered"); *Powell*, 379 U.S. at 58 (process for summons enforcement should "not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered"); *Reisman* v. *Caplin*, 375 U.S. 440, 446 (1964) (noting that an enforcement proceeding under Section 7402(b) is an "an adversary proceeding affording a judicial determination of the challenges to the summons"). The IRS cannot obtain summons enforcement through a mere *ex parte* submission attesting to its good faith; instead, "the Federal Rules of Civil Procedure apply" to summons enforcement proceedings, and "[t]he proceedings are instituted by filing a complaint, followed by answer and hearing." *Powell*, 379 U.S. at 58 n.18. Through this process, taxpayers are given the opportunity to test the government's assertion of good faith, and courts are not forced to rely only on a self-serving and often barebones submission before lending their imprimatur to enforcement of a summons.

B. The Government's Approach Would Effectively Transform Summons Enforcement Into An *Ex Parte* Proceeding

Despite this Court's repeated emphasis that taxpayers are entitled to challenge summons enforcement at an adversary hearing, the government argues that taxpayers are entitled to nothing more than the opportunity to "present any evidence in their possession that would impugn the Service's good faith." Br. 9-10; *id.* at 21 (hearing only appropriate when "pre-existing evi-

dence raises an inference of improper purpose"). In the government's view, taxpayers are not entitled to any process by which the government may be compelled to explain the purpose for the issuance and enforcement of the summons, and even if information within the government's possession would establish that the summonses were abusive, a taxpayer who cannot prove that fact on its own can never make its case.

The government's argument drains the adversary hearing foreseen by this Court in *Powell* of all meaning. *Powell* made clear that a summons that might appear proper on its face nonetheless should not be enforced if it was issued "to harass the taxpayer or to put pressure on him to settle a collateral dispute," or for some other improper purpose. 379 U.S. at 58. But in the great majority of circumstances, evidence of whether a summons has been pursued in good faith and should be enforced is "peculiarly within the knowledge or files of the Service." *United States* v. *Security Bank & Trust Co.*, 661 F.2d 847, 850 (10th Cir. 1981). And correspondingly, the taxpayer will almost always lack access to the evidence needed to establish the IRS is acting in bad faith. The government's proposed rule, which would require the taxpayer to produce its own significant affirmative evidence before even being allowed to question the IRS, would result in "an unreasonable circular burden on the taxpayer: the facts that he must show to obtain discovery are only available through discovery." *United States* v. *Southeast First Nat'l Bank of Miami Springs*, 655 F.2d 661, 667 (5th Cir. 1981).[10]

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[10] *See also United States* v. *Kis*, 658 F.2d 526, 540 (7th Cir. 1981) (noting "we do not want to put the taxpayer in the anomalous position of having to allege specific facts when he has no means to gather that information through discovery"); *United*

The right to a hearing on that question is therefore meaningless unless the taxpayer is afforded some opportunity to inquire into the IRS's purpose for issuing the summons. "[W]here a summonee raises colorable allegations of an improper purpose and seeks to prove those allegations, the enforcement court must afford the summonee at least some opportunity to substantiate its allegations. To rule otherwise … would render it virtually impossible for a summonee to prove that a facially valid summons was, in fact, issued for an improper purpose." *See FEC* v. *Committee to Elect Lyndon La Rouche*, 613 F.2d 849, 862 (D.C. Cir. 1979) (citations omitted).[11]

Indeed, the government never disputes that the IRS will usually be in exclusive possession of the evidence that would be necessary to establish that it had acted in bad faith. *See* Br. 19 (quoting, but not challenging, the Eleventh Circuit's characterization of the burden that the government asks the taxpayer to bear as circular). The government thus implicitly recognizes that if taxpayers cannot challenge summonses unless they already possess evidence of the government's bad

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States v. *Stuckey*, 646 F.2d 1369, 1373-1374 (9th Cir. 1981) ("We recognize the anomaly of placing a burden of proof upon the taxpayer and then denying access to what may be the very information needed to meet that burden.").

[11] This Court has recognized that procedural rules should be tailored in view of the parties' differing access to evidence. *See, e.g.*, *Campbell* v. *United States*, 365 U.S. 85, 96 (1961) (noting "the ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary," and structuring procedure to avoid "unfairly severe burden" where defendant was in need of access to information and the government had superior access to the relevant witness).

faith, few if any will ever be able to meaningfully exercise their right to challenge the IRS's summons enforcement. In practice, the IRS's initial declaration of good faith would almost always be dispositive and the government's submission would seldom be meaningfully tested. In the overwhelming majority of cases, the taxpayer's right to an adversary hearing would be effectively rendered meaningless, and IRS's power would be left unchecked.

C. Allowing A Limited Evidentiary Hearing To Test Government Good Faith Strikes A Proper Balance And Does Not Unduly Burden The IRS Or Frustrate Enforcement Of The Tax Laws

In seeking to ensure that taxpayers have a meaningful opportunity to develop evidence of bad faith while preserving expeditious enforcement of the tax laws, several courts, including the Eleventh Circuit, have gravitated to the same solution: If a taxpayer makes plausible allegations of bad faith, it should have the opportunity for a limited evidentiary hearing at which it can question an IRS representative about the purpose of the summons, but it is not entitled to any further discovery unless the hearing casts doubt on the IRS's good faith.[12] This procedure strikes an appropriate balance by providing the taxpayer with a meaning-

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[12] *See Nero*, 570 F.3d at 1249 (ordering "a limited adversary hearing where the taxpayer may question IRS officials concerning the Service's reasons for issuing the summons"); *see also Southeast First Nat'l Bank*, 655 F.2d at 667; *United States* v. *Church of Scientology of Cal.*, 520 F.2d 818, 824 (9th Cir. 1975) (adopting the procedure that the taxpayer may question an IRS representative at a hearing); *United States* v. *Salter*, 432 F.2d 697, 701 (1st Cir. 1970) (instituting same procedure at government's urging).

ful opportunity to obtain information likely to be within the sole possession of the IRS, while avoiding significant burdens on the IRS.

