IN THE SUPREME COURT OF THE UNITED STATES

Michael Presley, Cynthia Presley, BMP Family Limited Partnership, Presley Law and Associates, P.A.
Petitioners,
v.
United States of America
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The issue is whether the court below erroneously held that the issuance of summonses under 26 U.S.C. § 7609 preempts the privacy rights of non-party clients not under the purview of section 7609.

OPINIONS BELOW

The Eleventh Circuit's opinion (Pet. App. 1-16) is reported at 895 F. 3d 1284 (11th Cir. 2018). The Southern District's unreported opinion (Pet. App. 17-20) is available at 2017 U.S. Dist. LEXIS 1457 (S.D. Fla., Jan. 4, 2017).

STATEMENT OF JURISDICTION

On January 5, 2017, the Southern District entered an order dismissing the Presleys' motion to quash summonses directed to various banks. After authorized motions for reconsideration and stay were denied, the Presleys appealed the order on January 10, 2017. The Eleventh Circuit issued its opinion affirming the dismissal on July 18, 2018, and the Presleys timely petitioned for a panel rehearing on August 17, 2018, which was denied on September 4, 2018.

This petition for *certiorari* seeks the Court's review under 28 U.S.C § 1254(1) of a court of appeals' decision that (a) relied upon *United States v. Powell*, 379 U.S. 48 (1964), which finds no violation of Fourth Amendment rights belonging to **party taxpayers** when a summons complies with a test directed at the party, to decide upon an important question of law not settled, but should be, by the Court; (b) conflicts with *Katz v. United States*, 389 U.S. 347 (1967), which enhances a state's authority to create rights of privacy; and (c) conflicts with the Tenth Circuit in *Neece v. IRS*, 922 F. 2d 573 (10th Cir. 1990), which finds that the Right to Financial Privacy Act ("Act") is not preempted by the Internal Revenue Code ("Code") when the Code does not provide procedures. USCS Supreme Ct R 10(a), (c).

STATUTORY PROVISIONS

The Internal Revenue Code's provision for Special procedures for third-party summonses, 26 U.S.C. § 7609, is reproduced at Pet. App. 21 The pertinent text of the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422 is reproduced

at Pet. App. 30. Florida's Constitutional Right to Privacy, found in Article I, Section 12, is reproduced at Pet. App. 36.

STATEMENT OF CASE

The Presleys petitioned the Southern District to quash summonses issued under 26 U.S.C. § 7609. Pet. App. 2. The Presleys did not object to the production of accounts containing only their financial information. Pet. App. 3. However, as obligated by the Florida Bar, they sought to prevent disclosure of escrow and trust accounts held by the bank containing finances belonging to their non-party clients. Pet. App. 3. The Presleys argued that their non-party clients had a Fourth Amendment right grounded in Florida's Right to Privacy. Pet. 18-19. The non-party clients are not part of any investigation or audit, and did not receive notice. Pet. App. 3. The Southern District dismissed the petition upon finding that the summonses satisfied the *Powell* test as to the party taxpayers and that the non-party clients did not have Fourth Amendment protection as 26 U.S.C. § 7609 preempts Florida's Right to Privacy. Pet. App. 3, 19-20.

Appealing to the Eleventh Circuit, the Presleys argued that Florida's constitutional right to privacy creates a subjective, reasonable expectation of privacy over financial records that is not preempted because this is a function reserved to the states, which permits the non-party clients to assert a Fourth Amendment right. Pet. App. 8-12. The United States argued that the Internal Revenue Service ("IRS") complied with the *Powell* test as to the Presleys, and that the non-party clients do not have a subjective, reasonable expectation of privacy, as the records belong to the banking institution and not the clients. Pet. App. 8-14.

In reply, the Presleys asserted that this Court in *Tiffany Fine Arts Inc. v. United States*, 469 U.S. 310 (1985) would not permit bootstrapping a request for non-party financial records on summonses issued to third parties not under investigation, and that for the United States to obtain these records of a non-party, the IRS would need to conduct

a hearing under 26 U.S.C. § 7609(f). Pet. App. 14-16. Following oral argument, the Presleys filed a letter of supplemental authority citing to *Neece v. IRS*, 922 F.2d 573 (10th Cir. 1990) *rev'd in part on other grounds* 41 F. 3d 1396 (10th Cir. 1994). Pet. App. 11-12.

The Eleventh Circuit affirmed the Southern District's dismissal as the non-party clients had no reasonable expectation of privacy in records held by the bank due to the preemption; and that neither section 7609 nor the Act applied to the non-party clients. Pet. App. 8-16.

ARGUMENT IN FAVOR OF GRANTING *CERTIORARI*

I. The Eleventh Circuit decided a question of law not settled by this Court.

Under *United States v. Powell*, if the IRS satisfies a test inquiring into how the summons affects the rights of the **party taxpayer**, the summons does not violate those rights. 397 U.S. at 57-58. The key distinction here is that the rights belong to the non-party clients, who are not parties; not investigated; not summoned; and not given notice.

Powell does not have a test for whether the summons violates the rights of non-parties. The test is only approved for examining the rights of the party taxpayers. But, the Eleventh Circuit uses *Powell* to decide upon a question of law not settled by the Court by extending only the conclusion to non-parties. It conducts no inquiry into whether the IRS satisfies the *Powell* Test as to the non-parties. The Court should grant *certiorari* as that extension will continually result in the taking of property without notice via unwarranted intrusion. USCS Supreme Ct R 10(c). *See Neece*, 922 F. 2d at 574-75.

II. The decision conflicts with the rules that federal law must apply to the facts, and the states set privacy expectations.

The Eleventh Circuit concludes that the non-party clients' state rights are preempted under section 7609, but finds that the clients are not entitled to protection under that law as the *Powell* Test is satisfied by analyzing the summons impact on the Presleys. Pet. App. 8-10, 12-13. This conflicts with the Florida's Supreme Court in *Vreeland v. Ferrer*, 71 So. 3d 70, 83-84 (Fla. 2011) that finds when a federal law does not apply to the individual's circumstances, such as when federal law applying to common carrier injuries sustained on ground would not apply as the matter happened in the air, the applicable state law dealing with injuries sustained in the air is not preempted. USCS Supreme Ct R 10(a). Here, there is no federal law on point, so state law should control under *Ferrer*. Yet, the Eleventh Circuit concluded otherwise, creating conflict.

This Court in *Katz v. United States*, 389 U.S. 347, 350 (1967) finds that "…the protection of a person's *general* right to privacy…is…left largely to the law of the individual states." Florida's constitutional right to privacy "protect[s] the financial information of persons [held by banks] if there is no relevant or compelling reason to compel disclosure." *Borck v. Borck*, 906 So. 2d 1209, 1211 (Fla. Dist. Ct. App. 2005). With section 7609 inapplicable as to the non-party clients, there is no requirement that the state law yield. Finding "preemption" removes the state's authority to enact privacy laws, which nullifies this Court's ruling in *Katz*, creating a conflict. USCS Supreme Ct R 10(c).

