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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an unsupported allegation that the Internal Revenue Service (IRS) issued a summons for an improper purpose entitles an opponent of the summons to an evidentiary hearing to question IRS officials about their reasons for issuing the summons.

PARTIES TO THE PROCEEDINGS

The petitioner is the United States of America.

The respondents are Michael Clarke, as Chief Financial Officer of Beekman Vista, Inc.; Michael Clarke, as Chief Financial Officer of Dynamo GP, Inc.; Dynamo Holdings Limited Partnership; Rita Holloway, as Trustee for the 2005 Christine Moog Family Delaware Dynasty Trust; Marc Julien, as Trustee for the 2005 Robert Julien Family Delaware Dynasty Trust; and Robert Julien.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the *Federal Reporter* but is reprinted in 517 Fed. Appx. 689. The order of the district court in the lead case in these consolidated actions (Pet. App. 10a-19a) is not published but is available at 111 A.F.T.R.2d 2013-1697. The orders of the district court in the remaining cases (Pet. App. 20a-63a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 2013 (Pet. App. 7a-9a). On July 5, 2013, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including August 16, 2013. On August 12, 2013, Justice Thomas further extended the time to September 6, 2013, and the petition was filed on that date. The petition for a

writ of certiorari was granted on January 10, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-6a.

STATEMENT

1. Congress has "authorized and required" the Secretary of the Treasury "to make the inquiries, determinations, and assessments of all taxes" imposed by the Internal Revenue Code (Code) that "have not been duly paid by stamp at the time and in the manner provided by law." 26 U.S.C. 6201(a); see 26 U.S.C. 7601(a) ("The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax."). The Secretary has delegated that duty to the Commissioner of Internal Revenue. 26 C.F.R. 301.7602-1(b), 301.7701-9.

As the Secretary's delegate, the Internal Revenue Service (IRS or Service) has broad statutory authority to issue summonses in furtherance of its investigatory responsibility. "For the purpose of ascertaining the correctness of any return, making a return where none has been made, [or] determining the liability of any person for any internal revenue tax," the Commissioner is authorized "[t]o examine any books, papers, records, or other data which may be relevant or material to such inquiry," and to summon any person to appear and produce such documents and to give relevant testimony. 26 U.S.C. 7602(a)(1)-(3). Section

7602(b) further provides that the IRS may issue a summons, examine documents, or take testimony for "the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws." The Service thus "has broad authority to examine the accuracy of federal tax returns," including the authority to issue summonses. *Church of Scientology* v. *United States*, 506 U.S. 9, 10 n.2 (1992); see *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 816 (1984) ("In order to encourage effective tax investigations, Congress has endowed the IRS with expansive information-gathering authority; § 7602 is the centerpiece of that congressional design."); *United States* v. *Euge*, 444 U.S. 707, 716 n.9 (1980) ("Congressional intent to provide the Secretary with broad latitude to adopt enforcement techniques helpful in the performance of his tax collection and assessment responsibilities is expressed throughout the Code.").

When a summoned party fails to comply with a summons, the United States may petition a federal district court to enforce the summons. 26 U.S.C. 7402(b), 7604(a). Congress intended summons-enforcement proceedings to be "summary in nature." *United States* v. *Stuart*, 489 U.S. 353, 369 (1989) (quoting S. Rep. No. 494, 97th Cong., 2d Sess. 285 (1982) (*1982 Senate Report*)). The purpose of such a proceeding is not to determine guilt or tax liability, but to obtain information relevant to the IRS's fulfillment of its statutory obligation to examine tax returns. In order to enforce a contested summons, the IRS must demonstrate that: (1) "the investigation will be conducted pursuant to a legitimate purpose"; (2) "the inquiry may be relevant to the purpose"; (3) "the information sought is not already within the Commissioner's pos-

session"; and (4) "the administrative steps required by the [Internal Revenue] Code have been followed." *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964). Such a showing demonstrates "good faith in issuing the summons." *Stuart*, 489 U.S. at 359; see *United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298, 318 (1978).[1]

The government generally satisfies its initial burden of demonstrating good faith by filing an affidavit from the investigating agent attesting to the *Powell* factors. *United States* v. *Medlin*, 986 F.2d 463, 466 (11th Cir.), cert. denied, 510 U.S. 933 (1993); *United States* v. *Garden State Nat'l Bank*, 607 F.2d 61, 68 (3d Cir. 1979); see *Stuart*, 489 U.S. at 360 (noting that affidavits filed by the IRS "plainly satisfied the requirements of good faith [the Court] set forth in *Powell* and [later] repeatedly reaffirmed"). Once the United States has made its initial showing of good faith, the burden is on the party challenging a summons either to disprove one of the *Powell* factors or to demonstrate that enforcement of the summons would constitute an abuse of the court's process (because, for example, it was issued for an improper purpose). *Powell*, 379 U.S. at 57-58; see *Stuart*, 489 U.S. at 360.