This approach leaves room for the district courts to deny hearings to tax objectors or resisters who only assert conclusory, implausible, or speculative grounds that the government is acting in bad faith. It also gives the district court ample discretion to structure the adversary hearing so that the challenge to the summons can be heard in an expeditious and streamlined fashion. And it allows the district court to deny leave to undertake more extensive forms of discovery unless the hearing discloses a substantial basis for going forward.

1. The government raises a host of objections to this approach, none of which is persuasive, and all of which exaggerate the burden that it will place on tax enforcement. First, the government criticizes this approach as "reduc[ing] to zero the amount of evidence that is required to rebut a showing of good faith." Br. 9. But that contention conflates the issue of the ultimate burden of persuasion with the antecedent and narrower question of what burden the taxpayer must satisfy to secure a limited evidentiary hearing. Allowing the taxpayer to gather evidence that might rebut the government's assertion of good faith is not equivalent to finding that assertion of good faith to have been overcome. The court of appeals' decision in this case merely allows the taxpayer to enter the courthouse door; it does not dictate who leaves the court victorious.

The government also argues that under this approach, tax enforcement will be frustrated because any attempt to enforce a summons will be subject to "protracted inquir[ies]" into the IRS's operations. Br. 22. But the Eleventh Circuit—like other circuits who fol-

low a similar approach—has been quite clear that "the full 'panoply of expensive and time-consuming pretrial discovery devices'" is presumptively *not* available unless the taxpayer makes a sufficiently substantial showing of bad faith at the hearing. *See* Pet. App. 5a n.3 (quoting *Nero*, 570 F.3d at 1249). The limited evidentiary hearing serves as a screening mechanism that affords taxpayers a fair opportunity to develop their contentions, while shielding the government from any intrusive discovery or significant delay except in cases where the taxpayer has succeeded in raising doubts as to the government's good faith.[13]

The government's rather alarmist suggestion that this rule will "stultify [its] every investigatory move" (Br. 26 (internal quotation marks omitted)) is belied by the reality that the IRS has successfully operated under this regime for decades in several jurisdictions. Along with the Eleventh Circuit, the First, Fifth, and Ninth Circuits long ago ruled that a taxpayer may have an evidentiary hearing to test the IRS's good faith even if it does not have its own affirmative evidence establishing IRS bad faith. *See supra*, n.12. Other circuits

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[13] Thus, the government's reliance on *United States* v. *Armstrong*, 517 U.S. 456 (1996), is misplaced. In *Armstrong*, the lower court required the government to undertake a massive discovery obligation: compiling data regarding three years of cases. This can hardly be compared to the far less burdensome requirement of having the agent who issues a summons (or some other appropriate IRS representative) attend a single, limited hearing. Moreover, in *Armstrong*, this Court stressed that the criminal defendants in that case could themselves have developed evidence that would have supported their claim without unduly burdening the government. *Id.* at 470. Here, by contrast, the pertinent evidence is in the sole possession of the government.

follow similar rules.[14] For instance, the Sixth Circuit clarifies that a taxpayer must be afforded some "opportunity to substantiate his allegations." *United States* v. *Will*, 671 F.2d 963, 968 (6th Cir. 1982); *see also id.* (approvingly discussing *United States* v. *Joseph*, 75-1 USTC P 9369 (6th Cir. Feb. 25, 1975), which reversed a district court for cutting off cross-examination at an evidentiary hearing intended to afford the taxpayer an opportunity to substantiate allegations of bad faith).[15]

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[14] For a more extensive discussion of the approaches taken by each circuit, see Br. in Opp. 15-23.

[15] The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324, did not legislatively overrule any of these decisions. TEFRA provided that it is not an abuse of the summons power for the IRS to gather evidence that may support a criminal tax prosecution when it has not yet referred the matter for criminal prosecution. But TEFRA solely concerns the situation where an ongoing IRS *investigation* may legitimately have both a criminal and civil purpose; it says nothing about the IRS's effort to use summonses to gain an advantage in court litigation rather than to further an investigation, and it also says nothing about other forms of bad faith or the standard that should be employed to determine whether a taxpayer is entitled to a limited evidentiary hearing. *See* Joint Committee on Taxation, *Explanation of the Revenue Provisions of the Tax Equity and Fiscal Responsibility Act of 1982*, JCS-38-82 No. 8 (Dec. 31, 1982), *available at* 1982 WL 893228, at Part C.4.b (explaining the limited purpose of TEFRA was to simplify administration in cases with a criminal aspect); *United States* v. *Millman*, 822 F.2d 305, 308 (2d Cir. 1987) (addressing standard where IRS acts with some other form of "improper purpose"); *see also United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298, 317 n.19 (1978) ("The *Powell* elements were not intended as an exclusive statement about the meaning of good faith."); *id.* at 318 n.20 ("These requirements are not intended to be exclusive."). No circuit has concluded that the cases discussed above and in the brief in opposition to certiorari were overruled by TEFRA, and those cases have been cited and relied upon

Indeed, the approach that would allow a limited evidentiary hearing (but presumptively deny other forms of discovery) to a taxpayer who plausibly alleges bad faith was first proposed by the government itself shortly after *Powell*. *See United States* v. *Salter*, 432 F.2d 697, 700 (1st Cir. 1970) (accepting the "suggestion, offered by the government," that upon an allegation of improper purpose, the court should proceed to a hearing at which the taxpayer who alleged improper purpose could question the agent who issued the summons, and then determine whether further discovery was warranted). The Eleventh Circuit's rule is directly derived from that proposal.[16] Thus, the rule below is not just *consistent* with the IRS's ability to enforce the tax law: It was *suggested* by the IRS in the first place. When the IRS was faced with the question of how to balance its interests in enforcement with preventing the abusive use of tax summonses it proposed the exact rule at issue here.

