No. 20-645

In the Supreme Court of the United States

STANDING AKIMBO, LLC, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

For income tax purposes, the Internal Revenue Code disallows any deduction or credit for business expenses incurred in carrying on a trade or business that "consists of trafficking in controlled substances" in violation of federal or state law. 26 U.S.C. 280E. Marijuana is a controlled substance, and federal law prohibits trafficking it. 21 U.S.C. 812(c), 841(a)(1). Petitioners own and operate a marijuana dispensary in Colorado, which has decriminalized marijuana in some respects under state law. The question presented is as follows:

Whether the court of appeals correctly affirmed the district court's decision to enforce several third-party summonses issued by the Internal Revenue Service to a Colorado state agency as part of an investigation into the accuracy of petitioners' federal income tax returns, including whether petitioners claimed any business-expense deductions disallowed by Section 280E.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-44) is reported at 955 F.3d 1146. The order of the district court (Pet. App. 45-47) is not published in the Federal Supplement but is available at 2018 WL 6791071. The recommendation of the magistrate judge (Pet. App. 48-69) is not published in the Federal Supplement but is available at 2018 WL 6791104.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2020. A petition for rehearing was denied on June 10, 2020 (Pet. App. 70-71). The petition for a writ of certiorari was filed on November 6, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Internal Revenue Code (Code), 26 U.S.C. 1 *et seq.*, imposes a tax on the "taxable income" of individuals and corporations. 26 U.S.C. 1(a), 11(a). The Code defines "taxable income" to mean "gross income minus the deductions allowed by" the Code. 26 U.S.C. 63(a). The Code defines "[g]ross income," in turn, to mean "all income from whatever source derived, including * * * [g]ross income derived from business." 26 U.S.C. 61(a)(2). A taxpayer's gross income derived from business generally means the business's "total sales, less the cost of goods sold." 26 C.F.R. 1.61-3(a).

The deductions that a taxpayer may take "[i]n computing taxable income under section 63" are set forth elsewhere in the Code. 26 U.S.C. 161. As a general matter, the Code permits a taxpayer to deduct "all the ordinary and necessary expenses paid or incurred during [a] taxable year in carrying on any trade or business." 26 U.S.C. 162(a). But the Code prohibits tax deductions (or tax credits) for expenditures made "in carrying on any trade or business" that "consists of trafficking in controlled substances (within the meaning of Schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted." 26 U.S.C. 280E.

Congress enacted Section 280E in 1982, in response to a Tax Court decision. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, Tit. III, Subtit. I, § 351(a), 96 Stat. 640 (26 U.S.C. 280E); see S. Rep. No. 494, 97th Cong., 2d Sess. Vol. 1, at 309 (1982). The Tax Court case had involved a taxpayer "self-employed in the trade or business of selling amphetamines, cocaine, and marijuana," in violation of federal law. *Edmondson* v. *Commissioner*, 42 T.C.M. (CCH) 1533, 1534 (1981).

Under the Code's capacious definition of "gross income," 26 U.S.C. 61(a)(2), even income derived from illegal drug-trafficking is taxable. The taxpayer in *Edmondson* successfully sought to deduct from his taxable income what he claimed were "ordinary and necessary" expenses of drug-trafficking, such as "the purchase of a small scale, packaging expenses, telephone expenses, and automobile expenses." 42 T.C.M. (CCH) at 1535-1536. Congress responded by enacting Section 280E and prohibiting deductions for any expenses of engaging in the business or trade of unlawfully trafficking in controlled substances. 26 U.S.C. 280E.

2. a. Petitioners are Standing Akimbo LLC and its individual owners and business manager. Pet. App. 3 & n.1; Pet. 9-10. Standing Akimbo is a Colorado corporation that "operat[es] a medical-marijuana dispensary in Denver, Colorado." Pet. App. 3. Colorado does not criminalize such businesses as a matter of state law. *Ibid.* But, as a matter of federal law, the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, classifies marijuana as a Schedule I controlled substance, 21 U.S.C. 812(c), and prohibits knowingly or intentionally "manufactur[ing], distribut[ing], or dispens[ing]" it, 21 U.S.C. 841(a)(1).

