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1 P R O C E E D I N G S

2 (10:17 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 13-301, United States v.  
5 Clarke.

6 Ms. Harrington.

7 ORAL ARGUMENT OF SARAH E. HARRINGTON

8 ON BEHALF OF PETITIONERS

9 MS. HARRINGTON: Thank you, Mr. Chief  
10 Justice, and may it please the Court:

11 In this case, the Eleventh Circuit  
12 unambiguously held that a district court always abuses  
13 its discretion when it denies a summons opponent's  
14 request to examine IRS officials based on an unsupported  
15 allegation of improper purpose. That holding was wrong  
16 for at least three reasons, and even Respondents don't  
17 defend it at this point.

18 The three reasons are: First, the Eleventh  
19 Circuit's rule ignores Congress's intent that IRS  
20 summons enforcement proceedings be summary in nature.  
21 Second, the automatic examination rule is inconsistent  
22 with this Court's treatment of analogous,  
23 administrative, and grand jury subpoenas in other  
24 contexts. And the third, the rule fails to respect the  
25 district courts' core discretion to govern its own

1 proceedings, including governing when and how evidence  
2 should be developed.

3 JUSTICE SCALIA: As you say, the Respondent  
4 concedes all that. So why don't -- why don't you talk  
5 about what the difference is between you and the  
6 Respondent? Nobody defends what the lower court said  
7 here, right?

8 MS. HARRINGTON: I'm happy to. The  
9 Respondent suggests two what we think of as unworkable  
10 limitations or potential limitations on the rule. The  
11 first is that there be a requirement that the allegation  
12 be plausible, though, totally unsupported by evidence.  
13 And in our view, any plausibility requirement that is  
14 untethered to a requirement that a summons opponent  
15 actually point to some evidence that would substantiate  
16 the allegation is really not a limitation at all.

17 JUSTICE SCALIA: Is -- is there really a  
18 difference between those two? Can it be plausible if  
19 there is -- if there is no evidence that suggests that  
20 it's true?

21 MS. HARRINGTON: Well, in our view, no. I  
22 mean, I think that's the question that you might want to  
23 direct to Respondents. They seem to suggest that --

24 JUSTICE SCALIA: It may well be that the two  
25 of you agree in other words, depending on what they

1 think.

2 MS. HARRINGTON: And if that's true, then we  
3 invite the Court to reverse the Eleventh Circuit. I  
4 mean, the rule we want --

5 (Laughter.)

6 MS. HARRINGTON: What we would like is that  
7 there -- that before a district court is actually  
8 required to allow examination of IRS officials, a  
9 summons opponent has to put in enough evidence to at  
10 least raise an inference of --

11 JUSTICE ALITO: It all depends on what -- it  
12 all depends on what you mean by "evidence." Do you mean  
13 direct evidence? Is circumstantial evidence enough?

14 MS. HARRINGTON: Circumstantial evidence is  
15 enough. And -- and, again, what we're asking for is  
16 really a modest rule. A district court, in our view,  
17 has discretion to allow examination of an IRS official.

18 JUSTICE GINSBURG: Could you -- could you  
19 apply your rule, district court discretion in this  
20 particular case? There were two allegations, I think,  
21 that -- the first one was that the -- this was in  
22 retaliation for the taxpayers' refusal for the third  
23 time to extend the limitation period. And the other was  
24 this was an effort to circumvent the limited discovery  
25 that's allowed in the tax court.

1           Now, those were the allegations.           What would  
2   the taxpayer have to say in addition to those two  
3   allegations to pass your test?

4           MS. HARRINGTON:           Well, so I think there --  
5   there are sort of two threshold questions that the  
6   district court would consider. The first is whether  
7   those would actually be improper purposes. And the  
8   second is whether if they would be, they were actually  
9   the motivating purposes in this case. The district  
10  court -- the court of appeals in this case only  
11  considered the statute of limitations question, and it  
12  found that -- that issuing a summonses after a taxpayer  
13  declined to extend a statute of limitations would be an  
14  improper purpose. We disagree with that legal holding,  
15  but that's not the question on which we sought this  
16  Court's review --

17          JUSTICE KENNEDY:           Well, let -- let's assume  
18  that it is inappropriate for the IRS to avoid  
19  taxpayer -- tax court limitations on discovery. Let's  
20  assume that a subpoena cannot do that. The Supinski  
21  declaration, it seems to me, is quite sufficient to make  
22  that showing.

23          MS. HARRINGTON:           Well, I would just say --  
24  so there's a case we cited in our reply brief called Ash  
25  v. Commissioner, which is a tax court case, which says

1     that in the tax's court view, there's no problem with  
2     enforcing a summons that was issued before tax court  
3     proceedings were initiated, as was the case here, that  
4     there's no problem -- there's no interference with the  
5     tax court discovery rule when we need to do that.

6             JUSTICE KENNEDY:             But my supposition was  
7     that assume that you cannot avoid taxpayer -- or tax  
8     court discovery limits. If -- if that is so, it seems  
9     to me the Supinski affidavit is quite sufficient.

10            MS. HARRINGTON:            Well, it may or may not be.  
11     And, again, if this Court corrects the -- the Eleventh  
12     Circuit didn't consider that because in the Eleventh  
13     Circuit's view, there didn't need to be any evidence.  
14     And so the Eleventh Circuit did not examine the  
15     sufficiency of the evidence that the Respondents  
16     presented. And so if this Court corrects that legal  
17     rule, Respondents can make these arguments on remand to  
18     the Eleventh Circuit.

19            But I would just point out with respect to  
20     that -- that proposed improper purpose that the -- the  
21     validity of a summons is judged at the time that the  
22     summons was issued. And in this case, the summonses  
23     were issued before there was any tax court litigation.  
24     There's always the possibility, when a summons is  
25     issued, that there's going to be tax court litigation

1 down the road after the IRS makes its determination of  
2 the --

3 JUSTICE BREYER: Why is that?

4 JUSTICE SCALIA: That's a point -- that's a  
5 point for argument. I mean, you can argue that to  
6 the -- to the district court.

7 MS. HARRINGTON: Absolutely.

8 JUSTICE SCALIA: You don't want us to  
9 resolve that here.

10 JUSTICE BREYER: I mean, you can easily  
11 imagine circumstances where there's a subpoena, an  
12 administrative subpoena issued against Mr. Smith. By  
13 the time he comes around to enforcing it, where there's  
14 very little reason to enforce it, Mr. Smith is suffering  
15 an incurable disease and the district court would say,  
16 no, it's oppressive. Right? I mean, I've never heard  
17 of this rule that you -- a district court would be  
18 forbidden to look at the circumstances in which the -- a  
19 subpoena or any other discovery document is being asked  
20 to enforce it now. I mean, where does this rule come  
21 from that the district court can't look at the  
22 circumstances now?

23 MS. HARRINGTON: I'm not saying the district  
24 court can't look at the circumstances at the time of  
25 enforcement. There may be circumstances where --



1 JUSTICE BREYER: Very well. Once we say  
2 that, they've asked this question on the merits here.  
3 They say, why in heaven's name have they issued -- why  
4 have they asked this enforcement? There are only two  
5 possible reasons. One is to get some information in the  
6 years 2005, 2007 that would show that they owe more  
7 money than you claim they do owe, since you issued a  
8 final thing, which would be impossible because the  
9 statute of limitations has run.

10 And the other possible reason is that you want to  
11 obtain information to put in the tax court proceeding,  
12 which, in fact, is supported by the fact that the agents  
13 who came to enforce it were tax court lawyers and not  
14 the regular lawyers. And, in fact, it would be  
15 absolutely illegal under the law -- the rules of the  
16 tax court. So they said, that's our information.  
17 That's why we think this is oppressive. And your  
18 response to that is if they're wrong, why do you want  
19 this information?