The government does not point to anything to suggest that tax enforcement has been unduly hindered in those circuits where limited evidentiary hearings have been allowed. The government gives insufficient credit to the management capabilities of the district courts, which are quite competent at structuring this process to ensure that tax collection is not delayed and that the

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after TEFRA. The government itself (at 12 n.2) cites pre-TEFRA cases.

[16] The Fifth Circuit explicitly adopted *Salter* in *United States* v. *Harris*, 628 F.2d 875, 883 (5th Cir. 1980) ("We sanction the procedure stated by the First Circuit in *Salter*."), and then followed *Harris* in *United States* v. *Southeast First National Bank of Miami Springs*, 655 F.2d 661 (5th Cir. 1981). *Nero* merely reaffirmed *Southeast*, and the decision below applied *Nero*.

IRS is not unduly burdened. Indeed, the local rules of at least one district mandate precisely this procedure, yet the government suggests no untoward consequences. *See* E.D. Pa. R. Civ. P. 4.1.2(d) (stating that "the Secretary or Secretary's delegate shall be prepared to prove the material allegations of the complaint" and providing that taxpayer shall have opportunity to rebut Secretary's contentions).

In practice, district courts have proven amply capable of ensuring that evidentiary hearings are appropriately streamlined. In the great majority of cases, the hearing is likely to last at most a few hours, and the presence of any given agent would likely be required for even less time. *See, e.g.*, *Miccosukee Tribe of Indians of Fla.* v. *United States*, 730 F. Supp. 2d 1344, 1354 (S.D. Fla. 2010), *aff'd*, 698 F.3d 1326 (11th Cir. 2012) (setting aside "approximately two hours" for limited evidentiary hearing on claims of bad faith and limiting each side to two witnesses in case involving bank records of tribally owned casino); *Southeast*, 655 F.2d at 663 (taxpayer suggested that he could present his case in "one to two hours."). Indeed, the Ninth Circuit has held that a required hearing was sufficient where the district court allowed the taxpayer to fully examine one issuing IRS agent and cut off his examination of the second issuing agent, in a hearing "possibly" conducted during "a luncheon recess of a busy District Court." *United States* v. *Stuckey*, 646 F.2d 1369, 1387 (9th Cir. 1981) (Wyatt, J. dissenting). Courts are in agreement that, as long as the taxpayer is "afforded an opportunity to substantiate his allegations … the permissible scope of the hearing is a decision left to the discretion of the district court," and the taxpayer's right to cross-examination may be limited if it becomes apparent that

the taxpayer will be unable to raise any question as to the IRS's good faith. *Will*, 671 F.2d at 968.

The Eleventh Circuit, too, permits district courts to limit the scope of hearings, as demonstrated by its decision in *Nero*. There, the Eleventh Circuit upheld the enforcement of a summons against one of the taxpayers at issue, Ironwood Trading Co., because the district court "at least allowed" a "truncated" limited adversarial hearing. 570 F.3d at 1249; *see also id.* at 1250 (warning only against restrictions that would lead the hearings' utility to be "altogether frustrated"); *see also Southeast*, 663 F.3d at 667-668 (suggesting that the hearing is intended to allow taxpayers to obtain information that is "absolutely essential" to establish the taxpayer's theory of bad faith). The only limitation the Eleventh Circuit has placed on district courts' control over scope of such hearings is that a hearing may not be circumscribed to such an "extent that its utility is altogether frustrated." *Nero*, 570 F.3d at 1249. This is not an unfair or unreasonable burden to impose on the IRS, and will not meaningfully interfere with enforcement of the tax laws.

2. The government argues that it is wrong to allow every taxpayer who alleges bad faith—no matter how speciously—to have an evidentiary hearing at which it can cross-examine IRS officials. Br. 19. But that is not what the Eleventh Circuit has held,[17] and this case—

[17] Contrary to the government's persistent statements, the court of appeals did not adopt such an unqualified rule. *Nero*—which is the Eleventh Circuit's last published decision on point—explicitly states that an evidentiary hearing need not be conducted in every case. *See* 570 F.3d at 1249 (explaining that the court's ruling does not "categorically strip district courts of their discretionary power to determine whether an adversarial hearing is appropriate"). Instead, consistent with *Powell*'s promise that tax-

where the taxpayer has plausibly raised a substantial question about the government's good faith—does not require any such rule for the taxpayer to obtain a hearing. The question, rather, is under what circumstances district courts must provide at least *some* limited opportunity for taxpayers to question an IRS representative about the agency's good faith.

A taxpayer should have the opportunity for such an evidentiary hearing if it makes a *plausible* allegation of the agency's improper purpose. This standard—essentially the standard of *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009)—is consistent with *Powell*'s observation that summons enforcement proceedings are subject to the Federal Rule of Civil Procedure. *See Powell*, 379 U.S. at 58 n.18. That standard also serves to weed out the kinds of baseless assertions about IRS misconduct and delaying tactics that appear to concern the government. The district courts have developed extensive experience in applying the *Iqbal* standard of Federal Rule of Civil Procedure 8, and there is no reason to doubt that they can apply it in this context as well.