In 2017, the Internal Revenue Service (IRS) "began investigating whether Standing Akimbo had claimed business deductions prohibited by" Section 280E. Pet. App. 4. The IRS attempted to obtain certain information about the business from petitioners. *Id.* at 1, 5-6. Because Standing Akimbo is organized as a "pass-through entity," its profits are reportable as income on the individual federal tax returns of its owners. *Id.* at 5 & n.3. In response to the IRS's requests, petitioners "did not provide enough information to substantiate

their returns." *Id.* at 6. The IRS then issued four third-party summonses to the Marijuana Enforcement Division of the Colorado Department of Revenue. *Id.* at 3, 6. That division "collects data relating to the marijuana industry in Colorado and compiles that data into a database," *id.* at 50, known as the "Marijuana Enforcement Tracking Reporting Compliance ('METRC') system," *id.* at 5. Among other things, the IRS sought reports from METRC on Standing Akimbo's gross sales, annual harvests, and plant inventories. *Id.* at 6.

The IRS's authority to issue a summons to a third party is set out in Section 7602 of the Code. Under that provision, the IRS may "examine any books, papers, records, or other data" as part of an inquiry into "ascertaining the correctness of any return" or "determining the liability of any person for any internal revenue tax." 26 U.S.C. 7602(a)(1). The IRS may also "summon * * * any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax * * * to appear before the [IRS] * * * to produce such books, papers, records, or other data." 26 U.S.C. 7602(a)(2). When the IRS issues a summons to a third party seeking information about a person, it must notify the person, 26 U.S.C. 7609(a)(1), and the person may seek to quash the summons in federal district court, 26 U.S.C. 7609(b)(2).

Petitioners brought this proceeding to quash the third-party summonses issued by the IRS to Colorado's Marijuana Enforcement Division. Pet. App. 7. Petitioners contended that the summonses lacked a legitimate purpose and were deficient in other respects under this Court's decision in *United States* v. *Powell*, 379 U.S. 48 (1964). Pet. App. 7. The government moved to dismiss

the petition to quash and to enforce the summonses. *Ibid.*; see 26 U.S.C. 7604(a), 7609(b)(2)(A).

b. The district court referred the dispute to a magistrate judge. On August 6, 2018, the magistrate judge recommended denying the petition to quash, granting the government's motion to dismiss, and enforcing the third-party summonses. Pet. App. 68; see *id.* at 48-69.

The magistrate judge explained that, under this Court's decision in *Powell*, *supra*, the IRS may obtain enforcement of a summons if it shows that "(1) the investigation will be conducted pursuant to a legitimate purpose, (2) the information sought may be relevant to that purpose, (3) the information sought is not already in the IRS' possession, and (4) the administrative steps required by the Internal Revenue Code have been followed." Pet. App. 52 (quoting *Villarreal* v. *United States*, 524 Fed. Appx. 419, 422 (10th Cir. 2013)); see *Powell*, 379 U.S. at 57-58. The magistrate further explained that, if the IRS "establishe[s] its burden under *Powell*, the burden shifts to the" challengers to show that the IRS is not acting in good faith or is abusing the district court's process. Pet. App. 61. Here, the magistrate found that the IRS had satisfied each of the four *Powell* requirements. *Id.* at 54-60. The magistrate also found that petitioners had failed to show any bad faith or abuse of process. *Id.* at 61-68.

c. On December 10, 2018, the district court overruled petitioners' objections to the magistrate judge's recommendation and adopted the recommendation in its entirety. Pet. App. 46; see *id.* at 45-47. Accordingly, the court ordered that the third-party summonses be enforced. *Id.* at 47.

3. The court of appeals affirmed. Pet. App. 1-44. As an initial matter, the court stated that the district court

should have converted the government's motion to dismiss into a motion for summary judgment before relying on material outside the pleadings—specifically, the IRS agent's declaration—but that any error in that regard was harmless because "the record supports the government's position under the summary-judgment standard." *Id.* at 13-14; cf. Fed. R. Civ. P. 12(d).