20 MS. HARRINGTON: Well, we think they're sort  
21 of wrong, wrong, wrong, and wrong.

22 JUSTICE BREYER: Very good. Then you will  
23 explain to me why is it -- why is it that the government  
24 wants this information? To do what?

25 MS. HARRINGTON: Because so -- just to take

1 a step back. The courts have upheld that the inquiry is  
2 whether the summonses were issued for a proper purpose.  
3 This Court said in Couch that the legal parties -- the  
4 parties' legal duties are fixed at the time that the  
5 summons was issued. So if you adopt the type of  
6 approach that they're asking for, what you're going to  
7 do is give taxpayers an incentive not to comply with the  
8 legal duty that's imposed on them by operation of law,  
9 which is to disclose information related to their tax  
10 liabilities, and then to comply with summonses that are  
11 validly issued. You give them incentive to drag  
12 things out until the statute of limitations is about to  
13 run and they file a tax court --

14 JUSTICE BREYER: My question was: Why do  
15 you want the information?

16 MS. HARRINGTON: We want the information  
17 because the IRS wants to make a determination of their  
18 tax liability.

19 JUSTICE BREYER: Wait, wait. Now, explain  
20 that one to me.

21 MS. HARRINGTON: Okay. So that's --

22 JUSTICE BREYER: Now, when you say  
23 information, isn't the final partnership  
24 determination -- the final partnership for the years  
25 2005, 2007, is it you want the information to revise

1     that?  Is that why you want it?

2             MS. HARRINGTON:             That is -- I mean, yes.

3     So --

4             JUSTICE BREYER:             Yes.  So you want the  
5     information --

6             MS. HARRINGTON:             Well, that's a -- that's  
7     one possibility.

8             JUSTICE BREYER:             I want to know yes or no.  
9     What are the reasons you want this information?  One is  
10    you want to change the number on the final partnership  
11    assessment of liability.  Is that one of the reasons?

12            MS. HARRINGTON:            It could be.

13            JUSTICE BREYER:            Yes or no, please.

14            MS. HARRINGTON:            We want the right answer.  
15    And if the right answer is that we were wrong in the  
16    FPAA, then we would revise the FPAA.

17            JUSTICE BREYER:            You want -- in other words,  
18    I want to be quite precise.  I've asked the question, do  
19    you want the information with the idea in mind that it  
20    might show you should change the final number?

21            MS. HARRINGTON:            Yes.

22            JUSTICE BREYER:            Yes.  Is there any other  
23    reason you want the information?

24            MS. HARRINGTON:            No.

25            JUSTICE BREYER:            Okay.  Thank you.

1 JUSTICE ALITO: Well, can I ask you this --

2 JUSTICE SOTOMAYOR: Could I just go back to  
3 Justice --

4 CHIEF JUSTICE ROBERTS: Justice Alito.

5 JUSTICE ALITO: Can I ask you this on a  
6 related point. The IRS has to, as an initial step,  
7 if -- if the person who's subpoenaed resists  
8 enforcement, the IRS has to submit an affidavit saying  
9 it has a proper purpose.

10 MS. HARRINGTON: Yes.

11 JUSTICE ALITO: Right? Suppose that that  
12 affidavit says: We have a proper purpose and our proper  
13 purpose is solely this: We want discovery for the Tax  
14 Court case. In your view -- in your view, is that a  
15 proper purpose?

16 MS. HARRINGTON: So I guess -- so the  
17 premise of your question assumes that there is already a  
18 Tax Court proceeding underway?

19 JUSTICE ALITO: Right.

20 MS. HARRINGTON: And so that may -- that  
21 might not be a proper purpose because the IRS has said  
22 you need extraordinary circumstances -- the internal IRS  
23 guidelines say you need extraordinary circumstances to  
24 issue a summons after Tax Court proceedings are  
25 underway. And the Tax Court has similarly said you can

1     only use evidence obtained through those summons in  
2     extraordinary circumstances. But in almost every case,  
3     a summons is issued long before or at least somewhat  
4     before a Tax Court proceeding is initiated because  
5     it's -- the IRS is trying to get information to make a  
6     determination about the taxpayer's liability.

7             JUSTICE ALITO:             All right. Well -- so  
8     suppose the -- the answer is this: We have a proper  
9     purpose. We have no interest whatsoever in changing our  
10    assessment. However, we anticipate that there's going  
11    to be a Tax Court proceeding and we want to get  
12    discovery for the Tax Court proceeding. Is that a  
13    proper purpose?

14            MS. HARRINGTON:            I think that would be a  
15    question that would need to be decided in a particular  
16    case. The reason I'm hesitating to give you a straight  
17    answer is because I -- that's just not the way the IRS  
18    works. The IRS is trying to get the right answer. And  
19    believe it or not, sometimes when the IRS gets more  
20    information, it will actually give money back to a  
21    taxpayer. It might -- if it gets information that might  
22    exonerate the IRS's finding of improper liability or it  
23    might actually bring to light to the IRS the fact that  
24    the taxpayer has overpaid. And there are some case --

25            JUSTICE SOTOMAYOR:            Could I go -- interrupt

1 now, just to get back to the question that Justice Alito  
2 started with earlier and finish it. What do you mean by  
3 "evidence"? And -- and I ask this because I'm trying to  
4 figure out whether we're in the Iqbal-Twombly world,  
5 where what you mean by "evidence" is sort of a sworn  
6 complaint that points to facts from which a plausible  
7 inference can be drawn, or whether you're talking about  
8 evidence as a summary judgment standard where they have  
9 to proffer affidavits and show documents and sort of go  
10 through a summary judgment standard. Because  
11 evidence --

12 MS. HARRINGTON: Right.

13 JUSTICE SOTOMAYOR: -- is a -- it -- it has  
14 a lot of meaning and I'm not quite sure which one --

15 MS. HARRINGTON: So it's more like summary  
16 judgment than Iqbal. You know, I don't think summons  
17 enforcement standards exactly map onto any other civil  
18 standard like this. I'll tell you why we think the  
19 Iqbal standard does not apply. There's a couple  
20 reasons.

21 First, the Iqbal-Twombly standard is a  
22 pleading standard, it's not about what kind of  
23 evidence. It's -- it's not about production of evidence  
24 to support your pleadings. And so in this case what  
25 we're saying is it doesn't matter how artfully you plead

1     that there is an improper purpose; you need to be able  
2     to point to some kind of evidence to support that to  
3     raise an inference of improper purpose.

4             JUSTICE SOTOMAYOR:             But that -- that means  
5     point to some facts, point to some facts that --  
6     that --

7             MS. HARRINGTON:             It certainly --

8             JUSTICE SOTOMAYOR:             That's -- that's why I'm  
9     saying -- I don't know that --

10            MS. HARRINGTON:            But you can't just allege  
11     things --

12            JUSTICE SOTOMAYOR:            Let me tell you what I  
13     would have done if I had gotten this.

14            MS. HARRINGTON:            Okay.

15            JUSTICE SOTOMAYOR:            All right? If I had  
16     gotten their information, I would have looked at the  
17     government and said: Explain to me why you need this --  
18     I would have done what Justice Breyer did. And then I  
19     would have figured out and asked you enough questions,  
20     without holding a hearing, just through your attorney,  
21     until I got to a point where I decided whether or not  
22     your answers, like the district court did here, made  
23     sense or not.

24            MS. HARRINGTON:            Okay.

25            JUSTICE SOTOMAYOR:            And if they didn't make

1 sense, then I would say, no, let's go a little further.

