No. 13-301

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL CLARKE, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

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

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

CORPORATE DISCLOSURE STATEMENT

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

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BRIEF IN OPPOSITION

INTRODUCTION

The United States seeks review of an unpublished, per curiam decision in which the court of appeals applied its prior published decision in *Nero Trading, LLC* v. *U.S. Dep't of Treasury, IRS*, 570 F.3d 1244, 1249 (11th Cir. 2009), a decision that the government did not deem worthy of a petition for certiorari. The government had good reason not to seek certiorari in *Nero*. All that decision requires of the Internal Revenue Service ("IRS") is that, on a handful of occasions each year, it make available for a hearing the IRS agents who issued investigative summonses under 26 U.S.C. § 7602. *Nero* is entirely consistent with this Court's decision in *United States* v. *Powell*, 379 U.S. 48 (1964), and with decisions of other circuits. Indeed, as the government recognizes, there is a consensus that district courts always

have discretion to require the IRS to justify enforcement of a summons at an evidentiary hearing. Moreover, the ruling in *Nero* was derived from an indistinguishable proposal advocated by the government itself.

At most, then, then government's complaint in this case is that the Eleventh Circuit ordered the district court to do something that, it concedes, the district court could have decided to do itself: hold a hearing. Although the government believes that respondents did not make a showing sufficient to warrant such a hearing, that factbound disagreement with the decision below does not warrant this Court's review. The mere fact that two lower courts disagreed about whether respondents' showing met the threshold required for a hearing does not warrant this Court's intervention.

Moreover, this case does not present a suitable occasion for the Court to consider the government's contentions. Respondents presented substantial evidence that the IRS was improperly using the summons procedure to gain more expansive discovery than that permitted under the Tax Court rules. The Eleventh Circuit's conclusion that respondents had provided sufficient evidence to merit further inquiry at an adversary hearing should therefore be sustained even under the approach the government puts forward, and the government's disagreement with that decision is largely academic.

STATEMENT

1. The IRS conducted an examination of the tax returns of Dynamo Holdings Limited Partnership ("DHLP") for the tax years 2005-2007. Pet. App. 11a. As a general matter, the IRS has three years in which to examine and definitively fix a taxpayer's tax liability. *See* 26 U.S.C. § 6501. DHLP agreed to extend that lim-

itations period twice, so that the IRS's investigation of tax years 2005 and 2006 remained timely.

On August 11, 2010, as the extended limitations period drew to a close, the investigating IRS agent, Mary Fierfelder, signed a Final Partnership Administrative Adjustment ("FPAA") which set forth the IRS's position as to DHLP's tax liability for 2005-2007. Docket Entry 7-2, at 5.[1] As the name suggests, an FPAA represents the IRS's "final" position as to the taxpayer's liability. *See Sealy Power, Ltd.* v. *Commissioner*, 46 F.3d 382, 385-386 (5th Cir. 1995) ("[T]he FPAA … serve[s] to notify affected taxpayers that the Commissioner has made a final administrative determination of their liability for particular tax years."); *see also* 26 U.S.C. §§ 6221-6223. Once the IRS issues an FPAA, the taxpayer can seek judicial review of the IRS's determination in Tax Court, and the matter then shifts from the administrative sphere to the courtroom. The IRS's own Summons Handbook makes clear that, once a taxpayer's liability has been finally determined, the IRS should no longer be issuing summonses to investigate the returns in question because "the examination has been concluded," and "[t]he Service should no longer be in the process of gathering the data to support a determination[.]" DE 20-7 (Ex. F) (Handbook § 25.5.4.4.8).[2]

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[1] Docket Entry ("DE") refers to the district court's docket in the lead case, *United States* v. *Clarke*, No. 11-mc-80456 (S.D. Fla.), unless otherwise noted. *See* DE 18, designating *Clarke* as lead case and requiring motions and other papers to be filed in lead case only.

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

The IRS once again requested, however, that DHLP agree to extend the limitations period for tax years 2005-2007. DHLP declined. DE 7-1 ¶ 9. Shortly thereafter, in September and October 2010—and despite having signed the FPAA and not having asked for additional information for some time—Agent Fierfelder issued investigative summonses pursuant to 26 U.S.C. § 7602 to six additional parties, including five of the respondents here. Pet. App. 11a, 21a, 32a, 43a, 54a.[3] Those summonses called for the production of documents and testimony regarding DHLP's 2005-2007 tax returns. The summonses had return dates of October 25, 2010 (for four of the summoned respondents) and December 3, 2010 (for respondent Robert Julien). Pet. App. 11a, 21a, 32a, 43a, 54a. Those five respondents declined to comply with the summonses. Pet. App. 11a-12a, 21a-22a, 32a-33a, 43a-44a, 54a-55a. The sixth summoned person, Christine Moog, initially refused to comply with the summonses, but ultimately complied and was interviewed in September 2011. DE 20-2 ¶ 7.

On December 28, 2010, with three days remaining to the statutory limitations period, the IRS issued, unaltered, the FPAA signed by Agent Fierfelder in August 2010. DE 7-2, at 1.

2. On February 1, 2011, DHLP commenced a proceeding in the United States Tax Court challenging the FPAA. Pet. App. 12a; *see also* 26 U.S.C. § 6226(a). The

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[3] The respondents who received IRS summonses in 2010 are Michael Clarke, as Chief Financial Officer of Beekman Vista, Inc.; Michael Clarke, as Chief Financial Officer of Dynamo GP, Inc.; Rita Holloway, as trustee for the 2005 Christine Moog Family Delaware Dynasty Trust; Marc Julien, as trustee for the 2005 Robert Julien Delaware Dynasty Trust; and Robert Julien. The sixth respondent in this Court is DHLP itself, which was permitted to intervene in the summons enforcement proceeding. DE 15.

Tax Court imposes significant limitations on the scope of discovery available to both the taxpayer and the government. *See* Tax Court Rule 70(a) ("Discovery is not available under these Rules through depositions except to the limited extent provided in Rule 74."). In particular, the Tax Court treats non-consensual deposition as "an extraordinary method of discovery." Tax Court Rule 74(c)(B).