2. a. IRS agents examined the information returns of Dynamo Holdings Limited Partnership (DHLP) for the 2005 through 2007 tax years. Pet. App. 10a-11a, 21a, 32a, 43a, 54a. During the examination, questions arose about debt that DHLP had reported on its returns, including interest expenses totaling $34 million

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[1] The IRS may not issue a summons or initiate an enforcement proceeding, however, if the Service has referred the relevant taxpayer to the Department of Justice for potential criminal prosecution. 26 U.S.C. 7602(d).

over two years. *Id.* at 11a, 21a, 32a, 43a, 54a. In September and October 2010, as part of an effort to obtain information for the investigation, the IRS issued five summonses to third parties connected to DHLP whom the Service had reason to believe had information and records relevant to DHLP's tax-reporting obligations during the tax years at issue. *Id.* at 11a-12a, 21a-22a, 32a-33a, 43a-44a, 54a-55a; Gov't C.A. Br. 3-5. The summonses directed the recipients to give testimony and to produce for examination certain books, records, papers, and other data relating to the investigation. Pet. App. 11a-12a, 21a-22a, 32a-33a, 43a-44a, 54a-55a. None of the five recipients complied with the summonses. *Ibid.*

In December 2010, pursuant to 26 U.S.C. 6223, the IRS issued to the partnership's tax-matters partner a Notice of Final Partnership Administrative Adjustment (FPAA) that proposed adjustments to items on the partnership's information returns for 2005 through 2007. Pet. App. 12a, 22a, 33a, 44a, 55a; J.A. 60-92. For partnerships, an FPAA serves the same purpose that a notice of deficiency serves for an individual taxpayer, and it is generally a prerequisite to any assessment by the IRS of a deficiency attributable to the partnership. See 26 U.S.C. 6221-6223. The issuance of an FPAA gives certain partners in the relevant partnership the right to challenge the adjustment in the United States Tax Court, a district court, or the Court of Federal Claims. 26 U.S.C. 6226(a); see Pet. App. 12a, 22a, 33a, 44a, 55a. In February 2011, the partnership filed a petition for readjustment in the Tax Court, challenging the determinations in the FPAA. *Ibid.* That proceeding remains

pending. See *DHLP* v. *Commissioner*, Docket No. 2685-11 (T.C.).

b. Because the recipients of the above-described summonses did not comply with the summonses, the United States filed five petitions for enforcement in the United States District Court for the Southern District of Florida. Pet. App. 12a, 22a, 33a, 44a, 55a. The United States attached to each petition a declaration, attesting to satisfaction of the *Powell* factors, executed by the IRS agent who had issued the relevant summons. See *id.* at 12a-14a, 22a-24a, 33a-35a, 44a-46a, 55a-57a. DHLP intervened as a respondent, and several respondents moved for summary dismissal of the petitions or, alternatively, for the scheduling of a pretrial conference to allow discovery. See *id.* at 10a-11a, 20a-21a, 31a-32a, 42a-43a, 64a-84a; Gov't C.A. Br. 2-3.

In support of those requests, respondents asserted that "[t]here must have been some ulterior motive" (*i.e.*, other than a legitimate investigatory purpose) for the IRS's issuance of the summonses. Pet. App. 72a. Respondents identified several possible allegedly illicit motives, including "retribution for DHLP's refusal to grant a further extension of the applicable statute of limitations, a subterfuge to gather information related to [another party], in order to justify reopening the examination of its returns for the same periods or part of a larger scheme on the part of the government to send out such summonses in hopes of being able to use them to subvert the Tax Court Discovery Rules once a Tax Court case was commenced." *Ibid.*; see J.A. 48, 51-53. Respondents argued that they were entitled to "explore" their allegations through discovery and an evidentiary hearing. Pet.

App. 73a-75a; J.A. 54-55. They did not identify any evidence already available to them that would support their allegations.

c. The district court ordered the summonses enforced. Pet. App. 10a-63a. The court held that respondents had failed to rebut the United States' prima facie case for enforcement under *Powell*. *Id.* at 13a, 23a, 34a, 45a, 56a. The court also rejected respondents' various allegations of ulterior motive as legally irrelevant, conjectural, or incorrect as a matter of law. *Id.* at 13a-17a, 23a-27a, 34a-38a, 45a-49a, 56a-60a.

Although the district court recognized that a summons opponent is entitled to a limited adversarial hearing, it denied respondents' requests for discovery and for an opportunity to question IRS agents. Pet. App. 17a-18a, 27a-28a, 38a-39a, 49a-50a, 60a-61a. The court explained that a district court is not required to hold an evidentiary hearing at which a summons opponent may examine IRS agents "upon a mere allegation of improper purpose." *Id.* at 17a. The court observed that, in *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310 (1985), this Court had "upheld the denial of an evidentiary hearing in a summons enforcement proceeding under similar circumstances." Pet. App. 17a; see *id.* at 17a-18a, 27a-28a, 38a-39a, 49a-50a, 60a-61a. The district court explained that, because respondents had made "no meaningful allegations of improper purpose" that warranted discovery or an opportunity to question IRS officials, it declined to order either. *Id.* at 18a, 28a, 39a, 50a, 61a.

3. The court of appeals reversed. Pet. App. 1a-6a. The court of appeals agreed with the district court that respondents were not entitled to discovery based "on a mere allegation of improper purpose." *Id.* at 5a

n.3 (quoting *Nero Trading, LLC* v. *U.S. Dep't of Treasury, IRS*, 570 F.3d 1244, 1249 (11th Cir. 2009)). The court held, however, that the district court had abused its discretion by declining to hold an evidentiary hearing at which respondents may examine IRS agents. The court based that holding on respondents' allegation that the Service "may have issued the summonses * * * solely in retribution for [DHLP's] refusal to extend a statute of limitations deadline." *Id.* at 4a-5a. In the view of the court of appeals, respondents were "entitled to a hearing to explore their allegation of an improper purpose," *id.* at 5a, and "to ascertain whether the [IRS] issued a given summons for an improper purpose," *id.* at 6a (quoting *Nero Trading*, 570 F.3d at 1249).

