No. 23-

IN THE

Supreme Court of the United States

JEHAN AGRAMA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the district court erred under *United States* v. *Powell*, 379 U.S. 48 (1964), and *United States* v. *Clarke*, 573 U.S. 248 (2014), in enforcing the IRS summons even though the IRS admittedly already possesses summoned documents.

2. Whether the district court erred under *Powell* and *Clarke* in enforcing the IRS summons even though the IRS investigation reflects information obtained through unconstitutional searches.

3. Whether the district court erred under *Powell* and the principle of international comity in enforcing the IRS summons even though the summons seeks to circumvent the disclosure regime imposed by multiple foreign treaties.

PARTIES TO THE PROCEEDING

Petitioner is Jehan Agrama, successor-in-interest to Frank Agrama, who was the respondent in the district court and appellant in the court of appeals.

Respondent is the United States of America, which was the petitioner in the district court and appellee in the court of appeals.

RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

United States v. *Agrama*, No. 2:19-cv-09204

United States Court of Appeals (9th Cir.):

United States v. *Agrama*, No. 22-55447

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Jehan Agrama respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

INTRODUCTION

In 2006, the FBI conducted—as the district court put it—"unlawful and reprehensible" searches of the Los Angeles home and office of Frank Agrama, during which the FBI allowed an Italian prosecution team to review Agrama's privileged materials. Armed by that unconstitutional review, the Italian prosecution team collected additional documents from other countries pursuant to requests made under Mutual Legal Assistance Treaties ("MLATs") between Italy and those

countries ("MLAT Documents") and prepared a report purportedly analyzing Agrama's foreign business activities.

That tainted report—the Chersicla Report—which the IRS somehow acquired, now appears central to the IRS's tax examination of Agrama. Indeed, the IRS has already issued penalty letters to him admittedly based on that report. In furtherance of its examination, the IRS issued a summons to Agrama for all documents relating to his Italian prosecution, including his copy of the MLAT Documents that Italy collected from other countries through its MLAT requests.

This case is about the enforceability of that summons. Under *United States* v. *Powell*, a court may not enforce an IRS summons if it seeks "information … already within the [IRS's] possession" or if it was issued in bad faith or would abuse the court's process. 379 U.S. 48, 57-58 (1964). Agrama argued that, under this standard, the district court should not enforce the summons because it: (i) seeks documents the IRS admittedly already possesses, (ii) serves an investigation whose current scope or focus is tainted by the IRS's reliance on the Chersicla Report, which derives from the unconstitutional Los Angeles searches, and (iii) attempts to circumvent the disclosure regime imposed by the MLATs under which Italy obtained the MLAT Documents. Alternatively, Agrama argued that, under this Court's decision in *United States* v. *Clarke*, he has at least identified "facts … plausibly raising an inference" of these defects and therefore is "entitled" to an evidentiary hearing to further probe the summons' validity. 573 U.S. 248, 254 (2014). The district

court, however, denied a hearing and enforced the summons, and the court of appeals affirmed.

This Court's review is warranted as to each of those three grounds for challenging the summons. First, the court of appeals erroneously held that the IRS's possession of summoned documents did not matter because the IRS is not trying to harass Agrama. The court thus joined multiple other circuits that have nullified *Powell*'s "not already possessed" requirement—albeit in various ways. Some other circuits, however, have applied *Powell*'s "not already possessed" requirement more faithfully. This Court should intervene to resolve the lower courts' confusion and restore national consistency in an area that requires it—taxation—to vindicate the Court's supervisory authority to interpret federal law, and to reaffirm an important protection for taxpayers.

Second, the court of appeals erroneously rejected Agrama's taint argument because it found no evidence of a cooperation agreement between the IRS and the FBI, and because the IRS initiated the investigation of Agrama before it received the tainted Chersicla report. On both points, the court contradicted the more considered judgment of the Second and Third Circuits. Those circuits have correctly recognized that, under *Powell*, the driving consideration is maintaining judicial integrity, and accordingly an IRS summons should not be enforced if, as here, doing so would further the effects of past unconstitutional conduct. The Ninth Circuit's demand for a cooperation agreement, in contrast, mistakenly reflects the Exclusionary Rule's exclusive focus on deterring future unconstitutional conduct. Further, those circuits have correctly recognized that a summons should not be enforced if

it would serve an investigation that began legitimately but was tainted later. On this issue, too, this Court should step in to ensure nationally uniform protection for taxpayers from unconstitutional and abusive governmental action.

Finally, the court of appeals erroneously brushed aside Agrama's argument that the summons improperly tries to circumvent the MLATs' disclosure regime, focusing instead on the fact that the MLATs do not directly bar Agrama from disclosing his copy of the MLAT Documents. The court's reasoning contradicts the Second and Eleventh Circuits' recognition that courts should not enforce an IRS summons issued to circumvent a legal disclosure restriction. It also contradicts the principle of international comity, as elaborated by this Court and understood by the Second Circuit, which has held that judicially enforcing governmental information demands that attempt to circumvent foreign disclosure regimes does not reflect proper respect for foreign sovereigns. More broadly, this Court has emphasized that comity requires federal courts to carefully account for foreign sovereigns' interests when asked to enforce a disclosure demand. Here, the court of appeals completely disregarded the strong interest of Italy and its MLAT partners in ensuring the limited and controlled use of the MLAT Documents. The United States has an equally strong reciprocal interest in respecting MLAT disclosure regimes, for the benefit of its own law-enforcement activities. This Court should bring some much-needed clarity to this area of law to deter efforts like the IRS's.

OPINIONS BELOW

The court of appeals' unpublished opinion (App.1a-7a) is available at 2023 WL 4486735. The district court's unpublished order denying Agrama's motion for an evidentiary hearing (App.9a-20a) is available at 2020 WL 7056288, and its unpublished order granting the IRS's petition to enforce the summons (App.21a-22a) is available at 2022 WL 1434704.

JURISDICTION

The court of appeals entered judgment on July 12, 2023. Agrama's timely petition for rehearing was denied on September 21, 2023. On December 4, 2023, Justice Kagan extended the deadline to petition for certiorari until January 19, 2024. *See* No. 23A501. The district court had jurisdiction under 28 U.S.C. §§1340 and 1345, and this Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT STATUTORY AND TREATY PROVISIONS

Relevant statutory and treaty provisions are reproduced in Appendices F-J.

STATEMENT

A. Factual Background

1. The Italian Investigation of Agrama and the Unconstitutional Searches of Agrama's Home and Office

In the mid-2000s, Frank Agrama, a U.S. citizen, was prosecuted in Italy for tax fraud in two cases. C.A.ER-106 ¶3. In connection with those prosecutions, the lead Italian prosecutor submitted a

document request to the United States under the Mutual Legal Assistance Treaty ("MLAT") between Italy and the United States. App.9a-10a. Pursuant to that request, the FBI obtained warrants to search and seize documents at Agrama's Los Angeles home and business, Harmony Gold USA. *Id.* The warrants established "taint" procedures to protect Agrama's privileged materials. App.47a.