2 MS. HARRINGTON: And absolutely, we would  
3 say you would have discretion to do that as the district  
4 court. We -- we're not looking to constrain the  
5 district court's discretion here. And I think it's  
6 important to keep in mind, another reason that the Iqbal  
7 standard really doesn't work here is that by the time  
8 you're getting to this question about whether there's an  
9 improper purpose, as our opponent has alleged, the  
10 government has already made a substantial showing of  
11 good faith. The government has filed the Powell  
12 affidavit, a district court has satisfied itself that  
13 the government has established a proper purpose. And  
14 then the presumption is that the government's acting in  
15 good faith and for a proper purpose.

16 And so when you're -- in the Iqbal context,  
17 the person who files a complaint is entitled to the  
18 presumption that what they say is true. It's the  
19 opposite here.

20 JUSTICE SOTOMAYOR: So why not -- why not  
21 make life very simple -- and I think that's what your  
22 counterpart -- simply to say you have to point to facts  
23 from which a reasonable inference of improper motive can  
24 be drawn.

25 MS. HARRINGTON: That's what we're saying.



1 That's exactly the standard that we think should have  
2 been applied. And if it -- and as long as an opponent,  
3 a summons opponent, can do that, can point to facts that  
4 raise an inference of improper purpose, then a district  
5 court needs to allow examination of IRS --

6 JUSTICE ALITO: But that doesn't -- that's  
7 doesn't really seem very helpful because there are  
8 inferences and there are inferences. There are weak  
9 inferences and there are strong inferences. I don't  
10 think it's very helpful to a district judge for us to  
11 send this back and say: Figure out whether there is an  
12 inference here of -- of some unspecified strength.

13 Take the retaliation issue. You have --  
14 let's say these are the facts. The -- the IRS asks for  
15 a further extension of the statute of limitations, the  
16 taxpayer says no: I'm not going to agree to any further  
17 extensions, and then a half an hour later the summons  
18 are served. So you have one thing happening shortly  
19 after another. That gives rise to an inference of  
20 retaliation. Maybe it's a very weak inference; maybe  
21 it's a stronger inference. Do you see what I'm saying?  
22 We have to specify something other than it gives rise to  
23 an inference of some unspecified strength.

24 MS. HARRINGTON: Well, with respect, Your  
25 Honor, that -- that's the rule that's applied in the 11

1 other courts of appeals that have jurisdiction over  
2 these matters and it really has not been a problem in  
3 the district courts in those courts of appeals. It's  
4 only the Eleventh Circuit that has held you don't have  
5 to point to any evidence, you don't have to raise an  
6 inference, a district court has no discretions --

7 CHIEF JUSTICE ROBERTS: Counsel, could I --  
8 we hear that argument a lot, that there's never been any  
9 showing of any problem in these other circuits. But do  
10 you have any study to support that? I mean, is it -- I  
11 don't know that we -- how you would tell. I mean,  
12 because these -- these proceedings, not everybody is  
13 going to say I'm going to appeal, particularly facing  
14 the IRS, and go forward. Do you have any basis for the  
15 argument that this has not been a problem in the other  
16 circuits other than the fact that what, we haven't had a  
17 case yet or the courts of appeals haven't had a case?

18 MS. HARRINGTON: I can't point to any study,  
19 but I have to think that if there were serious problems,  
20 you would see a lot more litigation about this issue.

21 JUSTICE SCALIA: What -- what do you mean  
22 about a problem? I mean, some of them are applying a  
23 requirement of a strong inference and others are  
24 applying a requirement of a weak inference. How is that  
25 a problem? I mean, you could say no problem, they're

1 just doing what they want to do.

2 MS. HARRINGTON: But none of them is  
3 applying the rule that the Eleven Circuit applies, which  
4 is you don't have to have -- you can just have an  
5 unsupported allegation.

6 JUSTICE SCALIA: Oh. We're -- we're way  
7 beyond that.

8 MS. HARRINGTON: Okay. Great.

9 CHIEF JUSTICE ROBERTS: Well, not  
10 necessarily great. One thing that -- when we articulate  
11 a new standard, sometimes we like to apply it to the  
12 particular case to give clearer guidance over exactly  
13 what we mean.

14 MS. HARRINGTON: Okay.

15 CHIEF JUSTICE ROBERTS: And in this case --  
16 and particularly here when we're not being asked to  
17 resolve a legal question in the particular case, we're  
18 just trying to say what do you need to show a hearing --  
19 require a hearing. They've got more -- you know,  
20 they've got more than just a bare allegation. They've  
21 got the summons -- first of all, it's the third request  
22 for an extension. They've got the summons immediately  
23 after they refuse to grant it. They've got a contention  
24 that this is to circumvent the Tax Court's limits. They  
25 support that by the fact that when Moog came for the

1 deposition, you only had the Tax Court lawyers there,  
2 not Mr. Freefielder who was -- Frierfielder, who was  
3 running the investigation. That's more than just a bare  
4 allegation.

5 MS. HARRINGTON: Well, if I can separate the  
6 two allegations. On the -- on the statute of  
7 limitations issue --

8 CHIEF JUSTICE ROBERTS: There were -- there  
9 were three or four, not two.

10 MS. HARRINGTON: Well, I'm sorry. There are  
11 different allegations, but they're sort of two reasons.

12 CHIEF JUSTICE ROBERTS: I'm sorry. Maybe  
13 because it's a tax case, if you could slow down just a  
14 little bit.

15 MS. HARRINGTON: I'm sorry.

16 (Laughter.)

17 MS. HARRINGTON: I'm with you.

18 So the two purposes, improper purposes that  
19 they discussed before this Court, are: First,  
20 retaliation for refusing to extend the statute of  
21 limitations; and second, circumvention of Tax Court  
22 discovery rules. So as to the first, again, I think you  
23 need to step back and ask: Well, would it be an  
24 improper purpose for the IRS to issue a summons after a  
25 taxpayer declines to extend the statute of limitations.

1 CHIEF JUSTICE ROBERTS: No. It's a little  
2 bit more than that. It's the third request for an  
3 extension. And how often does the IRS request the  
4 taxpayers to waive the statute of limitations?

5 MS. HARRINGTON: I can't give you  
6 statistics, but my understanding is that the IRS does  
7 everything it can to get the information voluntarily and  
8 in a cooperative way from taxpayers before it has to  
9 resort to a summons. And so that often involves asking  
10 for extensions of the statute of limitations.

11 CHIEF JUSTICE ROBERTS: Well, I know. But  
12 Congress has established these statutes of limitations,  
13 and the IRS has enormous leverage. They're sitting here  
14 saying, well, we could file this thing saying you owe  
15 \$150,000 in taxes or you might -- or you could give us  
16 more time and we'll think about it longer.

17 And my sense, just from looking at the cases  
18 that come in and cert petitions, that happens almost  
19 always. They're always saying give us more time, give  
20 us more time. And I don't know how many times it  
21 happens three different times -- I mean three  
22 successive --

23 MS. HARRINGTON: To be honest, I don't know  
24 how often that happens either. I don't think it's  
25 infrequent. But I think you have to understand it

1 within the context of the tax system. This isn't a  
2 system where the obligation is on the IRS to figure out  
3 how much each of us owes and to come after us for that  
4 amount. The obligation -- Congress has put it on the  
5 taxpayer to determine. Everyone has to do their own  
6 taxes, figure out how much they owe, and to give  
7 documentary evidence supporting their determination of  
8 how much they owe. And Congress has also told the IRS,  
9 we want you to go out and inquire into the liabilities  
10 of taxpayers with respect to any tax and figure out if  
11 people are doing this correctly.