The court of appeals also stated that, "in situations such as this, requiring the taxpayer to provide factual support for an allegation of an improper purpose, without giving the taxpayer a meaningful opportunity to obtain such facts, saddles the taxpayer with an unreasonable circular burden, creating an impermissible 'Catch 22.'" Pet. App. 5a (quoting *Nero Trading*, 570 F.3d at 1250). The court explained that on remand, respondents "should be permitted to 'question IRS officials concerning the Service's reasons for issuing the summons[es].'" *Id.* at 6a (quoting *United States* v. *Southeast First Nat'l Bank*, 655 F.2d 661, 667 (5th Cir. 1981) (brackets in original)).

SUMMARY OF ARGUMENT

Before a district court will enforce an IRS summons, the Service must make a prima facie showing that the summons was issued in good faith and in compliance with applicable legal requirements. When the IRS makes that showing, it is entitled to have its

summons enforced unless a summons objector rebuts the prima facie case by presenting sufficient evidence from which the district court may infer bad faith. The court below held that, whenever a summons objector alleges that the IRS issued a summons for improper reasons, the objector is entitled to an evidentiary hearing at which it may examine IRS agents about their motives. The court thus erroneously reduced to zero the amount of evidence that is required to rebut a showing of good faith.

A. Congress has directed the IRS to make "inquir[ies] after and concerning all persons * * * who may be liable to pay any internal revenue tax." 26 U.S.C. 7601(a). To assist the Service in performing that duty, Congress empowered the agency to issue summonses "[f]or the purpose of ascertaining the correctness of any [tax] return, * * * determining the liability of any person for any internal revenue tax * * * , or collecting any such liability." 26 U.S.C. 7602(a). That summons authority is expansive and is essential to the proper functioning of our federal tax system, which depends substantially on taxpayers' self-reporting of information relevant to the determination of tax liabilities. The Court has analogized the IRS's broad summons authority to a grand jury's expansive power to subpoena individuals to testify, explaining that both powers invoke the broad testimonial duty that all citizens owe to the government.

When a taxpayer refuses to comply with an IRS summons, the IRS may apply to a district court for enforcement. In such circumstances, the Service must establish that it issued the summons in good faith and in compliance with applicable legal requirements. Summons objectors may challenge a summons on legal

grounds and may present any evidence in their possession that would impugn the Service's good faith. That system provides taxpayers with substantial protection against the potential for abuse of IRS summonses. As this Court has recognized, however, Congress intended summons-enforcement proceedings to be summary in nature. Thus, when the IRS establishes its good faith and a summons objector presents no evidence to contradict that showing, the objector need not be given an opportunity to probe the motives of the responsible agency officials.

B. A summons objector is not automatically entitled to an evidentiary hearing at which he may question IRS officials about their motives for issuing a summons. To be sure, if an objector presents evidence to support an inference of improper motive—or if a district court otherwise believes that such an opportunity for examination is appropriate—the district court may hold a hearing and require IRS agents to justify their actions. When an objector makes unsupported allegations of bad faith, however, a district court should have the discretion to deny the objector's request to examine IRS agents. Summons objectors are not entitled to delay congressionally authorized investigations and to consume time and agency resources unless they can substantiate an initial claim of bad faith with at least some evidence.

The court of appeals' contrary holding is inconsistent not only with this Court's decisions in the specific context of IRS summons enforcement, but also with the presumption of regularity that generally attaches to the conduct of government agents. It is also inconsistent with this Court's longstanding treatment of the analogous investigatory powers of grand

juries and other government agencies. This Court has been reluctant to embrace any departure from the default rule of mandatory compliance, particularly when such a departure would delay the relevant investigation or require procedural detours.

C. The district court did not abuse its discretion when it declined to offer respondents an opportunity to examine IRS agents. The court correctly found that respondents had presented no factual support for their allegations of improper purpose. The Eleventh Circuit's automatic-examination rule is inconsistent with Congress's intent that summons-enforcement proceedings be expeditious, undermines the smooth functioning of the federal tax system, and conflicts with the rules that apply in every other court of appeals. The judgment below should be reversed.

ARGUMENT

AN UNSUPPORTED ALLEGATION THAT THE IRS ISSUED A SUMMONS FOR AN IMPROPER PURPOSE DOES NOT ENTITLE THE OPPONENT OF THE SUMMONS TO AN EVIDENTIARY HEARING AT WHICH IT MAY QUESTION IRS AGENTS ABOUT THEIR MOTIVES FOR ISSUING THE SUMMONS

Before the IRS is entitled to judicial enforcement of a summons issued pursuant to 26 U.S.C. 7602, the Service must establish that the summons was issued in good faith by demonstrating that the factors set forth in *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964), have been satisfied. Under the rule adopted by the Eleventh Circuit, however, such a showing of good faith is insufficient to obtain an enforcement order if a summons opponent alleges that the IRS issued the summons for an improper purpose, even if the allegation is wholly speculative and lacking in evidentiary

support. The court below held that such an allegation, standing alone, entitles the summons opponent to an evidentiary hearing at which it may question IRS agents about their motives for issuing the summons. That holding, which conflicts with decisions of every other court of appeals with jurisdiction over IRS summons actions,[2] is inconsistent with the effective enforcement of federal tax laws and with this Court's decisions delineating the IRS's summons authority and analogous government powers of investigation.