In November 2006, less than one week before the first Italian trial would begin, the FBI, supervised by the U.S. Attorney for the Central District of California, conducted searches of Agrama's Los Angeles home and of Harmony Gold's Los Angeles offices. App.43a; C.A.SER-117. During those searches, FBI agents permitted the Italian prosecution team—including the lead prosecutor and a forensic accountant named Gabriella Chersicla—to access material protected by the attorney-client and work-product privileges prepared for Agrama's impending criminal trial in Italy, in violation of the warrants' taint procedures. App.47a-48a; *see* App.10a; App.44a-45a. During the searches, the FBI seized those privileged materials. App.10a; App.44a-45a. Shortly afterward, the lead Italian prosecutor asked the responsible Assistant U.S. Attorney, with whom he was in regular contact, about a potential "domestic investigation" of Agrama. C.A.ECF #28-3.

Agrama moved the district court to order that the seized materials be returned because the warrant violations rendered the searches and seizure unconstitutional. *See, e.g.*, *Horton* v. *California*, 496 U.S. 128, 140 (1990). The Justice Department eventually agreed that the Italian prosecution team's "view[ing] documents of Mr. Agrama that were protected by

attorney-client and work product privileges … constituted grounds to invalidate the searches under U.S. law" and "made it impossible for [the Department] to defend the legality of the searches." C.A.ER-102; *see* App.47a-48a; C.A.SER-194-195. Describing the "conduct in obtaining and executing the search warrants and seizing evidence" as "unlawful and reprehensible," the district court ordered the Department to return the seized documents and not to transmit them or any copies thereof to the Italian prosecution team. App.44a-46a; *see* App.10a.

2. The Italian Prosecution's Collection of the MLAT Documents From Other Countries and the Issuance of the Chersicla Report

Contemporaneously with the Italian prosecutor's MLAT request to the United States, he made documents requests to Hong Kong, Switzerland, and Ireland under the MLATs between Italy and those countries. App.11a; C.A.ER-106-108 ¶¶5, 9, 13. During the Hong Kong searches—which were conducted after the Los Angeles searches—the Italian prosecutor and Chersicla again unlawfully accessed privileged materials. App.11a; C.A.ER-106-107 ¶6; C.A.ER-61-64, 96. Through these MLAT requests, the Italian prosecution team eventually obtained documents from all three countries (together, "MLAT Documents"). App.11a; C.A.ER-106-108 ¶¶5-14.

Chersicla then prepared a report analyzing the purported financial relationship between Agrama and certain Hong Kong entities ("Chersicla Report"), to be used during Agrama's second Italian trial. App.11a; C.A.ER-106-107, 108-109 ¶¶6, 17; C.A.Add.82 ¶¶4, 9.

The report was directly based on and incorporated MLAT Documents obtained through the Hong Kong searches, but Chersicla and the Italian prosecution team's collection and review of the Hong Kong MLAT Documents, and their resulting analysis in the Cheriscla report, were necessarily informed by what they learned through their earlier unconstitutional review of Agrama's privileged materials in Los Angeles. *See Church of Scientology of California* v. *United States*, 506 U.S. 9, 12-13 (1992) (officials cannot "withdraw all knowledge or information … acquired" through unconstitutional search). Chersicla issued her report on December 9, 2013. C.A.ER-124 ¶10; C.A.ER-34-35.

The MLATs and associated national laws tightly restrict the Italian government's disclosure and use of the MLAT Documents, App.14a:

- The Italy-Hong Kong MLAT prohibits the Italian government from "disclos[ing] or us[ing] information or evidence furnished for purposes other than those stated in the request without prior consent of the Central Authority of the Requested Party." App.37a; *see also* App.35a.
- The Italy-Ireland MLAT states that requests for criminal assistance must be "execute[d] in the manner provided for by [the requested country's] law." App.39a. And in turn, Irish law permits evidence to be provided to a foreign government only if the requesting government gives "assurance" that "any evidence" supplied in response will not "be used for any purpose other than that permitted by the relevant international instrument or

specified in the request," absent "prior consent" from the appropriate Irish authority. App.41a-42a.

- The Italy-Switzerland MLAT prohibits disclosure or use of the MLAT documents for civil tax purposes. App.33a.

The Italian prosecutor provided a copy of the MLAT Documents to Agrama's Italian attorney. That disclosure was required by a *Brady*-like Italian law and accordingly was permitted by the MLATs because it served the purpose of Italy's MLAT requests: facilitating Italy's prosecution of Agrama. App.11a. Agrama was acquitted of all but one charge across his two Italian prosecutions; the lone conviction was pardoned and remains on appeal. C.A.ER-106 ¶3; C.A.ER-56 ¶6.

3. The IRS's Examination of Agrama and Its Reliance on the Chersicla Report

Meanwhile, in 2010 the IRS accepted Agrama into its "voluntary disclosure" program regarding foreign bank accounts. App.10a; C.A.ER-125 ¶16. Because of the criminal proceedings against Agrama in Italy, however, the IRS rescinded that acceptance in February 2013. App.10a-11a. In December 2013, after the Chersicla Report was issued, the IRS informed Agrama that he would be audited. App.11a; C.A.ER-113 ¶¶4-5. A few days later, the IRS issued its first Information Document Request to Agrama. C.A.ER-113 ¶5. In 2014, the IRS expanded the investigation to cover Harmony Gold. C.A.ER-113 ¶¶6-7.

In 2016, the IRS issued penalty letters to Agrama and Harmony Gold because the IRS had determined

that Agrama had an ownership interest in certain corporate entities in Hong Kong. C.A.ER-114 ¶¶9, 11; D.C.ECF #18-8 at 3. The IRS admitted to Agrama's tax lawyer that the penalty actions were based on the Chersicla Report, which the IRS had obtained from the Italian government "'through channels' or from an 'attaché' at the U.S. embassy in Italy." C.A.ER-114 ¶11.

"In furtherance of the examination," in 2018 the IRS issued to Agrama the summons at issue here. C.A.ER-123 ¶5; C.A.ER-131-139. The summons demanded from Agrama "[a]ll" MLAT Documents and "[a]ll documents … related to" Agrama's two Italian criminal trials or to a lawsuit Agrama had brought in Ireland challenging the Italian prosecutor's MLAT request to that country. C.A.ER-133; *see* C.A.ER-129 ¶41. Agrama believed the summons was invalid. However, in an effort to cooperate with the IRS, Agrama produced many documents, while withholding all MLAT Documents. App.11a-12a; C.A.ER-109 ¶19.