Moreover, that is, in essence, the standard that has long been applied in those circuits that have allowed

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payers will have a meaningful opportunity to challenge IRS summonses on "any appropriate ground," the Eleventh Circuit requires a hearing only when it would provide the sole realistic opportunity for a taxpayer to acquire evidence in support of his allegation of bad faith. *See id.* Although the decision below did not specifically address the circumstances under which a taxpayer's allegations are too insubstantial to warrant a hearing, it was unnecessary for the court of appeals to do so, given that this is clearly not such a case, and the decision below was an unpublished per curiam decision that followed and applied prior circuit decisions (including *Nero*) and did not purport to make new law in the circuit.

evidentiary hearings even when the taxpayer is unable to produce its own affirmative evidence of bad faith. In fact, the court of appeals in this case described the adequacy of respondents' allegations of bad faith by reference to "federal pleading standards." Pet. App. 5a; *see id.* (citing Fed. R. Civ. P. 8). Similarly, the Fifth Circuit required an evidentiary hearing when a taxpayer has placed "in issue" the IRS's good faith "in a substantial way." *Southeast*, 655 F.2d at 665-666; *see United States* v. *Harris*, 628 F.2d 875, 879 (5th Cir. 1980) (hearing not required where taxpayer did not "'raise in a substantial way the existence of substantial deficiencies in the summons procedure'"). *Cf. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d at 128 (allowing further discovery where summoned party demonstrates that allegations that the SEC was abusing the court's process were "non-frivolous"). By requiring a summoned party to challenge the government's good faith in "a substantial way," these cases appropriately balance the government's interest in avoiding unduly burdensome and frivolous litigation with citizens' rights to substantiate credible claims of government wrongdoing.[18]

Allowing taxpayers a realistic opportunity to substantiate non-frivolous, good-faith claims that they believe will have evidentiary support "strikes the appropriate balance between honoring the intended summary nature of the summons proceeding and protecting the interests of the taxpayer." *Nero*, 570 F.3d at 1250.

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[18] Other rules, such as Federal Rule of Civil Procedure 11, also provide additional checks against frivolous allegations of bad faith. *See* Fed. R. Civ. P. 11(b)(1) (attorney must certify that filing is not for "any improper purpose" including "to harass" or to "cause unnecessary delay"), 11(b)(3) (attorney must certify that contentions will "likely have evidentiary support after a reasonable opportunity for further investigation").

This rule will not "thwart and defeat" the IRS's investigatory powers. U.S. Br. 26 (internal quotation marks omitted). Rather, it provides a fair and balanced procedure to ensure those powers are deployed for legitimate ends.

D. The Government's Other Arguments Are Not Proper Grounds For Denying Taxpayers A Meaningful Opportunity To Challenge A Summons

The government argues that an opportunity for a hearing to test IRS good faith is incompatible with other legal rules, including decisions regarding other investigative bodies. Those arguments do not withstand scrutiny.

1. The government argues that the decision below is inconsistent with the presumption of good faith to which government actions are entitled. But the question here is not whether the government should be *presumed* to be acting properly, but rather, whether the taxpayer should be afforded any meaningful opportunity to overcome that presumption. *Powell* makes clear that the government's initial submission of good faith should "not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered." 379 U.S. at 58. Without any opportunity to obtain evidence exclusively in the hands of the IRS, taxpayers would for all practical purposes encounter an insurmountable obstacle to testing the government's (often boilerplate) assertions about its own good faith.

The government is doubtless correct that it would be improper for the court to "infer wrongdoing on the part of a government official based on a mere allegation" (Br. 22)—but the rule proposed here (which several courts have long applied) permits no such thing.

Instead, upon a plausible allegation of wrongdoing, it provides a limited mechanism through which the taxpayer may obtain basic evidence. If the hearing reveals no evidence of wrongdoing, then the summons is enforced. Moreover, the taxpayer bears the burden of demonstrating at the evidentiary hearing that further discovery is warranted. But the government asks for more. Its position is not merely that it should receive the benefit of the doubt, but that in practice it should be immune from questioning—and should therefore have unchecked latitude to require taxpayers submit to intrusive demands to produce documents and testimony based on nothing more than a pro forma recitation of its own good faith. This goes far beyond a presumption of regularity.

2. The government also argues that the Eleventh Circuit's rule is inconsistent with the treatment of grand jury subpoenas. This argument ignores the fact that courts have allowed challenges to grand jury subpoenas to go forward where it appears that the government is misusing the grand jury to gain a litigation advantage. It also ignores the structural distinctions between the grand jury and the IRS.

Courts have recognized that the grand jury subpoena power can be misused, and that improperly issued subpoenas should be quashed. For example, grand jury subpoenas may not be used to harass a target. *See United States* v. *Dionisio*, 410 U.S. 1, 12 (1972) ("[T]he Constitution could not tolerate the transformation of the grand jury into an instrument of oppression."); *In re Grand Jury Matters*, 593 F. Supp. 103, 107 (D.N.H. 1984) (quashing grand jury subpoena in part because it was "without doubt harassing"). Courts have also "universally recognized" that it is improper to use a grand jury subpoena to develop evidence for a

case in which the indictment has already been issued. Beale & Bryson, *Grand Jury Law and Practice* § 9:16 (2d ed. 2013) (collecting cases); *see infra*, p. 38 & n.24.