3. On April 28, 2011, six months after the return date for most of the summonses, and almost three months after DHLP commenced its suit in Tax Court, the IRS instituted a proceeding in district court for enforcement of the summonses. Pet. App. 10a, 20a, 31a, 42a, 53a; *see also* 26 U.S.C. § 7402 (authorizing district courts to hear summons enforcement proceedings). Respondents contended that, under *United States* v. *Powell*, 379 U.S. 48 (1964), enforcement should be denied and the summonses quashed because they had not been issued and were not being enforced for a proper investigative purpose.[4] Consistent with Eleventh Circuit precedent, respondents requested an evidentiary hearing at which they could inquire into and make a record about the government's purpose in issuing the summonses.[5] They also asked for pre-hearing discovery.[6]

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[4] *See* DE 7; *United States* v. *Clarke*, No. 11-mc-80457 (S.D. Fla.), DE 14; *United States* v. *Holloway*, No. 11-mc-80459 (S.D. Fla.), DE 10; *United States* v. *Julien*, No. 11-mc-80460 (S.D. Fla.), DE 12; *United States* v. *Julien*, No. 11-mc-80461 (S.D. Fla.), DE 7 (responses to motion to enforce); DE 20 (motion for summary dismissal).

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

Respondents offered several specific and substantial allegations indicating that the IRS may have issued and sought enforcement of the summonses for improper reasons. Specifically, they alleged that the summonses had been issued as retribution for DHLP's refusal to grant a further extension of the applicable statute of limitations.[7] Respondents also alleged that the IRS was abusing the district court's processes by enforcing the summonses for the purpose of circumventing the Tax Court restrictions on discovery.[8] Respondents did not rest on bare allegations, but rather supported these allegations with the competent evidence available to them without discovery. For example, they submitted a declaration from respondent Michael Clarke who confirmed that the summonses were issued "immediately" after DHLP refused to extend the limitations period. DE 8-1 ¶ 9; *Clarke*, No. 11-mc-80457, DE 15 ¶ 9; *Julien*, No. 11-mc-80461, DE 8 ¶ 9; Pet. App. 73a. And they submitted a declaration from attorney Richard Sapinski, who represented Christine Moog when she appeared in compliance with her IRS summons, and who stated that Moog's interview by the IRS was conducted

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

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

[8] DE 7, at 6-7; *Clarke*, No. 11-mc-80457, DE 14, at 6-7; *Holloway*, No. 11-mc-80459, DE 10, at 7-8; *Julien*, No. 11-mc-80460, DE 12, at 7-8; *Julien*, No. 11-mc-80461, DE 7, at 6-7; Pet. App. 72a-75a. Respondents further alleged that the summonses had been issued as a subterfuge to gather information related to another entity. DE 7, at 4; *Clarke*, No. 11-mc-80457, DE 14, at 4-5; *Holloway*, No. 11-mc-80459, DE 10, at 5-6; *Julien*, No. 11-mc-80460, DE 12, at 5-6; *Julien*, No. 11-mc-80461, DE 7, at 4-5; Pet. App. 72a-75a.

exclusively by the two attorneys representing the IRS in the Tax Court proceeding and that Agent Fierfelder did not even attend. DE 20-2 (Ex. B) ¶ 11.

Respondents also submitted several filings from the Tax Court case supporting their contention that the IRS was using the summonses not to assist the IRS in the administrative process of determining DHLP's tax liability, but rather as an improper form of discovery for the Tax Court litigation. For instance, the IRS refused to consent in referral of the Tax Court proceeding to IRS Appeals (a process similar to mediation) on the ground that the case is not "fully factually developed," due to respondents' noncompliance with the summonses "issued during the exam of [DHLP]." DE 20-3 (Ex. C). The IRS also opposed DHLP's motion for a protective order in Tax Court, in part because the respondents had declined to comply with the summonses. DE 20-4 (Ex. D) ¶ 8. And the IRS sought a continuance of the Tax Court case on the ground that the summonses were outstanding. DE 20-6 (Ex. E).

Respondents further pointed to the IRS's own Summons Handbook, which, as noted, disapproves of the issuance of summonses once a final determination of tax liability has been made. Pet. App. 70a-71a. Respondents argued that the IRS's conduct in this case constituted a departure from the principles recognized in the Handbook and that this departure was suggestive of the IRS's improper purpose in issuing the summonses. Pet. App. 68a-72a.

4. The district court denied the motions to quash the summonses and ordered enforcement. Pet. App. 19a, 29a, 40a, 51a, 62a. The court concluded that the respondents had made only a "naked assertion" that the summonses had been issued in retaliation for DHLP's refusal to extend the limitations period. Pet. App. 14a;

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

5. The court of appeals reversed in part, in a per curiam, unpublished decision. Applying the controlling Eleventh Circuit standard from *Nero Trading, LLC* v. *U.S. Dep't of Treasury, IRS*, 570 F.3d 1244, 1249 (11th Cir. 2009), the court concluded that respondents should have a limited evidentiary hearing at which they can seek to establish the IRS's bad faith. Pet. App. 5a. The court reached this conclusion after a "careful review of the record" revealed that the respondents had plausibly alleged an improper purpose behind the issuance of the summonses. Pet. App. 3a. On that basis, the court directed that the respondents should be afforded an opportunity to examine IRS officials regarding the IRS's purpose in issuing the summonses. *See* Pet. App. 6a. The court denied, however, respondents' request for pre-hearing discovery. Pet. App. 5a n.3.