III. The decision conflicts with the Tenth Circuit.

The decision conflicts with the Tenth Circuit in *Neece v. IRS*, 922 F. 2d 573 (10th Cir. 1990) *rev'd on other grounds* 41 F.3d 1396 (10th Cir. 1994). The Act provides "an elaborate mechanism to protect a taxpayer's privacy rights in records

kept by third parties" that must be protected. *Neece*, 922 F. 2d at 577-78. Thus, it must be read in unison with the Code when the Code is inapplicable. *Id.* at 578. The interpretation must avoid "misleading taxpayers who…rely on [the Code] and the ACT in believing that their bank records are secure from IRS intrusion absent notice and an opportunity to challenge IRS access…." *Id. Neece* rejects a Southern District of Indiana case that failed "to consider the impact of that statutory interpretation on the remainder of the Act, as well as on section 7609." *Id.* at 577. Instead, it concludes that the particular provision of the Code only authorized examination of books and records, and did not provide procedures to obtain them. *Id.* at 576. Because the right to examine is **fettered**, *Neece* concluded that the Act is not preempted since it provides the procedures for obtaining the documents where the Code is silent, and the Code must follow the Act. *Id.*

Here, the Eleventh Circuit concludes the opposite. Despite the Code having no procedures on how to obtain records belonging to both parties and non-parties not under summons, the Eleventh Circuit concluded that the Act did not apply. This conflicts with *Neece.* USCS Supreme Ct R 10(a). The Tenth Circuit sought to "protect this mechanism to the extent possible" and the Eleventh Circuit seeks to undo it. *See Id.* at 578.

CONCLUSION

Based on conflict with this Court and the circuit court of appeals, and ruling on a matter that should be but is not yet address by this Court, *certiorari* must be granted.

Respectfully Submitted,
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APPENDIX
Presley v. United States
United States Court of Appeals for the Eleventh Circuit
July 18, 2018, Decided
No. 17-10182

[*1287] ROSENBAUM, Circuit Judge:
To say that the 1980 United States Men's Olympic Hockey Team had the odds stacked against it would be an understatement. With a roster of amateur players whose age averaged 22, the U.S. team had been routed 10-3 by the Soviet team less than two weeks before the Olympics began.[1] And that was not surprising since the Soviet team was filled with seasoned professionals, had won the past four Olympic gold medals, and had not even lost an Olympic game since 1968.[2] Beating the Soviet team seemed impossible. Yet on February 22, 1980, the U.S. team—led by Coach Herb Brooks—did exactly that, scoring a 4-3 "Miracle" win. [**2] [3]

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[1] E.M. Swift, *A Reminder of What We Can Be*, Sports Illustrated, Dec. 22, 1980, https://www.si.com/vault/1980/12/22/106775781/a-reminder-of-what-we-can-be; *Miracle* (Walt Disney 2004).

[2] https://www.hockey-reference.com/olympics/teams/URS (last visited July 10, 2018).

[3] In many ways, Coach Brooks's story mirrored that of the 1980 team. Cut from the Olympic team in 1960, Brooks steadily rose through the coaching ranks, earning a reputation for fanatical preparation. Jamie Fitzpatrick, *The Miracle Unfolds*, https://www.thoughtco.com/miracle-on-ice-american-hockey-2778288 (last visited July 9, 2018). Coach Brooks knew the U.S. team faced overwhelming odds, but he used that fact to motivate the players. Indeed, the legendary pregame speech attributed to Coach Brooks relied in significant part on the long odds the team faced. The speech was so unforgettable that years later, for purposes of shooting the film *Miracle*, team member Jack O'Callahan (who faced the additional odds of coming back from a knee injury sustained in the 10-3 pre-Olympics loss to the Soviets) was able to recreate Coach Brooks's speech based on his own memories and those of

Our history contains many such stories of triumphs over long odds. This, however, is not one of those.

Plaintiffs-Appellants—a lawyer, his law firm, and associated parties—urge creative arguments to avoid their bank's compliance with Internal Revenue Service ("IRS") summonses for their account records. But forget about tough odds the U.S. hockey team faced, Plaintiffs face-off with something even more formidable: the Supreme Court's holdings long ago in *United States v. Miller*, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976), and *United States v. Powell*, 379 U.S. 48, 85 S. Ct. 248, 13 L. Ed. 2d 112 (1964). Those cases completely foreclose Plaintiffs' arguments. For this reason, neither Plaintiffs nor their law-firm clients whose interests Plaintiffs attempt to invoke have a viable Fourth Amendment objection to the IRS's collection of Plaintiffs' bank records from Plaintiffs' bank. We therefore affirm the district court's order denying the quashing of the IRS's summonses.

I.

In 2016, the IRS sent three summonses to Bank of America, N.A., (the "Bank") in the course of investigating the 2014 federal income-tax liabilities of each of Plaintiffs Michael Presley, Cynthia Presley, BMP Family Limited Partnership, and Presley Law and [**3] Associates, P.A. ("Presley Law"). The summonses sought records "pertaining to any and all accounts over which [each Plaintiff] has signature authority," including bank statements, loan proceeds, deposit slips, records of purchase, sources for all deposited items, and copies of all checks drawn.

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his teammates. Bill Littlefield, *Hollywood Scores a 'Miracle' With Locker Room Speech*, WBUR, http://www.wbur.org/onlyagame/2015/06/06/us-miracle-olympics-herb-brooks (last visited July 10, 2018). In that speech, Coach Brooks is said to have told the team, among other things, "[I]f we played [the Soviets] ten times, they might win nine. But not this game, not tonight." *See Miracle* (Walt Disney 2004).

[*1288] As we have suggested, Plaintiff Michael Presley is an attorney, while Presley Law is his law firm. Among the records the IRS sought were the law firm's escrow and trust bank-account records, which were held in the names of Presley Law and BMP.[4] Both accounts contained information about client finances. The IRS notified Plaintiffs of these summonses, but it did not inform Plaintiffs' clients because it was not investigating them.

Plaintiffs moved to quash. They objected only to the Bank's production of records related to their escrow and trust accounts, contending that these records revealed their clients' financial information. The government moved to dismiss, and the district court granted its motion. The district court reasoned that the summonses complied with the governing standard announced in *Powell*, 379 U.S. at 57-58, because the summonses were narrowly drawn and relevant to the IRS's investigation. In addition, [**4] the district court concluded that Plaintiffs lacked standing to challenge the summonses as violations of their clients' privacy because their clients lacked a reasonable expectation of privacy in records held by the Bank.

Plaintiffs now appeal.

II.