Courts take seriously their obligation to protect against misuse of grand jury subpoenas to gain a litigation advantage in the criminal trial—even though defendants who allege an improper purpose in the grand jury context seldom have access to direct evidence of wrongdoing. To accommodate this reality, courts will conduct hearings or review transcripts of the grand jury proceedings, to which the criminal defendant does not have access, to determine whether a grand jury subpoena has been misused and whether the defendant should be granted some form of relief as a result. *E.g.*, *United States* v. *Jenkins*, 904 F.2d 549, 559 (10th Cir. 1990) (lower court had conducted two "*in camera* hearings"); *United States* v. *Badger*, 983 F.2d 1443, 1458 (7th Cir. 1993) (district court "did review the grand jury materials *in camera*," although defendant had not offered "any evidence"); *United States* v. *Sellaro*, 514 F.2d 114, 122 (8th Cir. 1973) (court "ha[d] examined the grand jury transcript"); *In re Grand Jury Investigation*, 425 F. Supp. 717, 719 (S.D. Fla. 1977) (court elicited testimony from grand jury foreman to corroborate prosecutor's claimed proper purpose). When timing or circumstances suggest that a subpoena was issued solely to gather evidence of an already-charged crime, courts have imposed further requirements on the government; one district court, for instance, required the government to submit an affidavit and offer of proof demonstrating its proper purpose. *United States* v. *Finazzo*, 407 F. Supp. 1127, 1132 (E.D. Mich. 1975).[19]

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[19] The government relies (Br. 24-25) on *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292 (1991), to suggest that, because

Thus, even in the grand jury context—where there is no requirement for an adversary hearing, and where unique considerations of secrecy preclude defendants from either substantiating their allegations or meaningfully participating in a hearing—courts have created procedures roughly analogous to the hearings at issue here. When there are substantial allegations that their process is being abused, courts regularly review the available evidence, at least to the extent consistent with the independence and secrecy to which grand jury proceedings are entitled. *See In re Grand Jury Proceedings*, 814 F.2d 61, 71 (1st Cir. 1987) ("Despite these difficulties, neither we nor other courts have shirked the responsibility of deciding the merits of challenges to grand jury proceedings like the one raised here.").

Moreover, there are particular reasons for concern about intrusion into the grand jury's processes that do not apply to an executive agency like the IRS. As this Court has recognized, "the whole theory of [the grand jury's] function is that it belongs to no branch of the in-

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grand jury subpoenas are generally presumed to be reasonable, courts may not give targets of such subpoenas any opportunity to develop evidence against their enforcement. But *R. Enterprises* stands for the opposite proposition; it noted 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," because "[a]bsent even minimal information, the subpoena recipient is likely to find it exceedingly difficult to persuade a court that 'compliance would be unreasonable." *Id.* at 300, 302 (internal quotation marks omitted). In other words, in *R. Enterprises*, this Court recognized the unfairness that would arise if the subpoena's target would ultimately bear a heavy burden but had no access to critical information it would need to meet that burden, and it suggested that some accommodation for that reality would be in order.

stitutional Government, serving as a kind of buffer or referee between the Government and the people." *United States* v. *Williams*, 504 U.S. 36, 47 (1992); *see id.* at 48 (discussing the grand jury's "tradition of independence"); *United States* v. *Calandra*, 414 U.S. 338, 343 (1974) (noting grand jury's role as both a "body of accusers" and a "protector of citizens against arbitrary and oppressive governmental action"); *Dionisio*, 410 U.S. at 16-17 (explaining that the "constitutional guarantee" of a grand jury "presupposes an investigative body acting independently of either prosecuting attorney or judge" (internal quotation marks omitted)); *Stirone* v. *United States*, 361 U.S. 212, 218 (1960) ("The very purpose of the … grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge"). By contrast, an executive agency like the IRS lacks the independence of the grand jury. It is for that reason that Congress has required a separate "buffer" between the IRS and the people. That buffer is supplied by adversary hearings at which taxpayers have a meaningful opportunity to establish that the government is acting pursuant to an improper purpose (or at least a basis for so inferring, and for further inquiry).

In this vein, the government's extensive reliance on *Dionisio* is misplaced. If anything, *Dionisio* highlights the distinctions between grand juries and executive agencies like the IRS. There, this Court rejected an argument that a grand jury must make an affirmative showing of "reasonableness" before its subpoenas will be enforced. In other words, the Court ruled that grand juries are not subject to an affirmative showing comparable to the showing that the Court required of the IRS in *Powell*. This is precisely because of the

grand jury's special constitutional role as an independent "protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." *Dionisio*, 410 U.S. at 17. The government quotes *Dionisio*'s admonition that courts should be cautious to place procedural burdens on a grand jury. *See* Br. 24 (quoting 410 U.S. at 17). But the quoted language comes from a paragraph almost entirely devoted to underscoring the importance of the grand jury's independence from both the executive branch and the judiciary. Because of this independence, the Court explained, it is critical for grand juries to be "unhindered by external influence or supervision" to the greatest possible extent. 410 U.S. at 17. *Dionisio* does not control this situation, where—as this Court noted in *Powell*—Congress has specifically required court review to avoid executive agency abuse.

3. The government notes that courts have compared the IRS's investigative powers to similar powers of other agencies (Br. 23-24). For example, the government cites to the "power of inquisition" vested in the Federal Trade Commission ("FTC"). Br. 23. But the FTC's authority is quite different from that of the IRS. For one thing, the FTC, which has adjudicative powers, exercises continuing "jurisdiction" over the cases before it, while the IRS cedes jurisdiction to either the DOJ or the Tax Court after its investigative function is fulfilled. *See* FTC, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority* (July 2008), *available at* http://www.ftc.gov/about-ftc/what-we-do/enforcement-authority ("In the administrative process, the Commission makes the initial determination that a practice violates the law in either an adjudicative or rulemaking proceeding."). Thus, unlike the IRS, the FTC has no

incentive to use its investigative authority to circumvent the rules of another forum that assumes jurisdiction. Moreover, the FTC can require "compliance reports" because the FTC is charged with ensuring *ongoing* compliance with its own orders, and thus has a continuing responsibility to investigate. *See, e.g.*, 15 U.S.C. § 46(b); *FTC* v. *John Beck Amazing Profits, LLC*, 888 F. Supp. 2d 1006, 1016 (C.D. Cal. 2012) (FTC's proposed final judgment requiring defendants to file compliance reports for twenty years was justified in light of defendants' history of violations). The IRS's role, however, is retroactive only—it examines only past returns, set at a fixed point in time. Once the IRS has made a determination as to liability for a given period, its investigative role ceases, and it has no need to issue or enforce a summons related to that period.

