No. 16-358

In the Supreme Court of the United States

DYNAMO HOLDINGS LIMITED PARTNERSHIP, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
CAROLINE D. CIRAOLO
Principal Deputy Assistant Attorney General
ROBERT W. METZLER
JACOB EARL CHRISTENSEN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court abused its discretion by declining to permit petitioners on remand to submit supplemental evidence in support of their opposition to enforcement of summonses issued by the Internal Revenue Service (IRS).

2. Whether the district court abused its discretion by declining to hold an evidentiary hearing before enforcing the IRS's summonses.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 816 F.3d 1310. The orders of the district court in these consolidated actions (Pet. App. 62-68, 69-70) are unpublished but are available at 115 A.F.T.R.2d 2015-836 and 115 A.F.T.R.2d 2015-1053.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 2016. A petition for rehearing was denied on June 21, 2016 (Pet. App. 71-74). The petition for a writ of certiorari was filed on September 19, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has "authorized and required" the Secretary of the Treasury "to make the inquiries, de-

terminations, 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 ("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 Commissioner has broad statutory authority to issue summonses in furtherance of the agency's investigatory responsibilities. "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." 26 U.S.C. 7602(b). The IRS 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. Pt. 1, at 285 (1982)). The purpose of a summons is not to determine guilt or tax liability, but merely to obtain information relevant to the IRS's tax investigations. *United States* v. *Clarke*, 134 S. Ct. 2361, 2367 (2014) ("The purpose of a summons is 'not to accuse,' much less to adjudicate, but only 'to inquire.'") (quoting *United States* v. *Bisceglia*, 420 U.S. 141, 146 (1975)). 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 possession"; 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), and courts "must eschew any broader role of

'oversee[ing] the [IRS's] determinations to investigate.'" *Clarke*, 134 S. Ct. at 2367 (quoting *Powell*, 379 U.S. at 56) (brackets in original).

The United States generally satisfies its initial burden of demonstrating good faith by filing an affidavit from the investigating agent attesting that the *Powell* factors are satisfied. *Clarke*, 134 S. Ct. at 2367. Once the government has made its initial showing of good faith, the burden is on the party challenging the summons either to show non-compliance with 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. A party challenging a summons is entitled to an evidentiary hearing to examine IRS officials concerning their motives for issuing a summons only if he can (1) "point to specific facts or circumstances plausibly raising an inference of bad faith" and (2) "offer some credible evidence supporting his charge." *Clarke*, 134 S. Ct. at 2367. "[C]ircumstantial evidence can suffice to meet that burden," but "bare assertion or conjecture is not enough." *Id.* at 2367-2368.

2. Petitioners seek review of a court of appeals' decision that affirmed decisions in two separate (but related) district court proceedings that were consolidated on appeal. Both petitioners—Dynamo Holdings Limited Partnership (DHLP) and Robert Julien—were respondents in *Clarke*, and now seek review of rulings issued on remand following this Court's decision. Petitioner Julien also seeks review of the court of appeals' decision in related underlying proceedings

that were consolidated by the court of appeals with the most recent appeal in *Clarke*. Pet. App. 3 n.1.

a. i. IRS agents examined the information returns of petitioner DHLP for the 2005 through 2007 tax years. Pet. App. 19. During the examination, questions arose about debt that DHLP had reported on its returns, including interest expenses totaling $34 million over two years. *Ibid.* During the investigation, DHLP agreed to two year-long extensions of the three-year limitations period for the IRS's examination, but it refused to consent to a third extension in 2010. *Id.* at 3, 40.

In September and October 2010, as part of an effort to obtain information for the investigation, the IRS issued five summonses to third parties (including petitioner Julien) who were connected to DHLP and whom the Service had reason to believe possessed information and records relevant to DHLP's tax-reporting obligations during the tax years at issue. Pet. App. 3-4 & n.1, 19, 30. The summonses directed the recipients to give testimony and to produce for examination certain books, records, papers, and other data relating to the investigation. *Id.* at 19. None of the recipients complied with the summonses. *Id.* at 4, 19, 41.