12 CHIEF JUSTICE ROBERTS: And we want you to  
13 do it within whatever the statute of limitations period  
14 is.

15 MS. HARRINGTON: That's right. But if the  
16 -- if the IRS goes to taxpayers, they don't -- they  
17 don't just go to a taxpayer and issue a summons right  
18 off the bat. They go to a taxpayer, in this case the  
19 partnership. They made two deductions, questionable  
20 interest deductions totaling \$34 million. The IRS said  
21 we're not sure about this. They asked for information  
22 that would allow the IRS to determine whether the  
23 deductions were correct. Now keep in mind--

24 JUSTICE KENNEDY: Just so -- just so I -- I  
25 know what your position is in this case and your answer

1 to the Chief Justice, is it your contention that on this  
2 showing, that on these affidavits, a district court may  
3 not order a hearing?

4 MS. HARRINGTON: No. We're not offering a  
5 line that a district court would not --

6 JUSTICE KENNEDY: All right. So you say  
7 that the district court -- that there is a sufficient  
8 showing here so that a district court, in the exercise  
9 of its discretion, could order a further hearing.

10 MS. HARRINGTON: Yes. I mean, we think  
11 almost any time a district court thinks there's a reason  
12 to hold the hearing, that it would allow examination by  
13 IRS officials --

14 JUSTICE GINSBURG: But the problem is, you  
15 say the district court could say, yes, I'm going to --  
16 I'm going to require this agent to testify or no, I'm  
17 not going to.

18 You're using a discretion test, but you're  
19 not giving the district judges all over the country a  
20 clue about appropriate exercise of that question. And  
21 if I understand your most recent answer, you're saying  
22 it could go either way, it's up to the district judge.

23 MS. HARRINGTON: Well, I mean, I think any  
24 time you're talking about the district court's exercise  
25 of its discretion, you're going to have a range of

1 situations in which the district court could do A or it  
2 could do the opposite of A, and it wouldn't be an abuse  
3 of discretion either way. That's the nature of  
4 discretion.

5 In our view, in this case, if a district  
6 court sees a reason to hold the hearing and allow  
7 examination, it should do that, and the IRS, the  
8 government may argue --

9 JUSTICE KAGAN: Can I -- can I ask,  
10 Ms. Harrington, in the 11 circuits that follow what you  
11 think is the right approach, what actually happens? How  
12 often do courts ask IRS agents to come in and to give  
13 testimony about why they're -- why they've issued a  
14 summons?

15 MS. HARRINGTON: I don't have statistics.  
16 It's really hard to get numbers on all of these sort of  
17 numbers-based questions and I apologize for that. But  
18 my sense is it doesn't happen very often. But  
19 sometimes --

20 JUSTICE GINSBURG: But there was a time when  
21 the government thought that was the right procedure.  
22 The Salter case has been mentioned and there the  
23 government itself made the suggestion that if there's an  
24 allegation, an allegation of improper purpose, the court  
25 should have a hearing at which the taxpayer gets an



1 opportunity to question the agent.

2 MS. HARRINGTON: Well, Justice Ginsburg,  
3 it's not quite right that -- first of all, we offered  
4 testimony just in that case. I don't think we offered  
5 that as a rule to govern all cases. But also, it wasn't  
6 just about any allegation of improper purpose. It was  
7 about a particular type of purpose that was -- that was  
8 relevant then, which is that an allegation that the IRS  
9 had a criminal investigation only purpose. And when  
10 Congress enacted TEFRA in 1982, it took that allegation  
11 of improper purpose off the table by sort of drawing --  
12 making irrelevant whether the IRS -- whatever its  
13 internal motivation was, whether it was looking at  
14 criminal or civil liability, it took that off the table.

15 And so all the courts of appeals from the  
16 '70s and '80s that allowed examination of IRS officials,  
17 as a matter of course or more frequently, all of those  
18 courts of appeals except the Eleventh Circuit changed  
19 their rule after TEFRA was enacted because all of those  
20 holdings were really just about whether the IRS had a  
21 solely criminal investigation purpose.

22 JUSTICE KAGAN: Ms. Harrington, can I go  
23 back? You said it's rare. Does that mean it's  
24 really -- it never happens?

25 MS. HARRINGTON: I think it happens

1 sometimes. It doesn't happen very often. And again, I  
2 think that's because before you even get to the  
3 question, the IRS has already made a significant showing  
4 through the Powell affidavit. It has established that  
5 it has a proper purpose. And the IRS doesn't just say,  
6 we have a proper purpose. They have to identify the  
7 purpose. And if you look on pages 24 and 25 of the  
8 Joint Appendix, you will see the purpose that's alleged  
9 in this case, which is looking into these questionable  
10 interest deductions.

11 JUSTICE BREYER: Yes. But there's more --  
12 that's why -- what I don't have clear in my mind is how  
13 to write the facts into this. I mean, before we had our  
14 previous colloquy, I guess they had no idea why you  
15 wanted this information more specifically than you're  
16 saying. And then you say, quite truthfully -- it only  
17 took three seconds -- and you said no, we want it  
18 because we might want to revise the -- the final  
19 partnership -- final partnership administrative  
20 adjustment. And then what perhaps they'll say next --  
21 I'm just getting this out of their brief, they'll say -- in your own  
22 handbook you say, once that's issued, "The examination  
23 has been concluded and the Service should no longer be  
24 in the process of gathering data to support a  
25 determination."

1           And then they have a whole paragraph full of  
2   similar things from the IRS. So they'll read them to  
3   you, not you, but the lawyer, and they'll say, well,  
4   what was special about this that you decided to have  
5   this extra examination? And there'll have to be an  
6   answer to that. Well, as a -- as a sort of lay person  
7   in this area reading that, that sounds like a good set  
8   of questions to ask. You'd be interested in what the  
9   answer is and they should be able to ask them.

10           Now, am I missing something?           Can I say --  
11   would I cause some kind of big problem for something or  
12   it's -- if I were to say in an opinion, look, this is  
13   the kind of thing that they want to know, and it sounds  
14   as if, since we don't know your side of it, but it  
15   sounds as if this is the situation, and they should be  
16   able to find out.

17           MS. HARRINGTON:           Well, the problem is that  
18   the IRS seeks the information when it issues the summons  
19   and that happens before the FPAA was issued. It  
20   happened before there's tax court proceedings. And so  
21   if you write an opinion that says, well, if you -- you  
22   know, if the -- if the summonses don't get enforced  
23   until after the FPAA is issued and at that point, the  
24   taxpayer is entitled to examine IRS officials, then  
25   you're giving taxpayers an incentive not to comply with

1 summonses that are validly issued.

2           Now, the order to show cause was issued by  
3 the district -- excuse me -- that was issued afterwards. But  
4 the taxpayer has an obligation even before the summonses  
5 are issued to provide information to the IRS to support  
6 its tax liability. Once the summonses are issued, it  
7 certainly has an even stronger obligation, and just  
8 because that hasn't yet been enforced through the  
9 district court, just because the Respondents refuse to  
10 comply with their obligation --

11           JUSTICE SCALIA:           I am trying to figure out  
12 the difference between the two sides here. And I guess  
13 you can only answer for half of it. But I suspect the  
14 difference is you are saying that there is enough  
15 evidence here to allow a district court to exercise its  
16 discretion, but not enough to reverse a district court  
17 if it did not exercise its discretion in favor of  
18 allowing the hearing. Is that right?

19           MS. HARRINGTON:           Yes. That's exactly what I  
20 was --

21           JUSTICE SCALIA:           And I suspect the other  
22 side will be saying there is not only enough to enable  
23 the district court to make the finding of -- of a  
24 hearing, but there's enough to compel the district court  
25 to do that. We'll -- we'll see what they say about

1     that.

2             MS. HARRINGTON:             If I could reserve the  
3     balance of my time.

4             CHIEF JUSTICE ROBERTS:             Thank you, counsel.  
5     Mr. Marod.

6             ORAL ARGUMENT OF EDWARD A. MAROD  
7             ON BEHALF OF THE RESPONDENTS

8             MR. MAROD:             Mr. Chief Justice, and may it  
9     please the Court:

10            A taxpayer is entitled to an  
11     evidentiary -- a limited evidentiary hearing when he  
12     presents specific facts from which an improper purpose  
13     in issuance or enforcement of a summons may plausibly be  
14     inferred from those facts.