B. Legal Background

A court may enforce a summons only if the IRS has "demonstrate[d] good faith in issuing the summons." *United States* v. *Clarke*, 573 U.S. 248, 250 (2014) (cleaned up). "[T]hat means establishing what have become known as the *Powell* factors: '[1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within the IRS' possession, and [4] that the administrative steps required by the Internal Revenue

Code have been followed.'" *Id.* (quoting *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964)).

A summons should not be enforced if the taxpayer rebuts the IRS's prima facie showing of the *Powell* factors or otherwise shows the summons to be in "bad faith," *Clarke*, 573 U.S. at 249, 254, or "an abusive use of the court's process," *Powell*, 379 U.S. at 51; *see, e.g.*, *United States* v. *Lask*, 703 F.2d 293, 297 (8th Cir. 1983) ("Once the IRS establishes a prima facie case, the burden shifts to the summonee to disprove one of these elements or to demonstrate that judicial enforcement of the summons would otherwise constitute an abuse of the court's process ...."). The Court has long recognized that issuing a summons to "'harass the taxpayer'" would be "an improper purpose," *United States* v. *Stuart*, 489 U.S. 353, 359-360 (1989) (quoting *Powell*, 379 U.S. 58), and that "other forms of ... abuse" may be identified in "[f]uture cases," *United States* v. *LaSalle National Bank*, 437 U.S. 298, 317 n.19, 318 n.20 (1978).

Short of outright quashal, the taxpayer is "entitled" to an evidentiary hearing if he "can point to specific facts or circumstances plausibly raising an inference of bad faith," "improper purpose," or another basis to impugn the summons. *Clarke*, 573 U.S. at 254. Although "[n]aked allegations" "are not enough," "a fleshed out case [is not] demanded" and "circumstantial evidence can suffice to meet that burden; after all, direct evidence of another person's bad faith, at this threshold stage, will rarely if ever be available." *Id.*

C. Procedural History

1. District Court

In 2019, the IRS petitioned the U.S. District Court for the Central District of California to enforce the summons. Responding to an order to show cause, Agrama argued that the summons was infirm under *Powell* for several reasons.

First, the IRS admittedly already possesses summoned documents, thus failing to make a prima facie showing of the third *Powell* factor. Second, the summons was issued in bad faith, and its enforcement would abuse judicial process, because it serves an investigation whose current scope or focus is tainted by the IRS's reliance on the Chersicla Report, which in turn reflects the unconstitutional review of Agrama's privileged materials in Los Angeles by the Italian prosecution team, including Chersicla herself.[1] And third, the summons was issued in bad faith because it was designed to circumvent the MLATs' disclosure regime, and therefore enforcement would abuse judicial process and breach the principle of international

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[1] Agrama identified a second taint relating to the Chersicla Report: the IRS obtained it in violation of the treaty between Italy and the United States governing the exchange of income-tax-related information ("Tax Treaty"). It is undisputed that "an 'attaché' at the U.S. embassy in Italy," C.A.ER-114 ¶11—one of the two possible sources identified by the IRS—would have been an improper channel under the Tax Treaty. *See* Pet'r C.A.Br.33-34; Pet'r C.A.Reply.29; *cf* U.S. C.A.Br.56. Yet, the court of appeals rejected this argument because the IRS "was given the Chersicla Report by a U.S. government official in Italy." App.6a-7a. The court completely missed the point; the Tax Treaty requires inquiry into the transfer to the United States from Italy, not the subsequent transfer between U.S. officials.

comity. Alternatively, Agrama moved under *Clarke* for an evidentiary hearing to investigate the summons' validity with respect to these defects.

The government opposed Agrama's motion for an evidentiary hearing. It also filed an *ex parte* application for leave to file an *in camera* declaration providing the court with "certain information related to the ongoing IRS examination of the Agramas," C.A.ER-18-19—in effect, seeking to secretly conduct the very hearing Agrama requested.

The district court denied Agrama's motion for a hearing, granted the IRS's petition to enforce the summons, and denied the government's *ex parte* application as moot. App.9a, 19a n.8; App.21a-22a.

2. Court of Appeals

The court of appeals affirmed.[2]

First, the court concluded that, "[a]lthough the IRS concedes that it already possesses some of the material covered by the summons," *Powell*'s "not already possessed" requirement did not preclude enforcement because there is "no evidence" that the summons was "designed to 'harass'" Agrama. App.3a-4a.

Second, the court rejected Agrama's claim that the investigation is constitutionally tainted by the Chersicla Report. The court said there is no "proof of cooperation between the FBI and IRS." App.5a-6a. And the court dismissed any connection between that report and the IRS investigation because the IRS "would have opened an investigation into Agrama" upon his

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[2] Agrama died after the court heard oral argument. His successor-in-interest, Jehan Agrama, was substituted.

removal from the voluntary-disclosure program "even if the IRS never obtained the Chersicla Report." App.6a.

Third, the court held that compelling Agrama to provide the MLAT documents would not violate "principles of international comity" because there is "no evidence" that "the MLATs would be offended by *his* production of the MLAT documents." App.4a-5a.

The court of appeals then denied rehearing, App.TK, but granted Agrama's motion to stay the mandate pending disposition of this certiorari petition, C.A.ECF #50.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S CONCLUSION THAT THE DISTRICT COURT COULD ENFORCE A SUMMONS SEEKING DOCUMENTS THE IRS ADMITTEDLY POSSESSES CONTRADICTS THIS COURT'S PRECEDENT AND ENTRENCHES CONFUSION AMONG THE CIRCUITS

Powell's decree that a court may enforce an IRS summons only if the IRS has shown that "the information sought is not already within the [its] possession," 379 U.S. at 57-58; *accord Clarke*, 573 U.S. at 255, reflects Congress's command that "[n]o taxpayer shall be subjected to unnecessary examination or investigations," 26 U.S.C. §7605(b); *see Powell*, 379 U.S. at 52-56, 58. Here, the IRS "concedes that it already possesses some of the material covered by the summons." App.4a. That concession means the IRS failed to even make the prima facie showing required by *Powell*. The court of appeals' decision to enforce the summons anyway nullifies *Powell*'s "not already possessed" requirement and entrenches confusion among

the circuits about the meaning of that requirement. This is an important recurring federal question requiring uniformity because taxpayers' rights and duties should not vary geographically, nor should the degree of taxpayers' protection from investigative overreach.

A. The Decision Below Contradicts *Powell* and *Clarke*

The court of appeals asserted that *Powell*'s "not already possessed" requirement should not be taken literally but rather "serves to prohibit the issuance of unnecessary summonses that are designed to harass the taxpayer or that otherwise abuse the court's process." App.3a-4a (cleaned up). That understanding was dispositive because, the court said, Agrama "offers no evidence to prove" such a "motive[]." App.4a.