On the merits, the court of appeals agreed with the district court that the IRS had "establish[ed] the four *Powell* factors." Pet. App. 15. With respect to the purpose of the investigation, the court of appeals concluded that the IRS agent's declaration sufficed to show that the IRS was acting "with [the] legitimate purpose" of investigating petitioners' tax liability. *Id.* at 16-17. The court specifically rejected petitioners' argument that "the IRS acted with an illegitimate purpose, namely, investigating federal drug crimes." *Id.* at 17. The court explained that investigating potential violations of Section 280E "falls squarely within [the IRS's] authority under the Tax Code," *ibid.* (citation omitted), and that the court had repeatedly held that the IRS may investigate potential violations of Section 280E by Colorado marijuana businesses, see *ibid.* (citing *High Desert Relief, Inc.* v. *United States*, 917 F.3d 1170, 1187 (10th Cir. 2019); *Alpenglow Botanicals, LLC* v. *United States*, 894 F.3d 1187, 1197 (10th Cir. 2018), cert. denied, 139 S. Ct. 2745 (2019); *Green Solution Retail, Inc.* v. *United States*, 855 F.3d 1111, 1121 (10th Cir. 2017), cert. denied, 138 S. Ct. 1281 (2018)). The court also determined, based on the IRS agent's declaration, that the summonses did not run afoul of 26 U.S.C. 7602(d), which forbids the IRS to issue a summons with respect to any person if a Justice Department referral is in effect with respect to such person. Pet. App. 15-16.

The court of appeals found petitioners' reliance on Colorado's scheme for "legal" marijuana to be "unavailing." Pet. App. 18. The court explained that Congress's use of the term "or" in Section 280E "extends the statute to situations in which federal law prohibits the conduct *even if* state law" does not. *Id.* at 19; see 26 U.S.C. 280E (prohibiting deductions for the expenses of carrying on a business consisting of trafficking in a controlled substance "which is prohibited by Federal law *or* the law of any State in which such trade or business is conducted") (emphasis added). The court observed that Colorado's "legalization of marijuana cannot overcome federal law," Pet. App. 19 (citation omitted), and that a taxpayer may be subject to increased federal tax liability as a result of "federally unlawful activities," *ibid.*

The court of appeals rejected petitioners' remaining challenges to enforcement of the summonses. Pet. App. 20-44. As relevant here, the court determined that petitioners' argument that the IRS must satisfy the Fourth Amendment's probable-cause standard lacked merit because petitioners "have no reasonable expectation of privacy in the METRC data collected on their business." *Id.* at 34. The court explained that petitioners had already provided that information to a third-party, Colorado's Marijuana Enforcement Division. *Id.* at 35-36. The court also noted that, although Colorado law generally provides that "the METRC information is confidential," the now-applicable version of the confidentiality provision makes clear that the information may be used "'to investigate unlawful activity in relation to a medical marijuana business.'" *Id.* at 36 (quoting Colo. Rev. Stat. § 44-10-202(3) (2020)).

The court of appeals later denied petitioners' request for rehearing en banc. Pet. App. 70-71.

ARGUMENT

The court of appeals correctly rejected petitioners' effort to quash the third-party summonses issued by the IRS to Colorado's Marijuana Enforcement Division. The IRS seeks to obtain information about petitioners' marijuana dispensary as part of an investigation into the accuracy of petitioners' federal income tax returns, including whether petitioners claimed any business-expense deductions disallowed by 26 U.S.C. 280E. The decision below does not conflict with any decision of this Court or another court of appeals, and further review is unwarranted. This Court has repeatedly declined to grant petitions for writs of certiorari filed by Colorado marijuana dispensaries challenging the IRS's authority to investigate potential violations of Section 280E. See *Feinberg* v. *Commissioner*, 140 S. Ct. 49 (2019) (No. 19-129); *Alpenglow Botanicals, LLC* v. *United States*, 139 S. Ct. 2745 (2019) (No. 18-1122); *Green Solution Retail Inc.* v. *United States*, 138 S. Ct. 1281 (2018) (No. 17-663). The same course is warranted here.