In any event, the cases the government cites do not suggest any conflict with the Eleventh Circuit's approach—there is no dispute that one who challenges a subpoena must demonstrate why it should not be enforced. *See Oklahoma Press Publ'g Co.* v. *Walling*, 327 U.S. 186 (1946); *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950). The dispute here is simply about what opportunity taxpayers should have to meet their burden when the evidence they require is within the hands of the IRS. *See Nero*, 570 F.3d at 1250 (emphasizing that the taxpayer "normally has no knowledge" of the facts necessary to determine the IRS's purpose (quoting *Southeast*, 655 F.2d at 667)). The ultimate standard for *prevailing* on a challenge to a summons is not at issue.[20]

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[20] Throughout its briefing, the government relies on cases that establish the uncontested proposition that agency investigatory powers are often quite broad. *See, e.g.*, Br. 25-26 (discussing

II. RESPONDENTS HAVE MADE A SUFFICIENT SHOWING TO OBTAIN AN EVIDENTIARY HEARING

In challenging the IRS's summonses, respondents did not rely on speculative assertions of impropriety. To the contrary, respondents made several specific allegations of bad faith and supported those allegations with the evidence available to them—affidavits and other evidence raising at least a plausible inference that the IRS's proffered purpose for enforcing the summonses was pretextual and that its actual purpose was improper. Those submissions are sufficient to justify an evidentiary hearing.

Respondents submitted considerable evidence suggesting that, when the IRS moved to enforce the summonses, it was no longer truly engaged in an *administrative* investigation and determination of tax liability—which (as the IRS itself recognizes in its Handbook) is the proper purpose of tax summonses—but rather was attempting to use the summonses to gain an unfair procedural advantage in Tax Court litigation against DHLP. As respondents showed, IRS Agent Fierfelder signed the FPAA on August 11, 2010 (JA 68), indicating that the administrative investigation was at an end, more than a month before the IRS issued the summonses on September 24, 2010. And although four of the summonses had a return date of October 25, 2010 (JA 35; Pet. App. 11a, 21a, 32a, 43a), the IRS made no immediate effort to enforce the summonses—even though its own policies provide that a decision regarding enforcement should be made

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Blair v. *United States*, 250 U.S. 273 (1919) and *United States* v. *Euge*, 444 U.S. 707 (1980)). But it is precisely because the IRS's investigative powers are so expansive that the possibility of abuse is cause for concern.

"[w]ithin 3 workdays" of the return date specified on the summonses. JA 128. Instead, the IRS simply issued the (previously signed) FPAA on December 28, 2010, confirming that the summonses were not needed for an administrative determination of DHLP's tax liability. It was not until April 28, 2011, six months after the return date and almost three months after DHLP challenged the FPAA in Tax Court, that the IRS sought enforcement of the summonses. This chronology, standing alone, raises a substantial question as to whether the IRS has any true interest in using the summons for their proper purpose of gathering information to determine DHLP's tax liability, or whether the IRS had some other, improper, motivation.

Other evidence submitted by respondents indicates the IRS is no longer actually pursuing an administrative determination of DHLP's tax liability but rather is using the summonses to bolster its position in litigation—and, in particular, to circumvent the strictures of Tax Court discovery rules. In Tax Court, third-party depositions are generally not available. T.C. Rules 70(a)(1), 80(a). Several pieces of evidence suggest that the IRS is hoping to use these outstanding summonses as a means to evade that limitation and obtain third-party discovery to which it is not entitled in litigation.

First, the timing alone suggests that this was the IRS's true purpose: The Tax Court proceeding had been underway for nearly three months before the IRS sought enforcement of the summonses, and it had been nearly six months since most of the original return dates.[21] Moreover, as detailed in the affidavit of attor-

[21] In the grand jury context, when a defendant alleges that a subpoena was issued in order to develop a case post-indictment, and the government counters that the subpoena was issued pursu-

ney Richard Sapinski, when Christine Moog, a non-party to this case who was also summoned by Fierfelder in connection with the investigation of DHLP, complied with her summons, she was not interviewed by Fierfelder. JA 100 ¶ 11. Instead, the interview was conducted entirely by David Flassing, the IRS's trial counsel in the Tax Court proceeding. JA 98-100 ¶¶ 7-13. Respondents also submitted a letter from Flassing indicating that the IRS refused to submit the tax proceeding to IRS Appeals (a process similar to mediation) on the ground that he did not have "the complete facts of the case" because of the outstanding summonses. JA 102. During the Tax Court proceedings, the IRS also sought a continuance on the ground that the summonses were still outstanding. JA 105-106 ¶ 6.[22]

This form of gamesmanship is not a proper use of the summons procedure. There are two distinct phases

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ant to a proper investigation, courts consider whether there is some indication that such an investigation was, in fact, proceeding. *See In re Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985 (Simels)*, 767 F.2d 26, 29-30 (2d Cir. 1985) ("[S]ince not a single witness was called to the grand jury between October 10, 1984 and January 29, 1985, claims that the grand jury desired Simels' evidence as part of an active investigation seem particularly weak"); *United States* v. *Flemmi*, 245 F.3d 24, 28-29 (1st Cir. 2001) (suggesting that whether further review is required depends upon whether the grand jury ultimately issued a materially different indictment, because that would suggest a proper investigatory purpose). Here, there is no evidence of an active investigation after Agent Fierfelder signed the FPAA, let alone after the FPAA issued and the statute of limitations expired.