The court's analysis contradicts *Powell* and this Court's later decision in *Clarke*. Construing the "not already possessed" requirement to require harassment or some other abuse nullifies the "not already possessed" requirement because the *Powell* test expressly accounts for harassment and other abuses separately. *Powell*'s first factor requires the IRS to show that the investigation serves a "legitimate purpose" and its third factor requires the IRS to show that it does not already possess the summoned information. 379 U.S. at 57-58. *Clarke* reiterated that these are two distinct requirements. 573 U.S. at 250-251. Further, the Court has explained that "harass[ing] the taxpayer" is an "improper purpose." *Powell*, 379 U.S. at 58.

When it comes to this Court's decisions, "what they say and what they mean are one and the same."

Mathis v. *United States*, 579 U.S. 500, 514 (2016). What this Court said—and thus what it meant—was that non-possession and a non-abusive purpose are separate requirements for IRS summons enforcement. In contrast, the court of appeals collapsed the third *Powell* factor into the first, treating the IRS's possession as salient only if it reflected an abusive purpose. Under that approach, *Powell*'s "not already possessed" requirement is pointless.[3]

Further, the court of appeals' conclusion that the IRS has a legitimate interest in "confirm[ing] the completeness and accuracy of documents obtained from another source," App.4a, does not comport with *Powell* and *Clarke*. The IRS still must make a prima facie showing that it has a legitimate *particularized* need to confirm the accuracy and completeness of documents it already possesses. *Cf. United States* v. *Theodore*, 479 F.2d 749, 755 (4th Cir. 1973) (statute "allows IRS to summon information relating to the correctness of a particular return or to a particular person and does not authorize the use of open-ended Joe Doe summonses"), *cited favorably in United States* v. *Bisceglia*, 420 U.S. 141, 146 (1975). Here, the IRS failed to do so. The IRS identified only *one* document that it believes is incomplete (the Chersicla Report). *See* U.S. C.A.Br.20, 23, C.A.ECF #20. Beyond that, the IRS only asserted generically that it does not "know[]" whether any other documents it possesses are complete. *Id.* at 23. The IRS's mere epistemic

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[3] If the *Powell* test should be viewed in its entirety as being about abuse or bad faith, then the test must mean that seeking already-possessed information is per se abusive or bad faith, and therefore the court of appeals still erred.

doubt—unaccompanied by any concrete reason to believe any other particular document in its possession is incomplete—cannot suffice. Otherwise, *Powell*'s "not already possessed" requirement would be practically worthless because the IRS could always say that.[4]

At a minimum, under these circumstances Agrama was entitled under *Clarke* to an evidentiary hearing to determine what documents the IRS already possesses and whether and to what extent the IRS has a legitimate basis to doubt their accuracy or completeness.

B. The Decision Below Entrenches Confusion Among the Circuits

The lower courts have treated *Powell*'s "not already possessed" requirement in various ways, some of which—like the Ninth Circuit's—contradict the plain language of *Powell* and *Clarke*. The Ninth Circuit's approach widens the circuits' confusion.

Several circuits have remained faithful to what *Powell* and *Clarke* actually said, declaring unqualifiedly that a summons may not be enforced if, or at least to the extent that, the IRS already possesses summoned information. *See Theodore*, 479 F.2d at 755 (4th Cir.) (as "prerequisite[]" for enforcement, "obligation is upon the [IRS] to demonstrate that the material requested is not within [its] possession"); *United States* v. *Kis*, 658 F.2d 526, 537 (7th Cir. 1981) ("An assertion by an agent during a deposition that he only

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[4] The IRS's desire to confirm accuracy and completeness is especially suspect here because Agrama only has copies of the MLAT Documents given to him by the Italian prosecutor.

has access to copies of some of the documents sought is not sufficient to make out a prima facie case."); *United States* v. *Kerrigan*, 114 F.3d 1170, 1170 (1st Cir. 1997) (table) (per curiam) (summons enforcement properly "limited … so as not to require [recipient] to provide third party records already produced").

Like the court below, however, other circuits have replaced what *Powell* and *Clarke* said with their own policy view. Initially tracking *Powell* and *Clarke*, the Fifth Circuit once said that summons enforcement may be "limit[ed] … to those documents not already in the IRS's possession," and that "further discovery" on the extent of the IRS's possession might be appropriate. *United States* v. *Davis*, 636 F.2d 1028, 1037 (5th Cir. 1981). But the court promptly retreated, "construi[ing] the 'already possessed' principle enunciated by *Powell* as a gloss on §7605(b)'s prohibition of 'unnecessary' summonses, rather than an absolute prohibition against the enforcement of any summons to the extent that it requests the production of information already in the possession of the IRS." *Id.* Accordingly, the court endorsed an approach that "balances the government's need for effective investigation" and "the need to expedite summons enforcement proceedings" "against the potential for unnecessary harassment." *Id.* at 1038. Under that approach, "enforcement of the summons in its entirety is not" precluded by possession "[w]hen a summons as a whole is not harassing, when the bulk of the materials summoned is not demonstrably in the possession of the IRS, and where the marginal burden of supplying information which might already be in the possession of the IRS is small." *Id.* Indeed, the court stressed, the "'already possessed' rule should be limited to such cases as …

where a revenue agent had informally examined the taxpayer's records at length and later sought to force their production without any explanation of why the opportunity for informal examination had been insufficient." *Id.*; *see also United States* v. *Linsteadt*, 724 F.2d 480, 484 (5th Cir. 1984). Thus, the Fifth Circuit's approach is somewhat different from the Ninth Circuit's, but still it largely negates the "not already possessed" requirement. The Fifth Circuit's approach also governs in the Eleventh Circuit. *See, e.g.*, *United States* v. *Moore, Ingram, Johnson & Steele, LLP*, No. 21-10341, 2022 WL 3134374, at *2 (11th Cir. Aug. 5, 2022); *United States* v. *Clower*, 666 F. App'x 869, 875 (11th Cir. 2016).

In the Second Circuit, "some redundancy between the documents sought and those already produced … in itself does not require a finding that the summonses should be quashed." *Adamowicz* v. *United States*, 531 F.3d 151, 159 (2d Cir. 2008). To defeat the summons, "the taxpayer [must] show[] that the *bulk* of the information requested is already in the possession of the IRS." *Id.* (emphasis added).