In December 2010, shortly before the expiration of the statute of limitations and 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. 4, 20, 41. The issuance of a 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). In February 2011, the partnership filed a petition for readjustment in the Tax Court, challenging the determinations in the FPAA. Pet. App. 4, 20, 41. That proceeding remains pending. See *DHLP* v. *Commissioner*, Docket No. 2685-11 (T.C.).

ii. 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. 4, 20, 41, 75-79. The United States attached to each petition a declaration, attesting to satisfaction of the *Powell* factors, executed by the investigating IRS agent who had issued the relevant summons. See *id.* at 4-5, 87-89. DHLP intervened as a respondent. See *id.* at 18. The district court concluded that the government had made a prima facie showing that the summonses were issued in good faith, as required by *Powell*, and ordered the summonees to show cause why the summonses should not be enforced. *Id.* at 5, 20-21.

In response, the summonees requested a hearing to examine the investigating agent to determine whether the summonses were issued for an improper purpose. Pet. App. 5. In support of their requests, petitioners and their co-summonees argued that the government had issued the summonses for one or more of several hypothesized improper purposes. See *id.* at 112-120. Two of the possible motives that the summonees identified were "punishing DHLP for refusing to agree to a further extension of the applicable statute of limitations" and "evading the Tax Court limitations on discovery." *Id.* at 118-119. Petitioners requested discov-

ery and an evidentiary hearing to explore their allegations. See *id.* at 120.

iii. The district court denied the request for discovery and for an evidentiary hearing, and it ordered the summonses enforced. Pet. App. 5, 21-27, 42. The court held that petitioners had failed to rebut the United States' prima facie case for enforcement under *Powell*. *Id.* at 21-22. The court also rejected petitioners' various allegations of ulterior motive as legally irrelevant, conjectural, or incorrect as a matter of law. *Id.* at 5, 22-27, 42-43.

iv. The court of appeals reversed. Pet. App. 28-37. Although the court of appeals agreed with the district court that petitioners were not entitled to discovery based "on a mere allegation of improper purpose," *id.* at 33 n.3 (citation omitted), it held that such a bare allegation was sufficient to entitle petitioners to an evidentiary hearing to examine the IRS agent, *id.* at 33-34. The court therefore held that the district court had abused its discretion by denying the request for such a hearing. *Id.* at 32 n.2, 33-34.

v. This Court granted the government's petition for a writ of certiorari and reversed. Pet. App. 38-55; see *United States* v. *Clarke*, 134 S. Ct. 2361 (2014). The Court rejected the court of appeals' conclusion "that a bare allegation of improper motive entitles a person objecting to an IRS summons to examine the responsible officials." Pet. App. 43. The Court held instead that, when the government seeks to enforce an IRS summons, a taxpayer is entitled to examine an IRS agent only if the taxpayer "can point to specific facts or circumstances plausibly raising an inference of bad faith." *Id.* at 45. The Court explained that "circumstantial evidence can suffice to meet that bur-

den," but that "[n]aked allegations of improper purpose are not enough: The taxpayer must offer some credible evidence supporting his charge." *Ibid.*; see *ibid.* ("[A]lthough bare assertion or conjecture is not enough, neither is a fleshed out case demanded: The taxpayer need only make a showing of facts that give rise to a plausible inference of improper motive.").

This Court remanded the case to the court of appeals to consider petitioners' allegations and evidentiary submissions under the correct legal standard. Pet. App. 47. The Court instructed the court of appeals on remand to take into account the district court's "broad discretion to determine whether a taxpayer has shown enough to require the examination of IRS investigators." *Ibid.* The Court's opinion also included the "caveat[]" that the deference owed to the district court does "not extend to legal issues about what counts as an illicit motive." *Id.* at 47-48.

vi. On remand, the court of appeals stated that it was unable to determine "whether the district court 'asked and answered the relevant question,'" *i.e.*, "whether [petitioners] pointed to specific facts or circumstances plausibly raising an inference of improper motive." Pet. App. 54 (quoting *Clarke*, 134 S. Ct. 2368-2369). The court of appeals therefore remanded the matter to the district court to answer that question and to "consider in the first instance whether the improper purposes alleged by [petitioners], i.e., retaliating for [DHLP's] refusal to extend a statute of limitations deadline for a third time and seeking enforcement to avoid the Tax Court's discovery rules, are improper as a matter of law." *Ibid.*

vii. On remand, petitioners requested a status conference "to establish a schedule for the parties to