We will not reverse an order enforcing an IRS summons unless it is "clearly erroneous." *United States v. Morse*, 532 F.3d 1130, 1131 (11th Cir. 2008) (per curiam); *United States v. Medlin*, 986 F.2d 463, 466 (11th Cir. 1993).

Determining whether the district court's order was clearly erroneous requires us to first consider the general framework governing the enforceability of IRS summonses.

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[4] Neither the Amended Petition nor any other part of the record sets forth Cynthia Presley's relationship to the escrow and trust accounts summonsed. But one of the summonses sought "all records without limitation, pertaining to any and all accounts over which MICHAEL PRESLEY . . . & CYNTHIA PRESLEY . . . have signature authority . . . ."

To ensure compliance with the tax code, Congress designed a system that gives the IRS "broad statutory authority to summon a taxpayer to produce documents or give testimony relevant to determining tax liability." *United States v. Clarke*, 134 S. Ct. 2361, 2364, 189 L. Ed. 2d 330 (2014).

Section 7602 of the Internal Revenue Code is the "centerpiece of that congressional design." *United States v. Arthur Young & Co.*, 465 U.S. 805, 816, 104 S. Ct. 1495, 79 L. Ed. 2d 826, (1984). Under § 7602, the IRS may inquire into the correctness of a return by "examin[ing] any books, papers, records, or other data . . . ." 26 U.S.C. § 7602(a)(1) & (2). This summons power is not limited to examining documents of the taxpayer under investigation but also extends to allow the IRS to obtain relevant information from a third party. 26 U.S.C. § 7602(a)(2). But where, as here, the IRS issues a summons to a third-party recordkeeper to gather information about a taxpayer, [**5] the IRS must notify the taxpayer of the summons pursuant to 26 U.S.C. § 7609(a).

To guard against potential abuses of this "broad" power, the courts—and not the IRS—are authorized to enforce this summons power. *United States v. Bisceglia*, 420 U.S. 141, 146, 95 S. Ct. 915, 43 L. Ed. 2d 88 (1975) ("Substantial protection is afforded by the provision that an Internal Revenue Service summons can be enforced only by the courts."). In *United States v. Powell*, 379 U.S. 48, 85 S. Ct. 248, 13 L. Ed. 2d 112 (1964), the Supreme Court set forth the analytical framework that governs the courts' enforcement decisions.

First, for the government to establish a prima facie case for enforcement, [*1289] it must demonstrate that (1) the investigation has a legitimate purpose, (2) the information summoned is relevant to that purpose, (3) the IRS does not already possess the documents sought, and (4) the IRS has followed the procedural steps required by the tax code. *Id.* at 57-58. If the government satisfies *Powell*, the "burden shifts to the taxpayer 'to disprove one of the four *Powell* criteria, or to demonstrate that judicial enforcement should be denied

on the ground that it would be an 'abuse of the court's process."" *United States v. Centennial Builders, Inc.*, 747 F.2d 678, 680 (11th Cir. 1984) (quoting *United States v. Beacon Fed. Sav. & Loan*, 718 F.2d 49, 52 (2d Cir. 1983)). But significantly, a court's review is narrowly circumscribed. A court may inquire as to only whether the "IRS issued a summons in good faith, and must eschew any broader [**6] role of oversee[ing] the [IRS's] determinations to investigate." *Clarke*, 134 S. Ct. at 2367 (alterations in original and internal quotation marks omitted) (quoting *Powell*, 379 U.S. at 56)).

III.

Plaintiffs do not contend that the IRS failed to comply with *Powell.* Instead, they assert that *Powell* does not apply at all because the Fourth Amendment and the Internal Revenue Code preclude its application in the circumstances of this case. We conduct our analysis of Plaintiffs' arguments in two parts. First, we address whether Plaintiffs have standing to raise their clients' Fourth Amendment claims.[5] Second, we consider the merits of Plaintiffs' claims.

A. Standing

Plaintiffs argue that they have standing to guard their clients' privacy rights under the Fourth Amendment. The government disagrees. We need not decide this issue.

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[5] Plaintiffs have Article III standing to raise their clients' objections under the Internal Revenue Code because § 7609(b)(2) grants any person who has received notice of an IRS summons the right to file a petition challenging the summons on any ground. *See United States v. Gottlieb*, 712 F.2d 1363, 1369 (11th Cir. 1983) (ruling against the summoned party by holding that § 7609(f) was inapplicable to unnamed, unsummoned taxpayers and stating that "our holding does not leave unidentified third parties wholly without protection. [The summoned party] . . . can argue that the summons was issued for the purpose of obtaining the third party records and that the audit of the [summoned party] itself was a mere pretext or subterfuge").

Privacy is personal. *See, e.g., Rakas v. Illinois*, 439 U.S. 128, 132, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); *see also Crosby v. Paulk*, 187 F.3d 1339, 1345 n.10 (11th Cir. 1999) ("[T]he Crosbys are precluded from asserting Fourth Amendment rights of third parties who were subject to searches . . . ."); *Lenz v. Winburn*, 51 F.3d 1540, 1549 (11th Cir. 1995) ("[C]ourts have held that a person does not have a reasonable expectation of privacy in another's belongings."). So under most circumstances, Plaintiffs must demonstrate that their own privacy rights are at stake.

Here, Plaintiffs contest only others' privacy rights. As a result, they would ordinarily lack Fourth Amendment standing. [**7]

But some debate exists over whether those in situations analogous to Plaintiffs' have standing to assert their clients' interests. That's because Plaintiffs include an attorney and his law firm, and as non-targets of the investigation, Plaintiffs' clients could face obstacles in raising their own privacy objections. *See United States v. Zadeh*, 820 F.3d 746, 755 (5th Cir. 2016) (permitting doctor-plaintiff to raise the privacy objections of his clients); *In re McVane*, 44 F.3d 1127, 1136 (2d Cir. 1995) [*1290] (permitting summoned party to raise privacy objections of family members).

Recognizing the clients' hurdles in pursuing their own objections, some courts have authorized third-party standing in similar circumstances. In *Reiserer v. United States*, for example, the Ninth Circuit permitted an attorney to raise his clients' privacy objections to an IRS subpoena served on the attorney's bank. 479 F.3d 1160, 1165 (9th Cir. 2007) ("Reiserer does not object to the production of records relating to his leasing companies, but contends that client identity and fee information should be protected from disclosure."). The attorney had sought to represent his clients' interests on the grounds that the subpoena captured his clients' fee information. *Id.*

But we need not resolve whether Plaintiffs here have standing to assert their clients' interests. [**8] Plaintiffs' clients' objections rely on the Fourth Amendment. And

unlike Article III standing, standing under the Fourth Amendment is not jurisdictional; instead, we analyze it as a merits issue. *See Minnesota v. Carter*, 525 U.S. 83, 87, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998) ("expressly reject[ing]" treating Fourth Amendment standing like Article III standing); *United States v. Noble*, 762 F.3d 509, 526 (6th Cir. 2014) ("Somewhat confusingly, the Supreme Court refers to this burden as Fourth Amendment standing. This type of standing, however, is not jurisdictional, nor rooted in Article III . . . .").