A. The IRS's Summons Authority Is Broad And Should Be Summarily Enforced

1. Congress has "authorized and required" the IRS "to make the inquiries, determinations, and assessments of all taxes" imposed by the Internal Revenue Code, 26 U.S.C. 6201(a), including by making a "[c]anvass" of every internal revenue district and "inquir[ies] after and concerning all persons therein who may be liable to pay any internal revenue tax," 26

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[2] *United States* v. *Judicial Watch, Inc.*, 371 F.3d 824, 830-831 (D.C. Cir. 2004); *Sugarloaf Funding, LLC* v. *U.S. Dep't of the Treasury*, 584 F.3d 340, 350-351 (1st Cir. 2009); *United States* v. *Tiffany Fine Arts, Inc.*, 718 F.2d 7, 14 (2d Cir. 1983), aff'd, 469 U.S. 310 (1985); *United States* v. *Garden State Nat'l Bank*, 607 F.2d 61, 71 (3d Cir. 1979); *Hintze* v. *I.R.S.*, 879 F.2d 121, 126-127 (4th Cir. 1989), overruled on other grounds by *Church of Scientology* v. *United States*, 506 U.S. 9 (1992); *Zugerese Trading LLC* v. *IRS*, 336 Fed. Appx. 416, 419 (5th Cir. 2009); *Phillips* v. *United States*, No. 98-3128, 1999 WL 228585, at *4 (6th Cir. Mar. 10, 1999); *United States* v. *Kis*, 658 F.2d 526, 539-540 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982); *United States* v. *National Bank*, 622 F.2d 365, 367 (8th Cir. 1980); *Fortney* v. *United States,* 59 F.3d 117, 121 (9th Cir. 1995); *United States* v. *Balanced Fin. Mgmt., Inc.,* 769 F.2d 1440, 1444-1445 (10th Cir. 1985); see generally Pet. 15-19.

U.S.C. 7601(a). To facilitate the agency's performance of those statutory responsibilities, Congress has granted the IRS broad authority to issue summonses "[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax * * * , or collecting any such liability." 26 U.S.C. 7602(a). This Court has repeatedly recognized that the IRS's summons authority is broad and serves a vital information-gathering role in our federal tax system. See, *e.g.*, *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 814-815 (1984); *United States* v. *Euge*, 444 U.S. 707, 714 (1980); *United States* v. *Bisceglia*, 420 U.S. 141, 145-146 (1975).

As the Court explained in *Arthur Young & Co.*:

> Our complex and comprehensive system of federal taxation, relying as it does upon self-assessment and reporting, demands that all taxpayers be forthright in the disclosure of relevant information to the taxing authorities. Without such disclosure, and the concomitant power of the Government to compel disclosure, our national tax burden would not be fairly and equitably distributed. In order to encourage effective tax investigations, Congress has endowed the IRS with expansive information-gathering authority; § 7602 is the centerpiece of that congressional design.

465 U.S. at 815-816. Congress established a system of taxation in which "the Government depends upon the good faith and integrity of each potential taxpayer to disclose honestly all information relevant to tax liability." *Bisceglia*, 420 U.S. at 145. In administering the statutory scheme, however, "it would be naive to ignore the reality that some persons attempt to outwit

the system, and tax evaders are not readily identifiable." *Ibid.* The IRS's authority to investigate pursuant to Section 7601, and to effectuate such investigations by issuing summonses pursuant to Section 7602, therefore "are essential to our self-reporting system." *Id.* at 146.

The breadth of the IRS's summons authority is confirmed by this Court's repeated recognition that the IRS's "power to summon and inquire" is similar to the power of grand juries to investigate possible crimes and the power of other administrative agencies to collect information through analogous subpoena authority. *Bisceglia*, 420 U.S. at 147-148; see *Powell*, 379 U.S. at 57. The Court has noted that "the language of § 7602 suggests an intention to codify a broad testimonial obligation" that has its source in the common law. *Euge*, 444 U.S. at 714; see *id.* at 712, 714 n.8 (noting that "the common-law duties attaching to the issuance of a testimonial summons" provide, by "analogy," an "interpretive guide" "[i]n determining the scope of the obligation Congress intended to impose" in Section 7602). At common law, the testimonial obligation is expansive: "For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence." *United States* v. *Bryan*, 339 U.S. 323, 331 (1950) (quoting 8 John Henry Wigmore, *Evidence* § 2192 (3d ed. 1940)); see *Blair* v. *United States*, 250 U.S. 273, 279 (1919). It has thus long been established "that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony when-

ever he is properly summoned." *Blackmer* v. *United States*, 284 U.S. 421, 438 (1932).

A citizen's testimonial duty extends as well to compliance with summonses issued by administrative bodies pursuant to congressional authorization. See 1 Kenneth Culp Davis, *Administrative Law Treatise* § 3.04, at 176 (1958) ("Long-standing tradition permits the use of subp[o]enas in aid of grand jury proceedings. The authorities are now clear that the same may be done in aid of the administrative counterpart of grand jury proceedings." (internal footnote omitted)); 8 John Henry Wigmore, *Wigmore on Evidence*, § 2192, at 70 (McNaughton ed. 1961) (*Wigmore*) (same). Section 7602 imposes just such an "expansive" "'testimonial' or evidentiary duty" on the recipients of IRS summonses. *Euge*, 444 U.S. at 712 (internal footnote omitted); see *id.* at 714. Accordingly, "this Court has consistently construed congressional intent to require that if the summons authority claimed is necessary for the effective performance of congressionally imposed responsibilities to enforce the tax Code, that authority should be upheld absent express statutory prohibition or substantial countervailing policies." *Id.* at 711.