1. Petitioners principally contend (Pet. 15) that the court of appeals "incorrectly held that federal law supersedes Colorado law when it comes to state-legal cannabis sales." See Pet. 15-22. This case, however, does not present any question about federal preemption of state law. As the court explained, the Controlled Substances Act "does not have to preempt Colorado law for § 280E to apply," Pet. App. 18, because Section 280E applies as long as the trafficking at issue violates federal law—whether or not it also violates state law. In particular, the plain text of Section 280E disallows any deduction for expenditures incurred in carrying on a trade or business that "consists of trafficking in controlled substances (within the meaning of schedule I

and II of the Controlled Substances Act)," if the trafficking is "prohibited by Federal law *or* the law of any State in which such trade or business is conducted." 26 U.S.C. 280E (emphasis added). Trafficking in a controlled substance such as marijuana is "prohibited by Federal law." *Ibid.*; see 21 U.S.C. 812(c), 841(a)(1). Accordingly, whether the Controlled Substances Act preempts Colorado's marijuana laws (see Pet. 16-19) is academic here. The IRS's authority to investigate possible violations of Section 280E by Colorado marijuana dispensaries does not turn on that question.

Petitioners nonetheless assert (Pet. 21-22) that the decision below untenably interprets the term "or" in Section 280E to mean that "cannabis sales [are] simultaneously lawful and unlawful" in Colorado. But the court of appeals merely explained, correctly, that the federal prohibition on trafficking marijuana is itself a sufficient basis for the IRS to investigate potential violations of Section 280E by petitioners, irrespective of state law. See Pet. App. 19 ("Congress's use of 'or' extends the statute to situations in which federal law prohibits the conduct *even if* state law allows it.").

The court of appeals was also plainly correct that the Controlled Substances Act "reigns supreme" in the event of any conflict with Colorado law. Pet. App. 19. Colorado may, of course, choose not to prohibit conduct that federal law prohibits. See *Gamble* v. *United* States, 139 S. Ct. 1960, 1969 (2019) (acknowledging that States "may choose to legalize an activity that federal law prohibits, such as the sale of marijuana"). Under the Supremacy Clause, however, Colorado may not authorize any individual or business to violate federal law. See U.S. Const. Art. VI, Cl. 2 (providing that "the laws of the United States * * * shall be the supreme Law of

the Land"); see, *e.g.*, *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1476 (2018) ("[W]hen federal and state law conflict, federal law prevails and state law is preempted.").

Petitioners alternatively contend that the Controlled Substances Act does not actually prohibit trafficking in "state-legal marijuana." Pet. 19 (capitalization and emphasis omitted); see Pet. 19-21. The court of appeals also correctly rejected that contention. Pet. App. 18-19. Marijuana is listed on Schedule I of the Controlled Substances Act, see 21 U.S.C. 812(c), without any exception for "state-legal" marijuana. Petitioners' contrary view rests on a misreading of 21 U.S.C. 903. See Pet. 19-20. In that provision, Congress disclaimed any "intent * * * to occupy the field" of regulating controlled substances, thus making clear that States may also regulate the same substances. 21 U.S.C. 903. But the no-intent-to-preempt provision contains an exception, applicable whenever "there is a positive conflict between" federal law and state law "so that the two cannot consistently stand together." *Ibid.* Section 903 thus confirms that States may not countermand Congress's decision to prohibit trafficking in marijuana. Such activity violates federal law even when it does not independently violate state law (and even when it is affirmatively permitted by state law). See, *e.g.*, *United States* v. *Canori*, 737 F.3d 181, 184 (2d Cir. 2013) ("Marijuana remains illegal under federal law, even in those states in which medical marijuana has been legalized.") (citing 21 U.S.C. 903).

2. Petitioners next seek review of the question whether Section 280E "violate[s] the Sixteenth Amendment" by resulting in a tax on "more than constitutional income." Pet. i; see Pet. 23-25. That question does not warrant review in this case. First, the question is not presented here. The IRS has not yet made any final

determination about petitioners' tax liability and has not applied Section 280E to prohibit any deductions or credits claimed by petitioners for the tax years in question. Petitioners instead seek to quash third-party summonses issued by the IRS as part of an ongoing investigation. Second, and relatedly, the IRS's authority to investigate does not depend on the resolution of petitioners' Sixteenth Amendment question. The IRS may issue a summons to a third-party to produce records "[f]or the purpose of ascertaining the correctness of any return." 26 U.S.C. 7602(a); see 26 U.S.C. 7602(a)(2). The IRS therefore could seek information from Colorado's Marijuana Enforcement Division to verify the accuracy of petitioners' returns, whether or not Section 280E is applicable.