Because Fourth Amendment standing is not jurisdictional, we need not determine as a separate question whether Plaintiffs have standing under the Fourth Amendment to raise their clients' interests. *See United States v. Gonzalez*, 71 F.3d 819, 827 n.18 (11th Cir. 1996) (determining that the government waived the issue of standing because it "declined to press th[e] standing issue before the district court"); *Noble*, 762 F.3d at 527 (holding that the government may waive its Fourth Amendment standing argument because the "Supreme Court has made clear, Fourth Amendment standing is akin to an element of a claim and does not sound in Article III"); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (rejecting the practice of "assuming" Article III standing for the purpose of deciding the merits, but distinguishing between statutory standing and Article III standing). Rather, we consider standing as part of the merits when we substantively address Plaintiffs' Fourth Amendment claims.

B. Merits [**9]

In the administrative-summons context, Plaintiffs' objections "must be derived from one of three sources: a constitutional provision;" the Internal Revenue Code; "or the general standards governing judicial enforcement of administrative subpoenas enunciated in *United States v. Powell* . . . ." *S.E.C. v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 741-42, 104 S. Ct. 2720, 81 L. Ed. 2d 615 (1984).

Here, Plaintiffs offer arguments under the first two sources. First, Plaintiffs contend that the Fourth Amendment obligates the government to demonstrate probable cause because their clients had a reasonable expectation of privacy in the records held by the Bank. Second, Plaintiffs argue that the IRS was obligated to proceed under 26 U.S.C. § 7609(f) by issuing John Doe summonses to their clients and petitioning the district court for an ex parte hearing before obtaining Plaintiffs' bank-account records.

We find no merit in these contentions. First, as we explain below, settled precedent requires us to conclude that Plaintiffs' clients lack a reasonable expectation of privacy in financial records held by the [*1291] Bank, so the Fourth Amendment does not require a showing of probable cause. Second, the Internal Revenue Code does not require an ex parte hearing in the circumstances here. And since Plaintiffs do not dispute that the IRS satisfied the *Powell [**10]* factors, that is the end of the matter.

1. Plaintiffs' Clients Lack a Reasonable Expectation of Privacy in Financial Records Held By the Bank

Plaintiffs contend that the government must show probable cause to enforce the summonses. And that would be true if Plaintiffs' clients had a reasonable expectation of privacy in the financial records held by the Bank. *See Carpenter v. United States*, 138 S. Ct. 2206, 2221-22, 201 L. Ed. 2d 507 (2018) ("[T]his Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy."). But they don't.

Rather, the third-party doctrine precludes that conclusion here. According to that doctrine, a party lacks a reasonable expectation of privacy under the Fourth Amendment in information "revealed to a third party and conveyed by [that third party] to Government authorities, 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." *Miller*, 425 U.S. at 443; *see also Centennial Builders*, 747 F.2d at 683 ("An Internal

Revenue summons directed to a third party bank or accountant does not violate the Fourth Amendment rights of a taxpayer under investigation since the records belong to the summoned party and not the taxpayer.").

In *Miller*, 425 U.S. at 444, the Supreme Court [**11] considered whether a taxpayer enjoys a reasonable expectation of privacy in his bank records. There, while investigating Miller for tax evasion, the IRS subpoenaed his banks, seeking financial documents, including monthly statements. *Miller*, 425 U.S. at 440. Miller objected to the subpoenas, invoking the Fourth Amendment.

The Supreme Court rejected Miller's challenge for two reasons. First, Miller had "neither ownership nor possession" of the documents because they were "business records of the banks." *Id.* Second, the nature of the records the IRS was seeking—checks—further limited Miller's expectations of privacy since the checks were "not confidential communications but negotiable instruments to be used in commercial transactions." *Id.* at 442. The Supreme Court recently reaffirmed the vitality of *Miller*'s holding. *See Carpenter v. United States*, 138 S. Ct. at 2220 (2018) ("We do not disturb the application of . . . *Miller* . . . .").

Both of the Supreme Court's considerations in *Miller* also apply here. As in *Miller*, a third-party bank holds the financial records the IRS seeks, and these records are "not confidential communications" because they are simply registries of financial transactions. Nor does it matter that Plaintiffs' clients gave their records to Plaintiffs rather than directly [**12] to the bank. Plaintiffs conveyed their records, such as checks for deposit in Presley Law's escrow or trust accounts, knowing that the firm would, in turn, deposit these items with the Bank. So if Plaintiffs cannot escape *Miller* directly, Plaintiffs' clients cannot avoid its application indirectly. In short, *Miller* precludes us from holding that Plaintiffs' clients have a reasonable expectation of privacy in the summoned records.

Despite *Miller*'s teachings, Plaintiffs assert their clients have a reasonable expectation of privacy because the Florida Constitution recognizes a privacy right in the circumstances of this case. But that cannot help Plaintiffs.

[*1292] State law does not apply here because under the Supremacy Clause, state laws that conflict with federal laws by impeding the "full purposes" of Congress must give way as preempted. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 899, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000); *see also United States v. Fleet*, 498 F.3d 1225, 1227 (11th Cir. 2007); *Matter of Int'l Horizons, Inc.*, 689 F.2d 996, 1003 (11th Cir. 1982) ("It is clear . . . that this is a federal law proceeding and that the Bankruptcy Court is not required to apply the Georgia accountant-client privilege."); *United States v. Moore*, 970 F.2d 48, 50 (5th Cir. 1992) (per curiam) (holding that state-law doctor-patient privilege must yield when it conflicts with IRS's authority under federal summons statute).

And there is no question that the Florida constitutional provision [**13] granting a privacy interest in bank records would substantially impede the IRS's ability to summon bank records pursuant to the Internal Revenue Code. *See United States v. First Bank*, 737 F.2d 269, 274 (2d Cir. 1984) (holding state-law privacy statute that conflicted with the Internal Revenue Code was preempted); *see also St. Luke's Reg'l Med. Ctr., Inc. v. United States*, 717 F. Supp. 665, 666 (N.D. Iowa 1989) ("[S]tate law may not establish prerequisites to compliance with [an] administrative subpoena issued by a federal agency in accordance with and pursuant to federal statutory law, as such is prohibited [by] article VI, clause 2 of the United States Constitution." (internal quotation marks omitted)). So the privacy right in Florida's Constitution must yield.[6]

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[6] The way Plaintiffs attempt to use the Florida Constitution here would plainly interfere with the IRS's abilities to execute its summons authority and conduct its investigation. For that reason, the Court need not conduct a full-on preemption analysis. For a more thorough

Faced with these problems, Plaintiffs respond with a proposed solution to *Miller.* Relying upon *Neece v. IRS*, 922 F.2d 573 (10th Cir. 1990), Plaintiffs argue that if their Fourth Amendment challenge does not succeed, "then [the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422] would apply." But Plaintiffs asserted this argument for the very first time only after we held oral argument in this case, when they filed a Rule 28(j), Fed. R. App. P., supplemental authority contending that the RFPA applies. That is simply too late. *See, e.g., United States v. Njau*, 386 F.3d 1039, 1042 (11th Cir. 2004) (per curiam) (refusing to consider argument raised for the first time in a 28(j) letter).