[22] Agent Fierfelder's declaration attesting to the IRS's good faith is also suggestive as it is written in the past tense. Instead of alleging an ongoing investigation into DHLP's tax liability, Agent Fierfelder merely noted that the IRS "has examined" DHLP's tax returns. JA 24.

in the tax enforcement process. In the investigatory auditing stage, the IRS has broad "inquisitorial" powers, including its summons power. But the Tax Code clearly envisions that IRS investigations ultimately will come to a close; thus, for partnerships, a Final Partnership Administrative Adjustment must be issued before the statute of limitations has passed. *See* 26 U.S.C. §§ 6229, 6501. Although the FPAA is subject to modification in certain circumstances, as a general matter, it represents the final numerical figure that the IRS will defend in Tax Court.

Once the IRS has issued an FPAA, the taxpayer may contest it in Tax Court. In Tax Court, the taxpayer and the IRS are supposed to stand on equal footing, and both are subject to the same substantially limited discovery rules, which the court developed after extensive comment from the public. *See* Hyman, *When Rules Collide: Procedural Intersection and the Rule of Law*, 71 Tulane L. Rev. 1389, 1408 n.64 (1997). Thus, whereas the IRS has broad, unilateral powers in the investigatory stage, in the context of tax litigation, its discovery powers are no greater than the taxpayers' entitlement to discovery against the IRS. That the IRS's investigatory powers are limited once Tax Court proceedings have begun is confirmed by the IRS's own written internal policies: Its manual provides that only in exceptional circumstances may agents file summonses after an FPAA has issued, and suggests that agents may never issue summonses once a judicial proceeding is underway. *See* JA 119-120 ("It may be appropriate to issue a summons after an SND has been filed *but before a Tax Court petition has been filed* in rare situations in which an *independent and sufficient reason exists to justify this action*" (emphasis in original)).

As courts have recognized in other contexts, an agency should not be allowed to use its broad investigative powers solely for the purpose of obtaining an advantage in litigation that would otherwise be contrary to court rules. That is not a proper use of the agency's *investigative* powers; once (as happened here) the agency closes its investigation and shifts to the litigation arena, it may not use its summons power solely for the purpose of bolstering its court case. *See Resolution Trust Corp.* v. *Thornton*, 41 F.3d 1539, 1545-1548 (D.C. Cir. 1994) (quashing RTC subpoena during pendency of litigation because the agency no longer had a valid investigatory purpose for the summons).[23] As noted, this is true even in the grand jury context, on which the government heavily relies; "[w]hile a grand jury wields broad investigatory powers prior to returning an indictment, courts uniformly have held that, once a targeted individual has been indicted, the government must cease its use of the grand jury in preparing its case for trial." *Id.* at 1546 (collecting cases) (internal quotation marks and brackets omitted).[24]

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[23] *See generally* Hyman, 71 Tulane L. Rev. 1389 (discussing this point at length); Hyman, *Procedural Intersection and Special Pleading: Is Tax Different?*, 71 Tulane L. Rev. 1729, 1740 (1997) ("Preventing such circumvention is consistent with the overall logic of the system.").

[24] *See also* United States Attorney's Manual § 9-11.120 ("[T]he grand jury cannot be used solely to obtain additional evidence against a defendant who has already been indicted. Nor can the grand jury be used solely for pre-trial discovery or trial preparation." (internal citations omitted)); Beale & Bryson, *Grand Jury Law and Practice* § 9:16 ("It is universally recognized that it is improper to use the grand jury for the purpose of preparing an already pending indictment for trial." (collecting cases)); Diamond, *Federal Grand Jury Practice and Procedure* § 4.01[C] (5th ed. 2012) (stating that most common misconduct associated with grand

Preventing the IRS from using its investigative power to secure an unfair advantage in litigation in circumvention of court rules is also consistent with the approach courts have taken under the relatively analogous statutory scheme governing bankruptcy discovery. Under Bankruptcy Rule 2004, those involved in the administration of bankruptcy laws, such as trustees and other parties in interest, are empowered to conduct wide-ranging discovery as long as it is plausibly related to the bankruptcy, but once litigation is commenced, Bankruptcy Rule 2004 cannot be used to circumvent discovery restrictions. *See In re Bennett Funding Group, Inc.*, 203 B.R. 24, 27-28 (Bankr. N.D.N.Y. 1996); *In re Szadkowski*, 198 B.R. 140, 141 (Bankr. D. Md. 1996).[25]

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jury investigations is "the abuse of the jury to gather evidence for a pending indictment").