Finally, the Sixth Circuit has held that if the IRS "possess[es] some of the requested materials in a form it can use in th[e] investigation," "the burden [is] placed on the government rather than on [the taxpayer] to prove that the government's interests outweigh [the taxpayer's] hardship." *United States* v. *Monumental Life Insurance Co.*, 440 F.3d 729, 735 (6th Cir. 2006). That is reminiscent of the Fifth Circuit's balancing approach, and again fails to take seriously this Court's declaration that "not already possessed" is a distinct requirement from "not abusive." Yet, this approach differs from the Fifth Circuit's by

(more appropriately) placing the burden of justification on the IRS rather than on the taxpayer, and by leaving open a wider range of situations in which the taxpayer's interests could prevail. *See id.*

C. The Meaning of the "Not Already Possessed" Requirement Is an Important National Issue

The meaning of the "not already possessed" requirement is important and warrants the Court's attention because taxpayers' rights and duties with respect to the IRS should be uniform across the country, not dependent on where the taxpayer happens to be. This Court has repeatedly stressed that "a cardinal principle of Congress in its tax scheme is uniformity." *United States* v. *Speers*, 382 U.S. 266, 270 (1965) (cleaned up); *accord United States* v. *Equitable Life Assurance Society*, 384 U.S. 323, 331 (1966). The Court, therefore, frequently grants certiorari to resolve circuit conflicts on tax issues—including procedural issues—even when the conflicts are shallower than here. *See Connelly* v. *IRS*, No. 23-146 (2-1 conflict, petition granted Dec. 13, 2023); *Polselli* v. *IRS*, 598 U.S. 432 (2023) (2-1 conflict concerning notice requirements to third parties); *Bittner* v. *United States*, 598 U.S. 85, 89 (2023) (1-1 conflict); *PPL Corp.* v. *Commissioner*, 569 U.S. 329, 331, 334 (2013) (1-1 conflict); *Boeing Co.* v. *United States*, 537 U.S. 437, 440, 445-446 (2003) (1-1 conflict); *Chickasaw Nation* v. *United States*, 534 U.S. 84, 86-88 (2001) (1-1 conflict); *United Dominion Industries, Inc.* v. *United States*, 532 U.S. 822, 828-829 (2001) (1-1 conflict).

The circuits' inconsistency on this issue is especially troubling for two reasons. First, it results from

some lower courts' disregard of the black-and-white rule announced in *Powell* and reiterated in *Clarke*. Thus, the Court should intervene not only to restore uniformity but to vindicate its authority.

Second, the erosion of the "not already possessed" requirement diminishes or eliminates one of the few protections that taxpayers have against IRS overreach. As the government recognized in *Clarke*, "requiring the IRS to … demonstrat[e] the *Powell* factors" "protect[s] taxpayers against abusive summons practices." Pet. 20, *United States* v. *Clarke*, No. 13-301 (U.S. Sept. 6, 2013). Central to the "balance [this Court] ha[s] struck" between the IRS's and taxpayers' interests are the IRS's burden of establishing each element of the *Powell* test and the taxpayer's "entitle[ment]" to a hearing to "examine" the IRS to probe the summons' validity upon "plausibly raising an inference" of invalidity. *Clarke*, 573 U.S. at 254. As detailed above, however, the Ninth Circuit and some other circuits have absolved the IRS of one element of its initial burden and made it nearly impossible for taxpayers to even win a hearing on the issue. This Court's intervention is needed to preserve the *Powell* test as a bulwark of taxpayer protection.

II. THE NINTH CIRCUIT'S REJECTION OF AGRAMA'S CLAIM THAT THE IRS INVESTIGATION IS CONSTITUTIONALLY TAINTED CONTRADICTS OTHER CIRCUITS' DECISIONS

The court of appeals' rejection of Agrama's argument that the IRS investigation is tainted by the unconstitutional Los Angeles searches contradicts decisions by the Second and Third Circuits, in two ways. Those circuits have recognized correctly that

Exclusionary Rule jurisprudence does not control in the context of an IRS summons—and thus that an IRS summons that serves a constitutionally tainted investigation should not be enforced even if that would not deter future violations. And they have recognized correctly that a validly commenced IRS investigation may become tainted later. Determining whether an IRS summons that serves a constitutionally tainted investigation may be enforced is an important and recurring issue warranting this Court's review because taxpayers should not be burdened with tax investigations based on unconstitutionally obtained information.

A. The Decision Below Contradicts Other Circuits' Decisions Regarding Whether Non-Enforcement of a Summons Must Serve to Deter Unlawful Investigative Conduct

The court below rejected Agrama's contention that the unconstitutional FBI searches tainted the IRS's investigation of Agrama, and thus the summons, because of a supposed "absen[ce] of proof of cooperation between the FBI and IRS." App.5a. The court's cooperation requirement reflected Exclusionary Rule jurisprudence. App.5a (citing *Grimes* v. *Commissioner of Internal Revenue Service*, 82 F.3d 286, 290 (9th Cir. 1996)). The Exclusionary Rule's "sole purpose" is deterring similar unconstitutional conduct, *Davis* v. *United States*, 564 U.S. 229, 236-237 (2011), and the presence of a cooperative arrangement between the searching agency and the using agency is vital to evaluating whether suppression would promote deterrence, *see Grimes*, 82 F.3d at 288-290.

As the Second and Third Circuits have correctly recognized, however, that reasoning is irrelevant and Exclusionary Rule jurisprudence is not controlling in the context of an IRS summons. The Second Circuit has held that "the issue … is not whether evidence should be excluded from the fact finder's consideration." *United States* v. *Beacon Federal Savings & Loan*, 718 F.2d 49, 53 (2d Cir. 1983). Rather, because the IRS seeks "the court's aid in enforcing [the] summons," the question under *Powell* is "whether judicial enforcement of an IRS summons issued as the result of a fourth amendment violation might constitute one of the "other forms of agency abuse of … judicial process." *Id.* The Third Circuit agrees. *Gluck* v. *United States*, 771 F.2d 750, 755 (3d Cir. 1985) (question is whether misconduct "should bar the IRS from receiving the court's aid in enforcing summonses"); *United States* v. *Bank of Commerce*, 405 F.2d 931, 934 (3d Cir. 1969) (Exclusionary Rule "is not dispositive" because "a court may not permit its process to be abused" (cleaned up)). Put another way, whereas preserving judicial integrity is not the Exclusionary Rule's purpose, *see Davis*, 564 U.S. at 236-237, the *Powell* standard "has clear judicial integrity overtones," *Gluck*, 771 F.2d at 758 n.8.

Accordingly, those circuits have made clear that courts should consider whether enforcement of the IRS summons would "further[] the effects of, if not actually encourag[e], unconstitutional conduct," whether "suppression of evidence in a subsequent criminal proceeding would not be an adequate remedy" because of potential civil liability or difficulty evaluating the applicability of the Exclusionary Rule, and "the burden on a taxpayer of being tied up in an

audit that may continue for months, if not years." *Beacon*, 718 F.2d at 53-54; *see Gluck*, 771 F.2d at 756-758. Such concerns are significant here irrespective of whether the FBI and the IRS had a cooperation agreement, or whether non-enforcement of the summons would deter unconstitutional conduct by the FBI. Yet, the court below disregarded them.