And even if it weren't, the RFPA does not help Plaintiffs. In response to the broad sweep of *Miller* [**14] , Congress enacted the RFPA. The RFPA prohibits financial institutions from supplying the government with information about their customers' financial records, unless the customer authorizes the disclosure of such information or the government obtains a valid subpoena. *See* 12 U.S.C. § 3402.

But significantly, the RFPA does not affect the holding in *Miller* as it pertains to an IRS summons. On the contrary, the statute explicitly provides that "[n]othing in this chapter prohibits the disclosure of financial records in accordance with procedures authorized by Title 26." 12 U.S.C. § 3413(c); *see also Lidas, Inc. v. United States*, 238 F.3d 1076, 1083 (9th Cir. 2001) ("[C]ourts have consistently interpreted RFPA as exempting IRS summonses provided that the IRS followed appropriate Title 26 procedures.").

Nor does *Neece* assist Plaintiffs. Plaintiffs assert that *Neece* renders the RFPA's exemption of IRS summonses inapplicable in situations like the one here. There, the [*1293] Tenth Circuit recognized the RFPA's exemption of IRS summonses. *See Neece*, 922 F.2d at 575-76 ("The legislative history of [the RFPA] confirms that such records

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discussion of conflict preemption and its several forms, *see Arizona v. United States*, 567 U.S. 387, 398-400, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012).

are exempt from the RFPA . . . [a]dministrative summonses issued by the Internal Revenue Service are already subject to privacy safeguards under section 1205 of the Tax Reform Act of 1976." (citation and [**15] quotation marks omitted)). And though the court found it inapplicable, it did so only because of the circumstances in that case—circumstances that do not exist here.

In *Neece*, the IRS avoided the usual notice requirements under Title 26 by coaxing the bank into voluntarily disclosing the taxpayer's records. *See id.* at 576 ("Defendants' reading of section 7602(a)(1) would largely negate the taxpayers' protections found in the RFPA by giving a financial institution the unilateral power to abrogate those rights if the financial institution decides to cooperate voluntarily with an IRS investigation of one of its customers."). That, of course, is not the case here.

Plaintiffs have not suggested—and the record does not support the notion—that the IRS neglected to discharge its notice obligations under 26 U.S.C. § 7609(a). Rather, unlike in *Neece*, the IRS here notified Plaintiffs after summoning the Bank for records of Plaintiffs' accounts. And as we explain later in the next section, that is all the law requires. For these reasons, to enforce the summonses at issue here, the IRS was not required to demonstrate probable cause.

2. Compliance with *Powell* renders the IRS's summonses reasonable, and the IRS was not required to issue John-Doe [**16] **subpoenas.**

Nevertheless, the mere fact that probable cause does not apply does not mean the IRS's authority to issue subpoenas is unbridled. *See United States v. Bailey*, 228 F.3d 341, 349 (4th Cir. 2000) ("The value of constraining governmental power, which Bailey has urged through his misplaced probable cause argument, is nevertheless recognized in the judicial supervision of subpoenas."). In *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 66 S. Ct. 494, 90 L. Ed. 614 (1946), the Court held that "the basic distinction" between administrative summonses of business records and

actual searches of things in which citizens hold a reasonable expectation of privacy means a separate Fourth Amendment standard applies to each circumstance. *Id.* at 204.

For IRS summonses of bank records, the "gist" of the Fourth Amendment protection is that the disclosure sought "shall not be unreasonable." *Id.* at 208. This baseline requirement emanates from the interest of all citizens "to be free from officious intermeddling." *Id.* at 213. But an IRS summons is not unreasonable, provided the IRS "has complied with the *Powell* requirements." *United States v. Reis*, 765 F.2d 1094, 1096 (11th Cir. 1985) (per curiam). In other words, when it comes to the IRS's issuance of a summons, compliance with the *Powell* factors satisfies the Fourth Amendment's reasonableness requirement. *See United States v. McAnlis*, 721 F.2d 334, 337 (11th Cir. 1983); *Bailey*, 228 F.3d at 347.

The summonses here satisfy that standard. In fact, as we have mentioned, Plaintiffs do not contest that the [**17] summonses satisfy each *Powell* factor. For example, Plaintiffs do not suggest that the files containing their clients' records are not relevant to the IRS's investigation and that the summonses are not narrowly tailored. *See Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 321, 105 S. Ct. 725, 83 L. Ed. 2d 678 (1985) ("[B]y definition, the IRS is not engaged in a 'fishing expedition' when it seeks information relevant to a [*1294] legitimate investigation of a particular taxpayer. In such cases, the incidental effect on the privacy rights of unnamed taxpayers is justified by the IRS's interest in enforcing the tax laws."). Nor do Plaintiffs contend that the summonses were really just a subterfuge so the IRS could investigate their clients or invade the attorney-client privilege.[7] *Cf. id.* at 322 ("[I]f the

[7] This latter point bears repeating. Notably, Plaintiffs do not raise their clients' Sixth Amendment rights. For that reason, we have no occasion to consider how Plaintiffs' clients' Sixth Amendment rights might affect the analysis, if at all. The record likewise contains no evidence concerning this issue, and "[t]he identity of a client or matters involving the receipt of fees from a client are not normally within the [attorney-

district court finds in the enforcement proceeding that the IRS does not in fact intend to investigate the summoned party, or that some of the records requested are not relevant to a legitimate investigation of the summoned party, the IRS could not obtain all the information it sought unless it complied with § 7609(f)."). We are likewise unable to discern any other reason why the summonses should not be enforced. Because the *Powell* factors define the reasonableness of the summonses under the Fourth Amendment and Plaintiffs [**18] do not contest that the summonses satisfy them, our inquiry should be complete.

But Plaintiffs raise yet one more argument—this time under a different section of the Code. Specifically, Plaintiffs contend that the district court erred by not holding an ex parte hearing pursuant to § 7609(f). They base their contention on the premise that in *Tiffany*, 469 U.S. 310, 105 S. Ct. 725, 83 L. Ed. 2d 678, the Supreme Court allegedly suggested that the IRS may obtain documents pertaining to unnamed taxpayers in only two ways: "the summoned party and the unnamed taxpayer must both be under active investigations, or the United States needs to first conduct a full hearing pursuant to section 7609(f)." Appellants' Reply Br. at 8. We find three problems with this argument.