ARGUMENT

In *United States* v. *Powell*, 379 U.S. 48 (1964), this Court recognized that the IRS does not have an unfettered right under Section 7402(b) to enforce a summons requiring a taxpayer to produce testimony or records. Rather, because "[i]t is the court's process which is invoked to enforce the administrative summons," the court should deny enforcement where allowing enforcement would "permit its process to be abused." *Id.*

at 58. As a mechanism for determining whether a particular enforcement proceeding is abusive, the *Powell* Court adopted a burden-shifting framework. The IRS bears the initial burden to produce evidence of good faith (normally a sworn declaration). *Id.* To avoid enforcement, the taxpayer must then raise a "substantial question" as to whether enforcement would be abusive. *Id.* at 51. If the taxpayer does so, it is then "entitled" to an "adversary hearing … before enforcement is ordered," at which it "may challenge the summons on any appropriate ground." *Id.* at 58 (internal quotation marks omitted).

The narrow issue presented by the petition is whether, on the specific facts of this case, respondents are entitled to a limited evidentiary hearing—but not any other form of discovery—to help them obtain the evidence needed to carry that burden. That question is of limited significance and does not warrant this Court's review. The government does not dispute that the district court would have been authorized to hold such a hearing in this case, and quarrels only with the fact that the court of appeals directed it to do so. The hearing ordered by the court of appeals in this case is entirely consistent with *Powell*, which made clear that a taxpayer that has a substantial claim of abuse by the IRS should have the opportunity to demonstrate that enforcement of an IRS summons would be unwarranted. Moreover, the government makes no persuasive showing that the court of appeals' decision will impair the enforcement of the tax laws, which is not surprising given that the decision is likely to affect only a handful of cases each year and that the government did not seek review of the Eleventh Circuit's earlier decision in *Nero*, which the court of appeals applied in this case. The Court should therefore deny review.

A. The Eleventh Circuit's Approach To Summons Enforcement Does Not Unduly Burden The Government And Does Not Significantly Diverge From That Of Other Circuits

The government contends that, in the decision below, the Eleventh Circuit adopted a rule that a summons recipient is entitled to an evidentiary hearing based on any bare allegation of improper motive on the part of the IRS in issuing the summons, and that this requirement will seriously burden the government and impair enforcement of the tax laws. These assertions are unfounded.

1. As an initial matter, the decision below, which is unpublished, did not establish any new law in the Eleventh Circuit and did not alter the standard in that circuit as to when a taxpayer is entitled to an evidentiary hearing. Rather, the controlling precedent, which the court of appeals panel followed, is *Nero Trading, LLC* v. *U.S. Dep't of Treasury, IRS*, 570 F.3d 1244, 1249 (11th Cir. 2009), a case in which the government did not petition for certiorari. *Nero* held that a substantial "allegation of improper purpose is sufficient to trigger a limited adversary hearing where the taxpayer may question IRS officials concerning the Service's reasons for issuing the summons," and that the taxpayer is not to be denied a hearing merely because, at the threshold stage before any record has been developed, the crucial evidence remains in the hands of the government. *Id.* at 1249. However, *Nero* also emphasized that its decision did "not categorically strip district courts of their discretionary power to determine whether an adversarial hearing is appropriate." *Id.* Rather, *Nero* left room for district courts to deny even a limited evidentiary hearing where (for example) the taxpayer's allegations, even if true, would not provide

grounds for quashing the summons, or where denial of a hearing would not deprive the taxpayer of its sole means of proving the truth of its allegations. *Id.* at 1249 & n.3. *Nero* also emphasized that only a limited evidentiary hearing is presumptively available, and that other more intrusive and burdensome forms of discovery, by contrast, are not. *Id.* at 1249.

The court in *Nero* reversed a denial of a motion to quash a summons where the taxpayer had not received a limited evidentiary hearing. However, it did not do so on the ground that the taxpayer was categorically entitled to such a hearing, but rather only because the district court "did not explain its decision to not hold an evidentiary hearing," which precluded proper appellate review. 570 F.3d at 1250-1251. *Nero* also affirmed the denial of a motion to quash a summons as to a taxpayer who had received the opportunity to cross-examine the IRS agent who had issued that summons, even though that taxpayer had sought and been denied the opportunity to examine several other witnesses. *Id.*

Nero thus makes clear that, even when a taxpayer has the right to an adversary hearing to challenge enforcement of an IRS summons, the district courts retain significant discretion to structure the hearing (including to deny one when appropriate) and to restrict other discovery to ensure that the IRS's tax enforcement efforts are not impeded. The unpublished, per curiam decision below applied *Nero* to a particular set of facts. It did not (and could not) purport to alter the rule in the Eleventh Circuit. *E.g.*, *Cargill* v. *Turpin*, 120 F.3d 1366, 1386 (11th Cir. 1997). Thus, contrary to the government's contention, the decision below did not strip district courts in the Eleventh Circuit of the power to deny a limited evidentiary hearing to the extent allowed by *Nero*.

2. The government overstates the burden it faces under the Eleventh Circuit's approach to summons enforcement. Neither *Nero* nor the decision below opens up the government to intrusive inquiries based on speculation about governmental motive. The Eleventh Circuit carefully spares the government the "panoply of expensive and time-consuming pretrial discovery devices" available in other litigation. Pet. App. 5a n.3 (quoting *Nero*, 570 F.3d at 1249). And under *Nero*, the district court also retains substantial discretion to limit the scope of the evidentiary hearing as appropriate. *See Nero*, 570 F.3d at 1249 ("Generally, the scope of any adversarial hearing in this area is left to the discretion of the district court."); *id.* at 1250 ("[B]ecause the district court at least allowed a limited adversarial hearing, albeit a truncated one, we cannot find that the district court abused its discretion.").