The court below also contravened *Clarke* in denying Agrama's request for an evidentiary hearing on this issue. Agrama had "a right" to one because "he point[ed] to specific facts or circumstances plausibly raising an inference of bad faith," *Clarke*, 573 U.S at 249, especially given that "circumstantial evidence can suffice to meet that burden" because the nature of the relationship between the FBI and the IRS is within their exclusive knowledge, *id*. at 254-255. The central fact here is that the purpose of the FBI's Los Angeles searches was to find evidence of Agrama's alleged tax fraud through his international business dealings—the very activity that the IRS now investigates. Further, the lead Italian prosecutor asked the Assistant U.S. Attorney who was supervising the Los Angeles searches about "a domestic investigation" of Agrama just a few days after those unconstitutional searches occurred. C.A.ECF #28-3. These facts suffice to plausibly suggest that the IRS's future use of ill-gotten privileged evidence was at least within "the offending [searching] officer[s'] zone of primary interest" at the time of the searches, which is enough under the Exclusionary Rule. *United States* v. *Janis*, 428

U.S. 433, 458 (1976). The court of appeals disregarded all this evidence.[5]

B. The Decision Below Contradicts Other Circuits' Decisions Regarding Whether an IRS Summons Should Be Quashed If the Summons Serves an Investigation That Became Tainted After It Was Commenced

Although Agrama argued that the IRS investigation's *current* scope or focus was tainted by the unconstitutional Los Angeles searches (through the Chersicla Report), the court of appeals rejected Agrama's taint argument because, it said, "even if the IRS never obtained the Chersicla Report, it would have opened an investigation into Agrama" anyway given the IRS's "rules mandat[ing] the automatic examination of any taxpayer removed from the voluntary disclosure program." App.6a.

In focusing exclusively on the initiation of the IRS investigation, the court contradicted Second and Third Circuit precedent recognizing that what matters is whether the summons serves a tainted investigation at the time, even if the investigation was commenced properly. *See Beacon*, 718 F.2d at 53-55 ("investigation that was intensified as the result of the

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[5] Agrama introduced the correspondence between the Italian prosecutor and the Assistant U.S. Attorney about "a domestic investigation" through a motion to supplement the record on appeal because the government's Exclusionary Rule argument was "a new argument raised by Government on appeal" for the first time. App.7a n.3; *see* C.A.ECF #28-1. The court denied Agrama's motion as moot, App.7a n.3, which was erroneous given that the court rejected Agrama's taint argument based on the Exclusionary Rule requirement of cooperation.

information unconstitutionally obtained"); *Bank of Commerce*, 405 F.2d 931, 934-935 (unconstitutional search provided "the leads" for summoned records).

The Second and Third Circuits again have it right. The abuse of process takes place when the IRS seeks to enlist the court's aid in furthering an investigation. If, as here, the IRS comes to the court with unclean hands, it makes no difference whether its hands were already dirty when it commenced the investigation or were dirtied later. *Cf. Terry* v. *Ohio*, 392 U.S. 1, 18-19 (1968) ("a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope").

Under the Second and Third Circuits' approach, Agrama adduced sufficient evidence to preclude enforcement of the summons or, at a minimum, to hold a *Clarke* hearing to probe the connection between the Chersicla Report and the investigation's current scope or focus. For example, the summons itself is directed at obtaining a copy of the Chersicla Report—as that is the only document in the IRS's possession that the IRS has identified as potentially incomplete. U.S. C.A.Br.20. The Chersicla Report purportedly addresses Agrama's business activity in Italy and Hong Kong, App.11a, which is also the examination's current focus: "Agrama's foreign business activity," C.A.ER-120. The IRS opened its audit of Agrama's U.S. company, Harmony Gold, fifteen months after the IRS removed him from the voluntary-disclosure program, App.6a, but just six months after the Chersicla Report was issued, C.A.ER-124, 126 ¶¶10, 20. *See* C.A.ER-113 ¶6. And in 2016, the IRS issued penalty letters to Agrama and Harmony Gold admittedly based on the Chersicla Report. C.A.ER-114 ¶¶9, 11.

All this post-commencement history strongly indicates that the Chersicla Report shaped the current scope or focus of the investigation that the summons now serves.

C. The Circumstances Under Which Unconstitutional Conduct May Taint an IRS Investigation and Thereby Preclude Summons Enforcement Is an Important National Issue

Clarifying the circumstances under which unconstitutional conduct may taint an IRS investigation and thereby preclude IRS-summons enforcement is a nationally important issue warranting this Court's attention.

First, as explained above, taxpayers' rights and duties should be uniform across the country, not dependent on where the taxpayer happens to be. *Supra* p.20.

Second, these issues acutely implicate the fairness of the national government's relation to its citizens. "[O]nce the government begins to concentrate all its enormous resources on a citizen, the chance of its discovering that he has violated the tax laws is greatly multiplied." *Beacon*, 718 F.2d at 54 (cleaned up). Inviting the IRS to concentrate its enormous resources based upon information obtained in violation of the Constitution forms a direct line to the abuse of power. And as explained above, allowing the IRS to proceed while deferring the question to a later suppression hearing may prove inadequate for various reasons: it "could create later problems" for the court when "called upon" to evaluate the taxpayer's Exclusionary Rule claim; the Exclusionary Rule might be irrelevant

because the IRS seeks *civil* liability; and the Exclusionary Rule would not spare the taxpayer the burden of the audit. *Id.* at 53-54; *see supra* pp.23-24.

III. THE NINTH CIRCUIT'S REJECTION OF AGRAMA'S ARGUMENT THAT SUMMONS ENFORCEMENT WOULD IMPROPERLY CIRCUMVENT THE MLATS CONFLICTS WITH THIS COURT'S AND OTHER CIRCUITS' PRECEDENT

Italy's MLATs with Hong Kong, Switzerland, and Ireland undisputedly prohibit the IRS from obtaining the MLAT Documents directly from Italy. The IRS could have requested the MLAT Documents from their original source countries or asked Italy to request consent from those countries to share the documents with the IRS. Instead, the IRS has demanded the documents from Agrama, whose Italian attorney received a copy of the documents from the Italian prosecutor only to facilitate Italy's prosecution of him, consistent with the MLATs' disclosure restrictions. The summons, therefore, is a blatant attempt to circumvent the MLATs' disclosure regime.

The court of appeals brushed that aside because it saw "no evidence that the laws of Italy or the terms of the MLATs would be offended by [*Agrama's*] production of the MLAT documents." App.4a. The court's narrow focus on whether "foreign law … bars [the demanded] production," App.5a (cleaned up), contravenes other circuits' precedent on the application of *Powell* and this Court's and another circuit's precedent on the application of the principle of international comity, all of which warn federal courts against facilitating the circumvention of legal disclosure restrictions.