First, Plaintiffs make this argument for the first time in their reply brief. That is too late to raise a new issue. *See Big Top Koolers, Inc. v. Circus-Man Snacks, Inc.*, 528 F.3d 839, 844 (11th Cir. 2008) ("We decline to address an argument advanced by an appellant for the first time in a reply brief."); *United States v. Evans*, 473 F.3d 1115, 1120 (11th Cir. 2006) ("[A]rguments raised for the first time in a reply brief are not properly before a reviewing court.").

Second, even if it were not, the text of § 7609(f) does not support Plaintiffs' argument. Section 7609(f) requires the

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client] privilege." *In re Grand Jury Proceedings (David R. Damore)*, 689 F.2d 1351, 1352 (11th Cir. 1982). So today we decide only that neither the Fourth Amendment nor § 7609's notice requirements preclude enforcement of the IRS summonses at issue here.

Secretary to make certain showings concerning so-called John Doe summonses—summonses that "do[] [**19] not identify the person with respect to whose liability the summons is issued," 26 U.S.C. § 7609(f)—that is, unnamed persons who are the subject of the IRS investigation in furtherance of which the summons is issued. But the summonses here identify the subjects of the IRS's investigation as Plaintiffs. Specifically, they state that they seek records "relating to the tax liability or the collection of the tax liability or for the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws *concerning the person identified above*" (emphasis added), and the "person[s] identified above" are specified as Michael Presley, Cynthia Presley, Presley Law, and BMP. Plus, Plaintiffs expressly concede that their clients are not the subject of an IRS investigation. So the clients are not "person[s] with respect to whose liability the summons is issued," 26 U.S.C. § 7609(f), [*1295] and § 7609(f) does not apply.

Third and finally, *Tiffany* hurts, not helps, Plaintiffs' case. In fact, *Tiffany*'s holding requires the conclusion that notice to Plaintiffs affords their clients protection without notifying the unnamed clients specifically.

In *Tiffany*, the IRS issued summonses to a company for its financial [**20] statements as well as for a list of the names, addresses, and Social Security numbers of persons who had acquired licenses to distribute Tiffany's products. 469 U.S. at 312. The summonses served dual purposes: to investigate the tax liabilities of Tiffany and to investigate the tax liabilities of its licensees. *Id.* at 313. But because the IRS did not know the identities of the licensees, it provided notice to only Tiffany. *Id.* Tiffany contended that since the IRS sought information about the licensees, the IRS needed to comply with § 7609(f)'s strictures by obtaining court approval through an ex parte hearing. *Id.*

The Supreme Court rejected Tiffany's arguments. The Court held that so long as the IRS followed the proper notice procedures as to one party it was investigating (Tiffany), the

IRS was not required to comply with § 7609(f) for the unidentified licensees who were also under investigation but had not received a summons. *Id.* at 324. Under those circumstances, the Supreme Court concluded, "any incidental effect on the privacy rights of unnamed taxpayers is justified by the IRS's interest in enforcing the tax laws." *Id.* at 321. In further explaining this holding, the Court reasoned that notice to one of the parties under investigation would [**21] ensure that the "IRS w[ould] not strike out arbitrarily or seek irrelevant materials" because the summoned party "w[ould] have a direct incentive to oppose enforcement . . . ." *Id.*

Plaintiffs seek to draw a distinction between this case and *Tiffany.* They argue that *Tiffany* suggests that if the summoned party—in this case, the Bank—is not under investigation, the IRS must use the § 7609(f) process if the summons happens to sweep in information about somebody other than the taxpayer being investigated. But Plaintiffs miss *Tiffany*'s point. Under *Tiffany*, it matters only that Plaintiffs received notice under § 7609(a) that they were being investigated and were afforded the opportunity to contest the summonses. *See id.* at 317 n.5 ("[A]ll that matters is that the IRS was pursuing a legitimate investigation of Tiffany."). That happened here. And as the Court foresaw in *Tiffany*, Plaintiffs have "argued vigorously—albeit unsuccessfully—against enforcement of the summonses," to no avail. *Id.* at 321. So *Tiffany* cannot help Plaintiffs, either.

V.

For these reasons, the judgment of the district court is affirmed.

AFFIRMED.

Presley v. United States
United States District Court for the Southern District of Florida, West Palm Beach Division
January 4, 2017, Decided; January 5, 2017, Entered on Docket
Case No. 9:16-cv-81735-RLR

ORDER GRANTING UNITED STATES' MOTION TO DISMISS

The United States has moved to dismiss a petition to quash brought by Michael and Cynthia Presley, Presley Law and Associates, P.A., and BMP Family Limited Partnership ("Petitioners"). *See* ECF No. 1 (petition to quash), No. 5 (amended petition to quash), No. 9 (United States' motion to dismiss). The dispute arises from three summonses issued by the Internal Revenue Service to Bank of America seeking records related to Petitioners as part of examinations into their 2014 tax liabilities. Petitioners oppose Bank of America producing records regarding the client trust and escrow accounts of Presley Law and Associates, P.A. ("Presley Law"). They claim that, under Florida law, the clients of Presley Law, whose financial information [*2] may be reflected in the records requested by the IRS, have a reasonable expectation of privacy in those records.[1] The United States argues that federal law governs these proceedings, that the summonses comply with federal law, and that Florida law, to the extent it is inconsistent with federal law, is preempted. *See* ECF No. 9. This Court agrees with the United States and grants its motion to dismiss.

Though Petitioners base their argument exclusively on an expectation of privacy, they concede that the summonses satisfy the Fourth Amendment. This is so for two reasons.

[1] Petitioners initially appeared to rely on the Fourth Amendment and the attorney-client privilege, as well. *See* ECF No. 1. However, they have since abandoned those arguments. *See* ECF No. 14 (Petitioners' response to United States' motion to dismiss).

First, the summonses are narrowly drawn and comply with the standards set out in *United States v. Powell*, 379 U.S. 48, 85 S. Ct. 248, 13 L. Ed. 2d 112 (1964).[2] For IRS summonses, that is all the Fourth Amendment requires. *See United States v. McAnlis*, 721 F.2d 334, 337 (11th Cir. 1983) ("As long as the IRS complies with the *Powell* requirements, it will not violate the summoned party's [F]ourth [A]mendment rights."). Second, even if the summonses had not satisfied *Powell*, neither Petitioners nor the clients of Presley Law have standing to raise a Fourth Amendment argument because they lack a reasonable expectation of privacy in records maintained by a third-party bank. *See United States v. Miller*, 425 U.S. 435, 440, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976).