brief" the question whether petitioners "were entitled to an evidentiary hearing to examine an IRS agent or agents in support of their defense of the enforcement of the IRS summonses," as well as two "legal issues" that "were not previously specifically addressed by the [c]ourt," "under the new standard established by the Supreme Court" in *Clarke*. D. Ct. Doc. 55, at 1-2 (Oct. 3, 2014); *id.* at 3 (seeking "an opportunity to brief expressly the relevant issues under the new standard set forth by the Supreme Court"). Petitioners did not at that time indicate that they wished to amend their pleadings or to present additional evidence in support of their allegations. The district court denied petitioners' request for a status conference, but it established a schedule for the parties to rebrief the issues under the standard articulated by this Court (thereby achieving the objective that petitioners' proposed status conference was intended to accomplish). Pet. App. 60-61. The district court stated that it would "allow [petitioners] to brief their arguments and evidence under this standard, but said briefing shall not include any evidence not already presented to the Court." *Id.* at 60.

In their supplemental briefing, petitioners noted in a footnote:

> Since the standard that previously controlled has now been abrogated and a new standard announced, [petitioners] should be permitted to replead and provide additional evidence that they had previously, and even evidence that they have gathered since. There is additional evidence that has been gathered that further supports [petitioners'] position. However, it is not provided because of the

> restrictions in [the district court's] order setting the briefing schedule.

D. Ct. Doc. 60, at 4 n.1 (Dec. 5, 2014). Petitioners did not (either in that pleading or in any other pleading) identify or describe the new or previously undisclosed evidence that they claimed to possess. Nor did petitioners ever make an offer of proof pursuant to Federal Rule of Evidence 103(a).

The district court again ordered the summonses enforced. Pet. App. 62-68. The court held that none of the improper purposes petitioners alleged was improper as a matter of law. *Id.* at 64-65. The court also concluded that petitioners' allegation of retaliation was "unsupported by any evidence," and it rejected petitioners' allegation that the IRS had sought to evade Tax Court discovery rules, explaining that "[t]he validity of a summons is tested at the date of issuance" and the Tax Court case did not exist at that point. *Id.* at 65. The district court denied petitioners' request to submit new evidence, *id.* at 63-64, and it concluded that petitioners' "submissions do not show facts giving rise to a plausible inference of improper motive regarding the issuance of the summons," *id.* at 68.

b. In a separate action against petitioner Julien (who was also the subject of a summons in the proceedings described above), the IRS examined Beekman Vista, Inc. (Beekman) with respect to its withholding tax obligations for the years 2005 and 2006. Gov't C.A. Br. xvii, 18; Pet. App. 3 & n.1. Although the IRS had previously examined Beekman with respect to different tax and withholding issues, new information was uncovered during the examination of DHLP discussed above (in particular, $740 million in

property transfers between Beekman and DHLP) that gave rise to a new need to examine Beekman. Gov't C.A. Br. 18-19. In January 2011, the IRS notified Beekman that a second examination was necessary. *Ibid.* In September 2011, the IRS agent issued a summons to petitioner Julien, in his capacity as Beekman's president, directing him to provide testimony and produce specified records. *Id.* at 19. Julien did not comply with the summons. *Ibid.*

In February 2012, the United States filed a petition to enforce the summons. Gov't C.A. Br. 19. The government attached to the petition a declaration by the investigating agent attesting that each of the *Powell* factors had been satisfied. *Id.* at 19-20. The district court concluded that the United States had established a prima facie showing of good faith sufficient to enforce the summons, and it issued a show-cause order to Julien. *Id.* at 20-21. In response, Julien alleged that the summons had been issued as part of an unauthorized second audit of Beekman and for the purpose of circumventing the Tax Court's discovery rules governing litigation that Beekman had initiated after the United States filed the petition for enforcement. *Id.* at 21-22. Julien requested an evidentiary hearing and discovery from the IRS, but he did not submit any evidence in support of his allegations. See *id.* at 22.

After the district court ordered the *Clarke* summonses enforced on remand, it issued an order to show cause why the petition to enforce the summons in Julien's separate case should not also be enforced "in light of" the order in *Clarke*. Gov't C.A. Br. 22. In his written response, Julien did not include any evidentiary submissions, but he argued that his allegations were not identical to those made in the *Clarke*

litigation and should be considered separately. *Id.* at 22-23. The district court ordered the summons enforced "for the reasons stated" in its order on remand in the *Clarke* cases. Pet. App. 69-70.

