No. 23A_____

IN THE

Supreme Court of the United States

JEHAN AGRAMA,

Applicant,

v.

UNITED STATES,

Respondent.

APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Pursuant to this Court's Rule 13.5, applicant respectfully requests a 30-day extension of time, to and including January 19, 2024, to file a petition for a writ of certiorari in this case. Applicant has not previously requested an extension.

1. The United States Court of Appeals for the Ninth Circuit issued its decision and entered final judgment on July 12, 2023, *see* App. A, and denied applicant's timely rehearing petition on September 21, 2023, *see* App. B. Absent an extension of time, therefore, applicant's petition for a writ of certiorari would be due on December 20, 2023. This application complies with Rules 13.5 and 30.2 because it is being filed more than ten days before the petition is due. This Court would have jurisdiction over applicant's case pursuant to 28 U.S.C. §1254(1). The Ninth Circuit has stayed issuance of the mandate pending this Court's disposition of applicant's forthcoming certiorari petition. App. C.

2. This case presents multiple important and recurring questions concerning the scope of courts' authority to enforce IRS summonses. Under this Court's long-standing precedent, courts 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)). Further, the party opposing an IRS summons is "entitled" to an evidentiary hearing to probe the summons' validity 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. *Id.* at 254.

Here, the IRS petitioned to enforce a summons for documents issued to applicant's predecessor-in-interest, Frank Agrama, who died after oral argument was heard in the Ninth Circuit. In the district court, Agrama responded that the summons should not be enforced under the *Powell* test for several reasons. First, the IRS admittedly already possesses many of the summoned documents, thus failing to make a prima facie showing of the third *Powell* requirement. 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 an expert report—the Chersicla Report—that was prepared for Italian prosecutors based on information they obtained through the FBI's unconstitutional search of Mr. Agrama's home and office in Los

Angeles. And third, the summons was issued in bad faith also because it was designed to circumvent disclosure prohibitions in multiple Mutual Legal Assistance Treaties ("MLATs") between Italy and other countries, and therefore enforcement would abuse judicial process and breach the principle of international comity. In the alternative, Agrama argued that, under *Clarke*, he was at a minimum entitled to an evidentiary hearing to investigate the summons' validity with respect to each of the defects just identified.

3. The district court denied Agrama's motion for a hearing and granted the IRS's petition to enforce the summons. The Ninth Circuit affirmed on grounds that contradict decisions of this Court and other circuits on multiple important issues. App. A.

4. First, notwithstanding the IRS's "conce[ssion] that it already possesses some of the material covered by the summons," the court of appeals concluded that the IRS had satisfied the third *Powell* requirement because there is "no evidence" that the summons was "designed to 'harass'" Agrama. App. A at 4. The Ninth Circuit explained that the third *Powell* 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." *Id.* (cleaned up). In *Powell* and again in *Clarke*, however, this Court expressly stated that an IRS summons could be enforced only if "the information sought is not already within the IRS' possession," and expressly treated harassment as a separate ground for invalidating an IRS summons. *Powell*, 379 U.S. at 56-58; *Clarke*, 573 U.S. at 250-251. Thus, the court of appeals collapsed the "not already possessed" requirement into the separate "not designed to harass" requirement,

disregarding this Court's dictate that 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).

The Ninth Circuit's approach widens confusion among the circuits about the meaning of the third *Powell* requirement. Several circuits have remained faithful to what *Powell* actually said, holding unqualifiedly that a summons may not be enforced if, or at least to the extent that, the IRS already possesses summoned information. *See United States* v. *Kerrigan*, 114 F.3d 1170 (1st Cir. 1997) (table) (per curiam); *United States* v. *Theodore*, 479 F.2d 749, 755 (4th Cir. 1973); *United States* v. *Kis*, 658 F.2d 526, 537 (7th Cir. 1981). Other circuits have, like the Ninth Circuit, rejected a literal reading of *Powell* in favor of their own policy view, but they have not all agreed on how exactly to apply the "not already possessed" requirement. *See United States* v. *First National State Bank of New Jersey*, 616 F.2d 668, 675 (3d Cir. 1980); *United States* v. *Davis*, 636 F.2d 1028, 1037 (5th Cir. 1981); *United States* v. *Monumental Life Insurance Co.*, 440 F.3d 729, 735 (6th Cir. 2006); *United States* v. *Clower*, 666 F. App'x 869, 875 (11th Cir. 2016) (per curiam).

5. Next, the court of appeals rejected Agrama's claim that the current scope or focus of the IRS's investigation is unconstitutionally tainted because there is no "proof of cooperation between the FBI and the IRS," and because the IRS "would have opened an investigation into Agrama" "even if the IRS never obtained" the tainted expert report. App. A at 6-7. Both conclusions erroneously departed from other circuits' positions.