15            JUSTICE SCALIA:            So you would reverse the  
16     district court here if the district court -- you're --  
17     you're not defending what -- what the court of appeals  
18     said, that you're entitled to a hearing in every case  
19     whenever you -- you say improper motive. Yes, you  
20     have -- you don't defend that.

21            MR. MAROD:            If we read the case that  
22     way, I don't defend it. I read it to say that you look  
23     at pleading standards, including Iqbal, you look at all  
24     of the other cases that it relied upon.

25            JUSTICE GINSBURG:            Where do we have the --

1 we have the opinion of the Eleventh Circuit. Where does  
2 it say that?

3 MR. MAROD: It doesn't say those words. It  
4 says, we made a complete and detailed review of the  
5 entire record. We are applying pleading standards in  
6 the course of this and we are relying on Nero and -- and  
7 its predecessors, all of which say, for instance, you  
8 can't get this hearing by just saying denied or just  
9 saying I think they were acting with an improper  
10 purpose. And so therefore, if you put all these things  
11 together in an unpublished opinion that's deciding my  
12 case, we think that that's what the result was of what  
13 they were doing. But the rule --

14 JUSTICE SOTOMAYOR: Counsel, I'm -- you  
15 know, what the Eleventh Circuit is doing is a little  
16 confusing to me. I understand what motivated it. You  
17 use the word "evidentiary hearing." In my mind,  
18 evidentiary hearing by definition is live witnesses. Is  
19 that your definition?

20 MR. MAROD: What I'm talking about is a  
21 limited evidentiary hearing and at that hearing there  
22 would be --

23 JUSTICE SOTOMAYOR: So define what "hearing"  
24 means to you.

25 MR. MAROD: It could very well be live

1 witnesses. It would be up to the discretion of  
2 the court, based on what allegations were made in that  
3 particular case. But the typical case --

4 JUSTICE SOTOMAYOR: But that's the problem.  
5 I think the Eleventh Circuit means a live hearing  
6 because of its jurisprudence in this area, which has  
7 barred any other kind of evidence to be sought from the  
8 IRS. It has a case that says you can't have  
9 depositions, you can't have discovery, discovery in its  
10 traditional sense, documents or other things. But I  
11 don't know; has it also said you can't have affidavits.

12 MR. MAROD: No. It doesn't say you can't  
13 have affidavits, and we have provided affidavits --

14 JUSTICE SOTOMAYOR: Not you. Them, the IRS.

15 MR. MAROD: Right. No, the Eleventh Circuit  
16 has not said you can't present evidence by means of  
17 affidavits in order to try and support your position.  
18 What it has said --

19 JUSTICE SOTOMAYOR: Not you. I'm talking  
20 about the government, because I started by asking you,  
21 are you looking to cross-examine IRS agents.

22 MR. MAROD: We believe that what the  
23 Eleventh Circuit says we have the right to do and what  
24 we want to do is to get at least Mary Frierfelder in so  
25 that we can cross-examine her --

1 JUSTICE SOTOMAYOR: That's what I thought  
2 you --

3 MR. MAROD: -- with respect to her  
4 affidavit, which we have serious doubts about.

5 Now, as Ms. Harrington indicates, the  
6 taxpayer does have a duty to provide information to the  
7 IRS, but in this particular case what doesn't appear in  
8 the record is that the IRS lived at Dynamo for 2 years  
9 before these requests for enlargement of time. They  
10 weren't doing anything for a long period of time. As we  
11 indicated in our submissions, our allegations, our  
12 affidavits, they didn't do anything for a long period of  
13 time. Then they suddenly asked for a new extension of  
14 the statute of limitations. Then when we denied it,  
15 they promptly filed these summonses and --

16 JUSTICE SOTOMAYOR: In Powell we said  
17 similar allegations weren't enough. The fact that the  
18 documents had already been reviewed or that the statute  
19 of limitations has passed, that that wasn't enough. So  
20 what have you given us that -- here, what have you  
21 alleged that's greater than Powell?

22 MR. MAROD: All right. We're not saying  
23 it's because the statute of limitations has passed.  
24 We're saying it's because the FPAA has been issued; and  
25 the FPAA, according to the statute, you are only



1 permitted one FPAA. You can't go back and modify or  
2 amend the FPAA. Once you've done that, as Justice  
3 Breyer indicates, the matter is completed in terms of  
4 the examination.

5 JUSTICE GINSBURG: That's just the opposite  
6 of what Ms. Harrington told us. She said the only  
7 purpose of enforcing these subpoenas was the possibility  
8 of amending the FPAA. I thought I understood her to  
9 have said that.

10 MR. MAROD: Ms. Harrington said that that  
11 was what she thought one possibility might be.

12 We contend they cannot amend the FPAA.

13 JUSTICE BREYER: No, I think she said it was the  
14 possibility. I asked her. If there were others, she didn't  
15 say any others.

16 MR. MAROD: Right.

17 JUSTICE BREYER: But there will be an  
18 argument whether they can or can't.

19 MR. MAROD: Right. We believe the law makes  
20 it clear that they can't amend the FPAA and that once  
21 the FPAA is issued, the possibility of amendment of  
22 what's in there moves to a court. It either moves to  
23 the Federal Court of Claims or it moves to a district  
24 court, a bankruptcy court or the Tax Court. And when  
25 someone is asked to pay as much money as was asked for

1 in this case, the Tax Court is the logical place to go  
2 because it's the only one you can go to without first  
3 paying all the money and try to challenge --

4 JUSTICE GINSBURG: Could you have said in  
5 the Tax Court -- now that the proceeding has begun in  
6 the Tax Court -- say, Tax Court, there is -- the  
7 subpoenas, they are attempting to get information that  
8 they could not have gotten from this court through  
9 discovery. So, court, say no enforcement.

10 MR. MAROD: Correct. We're saying --

11 JUSTICE GINSBURG: Did you ask -- I mean,  
12 that would be a possibility. You're saying that once  
13 the case shifts to the Tax Court, it should be the Tax  
14 Court judgment, not a district court reviewing the  
15 subpoena.

16 MR. MAROD: I understand. We can't ask the  
17 Tax Court to not enforce the summonses, because Congress  
18 has given exclusive jurisdiction to enforce or not  
19 enforce summonses to the district court and, in fact,  
20 the Ash case that Ms. Harrington referenced actually  
21 held, we don't have jurisdiction to determine whether  
22 these should be enforced or shouldn't be enforced. If  
23 they go ahead and allow them to be enforced and the  
24 information is gathered, we will then consider the  
25 information that is gathered for whether it is

1     admissible or not admissible under rules of evidence in  
2     a particular case.

3             JUSTICE SCALIA:             The "we" is who?   The "we"  
4     is the Tax Court?

5             MR. MAROD:             I'm sorry?

6             JUSTICE SCALIA:             Whose words are you  
7     repeating?

8             MR. MAROD:             The words of the Ash case from  
9     the Tax Court.

10            JUSTICE SCALIA:            Okay.   So it's the Tax  
11     Court that's talking?

12            MR. MAROD:            Correct.

13            JUSTICE ALITO:            Do you know offhand what is  
14     the provision of law in which you rely for the  
15     proposition that the FPAA cannot be amended?