2. When a taxpayer refuses to comply with an IRS summons, the Service may file an enforcement petition in a federal district court. See 26 U.S.C. 7402(b), 7604(a); *Donaldson* v. *United States*, 400 U.S. 517, 524 (1971). That enforcement scheme reflects Congress's recognition that "the authority vested in tax collectors [by Sections 7601 and 7602] may be abused, as all power is subject to abuse." *Bisceglia*, 420 U.S. at 146. The solution that Congress adopted, however, "is not to restrict that authority so as to undermine the efficacy of the federal tax system, which seeks to assure

that taxpayers pay what Congress has mandated and to prevent dishonest persons from escaping taxation thus shifting heavier burdens to honest taxpayers." *Ibid.* Instead, "[s]ubstantial protection is afforded by the provision that an Internal Revenue Service summons can be enforced only by the courts." *Ibid.*; see *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964); see also *Wigmore* § 2195, at 87-88 (noting that the "ultimate act of enforcing answers" to agency requests for information is "generally held to be a judicial act requiring resort to a superior court for a ruling").

When Congress authorized district courts to enforce Section 7602 summonses, it did not "intend[] the courts to oversee the [IRS's] determinations to investigate." *Powell*, 379 U.S. at 56. A district court's role in deciding whether to enforce a summons is limited to determining whether the summons was issued in good faith—*viz.*, whether the investigation will be conducted pursuant to a legitimate purpose, whether the summons inquiry may be relevant to that purpose, whether the information sought is not already in the possession of the IRS, and whether the administrative steps required by the Code have been followed. *Id.* at 57-58. If the IRS makes that showing, it is entitled to have its summons enforced. *United States* v. *Stuart*, 489 U.S. 353, 356 (1989) ("So long as the summons meets statutory requirements and is issued in good faith, as we defined that term in *United States* v. *Powell*, compliance is required.") (internal citation omitted).

Congress intended that summons-enforcement proceedings would "be summary in nature." *Stuart*, 489 U.S. at 369 (quoting *1982 Senate Report* 285). Because summons proceedings do not accuse any tax-

payer of wrongdoing, *Bisceglia*, 420 U.S. at 146, enforcement of a summons is not a determination of guilt or liability. The purpose of the summons scheme is "to inquire," *ibid.*, and swift resolution of summons disputes is essential "so that the investigation may advance toward the ultimate determination of civil or criminal liability, if any," *United States* v. *Kis*, 658 F.2d 526, 535 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982).

Congress's intent that summons proceedings be resolved expeditiously is also reflected in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324. In *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), the Court held that the IRS could not issue a summons if the Service had already made an "institutional commitment" to refer the relevant taxpayer to the Department of Justice for possible criminal prosecution. *Id.* at 313-318. In the ensuing four years, that holding "spawned protracted litigation" in summons proceedings about the IRS's motives for issuing particular summonses, "without any meaningful results for the taxpayer." *1982 Senate Report* 285. Congress viewed such proceedings as "wasteful litigation" and responded by enacting TEFRA. *Ibid.*

TEFRA expanded the IRS's summons authority to encompass the investigation of "any offense" as long as the IRS has not actually referred the matter to the Department of Justice. See TEFRA § 333, 96 Stat. 622; 26 U.S.C. 7602(b) and (d). To reduce the volume of litigation associated with enforcement of IRS summonses, Congress thus replaced the prior "institutional commitment" standard, which turned in part on IRS officials' subjective intent regarding potential

criminal referrals, with an objective standard that turns on the presence or absence of an actual referral. By vesting summons opponents with the right to question IRS officials about their motives for issuing summonses, even in the absence of any reason to infer abuse, the Eleventh Circuit's inflexible rule frustrates Congress's stream-lining purposes in enacting that provision.

B. When A Summons Opponent Offers Only An Unsupported Allegation Of IRS Bad Faith, A District Court Does Not Abuse Its Discretion By Declining To Provide The Opponent An Opportunity To Examine IRS Agents About Their Motives For Issuing The Summons

1. Before enforcing an IRS summons, a district court must assure itself that the summons complies with the applicable statutory requirements and was issued in good faith. In *Powell*, this Court set forth the factors that a district court should consider in making that evaluation. 379 U.S. at 57-58; see *Stuart*, 489 U.S. at 356. As in this case, the IRS generally makes a prima facie showing that a summons is valid and was issued in good faith by filing an affidavit attesting to satisfaction of the *Powell* factors. *Stuart*, 489 U.S. at 360; see J.A. 24-36. A summons opponent may challenge the enforcement of a summons on "any appropriate ground." *Reisman*, 375 U.S. at 449. A summons opponent is entitled to a reasonable opportunity, including if appropriate an in-person adversary hearing, to present legal argument as to why a summons should be quashed. If a summons opponent alleges that a summons was issued for an improper purpose, he is also entitled to a reasonable opportuni-

ty to apprise the court of any evidence already in his possession that substantiates the allegation.

It does not logically follow, however, that a summons opponent should in every instance be entitled upon request to question IRS officials about their reasons for issuing a summons. But that is what the court of appeals held in this case. Without examining whether respondents had presented any evidence (or otherwise raised an inference) of bad faith, the court held that a district court necessarily abuses its discretion by denying an examination request whenever a taxpayer makes an "allegation of an improper purpose." Pet. App. 5a.