First, the court of appeals drew its requirement that there be cooperation between the FBI (the searching agency) and the IRS (the using agency) from Exclusionary Rule jurisprudence. *See* App. A at 6 (citing *Grimes* v. *Commissioner of Internal Revenue*

Service, 82 F.3d 286, 290 (9th Cir. 1996)). But the Second and Third Circuits correctly recognize that Exclusionary Rule jurisprudence is not controlling in the context of IRS summons enforcement because "the issue … is not whether evidence should be excluded from the fact finder's consideration" (*i.e.*, suppressed), but rather whether, under *Powell*, the IRS should "receiv[e] the court's aid in enforcing a summons." *United States* v. *Beacon Federal Savings & Loan*, 718 F.2d 49, 52-53 (2d Cir. 1983); *see also Gluck* v. *United States*, 771 F.2d 750, 755 (3d Cir. 1985); *United States* v. *Bank of Commerce*, 405 F.2d 931, 934 (3d Cir. 1969).

Second, the court of appeals focused on whether the IRS "would have *opened* an investigation into Agrama" regardless of the tainted report, App. A at 6-7 (emphasis added), but the Second and Third Circuits have rightly recognized that a court should (also) decline to enforce an IRS summons if it was "issued to assist an investigation" that, though commenced legitimately, was—as here—later altered or "intensified as the result of the information unconstitutionally obtained by the agent." *Beacon*, 718 F.2d at 53-55; *see Gluck*, 771 F.2d at 756-758.

6. Finally, the court of appeals held that compelling Agrama to produce documents subject to MLAT disclosure restrictions would not circumvent those treaties or violate "principles of international comity" because there is "no evidence" that "the MLATs would be offended by [Agrama's] production of the MLAT documents"; rather, the MLATs prohibit only *Italy* from disclosing the documents to the IRS. App. A at 5. That missed the point and contradicts other circuits' precedent and the views of foreign countries, many of which are parties to similar MLATs with the United States.

Italy provided many of the summoned documents to Agrama as a litigation disclosure required by Italian law and consistent with the MLATs' disclosure restrictions, which specify that the documents may be used or disclosed (only) for the purpose for which Italy requested them: Italy's prosecution of Agrama. Through the summons, the IRS seeks to do indirectly what it cannot do directly: obtain the documents that Italy collected through its MLAT requests to other countries. The Second and Eleventh Circuits have held that enforcement of an IRS summons is improper if it was issued to circumvent a legal disclosure restriction. *See PAA Management, Ltd.* v. *United States*, 962 F.2d 212, 219 (2d Cir. 1992); *United States* v. *Clarke*, 816 F.3d 1310, 1317 (11th Cir. 2016). And the Second Circuit has held that using judicial process to "circumvent" foreign disclosure law violates the principle of international comity. *In re Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962). Moreover, regulators in the European Union have previously voiced their concern with attempts by U.S. law enforcement to "circumvent[] … existing MLATs," stating that doing so is an "interference with the territorial sovereignty of an EU member state." *Statement of the Article 29 Working Party* 9 (Nov. 29, 2017).[1]

7. Applicant respectfully requests a 30-day extension of time, to and including January 19, 2024, within which to file a petition for a writ of certiorari. This extension is needed because applicant's counsel of record has other significant fixed obligations in the same period in which the petition is currently due, including: (1) a motion for judgment

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

due on December 19, 2023, in *MP Materials Corp.* v. *United States*, No. 23-cv-1975 (Ct. Fed. Cl.); (2) a hearing on December 20, 2023, on a motion for a preliminary injunction in *Florida Agency for Health Care Administration* v. *Administrator for the Centers for Medicare and Medicaid*, No. 23-cv-61595 (S.D. Fla.); and (3) a rehearing petition due on January 8, 2023, in *Calumet Shreveport Refining LLC* v. *EPA*, No. 22-60266 (5th Cir.).

For the foregoing reasons, applicant respectfully requests that the time for filing a petition for a writ of certiorari in this case be extended to and including January 19, 2024.

Respectfully submitted.

/s/ DAVID M. LEHN

MATTHEW D. BENEDETTO
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 South Grand Avenue
Suite 2400
Los Angeles, CA 90071
(213) 443-5300
matthew.benedetto@wilmerhale.com

DAVID M. LEHN
Counsel of Record
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue NW
Washington, DC 20005
(202) 237-2727
dlehn@bsfllp.com

NOVEMBER 29, 2023

APPENDIX A

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Petitioner-Appellee, v. JEHAN AGRAMA, Respondent-Appellant.	No. 22-55447 D.C. No. 2:19-cv-09204-DDP-JC MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dean D. Pregerson, District Judge, Presiding

Argued and Submitted April 19, 2023
Pasadena, California

Before: WARDLAW and KOH, Circuit Judges, and MCMAHON,** District Judge.