[25] Aside from a stray sentence in a footnote (Pet. 14 n.2), the government has not argued in this Court—in its petition for certiorari, its reply brief (after this point was made in the brief in opposition), or in its brief on the merits—that the IRS may use its summons power purely to gain a litigation advantage once the administrative process has closed and the dispute has shifted to Tax Court. The district court ruled that a summons should not be quashed on the ground that it was being used to circumvent Tax Court discovery limitations. Pet. App. 15a. That point was not addressed in the court of appeals' decision, and the district court was incorrect. The district court relied on an out-of-circuit case, *PAA Management, Ltd.* v. *United States*, 962 F.2d 212 (2d Cir. 1992). But in *PAA Management*, the Second Circuit held only that neither the issuance of an FPAA nor the initiation of a Tax Court proceeding, standing alone, suffices to show that a summons should be quashed. *See id.* at 218 (initiation of tax court proceedings "does not *necessarily* obviate the legitimacy of further IRS administrative investigation") (emphasis added); *id.* at 217-218 (summons issued after FPAA was issued is not illegitimate "for this reason alone," and "mere existence" of collateral proceedings

Nor should the fact that the summonses were issued before the FPAA insulate the summons enforcement from challenge. First, given that the FPAA had already been signed at the time the summonses were issued and that the IRS made no effort to enforce them during the two months between their return date and the date the FPAA was issued, it is logical at least to infer the IRS issued the summonses solely to lay a predicate for their later use during the Tax Court proceedings. In any event, even if Agent Fierfelder had a proper investigative purpose when the summonses were first issued, this Court has never held that summonses can later be enforced for an improper purpose even if issued for a proper purpose originally. In fact, if

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does not deprive IRS of its investigatory powers). The *PAA* court took pains to make clear that it likely would be an abuse of process for the IRS to seek enforcement of a summons to evade tax court rules, rather than pursuant to a legitimate "inquisitorial" investigative purpose. *See id.* at 219 ("This is by no means to say that the IRS may resort to the summons power whenever the discovery or evidentiary rules in a judicial proceeding block access to or use of desired information. The purpose of the summons, which is an investigative and enforcement tool, differs from the purpose of discovery …. [T]he summons power is not a power to procure or perpetuate evidence at all; it is strictly inquisitorial, and … the IRS's need to prepare its case by further examination is quite another matter from producing evidence in support of it." (punctuation altered; citation, ellipsis, and brackets omitted)); *see also PAA Mgmt., Ltd.* v. *United States*, 817 F. Supp. 425, 427 (S.D.N.Y. 1993) (decision on remand concluding that "summonses designed to enable the government to figure out what its theory was going to be" are permissible, but not summonses "primarily to collect evidence that would support a case that had otherwise been fully prepared"). At a minimum, if this Court vacates the judgment below, it should remand so that the court of appeals can consider whether evidence that the IRS is using a summons only to circumvent Tax Court discovery rules provides grounds for denying enforcement of the summons.

the courts are to prevent their processes from being abused, they should not countenance enforcement for an improper purpose, regardless of the intent with which the summonses were first issued. "It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused." *Powell*, 379 U.S. at 58.[26]

Second, and independently, respondents made sufficiently specific allegations and introduced sufficient evidence to raise a plausible inference that the IRS had issued the summons to retaliate against DHLP for declining to toll the statute of limitations a third time. (The government does not argue that such conduct would be a proper use of the summons power.) Before 2010, DHLP twice agreed to toll the statute of limitations to allow the IRS ample time to investigate its tax liabilities from 2005 through 2007. JA 95 ¶ 9. When the IRS requested yet another extension, DHLP—which had been cooperating with the IRS's investigation for more than a year—refused. As Mr. Clarke's affidavit

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[26] In the court of appeals, the government cited two other cases for the proposition that circumvention of Tax Court rules is not an improper use of the summons process, but even if this Court or the Eleventh Circuit adopted their holdings, neither would establish that respondents' allegations are deficient as a matter of law. In *Sugarloaf Funding LLC* v. *U.S. Department of Treasury*, 584 F.3d 340, 349 (1st Cir. 2009), the court specifically distinguished a case in which the IRS agent had admitted that the summons was not needed for its examination and was intended only to "protect the government's interest" in Tax Court. And in *Mary Kay Ash* v. *Commissioner*, 96 T.C. 459 (1991), the Tax Court considered only whether a protective order should be issued barring the IRS from using evidence obtained through a summons—in effect, rejecting an exclusionary rule; it did not rule whether the summons should actually have been enforced, which, it recognized, is a matter for the district court to decide. *See id.* at 462, 472-473.

explains, "immediately" after DHLP refused to grant the third extension, "despite having not asked for additional information for some time, the Government suddenly issued" expansive summonses. *Id.* This evidence, coupled with the circumstantial evidence that the IRS neither needed nor intended to use the evidence from the summonses for their investigation, allows a court to "infer a possibility" of an improper purpose. *See United States* v. *Kis*, 658 F.2d 526, 540 (7th Cir. 1981).

The evidence respondents have been able to marshal at least suggests that the IRS is not using the summonses for their proper purpose. At this stage, respondents request only a limited adversarial hearing at which to question the IRS on this point. That hearing may, or may not, enable the district court to reach a conclusion or demonstrate that further discovery may be warranted. But in light of their specific, plausible allegations and the substantial evidence they adduced in spite of their relative lack of access to potential evidence, under any standard, respondents were entitled to this limited, but important, relief.[27]

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[27] If this Court disagrees that respondents have marshaled sufficient evidence to show entitlement to an evidentiary hearing, it should remand and provide the respondents with an opportunity to submit further evidence. Respondents reasonably relied on binding circuit precedent in preparing their opposition to enforcement of the summonses, and to the extent that this Court adopts a new standard, respondents should be entitled to an opportunity to satisfy that standard.

Respectfully submitted.

EDWARD A. MAROD
Counsel of Record
JACK J. AIELLO
MARTIN R. PRESS
GUNSTER, YOAKLEY & STEWART, P.A.
777 S. Flagler Dr.
Suite 500 East
West Palm Beach, FL 33401
(561) 655-1980
EMarod@gunster.com

SETH P. WAXMAN
PAUL R.Q. WOLFSON
JOSHUA M. SALZMAN
CHRISTINA MANFREDI MCKINLEY
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

CARLEEN M. ZUBRZYCKI
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

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