Respondents attempted in their brief in opposition to recast the court of appeals' decision as requiring a summons opponent to demonstrate a "substantial" basis for alleging bad faith by the IRS. See Br. in Opp. 10, 12, 13, 17, 18, 20, 21. But nothing in the decision below suggests that an allegation of bad faith must be "substantial," or supported by evidence already in the summons opponent's possession, in order to trigger an absolute right to examine IRS agents. On the contrary, the court of appeals specifically rejected such a limitation as unduly restrictive, stating that "in situations such as this, requiring the taxpayer to provide factual support for an allegation of an improper purpose, without giving the taxpayer a meaningful opportunity to obtain such facts, saddles the taxpayer with an unreasonable circular burden, creating an impermissible 'Catch 22.'" Pet. App. 5a.

Respondents' gloss on the opinion below also ignores the court of appeals' separate holding that respondents 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 rationale for denying discovery "on a mere allegation of improper purpose" would make no sense if the court believed that respondents had made a substantial threshold showing of agency bad faith. Read as a whole, the court's opinion unambiguously holds that, although a "mere allegation of improper purpose" does not entitle a summons opponent to broad discovery, it *does* entitle him to question IRS agents about their reasons for issuing the summons. See *id.* at 5a-6a & n.3.[3] That holding is inconsistent with the core premises on which the IRS's summons-enforcement practices are based, and it improperly invites the "protracted" and "wasteful" litigation in summons cases that Congress sought to eliminate in 1982. See *1982 Senate Report* 285.

2. In any IRS summons-enforcement proceeding, an objector is entitled to an adversary hearing where it "may challenge the summons on any appropriate ground" by (for example) making legal arguments or presenting evidence already in the opponent's possession. *Powell*, 379 U.S. at 58 (quoting *Reisman*, 375

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[3] Similarly in *Nero Trading*, the Eleventh Circuit "simply refuse[d] to create a rule that would require [a] taxpayer to allege a factual background" for a charge of bad faith "before he is entitled to" "question the Service concerning its reasons for issuing the summonses." 570 F.3d at 1250. Although the court of appeals in *Nero Trading* stated that "the scope of any adversarial hearing in this area is left to the discretion of the district court," it made clear that in determining the "scope" of an adversarial hearing in this context, district courts in the Eleventh Circuit may not deny a summons opponent's request to question IRS officials. *Id.* at 1249.

U.S. at 449). The objector is not entitled, however, to engage in a fishing expedition about the motives of IRS agents when no pre-existing evidence raises an inference of improper purpose. Once the government makes a prima facie showing that it issued a challenged summons in good faith, it is entitled to have the summons enforced unless the objector "develop[s] facts from which a court might *infer* a *possibility* of some wrongful conduct by the Government." *Kis*, 658 F.2d at 540; see *Powell*, 379 U.S at 51, 56-58. And when a summons opponent seeks to probe IRS officials' motives for issuing the summons, based on an unsupported allegation of bad faith, a district court should have discretion to deny the objector's request.

Although the court below relied in part on *Powell*, see Pet. App. 3a-5a (citing 379 U.S. at 48, 57-58), the Court in *Powell* made clear that a summons opponent bears a heavy burden in challenging the enforcement of a summons. Once the IRS establishes that the summons was issued in good faith, it is entitled to enforce the summons. 379 U.S. at 57-58. A district court remains free thereafter to inquire into the IRS's motive for issuing a summons, but it is *required* to do so only if the taxpayer satisfies his "burden of showing an abuse of the court's process." *Id.* at 58. A taxpayer cannot satisfy that burden with bare assertions, but must "raise[] a substantial question that judicial enforcement of the administrative summons would be an abusive use of the court's process." *Id.* at 51.

3. When a summons opponent asserts that an IRS summons was issued for an improper purpose, but offers no evidence to support that allegation, a district court should have discretion to decline to hold an evidentiary hearing. Such a rule—adopted in every

other court of appeals with jurisdiction over IRS summons actions (see note 2, *supra*)—is consistent with the longstanding principle that "[e]very public officer is presumed to act in obedience to his duty, until the contrary is shown." *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 33 (1827). "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *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). Courts therefore may not infer wrongdoing on the part of a government official based on a mere allegation of improper motive.

Even when an allegation of improper motive is ultimately rejected on the merits, protracted inquiry into that charge may impede the effective conduct of the government's business. For that reason, this Court observed in a related context that "[t]he justifications for a rigorous standard for the elements of a selective-prosecution claim * * * require a correspondingly rigorous standard for discovery in aid of such a claim." *United States* v. *Armstrong*, 517 U.S. 456, 468 (1996). Although the court of appeals in this case held that respondents were "not entitled to discovery," Pet. App. 5a n.3, it required the district court to convene an evidentiary hearing at which respondents will be allowed to question IRS officials regarding their motives for issuing the summonses at issue here. The court of appeals' treatment of unsupported allegations of improper motive as triggering such a requirement cannot be reconciled with the presumption of regularity.

4. The court of appeals' automatic-examination rule is also inconsistent with this Court's longstanding treatment of analogous testimonial obligations in other contexts.