3. The court of appeals consolidated the two cases and affirmed the district court's orders enforcing the summonses. Pet. App. 1-17. The court of appeals disagreed with the district court's conclusion that none of the improper purposes alleged by petitioners was improper as a matter of law. The court held that, if they had been established, two of the purposes that petitioners had alleged—retaliation against a taxpayer for refusing to extend the limitations period, and circumvention of Tax Court discovery rules—would be improper purposes for issuing a summons. *Id.* at 10-14. But the court affirmed the district court's finding that petitioners had failed to "point to specific facts or circumstances plausibly raising an inference of bad faith." *Id.* at 14 (quoting *Clarke*, 134 S. Ct. 2367). Noting that "mere conjecture or bare assertion of an improper purpose is not sufficient" to entitle a taxpayer to an evidentiary hearing to examine an IRS agent, *id.* at 14-15, the court of appeals affirmed the district court's holding that the summonses were issued for a proper purpose, *ibid.*; see *id.* at 15 (concluding that petitioners' "submissions raise many allegations but no plausible inference of improper motive").

The court of appeals rejected petitioners' argument that, even if the summonses had been issued for a proper purpose, the government had sought to enforce them for improper reasons (namely, to circumvent Tax Court discovery rules). The court explained that neither the issuance of the FPAA nor petitioners' initiation of Tax Court litigation had affected the

IRS's investigatory authority under 26 U.S.C. 7602, and noted that "it is the domain of the tax court to control discovery in the pending tax litigation." Pet. App. 16. Having concluded that "the summonses were validly issued," the court of appeals affirmed the orders enforcing them. *Id.* at 16; see *id.* at 16-17.

The court of appeals also rejected petitioners' contention that the district court had abused its discretion when it permitted supplemental briefing but declined to consider additional evidence. Pet. App. 14. The court of appeals held that the district court's decision was "appropriate in light of the summary nature of a summons enforcement proceeding." *Ibid.*

ARGUMENT

Petitioners contend that the district court abused its discretion by declining to accept additional evidence on remand and by enforcing the summonses. The Eleventh Circuit correctly rejected those arguments, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Contrary to petitioners' argument (Pet. 17-27), the district court did not abuse its discretion when it declined on remand to consider additional evidence in support of petitioners' defenses to the government's motions to enforce the summonses.

a. Petitioners waived any claim of error in the district court's refusal to consider additional evidence on remand because petitioners never made an offer of proof pursuant to Federal Rule of Evidence 103(a)(2). Rule 103 provides that "[a] party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and * * * if the ruling excludes evidence, a party informs the court

of its substance by an offer of proof, unless the substance was apparent from the context." Fed. R. Evid. 103(a)(2). In response to petitioners' request for a status conference to set a briefing schedule, the district court issued a briefing schedule and stated, *sua sponte*, that "briefing shall not include any evidence not already presented to the Court." Pet. App. 60. In opposing that ruling, petitioners noted in their supplemental briefing that they "should be permitted to replead and provide additional evidence that they had previously, and even evidence that they have gathered since." D. Doc. 60, at 4 n.1. But petitioners never made an offer of proof or otherwise "inform[ed] the court of" the "substance" of the evidence they wished to rely on, and that substance was not "apparent from the context" of the proceedings. Fed. R. Evid. 103(a)(2). Petitioners therefore failed to preserve their objection to the district court's exclusion of evidence.

b. Even if petitioners had preserved the issue by making the required offer of proof, the district court did not abuse its discretion by limiting the evidence under consideration to the evidence already submitted. Petitioners' primary contention (Pet. 17-23) is that they should not have been held to their previously submitted evidence because they had submitted that evidence in reliance on the Eleventh Circuit's then-existing rule that a taxpayer was entitled to an evidentiary hearing to examine an IRS agent based on a mere allegation of improper purpose. That argument is unavailing because it tells only half the story of the first round of district court proceedings.

In their initial efforts to resist the government's motions to enforce the summonses, petitioners sought

both an evidentiary hearing to examine IRS agents *and* discovery from the government. In support of both requests, petitioners argued that the summonses were issued and enforced for improper purposes, and they presented circumstantial evidence that they believed supported those contentions. See Pet. App. 20-26; see *id.* at 120 ("Having raised in a substantial way the existence of substantial deficiencies in the summons proceedings, [petitioners] demand[] an evidentiary hearing in respect of the issues raised in [the pleadings], and discovery from the Government before such hearing."). Petitioners now argue (Pet. 18-23) that they would have submitted additional evidence if they had known they would be held to the standard this Court articulated in *United States* v. *Clarke*, 134 S. Ct. 2361 (2014), and that the district court should have allowed them to submit such evidence on remand once the applicable standard was clarified.