A. The Decision Below Contradicts Other Circuits' Application of *Powell*

The Second and Eleventh Circuits have recognized that using a summons to obtain information when another law "block[s] access to or use of [the] desired information" may be an "abuse or bad faith" and thus grounds to quash the summons under *Powell*. *PAA Management, Ltd.* v. *United States*, 962 F.2d 212, 219 (2d Cir. 1992); *see also United States* v. *Clarke*, 816 F.3d 1310, 1317 (11th Cir. 2016) ("issuing summons in bad faith for the sole purpose of circumventing tax court discovery would be an improper purpose as a matter of law").

By disregarding the IRS's attempted circumvention, the court of appeals contradicted those circuit precedents and disregarded *Powell*'s plain implications.

B. The Decision Below Contradicts This Court's and Another Circuit's Precedents Regarding International Comity

The court of appeals' decision also contradicts precedents on the principle of international comity. It directly contradicts the Second Circuit's conclusion that using judicial process to compel disclosure to circumvent a foreign disclosure law violates comity and therefore should be declined. In *Application of Chase Manhattan Bank*, the United States wanted to obtain records in the possession of a Panamanian branch of a U.S. bank, but Panamanian law prohibited the local branch from making the production (absent the consent of local authorities). 297 F.2d 611, 612 (2d Cir. 1962). So, the United States instead directed a subpoena to the bank's U.S. headquarters, on the theory

that, "consistently with Panamanian law," a U.S.-based bank official could direct the Panamanian branch to supply the records. *Id.* at 613. The Second Circuit refused to enforce the subpoena as written, declaring it was "an attempt to circumvent" Panama's disclosure restrictions and therefore its enforcement would "scarcely reflect[] the kind of respect which [U.S. courts] should accord to the laws of a friendly foreign sovereign state." *Id.* The court added: "Upon fundamental principles of international comity, our courts … should not take such action as may cause … an unnecessary circumvention of [a friendly neighbor's] procedures." *Id.* (cleaned up); *see also Ings* v. *Ferguson*, 282 F.2d 149, 152-153 (2d Cir. 1960) (same).

The Second Circuit's position accords with this Court's broader teachings on comity—whereas the Ninth Circuit's approach contravenes those teachings. "Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Société Nationale Industrielle Aérospatiale* v. *U.S. District Court for the Southern District of Iowa*, 482 U.S. 522, 543 n.27 (1987). In the context of a document request, "[t]he concept of international comity requires" a "more particularized analysis of the respective interests of the foreign nation and the requesting nation," including "whether the information originated in the United States," "the availability of alternative means of securing the information," and "the extent to which … compliance with the request would undermine important interests of the state where the information is located." *Id.* at 543-544 & n.28 (cleaned up); *accord Restatement (Fourth) of Foreign Relations Law* §426 cmt.a.

Here, these considerations require serious attention to the circumvention of the MLATs' disclosure regime. The summons touches the laws and interests of four foreign jurisdictions: Italy, Hong Kong, Switzerland, and Ireland. The summoned MLAT Documents came from Hong Kong, Switzerland, and Ireland. Those countries supplied them to Italy based on Italy's promise that they would be used only for Italy's prosecution of Agrama. Italy in turn supplied them to Agrama specifically for that purpose, consistent with Italian law and the MLATs. They remain with Agrama's attorney in Italy today. And the MLATs provide mechanisms for the IRS to attempt to obtain the documents—either asking the source countries directly or asking Italy to request consent from those source countries to share them. *See supra* pp.7-9.

Italy and the source countries have a strong interest in ensuring that the MLAT Documents are used only for the limited purpose for which they were provided to Italy. The MLATs' disclosure regime embodies the "rule of limited use," which states that "materials obtained through international cooperation in criminal matters may not be used for … purposes and proceedings other than those for which cooperation was requested." United Nations Office on Drugs and Crime, *Manual on International Cooperation in Criminal Matters related to Terrorism* 60 & n.165 (2009).[6] This rule is one of the "basic obligations" of international legal cooperation on criminal matters. *Id.* at 5, 27.

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[6] https://www.unodc.org/documents/terrorism/Publications/Manual_Int_Coop_Criminal_Matters/English.pdf.

The rule reciprocally benefits both requested and requesting nations. Requested nations may have various strong reasons to want to limit the material's use. *See, e.g.*, App.35a-36a; *In re Rubber Chemicals Antitrust Litigation*, 486 F. Supp. 2d 1078, 1084 (N.D. Cal. 2007) (assurance of confidentiality for industry submissions to European antitrust regulator is "indispensable to ensure the viability and efficacy" of regulatory program); *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, No. 05-MD-1720, 2010 WL 3420517, at *9 (E.D.N.Y. Aug. 27, 2010) (same). For requesting nations, the rule "ensure[s] that [requested] states are not deterred from assisting … in the prosecution of crime by the fear that material that they supply for one or more specified purposes might be used for other unrelated purposes." *Gohil* v. *Gohil*, [2012] EWCA Civ 1550, ¶18.[7] If requesting nations "were unable to give the guarantees and undertakings regarding collateral use required by some foreign states, there would be a reduction in the level of co-operation that they would be likely to provide." *Id.* ¶19. In short, the rule is "necessary to ensure that the scheme of international mutual assistance in criminal matters works effectively." *Id*.

Thus, the IRS's "attempt[] to circumvent" the MLAT's "limitations by seeking an order compelling" Agrama to disclose the MLAT Documents would "trench upon the interests of" Italy and its MLAT partners. *United States* v. *Davis*, 767 F.2d 1025, 1034 (2d Cir. 1985). If courts could compel disclosure from people who received documents properly pursuant to

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[7] https://www.bailii.org/ew/cases/EWCA/Civ/2012/1550.html.

an MLAT request—as Agrama did in connection with his criminal prosecution in Italy—the rule of limited use would have a giant loophole, because requesting countries will routinely but properly share such documents with people who are subject to the jurisdiction of other countries' courts. Consequently, U.S. courts must "strike a careful balance between the competing national interests and the extent to which these interests would be impinged upon by [an enforcement] order" that would circumvent the rule of limited use. *Id.* at 1034-1035.