Petitioners note that Florida law, unlike federal law, does recognize a reasonable expectation of privacy in records held by a third-party [*3] bank,[3] but state law is inapposite in these proceedings. The IRS, a federal agency, issued the three summonses pursuant to a federal statute, 26 U.S.C. § 7602. Under the Supremacy Clause of the U.S. Constitution,

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[2] In *Powell*, the Supreme Court held that IRS summonses are presumptively enforceable where: 1) "the investigation will be conducted pursuant to a legitimate purpose," 2) "the inquiry may be relevant to the purpose," 3) "the information sought is not already within the [IRS's] possession," and 4) "the administrative steps required by the [Internal Revenue] Code have been followed." 379 U.S. at 57-58. Since then, an additional requirement—the lack of a Justice Department referral—has been added. *See* 26 U.S.C. § 7602(d)(1). The United States submitted a declaration from an IRS revenue agent attesting that all of these requirements are satisfied. *See* ECF No. 9-1.

[3] The Florida Constitution provides that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein." Fla. Const. art. I, § 23. This includes, unlike under federal law, a "legitimate expectation of privacy in financial institution records." *Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation*, 477 So. 2d 544, 548 (Fla. 1985).

federal law determines the enforceability of the summonses "notwithstanding" any provisions in the "Constitution or Laws of any State." United States Const. art. VI, cl. 2. Thus, if "there is a conflict [between federal law and a state Constitution], federal law prevails under the Supremacy Clause." *United States v. Fleet*, 498 F.3d 1225, 1227 (11th Cir. 2007). Because the Florida Constitution creates requirements not present under the Fourth Amendment, it is preempted. *See In re Letter of Request for Judicial Assistance from Tribunal Civil de Port-au-Prince, Republic of Haiti*, 669 F. Supp. 403, 407 (S.D. Fla. 1987) (rejecting contention that the Florida Constitution's privacy rights are applicable to subpoenas issued pursuant to federal law because "[t]o the extent that state law is inconsistent, it is preempted").[4]

In sum, the IRS has issued three valid and enforceable summonses, and Petitioners' sole argument for quashing them fails. As a result, it is **ORDERED** that the United States' motion to dismiss (ECF No. 9) is **GRANTED**. The petition to quash (ECF No. 1) and amended petition to quash (ECF No. 5) are hereby **DISMISSED WITH PREJUDICE**. The Clerk of the Court shall **CLOSE THIS CASE**.

IT IS SO ORDERED this 4th day of January, 2017.

/s/ Robin Rosenberg [*4]
Robin Rosenberg
United States District Judge

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[4] Petitioners mistakenly rely on *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), in an attempt to get around the preemption issue. In *Katz*, the Supreme Court endorsed states' ability to create protections for their citizens that go beyond what the Fourth Amendment guarantees. *Id.* at 350-51. This is limited, however, to circumstances where state law supplies the rule of decision. In cases such as this one that arise under a federal statute, federal law governs, *In re International Horizons, Inc.*, 689 F.2d 996, 1003 (11th Cir. 1982), and inconsistent state law yields under the Supremacy Clause, *Fleet*, 498 F.3d at 1227.

Presley v. United States

United States Court of Appeals for the Eleventh Circuit

September 4, 2018, Decided

No. 17-10182

PER CURIAM:

The petition(s) for panel rehearing filed by Appellants BMP Family Limited Partnership, Cynthia Presley, Michael Robert Presley and Presley Law and Associates, P.A is DENIED.

ENTERED FOR THE COURT:

/s/ Robin S. Rosenbaum

UNITED STATES CIRCUIT JUDGE

§ 7609. Special procedures for third-party summonses.

(a) Notice.

(1) In general. If any summons to which this section applies requires the giving of testimony on or relating to, the production of any portion of records made or kept on or relating to, or the production of any computer software source code (as defined in 7612(d)(2) [26 USCS § 7612(d)(2)]) with respect to, any person (other than the person summoned) who is identified in the summons, then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain an explanation of the right under subsection (b)(2) to bring a proceeding to quash the summons.

(2) Sufficiency of notice. Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603 [26 USCS § 7603] (relating to service of summons) upon the person entitled to notice, or is mailed by certified or registered mail to the last known address of such person, or, in the absence of a last known address, is left

with the person summoned. If such notice is mailed, it shall be sufficient if mailed to the last known address of the person entitled to notice or, in the case of notice to the Secretary under section 6903 [26 USCS § 6903] of the existence of a fiduciary relationship, to the last known address of the fiduciary of such person, even if such person or fiduciary is then deceased, under a legal disability, or no longer in existence.

(3) Nature of summons. Any summons to which this subsection applies (and any summons in aid of collection described in subsection (c)(2)(D) shall identify the taxpayer to whom the summons relates or the other person to whom the records pertain and shall provide such other information as will enable the person summoned to locate the records required under the summons.

(b) Right to intervene; right to proceeding to quash.

(1) Intervention. Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604 [26 USCS § 7604].

(2) Proceeding to quash.

(A) In general. Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to begin a proceeding to quash such summons not later than the 20th day

after the day such notice is given in the manner provided in subsection (a)(2). In any such proceeding, the Secretary may seek to compel compliance with the summons.

(B) Requirement of notice to person summoned and to Secretary. If any person begins a proceeding under subparagraph (A) with respect to any summons, not later than the close of the 20-day period referred to in subparagraph (A) such person shall mail by registered or certified mail a copy of the petition to the person summoned and to such office as the Secretary may direct in the notice referred to in subsection (a)(1).

(C) Intervention; etc. Notwithstanding any other law or rule of law, the person summoned shall have the right to intervene in any proceeding under subparagraph (A). Such person shall be bound by the decision in such proceeding (whether or not the person intervenes in such proceeding).

(c) Summons to which section applies.

(1) In general. Except as provided in paragraph (2), this section shall apply to any summons issued under paragraph (2) of section 7602(a) [26 USCS § 7602(a)] or under section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7612 [26 USCS § 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7612].

(2) Exceptions. This section shall not apply to any summons--

(A) served on the person with respect to whose liability the summons is issued, or any officer or employee of such person;
(B) issued to determine whether or not records of the business transactions or affairs of an identified person have been made or kept;
(C) issued solely to determine the identity of any person having a numbered account (or similar arrangement) with a bank or other institution described in section 7603(b)(2)(A) [26 USCS § 7603(b)(2)(A)];
(D) issued in aid of the collection of--
(i) an assessment made or judgment rendered against the person with respect to whose liability the summons is issued; or
(ii) the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (i); or
(E)
(i) issued by a criminal investigator of the Internal Revenue Service in connection with the investigation of an offense connected with the administration or enforcement of the internal revenue laws; and
(ii) served on any person who is not a third-party recordkeeper (as defined in section 7603(b) [26 USCS § 7603(b)]).
(3) John doe and certain other summonses. Subsection (a) shall not apply to any summons described in subsection (f) or (g).

(4) Records. For purposes of this section, the term "records" includes books, papers, and other data.