What *Nero* did hold, and what the decision below recognized, is that, when a taxpayer (or other summoned person) has a substantial basis for alleging that enforcement of an IRS summons would be abusive, but the critical evidence supporting that contention remains in the hands of the government, the taxpayer should have a limited opportunity to establish its case by questioning appropriate witnesses from the government about the purpose for the summons. That kind of hearing will ordinarily impose no greater burden on the government than having to produce officials who can testify regarding the issuance of the summons. There is no reason that this should lead to any substantial delay in summons enforcement where the taxpayer's objections are not meritorious. Indeed, even though *Nero* was decided in 2009, the government has not pointed to anything suggesting that *Nero* has resulted in any significant delay in enforcement of legiti-

mate summonses within the Eleventh Circuit, or that it has been subjected to a torrent (or even a trickle) of challenges to IRS summonses.[9]

The government also overstates the frequency with which these issues arise. Even if hundreds of summonses are issued in the Eleventh Circuit each year (Pet. 19), the overwhelming majority are either undoubtedly complied with or never enforced. A Westlaw search indicates that district courts in the Eleventh Circuit adjudicate around five cases involving enforcement of IRS summonses each year, and there has been no discernible increase in that number since *Nero* was decided. Even if Westlaw searches are underinclusive, the evidence does not suggest that the issue arises with such frequency that it will present any serious difficulty for the IRS.

3. Moreover, the government itself previously advocated for exactly the approach adopted in *Nero*—confirming that it will not be unduly burdensome for tax enforcement. After this Court's decision in *Powell*, courts grappled with how to allow taxpayers to have a meaningful opportunity to challenge an IRS summons (as *Powell* requires) while also ensuring that enforcement proceedings remained streamlined. The government's guidance was that the courts should do exactly what the Eleventh Circuit has done. Thus, the government successfully argued in *United States* v. *Salter*, 432 F.2d 697 (1st Cir. 1970), that

> [t]he general solution would probably be for the district court to proceed directly to a hearing at

[9] While the government complains of the potential for the taxpayer to cause delay, here, it was the government itself that waited some six months between the return date of the summonses and the commencement of enforcement proceedings.

> which, if desired, the summonee could examine the agent who issued the summons, concerning his purpose. The court could then, by observation and, where necessary, its own questioning of the agent, make its own determination of whether exploration, as by discovery, seemed to be in order.

Id. at 700 (quoting brief of the government). The government also successfully urged this approach before the Ninth Circuit in *United States* v. *Church of Scientology of California*, 520 F.2d 818, 824 (9th Cir. 1975).

Thus, the government itself has endorsed an approach that distinguishes between a limited evidentiary hearing—which should be available in cases where substantial allegations of improper purpose have been made—and discovery, which would only be available after the taxpayer has put forth evidence of the government's bad faith (which might become available at the limited hearing).[10] This is precisely the balance struck in *Nero*, and thus, the government can hardly complain that it imposes unreasonable burdens.[11]

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[10] To obtain even that limited hearing, the taxpayer would have to raise defenses that would provide colorable grounds for quashing the summons. Where the taxpayer fails to plead facts that, even if taken as true, would provide grounds for quashing the summons, the district court may deny the taxpayer an evidentiary hearing. *See Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 324 n.7 (1985).

[11] *Nero* is in fact directly traceable to the government's proposal in *Salter*. The Fifth Circuit explicitly adopted *Salter* in *United States* v. *Harris*, 628 F.2d 875, 883 (5th Cir. 1980) ("We sanction the procedure stated by the First Circuit in *Salter*."), and then followed *Harris* in *United States* v. *Southeast First Nat'l Bank of Miami Springs*, 655 F.2d 661 (5th Cir. 1981). As noted *infra*, *Nero* merely reaffirmed *Southeast*.

4. The government also overstates the differences among the circuits as to what a taxpayer must produce to obtain an evidentiary hearing. While some courts of appeals have articulated the standard somewhat differently, the substance in the overwhelming majority of the circuits is not significantly different, and certainly not so different that this Court's intervention is warranted.

First, it bears emphasis that the divergence the government describes concerns only when a district court is *required* to hold an evidentiary hearing. The government acknowledges that, under *Powell*, "a district court has discretion to order an evidentiary hearing" based on allegations of IRS bad faith. *See* Pet. 20. Thus, the government accepts that, had the district court decided to conduct an evidentiary hearing in this case, it would have no basis for complaint. The government objects only that the court of appeals required the district court to do something it could have done on its own anyway. This is significant because even the government's approach would not result in uniformity across the country; the procedure followed in any specific case would necessarily depend on the judgment of the particular district judge as to whether a hearing was warranted.

The government also errs in arguing that the Fifth Circuit has adopted a different rule from that of the Eleventh Circuit. *Nero* broke no new ground, but rather followed the old Fifth Circuit's holding in *United States* v. *Southeast First Nat'l Bank of Miami Springs*, 655 F.2d 661 (5th Cir. 1981).[12] *See Nero*, 570 F.3d at 1249-1250 (describing *Southeast* as "the legitimate off-

[12] The Eleventh Circuit has adopted as precedent Fifth Circuit decisions issued before October 1, 1981. *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

spring of … *Powell*" and block-quoting it at length). That decision remains the law in the Fifth Circuit.[13] The government cites *Zugerese Trading LLC* v. *IRS*, 336 F. App'x 416 (5th Cir. 2009), for the proposition that the Fifth Circuit has adopted a different rule, but that unpublished decision did not purport to and could not overturn *Southeast*. *Zugerese* merely says that the taxpayer must raise a "substantial question" of bad faith to obtain an evidentiary hearing, but does not address whether that "substantial question" can be raised via pleading or whether it must be supported with evidence. And all *Zugerese* holds is that no evidentiary hearing is required when the taxpayer's allegations were aimed at the *merits* of the tax issue and not the good faith of the IRS in issuing the summons. *Id.* That ruling is merely a straightforward application of this Court's holding in *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310 (1985), that no evidentiary hearing is warranted where the taxpayer has not alleged proper grounds for quashing the summons, *see supra* note

[13] The government erroneously implies (Pet. 18 n.3) that *Southeast* did not survive the enactment of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324. TEFRA changed the standard for establishing the particular form of bad faith at issue in *Southeast*, but that decision provided a general framework for adjudicating taxpayer allegations of IRS bad faith, not just allegations that the government was misusing Section 7602 for criminal discovery. *See, e.g.*, *Nero*, 570 F.3d at 1250 n.4 (improper purpose not limited to the issuance of a summons to further a criminal investigation); *United States* v. *Millman*, 822 F.2d 305, 308 (2d Cir. 1987) (addressing standard applicable in deciding whether IRS acts with some "other improper motive or purpose").