This Court has analogized the IRS's summons authority under Section 7602 to the "subpoena power under the Fair Labor Standards Act" of the Department of Labor (DOL), and to the Federal Trade Commission's "power of inquisition," including its authority to require compliance reports. *Powell*, 379 U.S. at 57 (citing *Oklahoma Press Publ'g Co.* v. *Walling*, 327 U.S. 186, 216 (1946); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950)). In construing the DOL's analogous subpoena power in *Oklahoma Press Publishing Co.*, this Court recognized that the agency could not use its subpoena power for a harassing or otherwise improper purpose, and that the recipient of a subpoena is entitled to "make 'appropriate defence' surrounded by every safeguard of judicial restraint." 327 U.S. at 217 (quoting *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48 (1938)). The Court emphasized, however, that the subpoena objectors bore the "burden" of establishing such an improper purpose, and that the DOL was entitled to enforce its subpoenas in the absence of such a showing. *Id.* at 218 ("No sufficient reason was set forth in the returns or the accompanying affidavits for not enforcing the subpoenas, a burden petitioners were required to assume in order to make 'appropriate defence.'").

Similarly in *Morton Salt Co.*, the Court upheld enforcement of the Federal Trade Commission's investigative authority to require compliance reports. 338 U.S. at 640-644. As in *Oklahoma Press Publishing*

Co., the Court recognized that the agency could not exercise its investigative authority arbitrarily. *Id.* at 653. The Court explained, however, that the objecting corporation bore the burden of "present[ing] evidence" and "ma[king] a record" that a Commission order imposed an unreasonable burden. *Id.* at 653-654.

This Court has also stated that the IRS's summons authority is similar to—and should be interpreted in light of—the authority of grand juries to issue subpoenas. *Bisceglia*, 420 U.S. at 147-148; *Powell*, 379 U.S. at 57; pp. 14-15, *supra*. As with administrative subpoenas and summonses, a grand jury may not use its investigative power to harass potential witnesses. *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292, 299 (1991); see *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973); *Branzburg* v. *Hayes*, 408 U.S. 665, 707-708 (1972). The Court has never suggested, however, that an unsupported allegation of a harassing motive would be sufficient to excuse prompt compliance with a grand jury subpoena or to justify discovery into the grand jury's motives in issuing a subpoena. On the contrary, the Court has emphasized that a grand jury subpoena "is presumed to be reasonable, and the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance." *R. Enterprises, Inc.*, 498 U.S. at 301.

The Court therefore has been reluctant to require grand juries to submit to inquiries into their motives for issuing subpoenas, explaining that procedures "that would saddle a grand jury with minitrials and preliminary showings would assuredly * * * frustrate the public's interest in the fair and expeditious administration of the criminal laws." *Dionisio*, 410

U.S. at 17; see *R. Enterprises, Inc.*, 498 U.S. at 298-299. Thus, even when harassment is alleged in connection with a grand jury subpoena, a grand jury should not be detained with "procedural delays and detours," *R. Enterprises, Inc.*, 489 U.S. at 298, unless the objector can support its allegations with sufficient evidence to at least raise an inference of possible wrongdoing. See *United States* v. *Sterling*, 724 F.3d 482, 495-496 (4th Cir. 2013); see also *Dionisio*, 410 U.S. at 12 (upholding enforcement of contempt for failure to comply with grand jury subpoena when there was "no indication" that the grand jury had acted for purposes of "harassment"); *Branzburg*, 408 U.S. at 709-710 (Powell, J., concurring) (noting that a newsman may be excused from compliance with a grand jury subpoena if he "has some * * * reason to believe that" the request for his testimony is "without a legitimate need of law enforcement").

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. But this Court's repeated statements that such cases are helpful in delineating the IRS's Section 7602 authority, *Euge*, 444 U.S. at 712, 714; *Bisceglia*, 420 U.S. at 147-148; *Powell*, 379 U.S. at 57, reflect the similar purposes of the respective authorities. The IRS, no less than the grand jury, is charged with investigating subjects within its purview. Neither entity's inquiry establishes guilt or liability; both are essential to determine whether wrongdoing has occurred. The efficient collection of internal revenue taxes authorized by statute is vital to the Nation's well-being, and Congress accordingly has required

taxpayers "to disclose honestly all information relevant to tax liability." *Bisceglia*, 420 U.S. at 145.

As with grand jury investigations, this Court has been appropriately loath to complicate summons-enforcement proceedings in a way that would "stultify the Service's every investigatory move" or "thwart and defeat the appropriate investigatory powers that Congress has placed in 'the Secretary or his delegate.'" *Donaldson*, 400 U.S. at 531, 533. Such reluctance is especially appropriate here because the obligation to respond to IRS summonses functions as a sensible corollary to the affirmative duty of all taxpayers to apprise the Service of the information it needs to ascertain their tax liability. The common-law "duty to appear and testify" that "every person within the jurisdiction of the Government is bound to perform upon being properly summoned," *Blair*, 250 U.S. at 280-281, should apply with particular force in a legal context where self-reporting is the norm rather than the exception. "There is thus a formidable line of precedent construing congressional intent to uphold the claimed enforcement authority of the Service if [such] authority is necessary for the effective enforcement of the revenue laws and is not undercut by contrary legislative purposes." *Euge*, 444 U.S. at 715-716. The aberrant rule applied by the court below disserves the intent of Congress and should not be allowed to stand.

C. The District Court Did Not Abuse Its Discretion In Denying Respondents' Request For A Hearing To Examine IRS Agents

Traditionally, the broad testimonial obligation codified in provisions like Section 7602 is limited only by determinations of relevance and privilege. Respond-

ents have not argued that the information the IRS seeks to obtain through the summonses is irrelevant to the Service's duty "to make the inquiries, determinations, and assessments of all taxes" imposed by the Internal Revenue Code. 26 U.S.C. 6201(a). Nor have they contended that the summonses seek information irrelevant to "ascertaining the correctness of any return, * * * determining the liability of any person for any internal revenue tax * * * , or collecting any such liability." 26 U.S.C. 7602(a).