Petitioners' argument ignores the fact that, in the initial proceedings, petitioners sought discovery from the government as well as an opportunity to question IRS personnel. At that time, the Eleventh Circuit had held that, although a taxpayer was entitled to an evidentiary hearing based on a mere allegation of improper purpose, a taxpayer was not entitled to discovery based on such a bare allegation. Pet. App. 33 n.3; *Nero Trading, LLC* v. *United States Dep't of Treasury*, 570 F.3d 1244, 1249 (11th Cir. 2009). Rather, a summons objector in the Eleventh Circuit was (and is) not entitled to discovery unless the objector "raise[s] in a substantial way the existence of substantial deficiencies in the summons proceedings." *United States*

v. *Southeast First Nat'l Bank of Miami Springs*, 655 F.2d 661, 665 (5th Cir 1981).[1]

In their responses to the district court's initial show-cause orders, petitioners contended that they had satisfied the standard for obtaining discovery articulated in *Southeast First National Bank*. Pet. App. 120. Because the arguments petitioners asserted in support of their motion for discovery were identical to the arguments they asserted in support of their request for an evidentiary hearing, the evidence they submitted in support of their discovery request was equally relevant to their hearing request. Petitioners therefore had both an opportunity and an incentive to submit whatever evidence of bad faith they possessed. Given that opportunity and incentive, and in light of the principle that summons-enforcement proceedings should be "summary in nature," *Clarke*, 134 S. Ct. at 2367 (citing *Stuart*, 489 U.S. at 369), the district court did not abuse its discretion by limiting the record on remand to the evidence that petitioners had previously submitted.

c. Petitioners contend (Pet. 18-23) that the decision below conflicts with decisions of this Court and of other courts of appeals (and district courts) that have permitted litigants to amend pleadings pursuant to Federal Rule of Civil Procedure 15 when there has (and when there has not) been an intervening change to the governing standard of law. Petitioners' reliance on decisions discussing the breadth of Rule 15 is misplaced. See Pet. 18-22 (citing *Daniel* v. *Hancock*

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[1] In *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

Cnty. Sch. Dist., 626 Fed. Appx. 825, 835 (11th Cir. 2015); *Turkmen* v. *Ashcroft*, No. 02-cv-2307, 2010 WL 3398965, at *6 (E.D.N.Y. June 30, 2010); *Shane* v. *Bunzl Distribution USA, Inc.*, 200 Fed. Appx. 397, 406 (6th Cir. 2006); *Firestone* v. *Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996); *Thomas* v. *Town of Davie*, 847 F.2d 771, 773 (11th Cir. 1988); *Triplett* v. *Leflore Cnty.*, 712 F.2d 444, 446-447 (10th Cir. 1983); *Dussouy* v. *Gulf Coast Investment Corp.*, 660 F.2d 594, 597-598 (5th Cir. 1981); *Foman* v. *Davis*, 371 U.S. 178, 182 (1962)).

Rule 15 governs the amendment of pleadings. Petitioners are correct that, when a litigant seeks leave to amend a pleading pursuant to Rule 15, such leave should be freely given in most circumstances. But petitioners have never invoked Rule 15 to seek leave to amend their defenses to the enforcement of the summonses. See 6 Charles Alan Wright et al., *Federal Practice & Procedure* § 1485 (3d ed. 2010) (explaining that leave to amend pursuant to Rule 15(a)(2) is "[t]ypically * * * sought by a motion addressed to the court's discretion" that should be submitted with "a copy of the amendment" proposed). Rather, they seek to introduce additional evidence to support the defenses they previously asserted. Their request to supplement the evidentiary record does not implicate the liberal amendment standard that Rule 15 establishes. And in any event, this Court's decision in *Clarke*, which simply clarified the standard for obtaining an evidentiary hearing and did not alter the substantive criteria for summons enforcement under *Powell*, did not provide grounds for petitioners to amend their pleadings on remand.

d. Petitioners argue (Pet. 23-24) that the district court might have agreed to consider new evidence if the court had not held that petitioners' arguments failed as a matter of law. That argument is unavailing because the district court also held, in the alternative, that petitioners' submissions did "not show facts giving rise to a plausible inference of improper motive regarding issuance of the summons[es]." Pet. App. 68. In particular, the district court concluded that petitioners' retaliation claim was "unsupported by any evidence," *id.* at 65, and that petitioners had offered "no evidence to support th[eir] suspicion" that the summonses were being enforced to circumvent the Tax Court's discovery rules, *id.* at 66.

