No. 13-301

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL CLARKE, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

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The court below applied a bright-line rule under which the opponent of an Internal Revenue Service (IRS) investigatory summons is entitled to examine IRS agents regarding their subjective motives for issuing the summons whenever the opponent alleges agency bad faith. Respondents do not defend that holding. They instead recharacterize the court of appeals' decision as requiring district courts to allow such examinations only when an opponent makes a "substantial" showing of bad faith. *E.g.*, Br. in Opp. 10-11. But while that is the rule adopted by every other court of appeals with jurisdiction over IRS summons-enforcement actions, it is not the rule in the Eleventh Circuit. Review of that court's decision is warranted to resolve the intractable division among the courts of appeals and to correct the Eleventh Circuit's erroneous approach, which threatens to under-

mine the efficient enforcement of federal tax laws. In light of respondents' refusal to defend the proposition that a district court abuses its discretion by denying an examination request that is premised on a bare allegation of agency bad faith, summary reversal may be appropriate.

A. Respondents Do Not Defend The Court Of Appeals' Actual Holding

1. Respondents characterize the Eleventh Circuit as holding—first in *Nero Trading, LLC* v. *U.S. Department of Treasury*, 570 F.3d 1244, 1249 (2009), and then in this case—that a summons opponent is entitled to examine IRS agents about their motives for issuing a summons *only* when the opponent demonstrates a "substantial" basis for alleging bad faith by the IRS. See, *e.g.*, Br. in Opp. 10, 12, 14, 17, 18, 20, 21. The word "substantial," however, does not appear either in the decision below or in *Nero*. Instead, the Eleventh Circuit held that a district court abuses its discretion by denying an examination request whenever a taxpayer makes an "allegation of an improper purpose." Pet. App. 5a. Nothing in the court's opinion suggests that an allegation of bad faith must be "substantial," or supported by evidence already in the summons opponent's possession, in order to trigger an absolute right to examine IRS agents. On the contrary, the court of appeals specifically rejected such a limitation as unduly restrictive, stating that "in situations such as this, requiring the taxpayer to provide factual support for an allegation of an improper purpose, without giving the taxpayer a meaningful opportunity to obtain such facts, saddles the taxpayer with an unreasonable circular burden, creating an impermissible 'Catch 22.'" *Ibid.*

Respondents' gloss on the opinion below also ignores the court of appeals' separate holding that respondents were "not entitled to discovery" because "the full 'panoply of expensive and time-consuming pretrial discovery devices may not be resorted to as a matter of course and on a mere allegation of improper purpose.'" Pet. App. 5a n.3 (quoting *Nero*, 570 F.3d at 1249). That rationale for denying discovery would make no sense if the court believed that respondents had made a substantial threshold showing of agency bad faith. Read as a whole, the court's opinion unambiguously holds that, although a "mere allegation of improper purpose" does not entitle a summons opponent to broad discovery, it *does* entitle him to question IRS agents about their reasons for issuing the summons. See *id.* at 5a-6a & n.3.

Similarly in *Nero*, the Eleventh Circuit stated that "an 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." 570 F.3d at 1249 (quoting *United States* v. *Southeast First Nat'l Bank*, 655 F.2d 661, 667 (5th Cir. 1981)). As respondents observe (Br. in Opp. 12), the court in *Nero* also stated that "the scope of any adversarial hearing in this area is left to the discretion of the district court." 570 F.3d at 1249. The rest of the *Nero* opinion makes clear, however, that in determining the "scope" of an adversarial hearing in this context, district courts in the Eleventh Circuit may not deny a summons opponent's request to question IRS officials. The court in *Nero* recognized that its approach "is not in accord with that of a number of" other circuits that "requir[e] the taxpayer to develop facts sufficient to allow [a district]

court to draw [an] inference of wrongful conduct by [the] government" before a taxpayer is entitled to conduct such an examination. *Id.* at 1249-1250. The court in *Nero* "simply refuse[d] to create a rule that would require [a] taxpayer to allege a factual background" for a charge of bad faith "before he is entitled to" "question the Service concerning its reasons for issuing summonses." *Id.* at 1250.