(d) Restriction on examination of records. No examination of any records required to be produced under a summons as to which notice is required under subsection (a) may be made--

(1) before the close of the 23rd day after the day notice with respect to the summons is given in the manner provided in subsection (a)(2), or

(2) where a proceeding under subsection (b)(2)(A) was begun within the 20-day period referred to in such subsection and the requirements of subsection (b)(2)(B) have been met, except in accordance with an order of the court having jurisdiction of such proceeding or with the consent of the person beginning the proceeding to quash.

(e) Suspension of statute of limitations.

(1) Subsection (b) action. If any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations under section 6501 [26 USCS § 6501] (relating to the assessment and collection of tax) or under section 6531 [26 USCS § 6531] (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

(2) Suspension after 6 months of service of summons. In the absence of the resolution of the summoned party's response to the summons, the running of any period of limitations under section 6501 [26 USCS § 6501] or under section 6531 [26 USCS § 6531] with respect to any person with respect to whose liability the summons is issued (other than a person taking action as provided in subsection (b)) shall be suspended for the period--

(A) beginning on the date which is 6 months after the service of such summons, and

(B) ending with the final resolution of such response.

(f) Additional requirement in the case of a John Doe summons. Any summons described in subsection (c)(1) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that--

(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,

(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

(3) the information sought to be obtained from the examination of the records or testimony (and the identity of the person or persons with respect to whose liability the

summons is issued) is not readily available from other sources.

(g) Special exception for certain summonses. A summons is described in this subsection if, upon petition by the Secretary, the court determines, on the basis of the facts and circumstances alleged, that there is reasonable cause to believe the giving of notice may lead to attempts to conceal, destroy, or alter records relevant to the examination, to prevent the communication of information from other persons through intimidation, bribery, or collusion, or to flee to avoid prosecution, testifying, or production of records.

(h) Jurisdiction of District Court; etc.

(1) Jurisdiction. The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceeding brought under subsection (b)(2), (f), or (g). An order denying the petition shall be deemed a final order which may be appealed.

(2) Special rule for proceedings under subsections (f) and (g). The determinations required to be made under subsections (f) and (g) shall be made ex parte and shall be made solely on the petition and supporting affidavits.

(i) Duty of summoned party.

(1) Recordkeeper must assemble records and be prepared to produce records. On receipt of a summons to which this section applies for the production of records, the summoned party shall proceed to assemble the records requested, or such portion

thereof as the Secretary may prescribe, and shall be prepared to produce the records pursuant to the summons on the day on which the records are to be examined.

(2) Secretary may give summoned party certificate. The Secretary may issue a certificate to the summoned party that the period prescribed for beginning a proceeding to quash a summons has expired and that no such proceeding began within such period, or that the taxpayer consents to the examination.

(3) Protection for summoned party who discloses. Any summoned party, or agent or employee thereof, making a disclosure of records or testimony pursuant to this section in good faith reliance on the certificate of the Secretary or an order of a court requiring production of records or the giving of such testimony shall not be liable to any customer or other person for such disclosure.

(4) Notice of suspension of statute of limitations in the case of a John Doe summons. In the case of a summons described in subsection (f) with respect to which any period of limitations has been suspended under subsection (e)(2), the summoned party shall provide notice of such suspension to any person described in subsection (f).

(j) Use of summons not required. Nothing in this section shall be construed to limit the Secretary's ability to obtain information, other than by summons, through formal or informal

procedures authorized by sections 7601 and 7602 [26 USCS §§ 7601 and 7602].

12 USCS § 3401
Current through PL 115-277, approved 11/3/18

§ 3401. Definitions

For the purpose of this title [12 USCS §§ 3401 et seq.], the term--

(1) "financial institution", except as provided in section 1114 [12 USCS § 3414], means any office of a bank, savings bank, card issuer as defined in section 103 of the Consumers Credit Protection Act (15 U.S.C. 1602(n)), industrial loan company, trust company, savings association, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution, located in any State or territory of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands;

(2) "financial record" means an original of, a copy of, or information known to have been derived from, any record held by a financial institution pertaining to a customer's relationship with the financial institution;

(3) "Government authority" means any agency or department of the United States, or any officer, employee, or agent thereof;

(4) "person" means an individual or a partnership of five or fewer individuals;

(5) "customer" means any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a

financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name;

(6) "holding company" means--

(A) any bank holding company (as defined in section 2 of the Bank Holding Company Act of 1956 [12 USCS § 1841]); and

(B) any company described in section 4(f)(1) of the Bank Holding Company Act of 1956 [12 USCS § 1843(f)(1)];

(7) "supervisory agency" means with respect to any particular financial institution, holding company, or any subsidiary of a financial institution or holding company, any of the following which has statutory authority to examine the financial condition, business operations, or records or transactions of that institution, holding company, or subsidiary--

(A) the Federal Deposit Insurance Corporation;

(B) the Bureau of Consumer Financial Protection;

(C) the National Credit Union Administration;

(D) the Board of Governors of the Federal Reserve System;

(E) the Comptroller of the Currency;

(F) the Securities and Exchange Commission;

(G) the Commodity Futures Trading Commission;

(H) the Secretary of the Treasury, with respect to the Bank Secrecy Act [12

USCS §§ 1951 et seq.] and the Currency and Foreign Transactions Reporting Act [31 USCS §§ 5311 et seq.] (Public Law 91-508, title I and II); or

(I) any State banking or securities department or agency; and

(8) "law enforcement inquiry" means a lawful investigation or official proceeding inquiring into a violation of, or failure to comply with, any criminal or civil statute or any regulation, rule, or order issued pursuant thereto.

§ 3405. Administrative subpena and summons

A Government authority may obtain financial records under section 1102(2) [12 USCS § 3402(2)] pursuant to an administrative subpena or summons otherwise authorized by law only if--

(1) there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry;

(2) a copy of the subpena or summons has been served upon the customer or mailed to his last known address on or before the date on which the subpena or summons was served on the financial institution together with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry:

"Records or information concerning your transactions held by the financial institution named in the attached subpena or summons are being sought by this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 for the following purpose: If you desire that such records or information not be made available, you must:

"1. Fill out the accompanying motion paper and sworn statement or write one of your own, stating that you are the customer whose records are being requested by the

Government and either giving the reasons you believe that the records are not relevant to the legitimate law enforcement inquiry stated in this notice or any other legal basis for objecting to the release of the records.

"2. File the motion and statement by mailing or delivering them to the clerk of any one of the following United States district courts:

"3. Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to ----------.

"4. Be prepared to come to court and present your position in further detail.

"5. You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights.

If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein will be made available. These records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer."; and

(3) ten days have expired from the date of service of the notice or fourteen days have expired from the date of mailing the notice to the customer and within such time period the customer has not filed a sworn statement and motion to quash in an appropriate court, or the customer challenge provisions of section 1110 [12 USCS § 3410] have

Fla. Const. Art. I, § 12

Section 12. Searches and seizures.

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.