The court of appeals also independently reviewed the adequacy of petitioners' submissions—after disagreeing with the district court's holdings on the legal adequacy of petitioners' bad-faith allegations—and agreed with the district court that the submissions failed to raise a plausible inference of improper motive under *Clarke*. Pet. App. 15. The court of appeals concluded that petitioners' allegations of improper purpose rested on mere "conjecture" that was both "implausible and unsupported by the record." *Ibid.* The court thus correctly held that the district court had not abused its discretion when it enforced the summonses because "conjecture and bare allegations of improper purpose are insufficient as a matter of law" to justify a hearing under *Clarke*. *Ibid.*

2. Petitioners also ask (Pet. i) this Court to consider whether a validly issued summons may be enforced for an "irrefutably improper purpose." Contrary to petitioners' suggestion (see Pet. i, 27), however, neither the district court nor the court of appeals held

that the existence of a proper purpose for *issuing* a summons would entitle the IRS to *enforce* the summonses for an improper purpose. Rather, the court of appeals rejected petitioners' argument that the IRS had sought to enforce the summonses for the improper purpose of evading Tax Court discovery rules. Pet. App. 15-16.[2]

The court explained that petitioners had "failed to rebut the IRS's prima facie showing under *Powell* to bar enforcement of the summonses" because the mere possibility "[t]hat the IRS could conceivably attempt to introduce evidence from these summonses in the pending tax litigation does not rise to the level of an abuse of process contemplated by *Powell*." Pet. App. 16. That was a correct and straightforward application of this Court's holding that a "bare assertion or conjecture" of improper purpose is not a sufficient basis for defeating enforcement of a summons, and that "[t]he taxpayer must offer some credible evidence supporting his charge." *Clarke*, 134 S. Ct. at 2367-2368. The court of appeals correctly held that petitioners had failed to "point to specific facts or circumstances plausibly raising an inference," *id.* at 2367, that the IRS sought to enforce the summonses for the improper purpose of evading Tax Court discovery rules.

The court of appeals correctly rejected petitioners' argument (repeated in the petition for a writ of certiorari, see Pet. 28) that the "issuance of the FPAA" to

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[2] Petitioners do not seek this Court's review of the court of appeals' holding that petitioners failed to raise a "plausible inference" that the summonses were issued with the "improper motive" of retaliating against petitioners for refusing to further extend the statute of limitations. Pet. App. 15.

DHLP "foreclosed the IRS's legitimate need for the summoned information." Pet. App. 15-16. "[N]either the issuance of the FPAA nor the initiation of a challenge in the tax court affects the IRS's investigatory authority under" 26 U.S.C. 7602. Pet. App. 16. Congress has 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." *United States* v. *Bisceglia*, 420 U.S. 141, 145 (1975). 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 26 U.S.C. 7601, and to effectuate such investigations by issuing summonses pursuant to Section 7602, therefore "are essential to our self-reporting system." *Bisceglia*, 420 U.S. at 146.

In this case, the IRS issued the FPAA, even though petitioners had not complied with the validly issued summonses, in part because the statute of limitations for issuing a FPAA was on the verge of expiring. But the issuance of the FPAA did not extinguish the IRS's legitimate endeavor "to make the inquiries, determinations, and assessments of all taxes" imposed by the Internal Revenue Code. 26 U.S.C. 6201(a). "The rights and obligations of the parties [become] fixed when the summons [is] served," *Couch* v. *United States*, 409 U.S. 322, 329 n.9 (1973), and courts of appeals generally have agreed that the validity of a summons is determined as of the date of issuance. *United States* v. *Richey*, 632 F.3d 559, 564 (9th Cir. 2011); *PAA Mgmt., Ltd.* v. *United States*, 962 F.2d 212, 219 (2d Cir. 1992); *United States* v. *Gimbel*, 782