Respondents also do not assert any claim of privilege beyond the right of taxpayers not to accede to a government request for information that is pursued for an improper purpose. In order to obtain an opportunity to examine IRS officials, a taxpayer need not develop evidence sufficient to *prove* that the IRS has issued a summons for an improper purpose. But if a taxpayer cannot develop sufficient evidence from which at least an inference of possible wrongdoing might arise, "then an evidentiary hearing would be a waste of judicial time and resources," and a district court need not indulge such waste. *Kis*, 658 F.2d at 540.

In this case, the district court concluded that respondents had failed to present any evidence from which a reasonable trier of fact could infer that the IRS had issued these summonses for an improper purpose. Pet. App. 13a-19a. That conclusion fully justified the court's denial of respondents' request to inquire into the motives of individual IRS agents.[4]

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[4] In addition to concluding that respondents had failed to put forth any evidence to support their allegations, the district court held that, even if respondents' contentions had been factually supported, they would have failed as a matter of law to establish an

District courts already protect taxpayers against abusive summons practices by (a) requiring the IRS to establish (by demonstrating the *Powell* factors) that it issued a summons in good faith, and (b) allowing a taxpayer to present valid objections at an adversary hearing. A district court may also permit a summons opponent to examine IRS officials if the court finds reason to believe, notwithstanding the IRS's representation that it has satisfied the *Powell* factors, that a summons was issued for an improper purpose. The Eleventh Circuit has gone a substantial step further, however, by *requiring* district courts to permit such examinations whenever a summons opponent alleges bad faith. That approach subverts the presumption of regularity of government action and thereby distorts the balance that Congress sought to strike. The delay that would predictably flow from that requirement is not what Congress intended, and it is inconsistent with this Court's recognition that summons proceedings should be "summary in nature." See *Stuart*, 489 U.S. at 369 (quoting *1982 Senate Report* 285).

Affording discretion to district courts to decide whether to allow examination of IRS officials strikes the proper balance between preserving the summary nature of summons proceedings and protecting the

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improper purpose. Pet. App. 14a-19a. That alternative holding is supported by this Court's decision in *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310 (1985). In sustaining the district court's decision not to hold an evidentiary hearing, the Court in *Tiffany Fine Arts* explained that "the burden of showing an abuse of the court's process is on the taxpayer," *id.* at 324 n.7 (quoting *Donaldson*, 400 U.S. at 527), and it concluded that the allegation of improper purpose made in that case, "[e]ven if factually true, * * * did not provide a basis for quashing the summonses," *ibid.*

interests of taxpayers. Under the Eleventh Circuit's rule, by contrast, a taxpayer may delay the resolution of summons-enforcement proceedings merely by alleging that the summons was issued for an improper purpose. Requiring district courts to permit the examination of IRS officials in response to such bare allegations would have a recurring detrimental effect on the IRS's efficient enforcement of the federal tax laws.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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STATUTORY APPENDIX

1. 26 U.S.C. 6201(a) (Supp. V 2011) provides in pertinent part:

Assessment authority

(a) Authority of Secretary

The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law.

* * * * *

2. 26 U.S.C. 7601(a) provides:

Canvass of districts for taxable persons and objects

(a) General rule

The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

3. 26 U.S.C. 7602 provides:

Examination of books and witnesses

(a) Authority to summon, etc.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(b) Purpose may include inquiry into offense

The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsec-

tion (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

(c) Notice of contact of third parties

(1) General notice

An officer or employee of the Internal Revenue Service may not contact any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer without providing reasonable notice in advance to the taxpayer that contacts with persons other than the taxpayer may be made.

(2) Notice of specific contacts

The Secretary shall periodically provide to a taxpayer a record of persons contacted during such period by the Secretary with respect to the determination or collection of the tax liability of such taxpayer. Such record shall also be provided upon request of the taxpayer.

(3) Exceptions

This subsection shall not apply—

(A) to any contact which the taxpayer has authorized;

(B) if the Secretary determines for good cause shown that such notice would jeopardize collection of any tax or such notice may involve reprisal against any person; or

(C) with respect to any pending criminal investigation.

(d) No administrative summons when there is Justice Department referral

(1) Limitation of authority

No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.

(2) Justice Department referral in effect

For purposes of this subsection—

(A) In general

A Justice Department referral is in effect with respect to any person if—

(i) the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws, or

(ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.

(B) Termination

A Justice Department referral shall cease to be in effect with respect to a person when—

(i) the Attorney General notifies the Secretary, in writing, that—

(I) he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws,

(II) he will not authorize a grand jury investigation of such person with respect to such an offense, or

(III) he will discontinue such a grand jury investigation,

(ii) a final disposition has been made of any criminal proceeding pertaining to the enforcement of the internal revenue laws which was instituted by the Attorney General against such person, or

(iii) the Attorney General notifies the Secretary, in writing, that he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws relating to the request described in subparagraph (A)(ii).

(3) Taxable years, etc., treated separately

For purposes of this subsection, each taxable period (or, if there is no taxable period, each taxable event) and each tax imposed by a separate chapter of this title shall be treated separately.

(e) Limitation on examination on unreported income

The Secretary shall not use financial status or economic reality examination techniques to determine the existence of unreported income of any taxpayer unless the Secretary has a reasonable indication that there is a likelihood of such unreported income.