10, and is wholly consistent with *Nero*, *see* 570 F.3d at 1249 n.3.[14]

The government also errs in arguing that the Eleventh Circuit's rule diverges from that in the First and Ninth Circuits. As noted above, both circuits have held—adopting arguments by the government—that a taxpayer should have an evidentiary hearing (but not additional pretrial discovery) to examine the question of IRS bad faith if it makes sufficiently specific and substantial allegations tending to show that the IRS issued a summons for an improper purpose. The government suggests that those circuits have retreated from those decisions in later opinions, but in fact, neither the First Circuit's decision in *Salter* nor the Ninth Circuit's decision in *Church of Scientology* has been overruled or reconsidered.

The First Circuit has stated, in a footnote in a later case, that "the taxpayer must do more than allege an improper purpose: he must introduce evidence to support his allegations." *Copp* v. *United States*, 968 F.2d 1435, 1438 n.1 (1st Cir. 1992). For that point, *Copp* cit-

[14] In one unpublished, nonprecedential Fifth Circuit case, that court held that a taxpayer had failed to establish his entitlement to an adversary hearing to establish the government's bad faith. *See Mitchell* v. *Thomas*, 239 F. App'x 56, 57 (5th Cir. 2007). But that decision refers only to "conclusory assertions" of bad faith by the taxpayer, and emphasized that the taxpayer must "raise in a substantial way the existence of substantial deficiencies in the summons proceedings." *Id.* (quoting *Harris*, 628 F.2d at 879). Neither *Nero* nor the decision below suggests otherwise; and the *Mitchell* case did not hold that the taxpayer must be able to adduce admissible *evidence* of government bad faith before obtaining an adversary hearing. In any event, *Mitchell*, which does not even cite *Southeast*, could not overrule Fifth Circuit precedent. *See Jimenez* v. *Wood Cnty.*, 621 F.3d 372, 376 (5th Cir. 2010). *Southeast* remains the law in the Fifth Circuit.

ed *Salter*, but in fact *Salter* held that the taxpayer will not invariably be required to adduce evidence to obtain a hearing, especially where the critical evidence is likely to be in the hands of the government, as long as the taxpayer's allegations are substantial and nonconclusory. *See* p. 14, *supra*. The First Circuit's sentence in *Copp* likely reflected the insubstantiality of the allegations of bad faith in that case. And *Copp* gives no indication that it intended to diverge from or reconsider the more considered discussion of the showing necessary for an evidentiary hearing set forth in *Salter*.[15]

As for the Ninth Circuit, that court stated in *United States* v. *Samuels, Kramer & Co.*, 712 F.2d 1342 (9th Cir. 1983), that a taxpayer should have an evidentiary hearing when it "is able to make a sufficient showing of bad faith on the Government's part," *id.* at 1346-1347, such as "responsive pleadings, supported by affidavits, that allege *specific facts* in rebuttal," *id.* at 1348. But that approach is not significantly different from the Eleventh Circuit's; neither court allows an evidentiary hearing based on conclusory allegations of bad faith not supported by reference to any facts that might sustain a finding of bad faith on the part of the government.

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[15] *Copp*'s statement of the applicable rule was later repeated in *Sugarloaf Funding, LLC* v. *United States Dep't of Treasury*, 584 F.3d 340, 351 (1st Cir. 2009). But in that case, the First Circuit ruled that the taxpayer's allegations of IRS bad faith were *legally* insufficient. *See id.* at 348-350. The case therefore did not ultimately turn on whether the taxpayer had made a factual showing that was sufficient to warrant a hearing. The First Circuit cited both *Salter* and *Copp* in *United States* v. *Gertner*, 65 F.3d 963 (1st Cir. 1995), but that case did not turn on what showing (if any) the taxpayer must make to obtain an evidentiary hearing; in that case the district court ruled in favor of the *taxpayer* without holding a hearing, and the court of appeals rejected the government's argument that such a hearing was required. *Id.* at 969.

Indeed, the Ninth Circuit in that case reversed the district court's order enforcing the summonses and remanded the case for exactly the kind of "limited evidentiary hearing" that the court in *Church of Scientology* had indicated would be appropriate. *See id.* at 1344, 1348. The subsequent decision in the Ninth Circuit cited by the government makes clear that the showing required of the taxpayer for this kind of limited evidentiary hearing is not overly demanding. *See Fortney* v. *United States*, 59 F.3d 117, 121 (9th Cir. 1995) (taxpayer must provide "'minimal amount of evidence'"). This standard is more than satisfied by the affidavits submitted by respondents.[16]

The approach taken in the Sixth Circuit is in accord with that of the First and Ninth Circuits. In *United States* v. *Will*, 671 F.2d 963 (6th Cir. 1982), the Sixth Circuit considered a taxpayer's appeal of a summons enforcement order, which the district court granted after allowing the taxpayer to cross-examine the IRS agent who had issued the summons. In ruling that the district court did not improperly curtail cross-examination, the Sixth Circuit—citing the Ninth Circuit's decision in *Church of Scientology*—explained that an adversary proceeding is "of a summary nature: a summonee, bearing the burden of proving bad faith, harassment, or some other abuse, must only *be afforded an opportunity to substantiate his allegations*." *Id.* at

[16] Since *Salter* and *Church of Scientology* were decided, TEFRA was enacted and this Court has reaffirmed that summons enforcement proceedings should be summary in nature, *see United States* v. *Stuart*, 489 U.S. 353, 369 (1989), but none of those intervening events undermined those decisions or eroded the core holding of *Powell*, implemented through those decisions, that a taxpayer is entitled to a meaningful opportunity to raise a substantial question as to the government's good faith.