F.2d 89, 93 (7th Cir. 1986); *United States* v. *Garrett*, 571 F.2d 1323, 1327 (5th Cir. 1978); *United States* v. *Rosinsky*, 547 F.2d 249, 254 (4th Cir. 1977); *United States* v. *Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974); *United States* v. *Held*, 435 F.2d 1361, 1364 (6th Cir. 1970), cert. denied, 401 U.S. 1010 (1971).[3]

Petitioners are also wrong in contending (Pet. 28) that issuance of the FPAA to DHLP terminated the IRS's investigation, thereby rendering enforcement of the summons unnecessary. As the Second Circuit has explained:

> The FPAA is not "final" in the sense that its issuance necessarily obviates the need for further information, brings the curtain down on the IRS's administrative or investigative role, or muzzles the IRS from requesting that the court invoke its authority finally to determine partnership items.

PAA Mgmt., 962 F.2d at 219; accord *Sugarloaf Funding, LLC* v. *U.S. Dep't of the Treasury*, 584 F.3d 340, 349 (1st Cir. 2009). All of the summonses at issue here were issued well in advance of the FPAA. The IRS was nevertheless forced to issue the FPAA without first having obtained all the information it needed to fully investigate DHLP's returns because the summons recipients failed to comply with the summonses,

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[3] Some courts have hypothesized that a validly issued summons might be unenforceable when a "final, irrevocable determination of the taxpayer's liability" has been made before enforcement is sought. *Richey*, 632 F.3d at 565; *PAA Mgmt.*, 962 F.2d at 217; *Gimbel*, 782 F.2d at 93. In the present case, there has been no "final" determination of tax liability because the Tax Court (in which both the DHLP and Beekman proceedings are still pending) has the "ultimate authority" to revise the IRS's adjustments in the FPAA. *PAA Mgmt.*, 962 F.2d at 218; see 26 U.S.C. 6226(a) and (f).

and the limitations period for assessing tax was on the verge of expiring.[4]

The practical effect of adopting petitioners' view would be to establish a per se rule that the IRS loses its statutory authority, see 26 U.S.C. 7402(b), 7604(a), to enforce a validly issued summons as soon as it issues a FPAA (or as soon as a taxpayer challenges the FPAA by filing an action in the Tax Court). Such a rule would create a perverse incentive for taxpayers to ignore their duty to comply with summonses, particularly when a statute of limitations is about to expire. That approach would "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." *Bisceglia*, 420 U.S. at 146. Such a rule would also be contrary to Congress's directive that "[n]othing in" the statutory subchapter that governs the issuance of a FPAA and review of a FPAA in the Tax Court "shall be construed as limiting the authority granted to the Secretary under section 7602." 26 U.S.C. 6230(h).

Petitioners are also wrong in suggesting (Pet. 28-31) that their approach would promote comity be-

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[4] Petitioners' assertion (Pet. 32) that the FPAA "was completed and signed on August 11, 2010," is incorrect. Although the investigating agent may have signed the FPAA on that date, a FPAA is issued by the IRS as an institution, after an internal process of pre-issuance review during which time the FPAA is subject to modification. The FPAA issued to DHLP was not finalized until December 28, 2010, when it was signed by the Territory Manager, John W. Joseph. (D. Ct. Doc. 7-2, at 1-3.) If the summons recipients had complied with the summonses, the new information might have caused the investigating agent to revise, or even withdraw, the proposed FPAA she had signed in August 2010.

tween federal district courts enforcing summonses and the Tax Court. The Tax Court's longstanding view is that:

> any administrative summonses issued by [the IRS] prior [to the filing of a Tax Court petition] do not pose a threat to the integrity of our Rules. Nor will the summonses pose a threat to the administration or effectiveness of our Rules of Practice and Procedure.

Ash v. *Commissioner*, 96 T.C. 459, 468 (1991); see Pet. App. 16 (explaining that "it is the domain of the tax court to control discovery in the pending tax litigation") (citing *Ash*, 96 T.C. at 470-471). Because the summonses in this case were issued several months before DHLP (or Beekman) filed its Tax Court petition, they are not, under the Tax Court's own precedent, an improper attempt to circumvent the Tax Court's discovery rules.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
CAROLINE D. CIRAOLO
Principal Deputy Assistant Attorney General
ROBERT W. METZLER
JACOB EARL CHRISTENSEN
Attorneys

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