By blinding itself to the IRS's concrete attempt to circumvent the MLATs' disclosure regime, the court of appeals failed to heed these teachings. In effect, the court required a "true conflict," where Agrama himself could not comply with both the IRS summons and foreign law. The D.C. Circuit has also suggested that a true conflict is necessary to trigger consideration of foreign sovereign interests in a dispute over subpoena enforcement. *In re Sealed Case*, 932 F.3d 915, 931 (D.C. Cir. 2019). The Second Circuit, however, has disagreed, recognizing—consistent with the precedents discussed above—that the principle of comity as articulated by this Court in *Aérospatiale* and other cases requires consideration of foreign sovereign interests even in the absence of a true conflict (at least outside the distinct context of "prescriptive comity," i.e., determining the territorial reach of legislation). *See In re Vitamin C Antitrust Litigation*, 837 F.3d 175, 185-186 (2d Cir. 2016), *vacated on other grounds sub nom. Animal Science Products, Inc.* v. *Hebei Welcome Pharmaceutical Co.*, 138 S. Ct. 1865 (2018); *cf. Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-265 (2004) (when asked to enforce foreign

requests for judicial assistance under 28 U.S.C. §1782(a), courts should "consider whether … request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country").

C. The Proper Role of Comity in Adjudicating International Discovery Disputes Is an Important National Issue

The United States is party to many MLATs of its own—with the European Union, Switzerland, Ireland, and Italy, among others—that contain provisions reflecting the rule of limited use.[8] When the shoe is on the other foot, the United States presumably would expect other countries' courts not to compel disclosures that circumvent the disclosure regime in its MLATs, and so it is imperative that the United States do the same. *See Chase Manhattan*, 297 F.2d at 613 ("Just as we would expect and require branches of foreign banks to abide by our laws applicable to the

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[8] *See, e.g.*, Agreement on Mutual Legal Assistance Between the United States of America and the European Union art. 9, June 25, 2003, T.I.A.S. No. 10-201.1 ("Limitations on use to protect personal and other data"); Treaty Between the United States of America and the Swiss Federation on Mutual Assistance in Criminal Matters art. 5, May 25, 1973, T.I.A.S. No. 8302, 27 U.S.T. 2019 ("Limitations on Use of Information"); Treaty Between the Government of the United States of America and the Government of Ireland on Mutual Legal Assistance in Criminal Matters art. 7, Jan. 18, 2001, T.I.A.S. No. 13137 ("Limitations on Use"); Instrument Amending the November 9, 1982 Treaty Between the United States of America and the Italian Republic on Mutual Assistance in Criminal Matters art. 8, May 3, 2006, T.I.A.S. No. 10-201.36 ("Protecting Confidentiality and Restricting Use of Evidence and Information").

conduct of their business in this country, so should we honor their laws affecting our bank branches which are permitted to do business in foreign countries.").

Certainly, the United States has recognized and embraced the reciprocal benefits of the rule of limited use when it served the United States's interests. The IRS itself has repeatedly done so to refuse to disclose confidential documents—and federal courts have supported that position. *See Shannahan* v. *IRS*, 680 F. Supp. 2d 1270, 1276 (W.D. Wash. 2010) (affirming IRS's decision not to disclose documents obtained from Hong Kong pursuant to mutual legal assistance agreement that "require[d] information obtained to remain confidential and to be used only for the criminal investigation"), *aff'd*, 672 F.3d 1142 (9th Cir. 2012); *Pacific Fisheries, Inc.* v. *IRS*, 2009 WL 1249296, at *2-3 (W.D. Wash. May 6, 2009) (same regarding documents received under cooperation agreement with Russia), *aff'd*, 395 F. App'x 438, 440 (9th Cir. 2010). As the IRS explained in those cases, violating the MLATs' assurance of confidentiality would "jeopardize the IRS's ability to obtain information from [other countries] in future investigations." *Shannahan*, 680 F. Supp. 2d at 1276; *see Pacific Fisheries*, 2009 WL 1249296, at *2 ("failure to honor [source nation's] expectations of confidentiality … would chill future cooperation by" source nation and "materially impair[] the effectiveness of th[e] treaty," to the United States's detriment).

Other federal agencies have done the same. *See, e.g.*, *Grynberg* v. *DOJ*, 302 F. Supp. 3d 532, 540 (S.D.N.Y. 2018) (affirming Justice Department's refusal to disclose documents obtained from Switzerland "pursuant to the MLAT's confidentiality

provisions"), *aff'd*, 758 F. App'x 162 (2d Cir. 2019); *FTC* v. *Qualcomm Inc.*, No. 17-cv-220, ECF #152, at 4 n.15 (N.D. Cal. July 18, 2017) (Federal Trade Commission refused to produce documents received from European and Korean authorities during their investigations, to "protect[] the interests of [those] foreign agencies").

But as this case illustrates, neither the United States nor the federal judiciary is consistent about accounting for legitimate foreign sovereign interests in discovery disputes touching on foreign states. That holds true when, like here, federal courts are asked to compel production of documents provided by foreign governments in connection with their own confidential investigations—sometimes even over the United States's express opposition to disclosure, as in the *Qualcomm* case just cited. *Compare, e.g.*, *Qualcomm*, ECF #176, at 2 (N.D. Cal. Aug. 24, 2017) (compelling production even though "FTC wants the Court to consider the foreign agencies' objection to production under *Aérospatiale*"), *with Payment Card Interchange*, 2010 WL 3420517, at *9-10, *and Rubber Chemicals*, 486 F. Supp. 2d at 1083-1084.

Such inconsistency is unsurprising given this Court's prior decision "not [to] articulate specific rules to guide this delicate task" of determining how to adjudicate comity issues in discovery disputes, *Aérospatiale*, 482 U.S. at 546, and the "dearth of appellate decisions" articulating a "coherent body of doctrine" on the subject, *Payment Card Interchange*, 2010 WL 3420517, at *7 n.14. A recent extensive empirical study found that under *Aérospatiale*, "[c]ourts continue to show a pro-forum bias in favor of U.S. national interests, and they frequently do not

understand the interests behind foreign nations' laws." Sant, *Court-Ordered Law Breaking: U.S. Courts Increasingly Order the Violation of Foreign Law*, 81 Brook. L. Rev. 181, 225 (2015). That creates a significant risk of eroding foreign states' respect for U.S. interests and compromising the ability of U.S. law enforcement to obtain cooperation from other countries. *See id.* at 232-235 ("Impact on U.S. Business and Foreign Respect for U.S. Laws"). Indeed, representatives of twenty-eight European Union members recently stated that attempts by U.S. law enforcement to "circumvent[] … existing MLATs" are an "interference with the territorial sovereignty of an EU member state." *Statement of the Article 29 Working Party* 9 (Nov. 29, 2017).[9]

Only a few Terms ago, this Court took up a challenge to an informational demand—a warrant—that, like the summons here, sought to circumvent an MLAT (between the United States and Ireland), but later dismissed the case as moot. *United States* v. *Microsoft Corp.*, 138 S. Ct. 1186 (2018). This case presents the Court with a new chance to bring some clarity to comity law in a way that provides all litigants with greater predictability, respects foreign sovereigns' interests, and reciprocally enhances the United States's ability to obtain cooperation from foreign governments.

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[9] http://ec.europa.eu/newsroom/just/document.cfm?doc_id=48801.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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