16            MR. MAROD:            It's 26 U.S.C. 6223 sub (f).

17            JUSTICE ALITO:            Could you say that again?

18            MR. MAROD:            Yes.   6223 sub (f).

19            JUSTICE ALITO:            Thank you.

20            MR. MAROD:            So our belief is that once the  
21     Tax Court case has begun, all discovery in that case  
22     should be there, and we have already said that when --  
23     that once that case started was the first time they  
24     tried to enforce these summonses.   The summonses were  
25     issued back in October and September of 2010.   They

1 weren't obeyed back in 2010. The IRS manual says, and I  
2 know it's not the force of law, but it does say what the  
3 IRS says, which is, if they don't perform the summonses,  
4 you must come in and seek enforcement of that summons  
5 within 3 days, and then it moves up the channel and then  
6 you must pursue that as quickly as you can, and they  
7 didn't do that.

8         Nothing happened in terms of trying to  
9 enforce these summonses at any time until the FPAA was  
10 issued. In addition to that, we know that the FPAA that  
11 was issued on December 28 of 2010 was actually signed by  
12 this agent on August 11th of 2010 and was issued without  
13 any change.

14         And so what we're looking at here is an  
15 agent who has finished the FPAA in August, suddenly  
16 issues summonses in September and October; when they're  
17 not performed, doesn't try to get them enforced because  
18 if she had wanted that information for the purpose of  
19 completing her FPAA, which she had already completed and  
20 might be considering revising, she didn't do that and  
21 she had the opportunity to do that, and she was implored  
22 by the IRS manual to do those things and she didn't do  
23 those things.

24         Then the FPAA goes out, we file a Tax Court  
25 case, they answer. A month later is the first time that

1 we get any indication from them that they want to try  
2 and enforce these summonses, and what they are looking  
3 for is documentation that they could easily get through  
4 a request for production of documents in the Tax Court.  
5 The only problem in the Tax Court with getting those  
6 documents would be it would be subject to a scope  
7 objection with respect to discovery; whereas, under a  
8 summons there is no objection to scope. They can ask  
9 for anything that they want that has anything to do with  
10 the finances of the particular taxpayer, and that's why  
11 we make the analogy to Rule 2004 of the Bankruptcy Court  
12 Rules, where trustees and creditors and other parties in  
13 interest can ask for information about the finances of  
14 the debtor without any limitations on what they can ask.

15 JUSTICE KENNEDY: I just want to make sure I  
16 understand. The district court has in front of it a  
17 request to enforce a subpoena. The district court has  
18 no authority at all, either on its own motion or by  
19 request from the taxpayer, to limit that scope, the  
20 scope of discovery? Millions of documents, he just has  
21 to sign it? Is that what I'm hearing?

22 MR. MAROD: There are cases in which  
23 district courts have, in fact, limited the scope of  
24 summonses. In the typical enforcement of a summons, if  
25 they serve you with a summons, you are not entitled even

1 to have a lawyer at the examination. You have to give  
2 them everything. If you don't give them everything or  
3 make an excuse why there isn't -- that something doesn't  
4 exist, then you are into these enforcement proceedings  
5 and then you have to go into that litigation.

6 JUSTICE KENNEDY: You are in the litigation,  
7 in that litigation in the district court. Once you are  
8 before the district court, you can make an objection as  
9 to excessive scope.

10 MR. MAROD: Yes. We didn't make an  
11 objection as to scope because they made such a broad  
12 FPAA -- or they were making such broad allegations at  
13 the time these summonses initially came out, and they  
14 were making such broad allegations in the Tax Court,  
15 that that would not be successful, and we don't think  
16 that the district court should be deciding what the  
17 correct scope is. That is something that the Tax Court  
18 should be deciding based on what the issues are in the  
19 Tax Court. The Tax Court was designed to especially  
20 know about all of these issues that come up relating to  
21 tax returns and examination of tax returns and --

22 JUSTICE GINSBURG: But at the point where  
23 the summons is sought to be enforced, it may be that  
24 there is no Tax Court proceeding yet, and there may be  
25 never any Tax Court proceeding. So how can the district

1 judge make the ruling predicting the future course?

2 MR. MAROD: I don't think it can, Your  
3 Honor. I -- I don't believe that if -- if these  
4 summonses had been -- if enforcement proceedings had  
5 been begun in 2010 before the FPAA had been issued,  
6 before any tax court proceeding had begun, that we could  
7 at that time in good faith have signed the paper under  
8 Rule 11 saying they're only going to use this for the  
9 use in the tax court, they're not going to use it for  
10 the FPAA. We haven't -- we hadn't seen the August 11th  
11 FPAA that was signed by Ms. Frierfelder until after it  
12 was issued in December of 2010.

13 CHIEF JUSTICE ROBERTS: What is it that you  
14 want to ask -- I suspect at this hearing you want to  
15 call her?

16 MR. MAROD: Absolutely.

17 CHIEF JUSTICE ROBERTS: What do you want to  
18 ask her?

19 MR. MAROD: I want to --

20 CHIEF JUSTICE ROBERTS: Without -- without  
21 giving up your --

22 MR. MAROD: No.

23 (Laughter.)

24 CHIEF JUSTICE ROBERTS: Without giving up  
25 the element of surprise.

1 (Laughter.)

2 CHIEF JUSTICE ROBERTS: What -- what general  
3 areas of inquiry would you like to explore?

4 MR. MAROD: I'm pretty sure the surprise is  
5 gone at this point, Your Honor. But why did you delay  
6 in issuing these summonses until the very end of this  
7 case, of the statute of limitations period, when you had  
8 had people in the store for two years looking at  
9 everything that was available. Why did you delay?

10 Why did you sign the FPAA, which is your  
11 Final Partnership Administrative Adjustment, on August  
12 11th of 2010, if you hadn't completed your examination  
13 already? When did you send this Final Partnership  
14 Administrative Adjustment up to be issued? The way I  
15 understand this works, it has to go up through the  
16 ranks, she can't just issue the FPAA herself, it has to  
17 be issued out of Washington, D.C.

18 And, of course, the last one would be  
19 questions related to and what role would the enforcement  
20 of these summonses have in helping your examination,  
21 which is one of the two purposes that might possibly  
22 apply to this case, in view of the fact that there's a  
23 tax court case pending and an FPAA has already been  
24 filed. What could you possibly use this for in the course  
25 of your examination of these tax returns for 2005 to



1 2000 --

2 JUSTICE KENNEDY: It seems to me that if  
3 those are the questions you're going to ask, that almost  
4 every taxpayer's lawyer could ask those questions in  
5 almost every subpoena case. I'm -- I'm now concerned, I  
6 thought that there was agreement. I now think there's  
7 much more to the government's position than I had  
8 thought with reference to harassment. I think you can  
9 ask that in any tax case I've ever heard of.

10 MR. MAROD: Well, until the FPAA has already  
11 been issued, I'm sure you can't ask it. And in most of  
12 these cases, the summonses are being enforced long  
13 before the statute of limitations comes. If -- if you  
14 look even at the tax advocate report that is included in  
15 the reply brief of the -- referenced in the reply brief  
16 of the government in this case, you see that there were  
17 117 cases that were -- had reported decisions over the  
18 last year. And it lists who was represented and who  
19 wasn't, and almost no one was represented. It simply  
20 was 12 people had lawyers, and only a couple of them  
21 resulted in IRS -- in the IRS losing. They said we  
22 lost, that they lost in this case. We're not sure that  
23 they've lost yet.

24 JUSTICE SCALIA: Just to be clear on what  
25 you're -- what you're asking us to do. You want us to

1 affirm the judgment on -- but on a different basis --  
2 well, on -- you do not concede it's a different basis.  
3 But the reason you want us to confirm the judgment --  
4 affirm the judgment below is that, in your view, it  
5 would be an abuse of discretion for the district court  
6 not to have the -- the hearing.