2. Respondents do not defend the rule actually announced and applied by the court of appeals, which is inconsistent with the core premises on which the IRS's summons-enforcement practices are based. Congress has granted the IRS expansive summons authority, 26 U.S.C. 7602, and this Court has repeatedly held that the agency's authority is both broad and essential to effectuating our self-reporting system of federal taxation. See *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 815-817 (1984); *United States* v. *Euge*, 444 U.S. 707, 714-715 (1980); *United States* v. *Bisceglia*, 420 U.S. 141, 145-146 (1975); Pet. 9-13.

Once the government makes a prima facie showing that it issued a challenged summons in good faith, it is entitled to have the summons enforced unless the objector "develop[s] facts from which a court might *infer* a *possibility* of some wrongful conduct by the Government." *United States* v. *Kis*, 658 F.2d 526, 540 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982); see *United States* v. *Powell*, 379 U.S 48, 51, 56-68 (1964); see also Pet. 11-15. In any summons-enforcement proceeding, an objector is entitled to an adversary hearing at which it "may challenge the summons on any appropriate ground" by (for example) making legal arguments or presenting evidence already in the opponent's possession. *Powell*, 379 U.S. at 58. But

when a summons opponent seeks to probe IRS officials' subjective motivations for issuing the summons, based on a bare allegation of bad faith, a district court should have discretion to deny the objector's request.

B. The Decision Below Conflicts With Decisions Of Every Other Court Of Appeals With Jurisdiction Over IRS Summons-Enforcement Actions

Respondents contend (Br. in Opp. 15-23) that the decision below is consistent with the standard applied by all (or nearly all) other courts of appeals. That assertion is unfounded. Every other court of appeals with jurisdiction over summons-enforcement proceedings allows a district court, in its discretion, to deny a request for an opportunity to examine IRS officials when the request is based on a bare allegation of bad faith. See Pet. 15-19. Respondents' attempts to reconcile the Eleventh Circuit's holdings in this case and in *Nero* with the holdings of the eleven other courts of appeals to consider this question is premised on respondents' misreading of the decision below.

Respondents contend (Br. in Opp. 15-20) that the court below applied a substantiality standard that is the same, or approximately the same, as the standards applied in the Fifth, Sixth, and Ninth Circuits. As discussed, the Eleventh Circuit does not apply such a standard; the Eleventh Circuit's per se rule thus conflicts with the standard applied in those circuits, each of which requires more than a bare allegation of bad faith to guarantee an opportunity to question government officials. See *Mitchell* v. *Thomas*, 239 Fed. Appx. 56, 57 (5th Cir. 2007) (rejecting request for hearing to examine officials when request was based only on "conclusory assertions" and allegations with "no support * * * that the summons [at issue] was

issued in bad faith"); *Phillips* v. *United States*, No. 98-3128, 1999 WL 228585, at *4 (6th Cir. Mar. 10, 1999) (affirming district court's refusal to hold evidentiary hearing based on allegations of bad faith because challengers had not made "a considerable showing of abuse"); *Fortney* v. *United States*, 59 F.3d 117, 121 (9th Cir. 1995) (similar).

As respondents acknowledge, the Third and Seventh Circuits similarly do not require a district court to allow examination of IRS officials unless a summons objector has "provide[d] evidence of bad faith." Br. in Opp. 20. Respondents argue (*id.* at 20-21) that the difference between the standard applied in those courts and that in the Eleventh Circuit is insignificant because the Third and Seventh Circuits "require the government to provide certain forms of pre-hearing discovery that would give the taxpayer the materials necessary to meet this evidentiary hurdle." *Id.* at 21. Respondents are incorrect.