968 (emphasis added). But as that language shows, the Sixth Circuit indicated no doubt that a taxpayer should have an opportunity to substantiate tenable allegations of IRS bad faith, and it cited approvingly (*id.*) its prior unpublished decision in *United States* v. *Joseph*, 75-1 USTC P 9369, 1975 U.S. App. LEXIS 15937 (6th Cir. Feb. 25, 1975) (No. 74-7006), which reversed a district court's enforcement of a summons without giving the taxpayer the opportunity to create a record about the bad faith of the IRS in issuing the challenged summons. Thus, the Sixth Circuit has struck the same balance as have the First, Fifth, Ninth, and Eleventh Circuits: A taxpayer who has made substantial allegations of IRS bad faith should ordinarily have the opportunity to substantiate those allegations at an adversary hearing (including by cross-examination where appropriate), but the district court has significant discretion in holding that hearing, and further discovery is presumptively unavailable at least until after the hearing.[17]

Nor does *Nero* substantially diverge from the approach taken in the Third and Seventh Circuits. In those circuits, the taxpayer must provide evidence of bad faith in order to obtain an evidentiary hearing, but

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[17] The government claims (Pet. 16) that the Sixth Circuit's unpublished decision in *Phillips* v. *United States*, No. 98-3128, 1999 WL 228585 (6th Cir. Mar. 10, 1999), adopted a stricter standard. But the primary authority cited in *Phillips* was *Will*—which, as noted, made clear that a taxpayer should have the opportunity to substantiate his allegations at an evidentiary hearing. *Phillips* also cited *United States* v. *Ernst & Whinney*, 750 F.2d 516, 518 (6th Cir. 1984). But *Ernst & Whinney* followed precisely the procedure endorsed in *Nero*. The district court "deferred" consideration of the taxpayer's request to "undertake detailed discovery" until after an evidentiary hearing (*id.*), and the taxpayer was then allowed "to cross-examine the official who issued the summons at the enforcement hearing" (*id.* at 520).

those circuits—unlike the Fifth and Eleventh Circuits—correspondingly require the government to provide certain forms of pre-hearing discovery that would give the taxpayer the materials necessary to meet this evidentiary hurdle. *See United States* v. *Garden State Nat'l Bank*, 607 F.2d 61, 71 (3d Cir. 1979); *United States* v. *Kis*, 658 F.2d 526, 540 (7th Cir. 1981).[18] Thus, while the specific procedures used in those circuits differ somewhat from the approach taken in *Nero*, they, like the Eleventh Circuit, have adopted a mechanism by which the taxpayer may obtain limited discovery to assist it in shouldering its burden under *Powell*. The government does not question the propriety of this approach. This further confirms that the courts of appeals generally agree that a taxpayer or summoned entity that makes a substantial allegation of bad faith on the part of the IRS should have access to some form of limited discovery so that it can have a meaningful opportunity to prove its allegation.

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[18] Specifically, the Third and Seventh Circuits have adopted a procedure whereby the taxpayer is aided by the provision of "basic discovery." *See Garden State*, 607 F.2d at 71; *Kis*, 658 F.2d at 540. The specific discovery that the government must provide under those decisions was tailored to the particular form of bad faith recognized by this Court in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978). *LaSalle Bank* was subsequently legislatively overruled by TEFRA. Those courts have not specifically addressed whether this "basic discovery" remains available post-TEFRA for other kinds of allegations of bad faith. *See Moutevelis* v. *United States*, 727 F.2d 313, 315 (3d Cir. 1984) (declining to award taxpayer basic discovery where he alleged only that government's improper purpose was furtherance of criminal investigation, but suggesting that basic discovery might otherwise be available for other purposes). The reasoning of those decisions, however, suggests no basis to conclude that such basic discovery would not be available to the taxpayer or summoned entity based on a substantial allegation of bad faith.

Some circuits appear to use more stringent language to articulate the standard for when a taxpayer is entitled to an evidentiary hearing, but even those circuits do not in practice employ an approach that differs significantly from that of the Eleventh Circuit.[19] Thus, although some circuits have noted that an evidentiary hearing is not invariably required when a taxpayer alleges bad faith and have stated that a taxpayer must ordinarily put forward some evidence (rather than bare allegations) of IRS bad faith to obtain such a hearing, even in those circuits it is generally sufficient for the taxpayer to provide its own affidavits substantiating its allegations of bad faith, as long as those affidavits are not merely conclusory.[20] That is precisely what DHLP

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[19] The D.C. Circuit does not seem to have addressed a situation like the present case. In *United States* v. *Judicial Watch, Inc.*, 371 F.3d 824, 830 (2004), the D.C. Circuit held that a taxpayer was not entitled to cross-examine IRS agents who had issued a summons when the district court had already required the IRS to produce "all documents relating to its motivation and purpose" in issuing a summons and had reviewed those documents—more than 1000 pages in total—*in camera*. *See id.* at 831. Based on the court's citation to *United States* v. *Fensterwald*, 553 F.2d 231, 231-232 (D.C. Cir. 1977), however, it appears the D.C. Circuit endorsed the proposition that a taxpayer who makes credible allegations of IRS bad faith is entitled to gather some evidence from the IRS regarding the motivation of the agent issuing a summons. 371 F.3d at 831.

[20] *See, e.g.*, *Millman*, 765 F.2d at 29 (2d Cir.) (remanding for evidentiary hearing based on taxpayer allegations of bad faith: "Although mere conclusory allegations of wrongdoing unsupported by any evidence from which a court might draw an inference of abuse are insufficient to rebut the government's prima facie showing of a proper investigatory purpose, the taxpayer has met his burden if he alleges specific facts 'from which a court *might infer a possibility* of some wrongful conduct by the Government.'"); *Hintze* v. *IRS*, 879 F.2d 121, 126 (4th Cir. 1989) (taxpayer is entitled to an evidentiary hearing upon producing "some substantive

has done.[21] Accordingly, even if there were significance to the distinction some circuits have drawn between allegations supported by affidavit as opposed to those raised in a pleading, DHLP would nonetheless be entitled to an evidentiary hearing.