7 MR. MAROD: The preliminary hearing,  
8 correct. The limited --

9 JUSTICE SCALIA: It would be an abuse of  
10 discretion not to do it on the facts of this case.

11 MR. MAROD: We believe it would be an abuse  
12 of discretion not to do it on the facts of this case  
13 because on the pleading standards established in Iqbal  
14 and Twombly, we did it in allegations and --

15 JUSTICE SOTOMAYOR: If I look at the statute  
16 you cited and come to a contrary conclusion, you're  
17 right, it takes a showing of fraud -- what's the  
18 words -- fraud, malfeasance or misrepresentation of a  
19 material fact --

20 MR. MAROD: That's correct.

21 JUSTICE SOTOMAYOR: -- to amend a Final  
22 Partnership Administrative Adjustment notice.

23 MR. MAROD: And I apologize. That's true.

24 JUSTICE SOTOMAYOR: But since -- yes, but  
25 that's a really big issue, because I think an IRS agent

1     who says I want to make sure there's none of those  
2     things and that's why I'm issuing the subpoena has a  
3     legitimate basis. So if I don't think it's an abuse of  
4     discretion or that you showed me much with respect to  
5     that issue, what's left for you? What -- what other  
6     fact would you -- could you plausibly have stated?  
7     Because we already said in Powell that the expiration of  
8     the statute of limitations doesn't make a difference.

9             MR. MAROD:             Correct.

10            JUSTICE SOTOMAYOR:        They can always have a  
11     legitimate statement of wanting to make sure that none  
12     of those three things happened. So what else in your  
13     allegations stands up?

14            MR. MAROD:             Well, I'm not sure it's in my  
15     allegation. I think it's in the affidavit.

16            JUSTICE SOTOMAYOR:        In the facts. Yes, all  
17     right. So what -- I'm sorry.

18            MR. MAROD:             The affidavit that was  
19     submitted --

20            JUSTICE SOTOMAYOR:        All right. The evidence  
21     that was submitted.

22            MR. MAROD:             -- by Frierfelder --

23            JUSTICE SOTOMAYOR:        What else?

24            MR. MAROD:             -- which said -- which said I  
25     wanted to complete this examination and never mentioned

1 anything about fraud or malfeasance, none of which have  
2 been even hinted about or suggested in this case as far  
3 as we're aware.

4 Now, that would be something -- there's this  
5 -- always this dual purpose problem that we have with  
6 the enforcement of these summonses. If a summons has a  
7 proper purpose and an improper purpose, I'm not sure we  
8 can possibly win in that situation. When we go to this  
9 preliminary hearing, we're trying to develop what  
10 evidence we can from the --

11 JUSTICE SOTOMAYOR: There's an IRS  
12 regulation that says they can't use it in the  
13 criminal -- in a criminal prosecution.

14 MR. MAROD: Correct.

15 JUSTICE SOTOMAYOR: So even if it was a dual  
16 purpose, what difference does it make since they can't  
17 use it?

18 MR. MAROD: Well, it's not the dual purpose  
19 -- that's not the dual purpose I'm talking about. The  
20 dual purpose that I'm talking about is, for instance, to  
21 use this evidence solely in the tax court after the tax  
22 court case has been filed, after the FPAA has been  
23 issued. Just -- Mary Frierfelder did not say that she  
24 was going to use this to try and investigate a fraud or  
25 a malfeasance or anything else like that. She only said

1 she wanted it -- she didn't say why she wanted it. She  
2 said she had examined the tax returns and she had issued  
3 the FPAA and a tax court case is underway and seems to  
4 be just buying into the idea that the IRS has, which is  
5 that as long as you issue your summons before the FPAA  
6 comes out and a tax court case starts, you can enforce  
7 it no matter what. There's no --

8 CHIEF JUSTICE ROBERTS: In your -- in your  
9 experience, how often does the IRS ask a taxpayer to  
10 waive the statute of limitations?

11 MR. MAROD: Too much.

12 (Laughter.)

13 CHIEF JUSTICE ROBERTS: I suspect that's  
14 your judgment. But in your experience, how often do  
15 they do it?

16 MR. MAROD: I'd have to confer with my tax  
17 counsel, but in almost every significant case, they will  
18 ask for at least one extension of the statute of  
19 limitations. They -- all right.

20 Now, going back to Powell, which --

21 JUSTICE SCALIA: And what normally happens  
22 if you say no?

23 MR. MAROD: Usually they go forward and  
24 issue their Final Partnership Administrative Adjustment  
25 or their statutory notice of deficiency within the time

1 that's permitted. Or if they don't think they've got a  
2 problem, they let it go. That almost never happens, but  
3 the statutory notice of deficiency or the FPAA will come  
4 out. You usually don't get, when you're nearing the end  
5 of the statute of limitations, a raft of summonses like  
6 this, except apparently in this case and in this  
7 particular district where it happens quite a bit.

8 We think that the rules set forth relating  
9 to grand jury subpoenas not being able to be used to  
10 bolster a criminal case after an indictment has already  
11 been issued is universally accepted. We think that the  
12 Rule 2004 rule relating to bankruptcy subpoenas, which  
13 says that the bankruptcy subpoena can no longer be  
14 enforced once litigation is underway between the  
15 discovering party and the non-discovering party about  
16 the subject of the actual subpoena is universally  
17 accepted.

18 JUSTICE GINSBURG: But you told me before, I  
19 think, that the tax court can stop it. I asked you a  
20 question, could the tax court say now we're in court,  
21 any information has to be in compliance with the scope  
22 of discovery we allow. You said because there's a  
23 separation and the summons is enforced by the district  
24 court, the tax court will do nothing and indeed will  
25 accept the information that is made available as a

1 result of the summons.

2 MR. MAROD: We believe that that is  
3 ordinarily true. We can always make an argument to try  
4 and prevent particular evidence from coming in in the  
5 tax court, but we can't absolutely know that we're going  
6 to be able to stop it in the tax court. It's going to  
7 be up to them to decide whether to accept the  
8 information.

9 The real issue in this case isn't the documents; it's the  
10 examination. The examination that the IRS wants to take  
11 is an examination that basically has no strictures. It  
12 has no absolute right for counsel to be in attendance.  
13 It has no right for cross-examination. It has no limits  
14 on what the scope of the examination can be. It can be  
15 what is referenced in a lot of the cases about IRS  
16 summonses, a fishing expedition.

17 And that's what the IRS wants to do here.  
18 And we're positive about that because of the way they've  
19 been pursuing this, including the deposition taken of  
20 Ms. Moog by -- that Mr. Supinski attended. He was  
21 permitted to attend. We weren't invited to attend.

22 The matter was -- ultimately came out that  
23 they didn't get much from Ms. Moog. I'm sure that's why  
24 she agreed to go ahead and give that deposition. But we  
25 couldn't insist on being there. We couldn't have

1 insisted on cross-examining her. And what the IRS  
2 attorney who's handling the Tax Court case we're  
3 positive wants to do, from all the things that have  
4 happened in that case, is to get the examinations of the  
5 individuals who were summoned without us being able to  
6 control it and without us being able to examine at  
7 those -- at those examinations.

8 JUSTICE GINSBURG: Do you agree with  
9 Ms. Harrington that the Salter case, where the  
10 government said in Salter, the First Circuit case, that  
11 the way to proceed is call -- call the agent?  
12 Ms. Harrington said, if I remember correctly, that the  
13 Salter decision became academic when TEFRA passed.

14 Do you agree with that?

15 MR. MAROD: I do not agree with that. We  
16 believe that, as Nero said, and I believe it was  
17 footnote 4 of Nero, that the TEFRA enactment only  
18 affected issues relating to potential abuse of process  
19 relating to criminal prosecutions, and -- and it was to  
20 resolve a problem that was created by the decision  
21 that you couldn't go based on the intention of a single  
22 agent having an intention of pursuing criminal  
23 prosecution. You had to look at the institutional  
24 intention of the IRS. And that meant you had to take  
25 the testimony of everybody in the IRS to establish what



1 the institutional intention was.