Frank Agrama appeals from the district court's order enforcing an Internal Revenue Service ("IRS") summons that requires Agrama to appear and produce for examination certain records, including records related to his prosecution for tax

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Colleen McMahon, United States District Judge for the Southern District of New York, sitting by designation.

crimes in Italy.[1] Agrama argues that the summons was issued in bad faith and that, at a minimum, the district court erred by ordering enforcement of the summons without an evidentiary hearing.

We have jurisdiction under 28 U.S.C. § 1291. We review for clear error the district court's decision to enforce the summons. *See United States v. Richey*, 632 F.3d 559, 563 (9th Cir. 2011) (citing *David H. Tedder & Assocs., Inc. v. United States*, 77 F.3d 1166, 1168 (9th Cir.1996)). We review the district court's decision not to hold an evidentiary hearing for abuse of discretion. *See United States v. Clarke*, 573 U.S. 248, 255–56 (2014) (citations omitted). We affirm.[2]

The district court did not clearly err by enforcing the summons, nor did it abuse its discretion by denying Agrama an evidentiary hearing. To enforce an IRS summons, the Government must make a prima facie showing that the summons was issued in good faith. *See Crystal v. United States*, 172 F.3d 1141, 1143–44 (9th Cir. 1999). The Government does so by showing that (1) the investigation

[1] Respondent-Appellant Frank Agrama passed away on April 25, 2023, shortly after oral argument was heard on this appeal. Jehan Agrama, the daughter of Frank Agrama and the co-trustee of the Agrama Trust, which is the custodian of the summonsed records, has filed an unopposed motion to be substituted as respondent-appellant pursuant to Federal Rule of Appellate Procedure 43(a)(1). That motion is GRANTED. However, in this memorandum disposition we refer to the decedent, Frank Agrama, as the Respondent-Appellant.

[2] The parties are familiar with the facts of this case, so we include them only as necessary to resolve the appeal.

will be conducted pursuant to a legitimate purpose; (2) the information sought may be relevant to that purpose; (3) the information sought is not already within the IRS's possession; and (4) the administrative steps required by the Internal Revenue Code have been followed. *United States v. Powell*, 379 U.S. 48, 57–58 (1964). The Government's burden "is a slight one, and may be satisfied by a declaration from the investigating agent that the *Powell* requirements have been met." *Richey*, 632 F.3d at 564 (quoting *United States v. Dynavac, Inc.*, 6 F.3d 1407, 1414 (9th Cir. 1993)).

If the Government meets its burden, the taxpayer challenging the summons then has the "heavy" burden of proving either lack of institutional good faith or an abuse of process. *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 314–16 (1978). There is an abuse of process if the summons was "issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *Powell*, 379 U.S. at 58. A taxpayer challenging a summons is entitled to an evidentiary hearing only when "he can point to specific facts or circumstances plausibly raising an inference of bad faith." *Clarke*, 573 U.S. at 254.

The district court did not err by concluding that the Revenue Agent's declaration was sufficient to meet the Government's initial burden to show good

faith, as the Agent's declaration indicates that each of the *Powell* factors are met. Moreover, the district court did not clearly err in rejecting Agrama's contention that the IRS did not meet the third *Powell* factor. The third *Powell* factor serves to prohibit the issuance of "unnecessary summonses that are designed to 'harass the taxpayer' or that otherwise abuse the court's process." *Action Recycling Inc. v. United States*, 721 F.3d 1142, 1146 (9th Cir. 2013) (citing *Powell*, 379 U.S. at 54–59). But "[it] was not designed . . . to obstruct the ability of the IRS to obtain relevant information necessary to a legitimate investigation." *Id.* (citing *United States v. Euge*, 444 U.S. 707, 711 (1980). Pursuant to that goal, we have long held that the IRS may issue a summons to confirm the completeness and accuracy of documents obtained from another source. *See Liberty Fin. Servs. v. United States*, 778 F.2d 1390, 1393 (9th Cir. 1985).

Although the IRS concedes that it already possesses some of the material covered by the summons, the agency does not possess all of the summonsed documents, and it knows that at least some documents in its possession are incomplete. Agrama offers no evidence to prove — or even to raise a plausible inference — that the IRS summons is motivated by anything other than a desire to ensure that it has accurate and complete copies of anything it has obtained from other sources. And since it was unnecessary to determine to what extent documents in the IRS's possession were duplicative of the documents sought, the

district court did not abuse its discretion by denying Agrama an evidentiary hearing on this point.