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evidence" corroborating his claim, in the form of "specific facts … supported by affidavits, from which the court can infer a possibility of some wrongful conduct" (quoting *Kis*, 658 F.2d at 539)), *overruled on other grounds*, *Church of Scientology of California* v. *United States*, 506 U.S. 9, 15-17 (1992); *United States* v. *Balanced Fin. Mgmt., Inc.*, 769 F.2d 1440, 1445-1446 (10th Cir. 1985) ("[I]t is clear that a taxpayer must factually oppose the Government's allegations by affidavit. Legal conclusions or mere memoranda of law will not suffice" (quoting *Garden State Nat'l Bank*, 607 F.2d at 71)); *United States* v. *National Bank of S.D.*, 622 F.2d 365, 367 (8th Cir. 1980) ("An evidentiary hearing is necessary only where substantial deficiencies in the summons proceedings are raised by the party challenging the summons. And when, as in the instant case, only conclusory allegations of impropriety are made, the district court does not abuse its discretion in refusing to hold an evidentiary hearing." (citations omitted)); *see also United States* v. *John G. Mutschler & Assocs., Inc.*, 734 F.2d 363, 367 (8th Cir. 1984) (reaffirming that, under *Powell*, "a court asked to enforce an IRS summons may 'inquire into the underlying reasons for the examination' in order to prevent an abuse of the judicial process," in a case where an IRS official testified at an adversary hearing).

[21] Respondents did not rest on conclusory allegations of bad faith alone, but rather submitted declarations supporting their defenses to the extent possible given the limited information available to them. Thus, for example, respondent Clarke submitted a declaration stating: "DHLP refused to grant another extension [of the statute of limitations] and, immediately thereafter, despite having not asked for additional information for some time, the Government suddenly issued the instant summons." DE 8-1 ¶ 9.

B. The Eleventh Circuit's Approach Is An Appropriate Means Of Implementing This Court's Decision In *Powell*

This Court's review is also unwarranted because the Eleventh Circuit's approach is fully consistent with this Court's precedents and appropriately allows taxpayers a meaningful opportunity to prove the truth of their allegations of bad faith, as *Powell* requires.

In *Powell*, this Court confirmed that enforcement of a summons should be denied where the summons was issued "to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." 379 U.S. at 58; *see also Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964) (noting that a summons may be challenged on "any appropriate ground"); *United States* v. *Bisceglia*, 420 U.S. 141 (1975) (summons "must be scrutinized by a court to determine whether it seeks information relevant to a legitimate investigative purpose"). Moreover, *Powell* made clear that the taxpayer is entitled to establish the government's lack of good faith at an "adversary hearing." 379 U.S. at 58; *see also Reisman*, 375 U.S. at 446 (noting that an enforcement proceeding under Section 7402(b) is "an adversary proceeding affording a judicial determination of the challenges to the summons"); *Donaldson* v. *United States*, 400 U.S. 517, 527 (1971) (referring to "the adversary hearing to which the taxpayer is entitled before enforcement is ordered").

Powell thus makes clear that taxpayers must have a meaningful opportunity to establish that IRS summonses, though *presumptively* valid, nonetheless

should not be enforced.[22] Under *Powell*'s burden-shifting framework, the taxpayer bears the burden of raising a substantial question as to the government's good faith, but often the critical information needed to prove bad faith will be in the possession of the government. *See United States* v. *Security Bank & Trust Co.*, 661 F.2d 847, 850 (10th Cir. 1981) ("To flesh out [certain] defenses, the taxpayer must rely on information peculiarly within the knowledge or files of the Service."). If the taxpayer were denied all forms of discovery, the right recognized in *Powell* might well be rendered meaningless. *See Southeast First Nat'l Bank*, 655 F.2d at 667 (noting the potential for "an unreasonable circular burden on the taxpayer: the facts that he must show to obtain discovery are only available through discovery."); *United States* v. *Stuckey*, 646 F.2d 1369, 1373-1374 (9th Cir. 1981) ("We recognize the anomaly of placing a burden of proof upon the taxpayer and then denying access to what may be the very information needed to meet that burden."); *Kis*, 658 F.2d at 540 ("we do not want to put the taxpayer in the anomalous position of having to allege specific facts when he has no means to gather that information through discovery").

Here, for example, respondents made several specific allegations of bad faith that, if proven, would establish that the summonses should be quashed. Yet proof of these allegations is likely to require evidence in

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[22] The government emphasizes the "presumption of regularity" that inheres in governmental actions (Pet. 20), but neither *Powell* nor the Eleventh Circuit's rule is inconsistent with that presumption. Rather, those decisions provide a meaningful mechanism by which the taxpayer can rebut the presumption. The presumption of regularity of which the government speaks is not a *conclusive* presumption that can never be refuted.

the possession of the IRS. For example, respondents pleaded that the summonses were improperly issued in retaliation for DHLP's refusal to extend a statute of limitations. Proving that allegation will require respondent to develop evidence, either direct or circumstantial, about the agency's purpose in issuing the summonses. It would be unreasonable to expect respondents to carry a burden of producing evidence of retaliatory purpose without the opportunity to question the IRS official responsible for issuing the summons.

For circumstances like these, where specific, plausible allegations of bad faith have been made, the appropriate approach—as the government itself recognized in *Salter* and *Church of Scientology*—is to provide the taxpayer with a limited evidentiary hearing. The taxpayer can use that hearing to obtain evidence of bad faith, but is not entitled to further discovery unless the evidentiary hearing yields evidence that justifies further inquiry. The hearing itself serves as a filtering mechanism to prevent intrusive discovery in cases where the taxpayer's objections lack substantiation. *See Salter*, 432 F.2d at 701 ("the hearing requirement will have the salutary effect of eliminating discovery in cases in which it is clear that respondent will not be able to prove his allegations").