In any event, petitioners' Sixteenth Amendment question does not warrant review. Petitioners identify no division of authority in the courts of appeals on the question. Indeed, as far as the government is aware, only the Tenth Circuit has addressed whether the operation of Section 280E to disallow deductions by a marijuana dispensary violates the Sixteenth Amendment. In *Alpenglow Botanicals, LLC* v. *United States*, 894 F.3d 1187 (2018), cert. denied, 139 S. Ct. 2745 (2019), the Tenth Circuit held that "Congress's choice to limit or deny deductions" for business expenses incurred in illegally trafficking in marijuana "does not violate the Sixteenth Amendment," *id.* at 1202, because deductions for business expenses "are matters of 'legislative grace,'" *id.* at 1199-1200 (citation omitted); see *New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435, 440 (1934) (observing that Congress's power to tax income "extends to the gross income" and that "[w]hether and to what extent deductions shall be allowed depends upon legislative

grace"). The court of appeals adhered to that precedent here. See Pet. App. 18 n.7.*

Petitioners' contrary view of the Sixteenth Amendment (Pet. 24-25) rests largely on the dissenting opinions of two Tax Court judges in *Northern California Small Business Assistants Inc.* v. *Commissioner*, 153 T.C. 65 (2019). See *id.* at 77-84 (Gustafson, J., concurring in part and dissenting in part); *id.* at 90 (Copeland, J., concurring in part and dissenting in part). The majority in that case explained, consistent with the Tenth Circuit's precedents, that "any deductions from gross income are a matter of legislative grace and can be reduced or expanded in accordance with Congress' policy objectives." *Id.* at 69. Petitioners identify no sound reason for this Court to review a Sixteenth Amendment challenge that has yet to persuade any lower court, particularly in a case where the challenge is not squarely presented.

3. Petitioners further contend that enforcement of the IRS's third-party summonses would violate the Fourth Amendment in the absence of a search warrant based on probable cause. Pet. ii, 26-33. As the court of appeals correctly held, petitioners' Fourth Amendment claim fails because petitioners lack any "reasonable expectation of privacy in the METRC data collected on their business." Pet. App. 34. That information is already in the hands of a third party—namely, Colorado's Marijuana Enforcement Division. And "[t]his Court has held repeatedly that the Fourth Amendment does

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* A marijuana dispensary in California has raised a similar constitutional argument in *Patients Mutual Assistance Collective Corp.* v. *Commissioner*, No. 19-73078 (9th Cir. filed Dec. 4, 2019), which was argued on February 9, 2021. See Appellant's Br. at 28-48, *Patients Mut. Assistance Collective Corp.*, *supra* (No. 19-73078).

not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities." *United States* v. *Miller*, 425 U.S. 435, 443 (1976). That is true even if, as petitioners contend (Pet. 27-28), they had a subjective expectation that information they provided to Colorado would be kept confidential. See *Miller*, 425 U.S. at 443 (third-party doctrine applies "even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed"); cf. Pet. App. 36-37 (explaining that the provision of Colorado law on which petitioners rely for their purported confidentiality interest has been repealed and replaced with a provision making clear that METRC data may be shared in some circumstances).

Petitioners err in suggesting (Pet. 28) that the decision below is inconsistent with this Court's decision in *Carpenter* v. *United States*, 138 S. Ct. 2206 (2018). In *Carpenter*, the Court expressly did not "disturb" existing third-party doctrine, including *Miller*, while declining to extend the doctrine to the novel context of information showing a cellphone's physical location (and thus by inference its owner's location) over an extended period of time. *Id.* at 2220; see *id.* at 2217. None of the factors that led the Court to decline to extend the third-party doctrine to those "novel circumstances," *id.* at 2217, is present here. The summonses at issue do not implicate any new surveillance technology or any interest that petitioners may have in the privacy of their physical movements, see *id.* at 2216-2220—an interest that a corporation such as Standing Akimbo could not assert in any event. Nor does participation in modern society require petitioners to establish a state-licensed marijuana dispensary and then comply with require-

ments to convey information about its inventory and sales to state regulators. See *id.* at 2220.