Before Congress enacted the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324 (see Pet. 12-13), the Third and Seventh Circuits required the government to provide factual information related specifically to whether a challenged summons was issued solely for an improper criminal-investigation purpose. *United States* v. *Garden State Nat'l Bank*, 607 F.2d 61, 71 (3d Cir. 1979); *Kis*, 658 F.2d at 540-541. District courts in the Third and Seventh Circuits have recognized, however, that this requirement was abrogated by TEFRA, which clarified the relationship between civil and criminal IRS investigations. See *Drum* v. *United States*, 570 F. Supp. 938, 941-942 (M.D. Pa. 1983), aff'd, 735 F.2d 1348 (3d Cir. 1984); *Godwin* v. *United*

States, 564 F. Supp. 1209, 1214 (D. Del. 1983); *United States* v. *Particle Data, Inc.*, 634 F. Supp. 272, 276-277 (N.D. Ill. 1986). And with respect to all allegations of bad faith (whether or not related to a potential ongoing criminal investigation), neither circuit has required district courts to permit questioning of IRS officials when such allegations are unsupported. See *Garden State Nat'l Bank*, 607 F.2d at 71; *Kis*, 658 F.2d at 539. For the same reason, the First Circuit's pre-TEFRA decision in *United States* v. *Salter*, 432 F.2d 697 (1970) (see Br. in Opp. 17-18), does not render insignificant the conflict between the First and Eleventh Circuits. See *Sugarloaf Funding, LLC* v. *U.S. Dep't of Treasury*, 584 F.3d 340, 351 (1st Cir. 2009) (holding that, in order to be entitled to examine IRS officials, a "taxpayer must do more than allege an improper purpose; he must introduce evidence to support his allegations"); see *Copp* v. *United States*, 968 F.2d 1435, 1438 n.1 (1st Cir. 1992) (same), cert. denied, 507 U.S. 910 (1993).[1]

Respondents appear to concede (Br. in Opp. 22-23 & nn.19-20) that the Eleventh Circuit's approach conflicts with the approach adopted by the Second,

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[1] Respondents read too much (Br. in Opp. 13-14, 26) into the government's pre-TEFRA position in *Salter* that examination of IRS officials was appropriate where the summons opponents had alleged that the summonses were issued solely for the purpose of criminal investigation. Under TEFRA, such allegations are now legally insignificant, and the First Circuit's current standard on the question presented in this case conflicts with the standard applied below. Respondents appear to be mistaken in contending (*id.* at 14, 26) that the government made the same argument in *United States* v. *Church of Scientology*, 520 F.2d 818 (9th Cir. 1975), where there was no allegation of an improper criminal-only purpose, see *id.* at 824-825.

Fourth, Eighth, and Tenth Circuits. That concession alone provides a sufficient basis to grant certiorari. Respondents suggest (*id.* at 23) that the conflict is not significant because they could have satisfied the more stringent rule applied outside the Eleventh Circuit. As explained at pp. 10-11, *infra*, that is not so. In any event, the Eleventh Circuit never considered that question because it applied a categorical rule that a district court must permit examination of IRS officials whenever a summons opponent alleges bad faith. That broad rule should be corrected.[2]

C. The Question Presented Is Recurring And Important

Respondents attempt to downplay (Br. in Opp. 12-13) the disruption the Eleventh Circuit's standard will cause to the IRS's efficient enforcement of the federal tax laws. They see "no reason" to think that the Eleventh Circuit's approach "should lead to any substantial delay in summons enforcement where the taxpayer's objections are not meritorious." *Id.* at 12. Respondents underestimate the practical significance of the Eleventh Circuit's deviation from usual summons-enforcement standards.

District courts already protect taxpayers against abusive summons practices by requiring the IRS to

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[2] As respondents explain (Br. in Opp. 22 n.19), the D.C. Circuit's decision in *United States* v. *Judicial Watch, Inc.*, 371 F.3d 824 (2004), arose in a different factual posture because the court there had examined IRS documents that shed light on the reasons for the summonses. See *id.* at 828. That court explained more generally, however, that "[i]f the taxpayer cannot develop even the evidence necessary to [suggest that an audit was improper], then an evidentiary hearing would be a waste of judicial time and resources." *Id.* at 831 (quoting *Kis*, 658 F.2d at 540) (second brackets in original).