This approach preserves the summary nature of enforcement proceedings, *see Donaldson*, 400 U.S. at 528-529, but ensures that the taxpayer has a meaningful opportunity to carry his burden under *Powell*. And, as the courts of appeals have recognized, a more restrictive rule would place the taxpayer in a "Catch-22": it would require rejection of a taxpayer's request for a hearing because the taxpayer had not adduced sufficient evidence, even though the hearing was precisely what the taxpayer needed to develop its evidence. *See*

Nero, 570 F.3d at 1250; *Southeast First Nat'l Bank*, 655 F.2d at 667 ("[W]e simply refuse to create a rule that would require [a] taxpayer to allege a factual background before he is entitled to the initial, basic discovery provided by an adversary hearing."); *see also Federal Election Comm'n* v. *Committee to Elect Lyndon La Rouche*, 613 F.2d 849, 862 (D.C. Cir. 1979) ("[S]everal courts have held that, where a summonee raises colorable allegations of an improper purpose and seeks to prove those allegations, the enforcement court must afford the summonee at least some opportunity to substantiate its allegations. To rule otherwise … would render it virtually impossible for a summonee to prove that a facially valid summons was, in fact, issued for an improper purpose." (citations omitted)).

The Eleventh Circuit's measured approach appropriately allows the taxpayer to have a meaningful opportunity to develop its allegations of bad faith while ensuring that enforcement proceedings remain streamlined. Absent any actual showing by the government that this approach threatens the effective enforcement of the tax laws, this Court's intervention is not warranted.

C. This Case Is A Poor Vehicle For Review Because Respondents Adduced Substantial Evidence That The Government Improperly Issued The Summonses To Circumvent Tax Court Discovery Rules

Finally, review should be denied because, in addition to alleging that the IRS had improperly issued the summonses in retaliation for DHLP's refusal to extend the statute of limitations (which the Eleventh Circuit found sufficient to warrant a hearing), respondents also brought forward compelling, and as yet unrebutted, evidence that the IRS was not seeking to enforce the

summonses for a proper *investigative* purpose, but rather was using them for its advantage in the Tax Court litigation and in circumvention of Tax Court discovery rules. The Eleventh Circuit did not reach that issue,[23] but there can be no serious dispute that if such government tactics are recognized, as they should be, as an abuse of process, then DHLP has produced more than adequate evidence to warrant an evidentiary hearing in any circuit. *See supra* A.4.

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[23] The government argued below and the district court held that circumvention of Tax Court discovery rules would not constitute an abuse of the summons process. *See* Pet. 14 n.2; Pet. App. 19a. Although two circuits have adopted the government's position, that issue remains open in the Eleventh Circuit. *Cf. Nero*, 570 F.3d at 1250 n.4 (refusing to "narrowly circumscribe[]" the definition of "improper motive"). The Eleventh Circuit might well conclude that the IRS should not be allowed to use its summons power to engage in fact discovery that would not be permitted under Tax Court rules after the IRS has issued an FPAA and the dispute has entered the litigation stage. *See generally* Hyman, *When Rules Collide: Procedural Intersection and the Rule of Law*, 71 Tulane L. Rev. 1389 (1997); *see also* Hyman, *Procedural Intersection and Special Pleading: Is Tax Different?*, 71 Tulane L. Rev. 1729, 1740 (1997) ("Preventing such circumvention is consistent with the overall logic of the system. The sweeping summons power is a creature of the audit examination, and must operate within the functional limits imposed by the statute of limitations. Issuance of a deficiency notice marks the end of the audit examination—and hence the termination of the summons power with regard to those years." (footnote omitted)); *see also Resolution Trust Corp.* v. *Thornton*, 41 F.3d 1539, 1545-1548 (D.C. Cir. 1994) (quashing RTC subpoena during pendency of litigation because the agency no longer had a valid investigatory purpose for the summons); *cf. In re: 2435 Plainfield Ave., Inc.*, 223 B.R. 440, 455-456 (Bankr. D.N.J. 1998) (compiling cases holding that the broad investigative powers available under Bankruptcy Rule 2004 cannot be used in adversary proceedings to circumvent the discovery limitations in the Federal Rules of Civil Procedure).

Respondent submitted affidavits and Tax Court pleadings showing that (1) the summonses were issued after the final version of the FPAA was signed; (2) when one of the six summoned individuals complied with the summons, she was interviewed by the IRS attorneys representing the government in the Tax Court case, and the IRS agent who actually issued the summons did not attend; (3) in the Tax Court case, the IRS refused to participate in standard court mediation on the grounds that the IRS is still awaiting the "discovery" sought through the summonses; (4) the IRS opposed a motion for a protective order in the Tax Court by reference to the outstanding summonses; and (5) the IRS sought a continuance in the Tax Court case on the grounds that the summonses were still outstanding. *See* DE 20-2 to 20-6 (Exs. B-E).

Respondents also submitted an excerpt from the IRS's own Summons Handbook suggesting that issuance and enforcement of these summons constituted an abuse of the summons process. Specifically, the Handbook states:

> In all but extraordinarily rare cases, the Service must not issue a summons after a Statutory Notice of Deficiency (SND) is mailed to the taxpayer to continue the investigation of the same taxable periods and liabilities covered by the SND. After an SND is mailed, the Service should no longer be in the process of gathering the data to support a determination because the SND represents the Service's presumptively correct determination and indicates the examination has been concluded.

DE at 20-7 (Ex. F) (Handbook § 25.5.4.4.8). Thus, the IRS itself seems to acknowledge it should no longer

have been in the process of gathering data to support its determination after a presumptively correct final determination (the FPAA) had already been issued.[24]

There is thus copious evidence that the IRS was improperly attempting to use investigative summonses to evade Tax Court rules. The government's disagreement with the Eleventh Circuit's ruling is, therefore, largely academic, and this case does not present a suitable occasion for the resolution of any divergence among the court of appeals' standards for an evidentiary hearing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[24] Here, the summonses were issued before the FPAA was mailed, but after the final version of the FPAA was signed. And the summonses were not enforced until months after the FPAA was issued.