2 That got eliminated by TEFRA, because now it  
3 has to be -- there's a referral or there is not a  
4 referral, and otherwise that issue doesn't come up. But  
5 it doesn't deal with the situation in which Powell says  
6 we're entitled to show at a meaningful adversary hearing  
7 anything else showing abuse of the court process. And  
8 that means abuse of the district court's process.

9 And to us, the use of the district court's  
10 process in enforcing an IRS summons that's supposed to  
11 be used only for examinations, one of which has already  
12 been completed, solely for the purpose of evading the  
13 rules of the -- of the Tax Court that control discovery  
14 is an abuse of process. And we believe that that's what  
15 all the 2004 cases talk about, the Rule 2004 cases,  
16 Szadkowski, Bennett Funding, and Snyder, which I believe  
17 we've -- we've cited in our briefs.

18 We believe that if we don't get the ability  
19 to come forward with allegations that under Iqbal and  
20 Twombly would pass muster to support our allegations,  
21 that we're going to go back into the impermissible  
22 Catch-22 that the -- that the Eleventh Circuit talks  
23 about, and there'll be an unreasonable circular burden  
24 because we have to have evidence to get evidence, and we  
25 can't get the evidence without already having the evidence.

1           In our case, with respect to the evasion of  
2   the Tax Court rules, we believe that we already  
3   presented enough evidence, but the trial court judge  
4   didn't even look at that evidence and said that you  
5   absolutely -- that's -- as a matter of law, that can't  
6   possibly be a defense to these summonses.

7           Congress intended the courts to be a check  
8   on abusive use of administrative summonses. We believe  
9   that these -- that we have shown by allegations and by  
10  our evidence that these were abusive attempts to use  
11  these administrative summonses. We believe that the  
12  judgment of the Eleventh Circuit should be affirmed, and  
13  if necessary to clarify what appears that -- a rule  
14  clarifying it as I've indicated with requiring pleadings  
15  that would pass muster under Iqbal would get you the  
16  entitlement of a preliminary hearing.

17           CHIEF JUSTICE ROBERTS:           Thank you, counsel.

18           4 minutes, Ms. Harrington.

19           REBUTTAL ARGUMENT OF SARAH E. HARRINGTON

20           ON BEHALF OF THE PETITIONER

21           MS. HARRINGTON:           Thank you. If I just --  
22  I'd like to start by clarifying the finality of the FPAA  
23  issue. I tried to be very careful in my answer to  
24  Justice Breyer, and if I misspoke I apologize. What I  
25  intended to say or what I wanted to say was that the

1 ongoing issue for the IRS is -- it might amend its final  
2 determination of liability for the taxpayer. Once  
3 you're in the Tax Court, that happens in the Tax Court,  
4 not by amending the FPAA, and I didn't mean to suggest  
5 otherwise.

6 But -- so thinking about the Tax Court --  
7 Tax Court, once you have the proceedings going there,  
8 the Tax Court itself has said that if you have a summons  
9 that was issued before the FPAA, it can be helpful to  
10 have that summons enforced because the information that  
11 would be acquired through enforcing that summons would  
12 be relevant to the ultimate question in the Tax Court.

13 JUSTICE BREYER: Well, I mean, if you change it to that,  
14 the only reason there that she in her affidavit, the  
15 agent, just says she wants the information to help  
16 decide the tax liability. She doesn't say anything  
17 specific. So you're saying the reason we wanted it is  
18 we wanted to change the tax liability possibly. That's  
19 a matter in the Tax Court. And therefore, you wanted it  
20 for the Tax Court.

21 So now there's a question. Can you use a  
22 subpoena enforced through a court to get information  
23 that you, I think, are saying -- correct me if I'm not  
24 right -- has no purpose other than to change, modify, or  
25 help our case in the Tax Court.

1 MS. HARRINGTON: Well, that is the reason  
2 for enforcing the summons. That was not the reason for  
3 issuing the summons.

4 JUSTICE BREYER: I realize that.

5 MS. HARRINGTON: And Powell has pointed to  
6 the --

7 JUSTICE BREYER: So if that is the only  
8 reason for enforcing the summons, I don't know, is there  
9 any more need for a hearing? I mean, it's a legal  
10 question.

11 MS. HARRINGTON: And the Tax Court has said  
12 that issuing a summons in that circumstance doesn't  
13 offend anything that's happening in the Tax Court. As  
14 Justice Ginsburg said --

15 JUSTICE BREYER: You said you can get  
16 information to help their case or change the liability  
17 in the Tax Court. And they say you can't.

18 MS. HARRINGTON: And they can go, as Justice  
19 Ginsburg suggested, they can go to the tax --

20 JUSTICE BREYER: I don't think we can decide  
21 that, can we?

22 MS. HARRINGTON: Well, they can go to the  
23 Tax Court and say: Look, we don't think this  
24 information should be included. That's what happens in  
25 the grand jury cases they cite. They don't try -- you

1 don't go and quash a grand jury subpoena. What you do  
2 is you go in your criminal case in the district court  
3 and say: You shouldn't use that information because it  
4 was obtained pursuant to a subpoena that was improperly  
5 issued.

6 Now, the taxpayer -- it's the taxpayer's  
7 duty to establish that the deductions it's taking are  
8 justified. And in this case, the IRS didn't have enough  
9 information to make its own determination about that.  
10 And so what it decided was the taxpayer hadn't met its  
11 burden, and it issued the FPAA. And the IRS is entitled  
12 to take that protective step if the -- if the taxpayer  
13 is refusing to turn over information.

14 Now, Respondents sort of pointed to several  
15 questions that they might want to ask the IRS agent who  
16 issued the summons. Those questions are clearly not  
17 relevant to the purpose for issuing the summons. Again,  
18 they just go to the purpose for enforcing the summons.

19 And just one last point on Iqbal. We really  
20 don't think Iqbal applies here, because in this -- in  
21 this instance, what you are talking about is you already  
22 have a showing by the IRS that it has a proper purpose.  
23 And a district court is not going to issue an order to  
24 show cause unless the district court is satisfied that  
25 the IRS has established a proper purpose.

1           And so the presumptions shift, are the  
2   opposite of Iqbal in that context. In that context,  
3   there's a presumption that the IRS has a proper purpose.  
4   And this Court said in the LaSalle National Bank case  
5   that then the duty is on the summons opponent to  
6   disprove a proper purpose. And so the opponent isn't  
7   entitled to a presumption that what they say is correct.

8           JUSTICE KAGAN:           So could you say a little  
9   bit more, Ms. Harrington, about what -- what kind of  
10   evidence would overcome the presumption in a particular  
11   case?

12          MS. HARRINGTON:           Well, so this Court  
13   identified in Powell two potential improper purposes:  
14   One would be harassment and one is an attempt to kind of  
15   leverage a settlement in a collateral matter. And I  
16   think to take the second one, if the IRS were really  
17   trying to pressure a taxpayer into settling a collateral  
18   matter, the IRS would have some evidence of that;  
19   otherwise, it would be a pretty ineffective attempt to  
20   leverage a settlement. So they're going to have some  
21   communications from the IRS or something like that, and  
22   the taxpayer can submit affidavits or any kind of  
23   documentary evidence that's in the taxpayer's possession  
24   or the summons recipient's position to the district  
25   court and then the district court has discretion if it

1     wants to hear more from the IRS, to ask for that more  
2     information in whatever way it deems appropriate.

3             Thank you.

4             CHIEF JUSTICE ROBERTS:             Thank you, counsel.

5             The case is submitted.

6             (Whereupon, at 11:14 a.m., the case in the  
7     above-entitled matter was submitted.)

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