establish that it issued a challenged summons in good faith and by allowing a taxpayer to present valid objections at an adversary hearing. District courts also have discretion (outside the Eleventh Circuit) to hold additional hearings for examination of IRS officials if there is reason to believe, notwithstanding the IRS's representation that it has satisfied the *Powell* factors, that a summons was issued for an improper purpose. The Eleventh Circuit has gone a step further by requiring district courts to permit such examinations whenever a summons objector alleges bad faith. The delay that will predictably flow from that requirement is not what Congress intended, and it is inconsistent with this Court's recognition that summons proceedings should be summary in nature. See *United States* v. *Stuart*, 489 U.S. 353, 369 (1989).[3]

Respondents are also wrong in suggesting (Br. in Opp. 1, 10) that the government's decision not to file a petition for a writ of certiorari in *Nero* indicates that the Eleventh Circuit's rule does not unduly burden the government's enforcement of IRS summonses. Slightly more than a month after the Eleventh Circuit denied the government's rehearing petition in *Nero*, the district court in that case enforced the summons without any examination of IRS officials after the objector failed to appear at a scheduled hearing. 1:07-

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[3] Respondents severely underestimate the extent of summons-enforcement litigation in the district courts within the Eleventh Circuit. Respondents identify (Br. in Opp. 13) an annual average of five *published* decisions on Westlaw involving enforcement of an IRS summons in such courts. Internal Department of Justice case-tracking data indicate, however, that the Department's Tax Division has litigated 93 summons cases in those district courts since 2009. That figure does not include the number of summons cases litigated by United States Attorney Offices in those districts.

CV-1816, Docket entry No. 51 (N.D. Ga. Nov. 12, 2009) (minute entry); *id.* Docket entry No. 52 (Nov. 16, 2009) (order); *id.* Docket entry No. 53, at 5-6 (Dec. 10, 2009) (transcript of Nov. 12, 2009 hearing). The district court's enforcement order in *Nero* rendered moot the government's objection to the broad rule applied by the court of appeals in that case.

D. This Case Is An Appropriate Vehicle For Reviewing The Question Presented

Respondents argue (Br. in Opp. 27-30) that this case is not an appropriate vehicle for resolving the question presented because they presented "compelling * * * evidence" that the IRS did not seek to enforce the summonses at issue for a proper investigatory purpose, *id.* at 27-28, and "some evidence" to "substantiat[e their] allegations of bad faith" with respect to the issuance of the summonses, *id.* at 22. That is incorrect. Even if respondents' factual allegations had been substantiated with probative evidence, respondents should not have been entitled to examine IRS officials because (as the district court held, see Pet. App. 18a-19a) their allegations of abuse would have failed as a matter of law. See Gov't C.A. Br. 23-48; see also *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 324 n.7 (1985) (noting that no evidentiary hearing is required when an allegation of improper purpose, "[e]ven if factually true, * * * did not provide a basis for quashing the summonses"). The proper resolution of that question, however, is ultimately irrelevant to the certworthiness of this case. If this Court grants review and corrects the court of appeals' erroneous legal rule, respondents will remain free on remand to argue the merits of their objections to the summonses under the appropriate standard.

Respondents' contention that the Court should forgo review is unsound for an additional reason. Because the court of appeals' erroneous rule requires a district court to allow examination of IRS agents whenever a summons opponent alleges bad faith, the question whether such examination is required is very unlikely to come before the Eleventh Circuit again. When a district court grants a motion for examination—as all district courts in the Eleventh Circuit will be required to do in these circumstances going forward—the court of appeals will have no occasion to consider whether it would have been an abuse of discretion to deny such a request.

That question reached the court of appeals in this case because the district court construed *Nero* not to require examination of IRS officials based on a bare allegation of bad faith. See Pet. App. 17a. The Eleventh Circuit eliminated any uncertainty about the import of *Nero*, however, by clarifying that respondents were entitled to conduct such an examination *without* "provid[ing] factual support for [their] allegation of an improper purpose." *Id.* at 5a; see *id.* at 6a. Thus, although district courts throughout the country will continue to receive examination requests in summons proceedings, this Court is unlikely to have a future opportunity to correct the Eleventh Circuit's erroneous rule. Review is therefore warranted in this case.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted. In the alternative, the judgment of the court of appeals should be summarily reversed.

Respectfully submitted.

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