Petitioners suggest (Pet. 29-31) that their Fourth Amendment claim is comparable to the Fifth Amendment claim in *Marchetti* v. *United States*, 390 U.S. 39 (1968), but that case is inapposite. In *Marchetti*, this Court held that the defendant could invoke his Fifth Amendment privilege against self-incrimination as a complete defense in a federal criminal prosecution for failing to register his illegal gambling business with the IRS, as required by federal law at the time. See *id.* at 44-49. Here, however, the IRS seeks to compel the production of information that petitioners have already created and turned over to a third party. Enforcing the IRS summonses would compel Colorado's Marijuana Enforcement Division, not petitioners, to produce the information. And, unlike in *Marchetti*, petitioners do not assert that they have or had any Fifth Amendment privilege against providing the information at issue to the Marijuana Enforcement Division in the first instance.

Petitioners contend (Pet. 31-33) that the court of appeals erred in applying *United States* v. *Powell*, 379 U.S. 48 (1964), to determine that the third-party summonses were reasonable under the Fourth Amendment without a showing of probable cause. See Pet. App. 37. In *Powell*, this Court squarely held that the statutory framework for IRS investigations does not impose "any standard of probable cause" before the IRS may "obtain enforcement of [a] summons." 379 U.S. at 57; see *United States* v. *Stuart*, 489 U.S. 353, 359 (1989) ("In *United States* v. *Powell*, *supra*, we rejected the claim that the IRS must show probable cause to obtain enforcement of an administrative summons issued in con-

nection with a domestic tax investigation."). The Court instead held that, to obtain judicial enforcement of a summons, the IRS must show "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." *Powell*, 379 U.S. at 57-58.

Petitioners fail to explain how the court of appeals could have erred in rejecting a probable-cause requirement in light of *Powell*. Petitioners suggest (Pet. 32) that this case is distinguishable from *Powell* because the IRS has, in petitioners' view, already "made the determination that the law is being violated." But the IRS's authority to enforce a summons does not turn on that distinction. To be sure, the IRS may not issue an administrative summons about a person for whom the IRS has made an active referral to the Department of Justice. See 26 U.S.C. 7602(d); *United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298, 318 (1978). But petitioners did not contest, and the court of appeals found, that the IRS has not made a criminal referral here. See Pet. App. 15-16.

4. Lastly, petitioners contend (Pet. 33-39) that the court of appeals misapplied the summary-judgment standard. Petitioners' case-specific disagreement with the application of settled law does not warrant this Court's review. See Sup. Ct. R. 10 (stating that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law"); see also Pet. 34 (asserting that the court of appeals "gave only lip service" to the "rather straightforward" summary-judgment standard).

Moreover, the decision below is correct. Petitioners complain (Pet. 34-37) that the court of appeals improperly weighed evidence by considering the IRS agent's affidavit. This Court has explained, however, that, in a summons-enforcement proceeding, the IRS need only establish good faith by satisfying the *Powell* factors and that, "[t]o make that showing, the IRS usually files an affidavit from the responsible investigating agent." *United States* v. *Clarke*, 573 U.S. 248, 250 (2014) (citing *Stuart*, 489 U.S. at 360). The Court has "also emphasized that summons enforcement proceedings are to be 'summary in nature.'" *Id.* at 254 (quoting *Stuart*, 489 U.S. at 369). To counter the IRS's showing, a taxpayer must "point to specific facts or circumstances plausibly raising an inference of bad faith." *Ibid.* "Naked allegations of improper purpose are not enough: The taxpayer must offer some credible evidence supporting his charge." *Ibid.*

Here, the court of appeals correctly recognized and applied the standards that this Court set out in *Clarke*, *Stuart*, and *Powell*. Pet. App. 10-13. The court addressed each of the *Powell* factors, considering both the IRS agent's affidavit and petitioners' allegations. *Id.* at 16-25. The court determined that the IRS had made the *prima facie* showing required by *Powell* and that petitioners had not succeeded in rebutting that showing. *Id.* at 25-26. Petitioners identify no error in the decision below, let alone one warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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