Agrama also argues that he is barred from producing the so-called Mutual Legal Assistance Treaty ("MLAT") documents because Italy could not itself produce those documents to the IRS without first obtaining permission from Hong Kong, Switzerland, and Ireland, per the terms of the relevant MLATs. But he offers no evidence that the laws of Italy or the terms of the MLATs would be offended by *his* production of the MLAT documents that are in *his* possession in connection with a U.S. investigation into *his* conduct as a U.S. citizen. As such, he cannot challenge enforcement of the summons on the ground that principles of international comity demand nonenforcement. *See United States v. Vetco Inc.*, 691 F.2d 1281, 1289 (9th Cir. 1981) ("The party relying on foreign law has the burden of showing that such law bars production.").

Agrama next argues that it is an abuse of judicial process to seek court enforcement of a summons issued in connection with an investigation that "intensified" because of information obtained during an unconstitutional search. *United States v. Beacon Fed. Sav. & Loan*, 718 F.2d 49, 53 (2d Cir. 1983). Agrama claims that the "scope or focus" of the current IRS investigation, and of this summons specifically, was shaped and intensified by evidence derived from the Federal Bureau of Investigation's ("FBI") illegal search of his Los Angeles

home in 2006. Specifically, Agrama claims that the IRS's current investigation was spurred by information from an Italian forensic accountant, Gabriela Chersicla, who was present during the FBI's 2006 search. Agrama presses this claim even though the report Chersicla produced at the behest of Italian prosecutors ("Chersicla Report") was based not on the FBI's search, but on review of documents seized in Hong Kong in 2007.

Agrama's argument is flawed both legally and factually. Because Agrama concedes that the FBI—not the IRS—conducted the 2006 search of his premises, enforcement of the IRS summons would not constitute an abuse of judicial process absent proof of cooperation between the FBI and IRS. *See Grimes v. Comm'r*, 82 F.3d 286, 290 (9th Cir. 1996) (holding that evidence illegally obtained by other law enforcement agencies should not be suppressed in an IRS civil tax proceeding unless there is "an agreement between agencies"). Notably, *Beacon* — the Second Circuit case on which Agrama principally relies — is inapplicable on the facts before us because it concerns an illegal search *that was conducted by the IRS*. *See* 718 F.2d at 53–55.

Further, the district court correctly concluded that receipt of the Chersicla Report did not shape the "scope or focus" of the IRS' investigation into Agrama. Agrama's argument that the IRS's investigation was shaped by the Chersicla Report rest on little more than speculation. In fact, even if the IRS never obtained

the Chersicla Report, it would have opened an investigation into Agrama: in February 2013, months before the Chersicla Report was completed, Agrama was expelled from the IRS's voluntary disclosure program for failure to disclose his criminal indictment in Italy, and IRS rules mandate the automatic examination of any taxpayer removed from the voluntary disclosure program.

Even assuming *arguendo* that the "scope or focus" of the IRS investigation was somehow impacted by the Chersicla Report, Agrama does not identify anything in that Report, or in any of other MLAT documents, that qualifies as privileged information — information that should not have been seen by Italian authorities during the 2006 FBI search. Agrama possesses the summonsed documents, so he should be able to identify any arguably tainted information they contain. As he did not do so, he failed to demonstrate that enforcement of the summons would constitute an abuse of process.

Finally, Agrama asserts that the summons should not be enforced because the IRS obtained the Chersicla Report from the Italian government in contravention of the Convention for the Avoidance of Double Taxation with Respect to Taxes on Income and the Prevention of Fraud or Fiscal Evasion, It.-U.S., Aug. 25, 1999, T.I.A.S. No. 09-1216 ("Tax Treaty"). There is no evidence that the IRS obtained the Chersicla Report via the Tax Treaty; the agency was given the Chersicla Report by a U.S. government official in Italy. Because

Agrama failed to advance any factual allegations suggesting that the Chersicla Report was obtained illegally, the district court did not abuse its discretion by denying Agrama's request for a hearing on this issue.

AFFIRMED.[3]

[3] In light of a new argument raised by the Government on appeal, Agrama moves to supplement the record with, or for the court to take judicial notice of, a 2006 email exchange. However, our affirmance is limited to the grounds relied upon by the district court, so Agrama's motion is DENIED as moot.

APPENDIX B

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Petitioner-Appellee, v. JEHAN AGRAMA, Respondent-Appellant.	No. 22-55447 D.C. No. 2:19-cv-09204-DDP-JC ORDER

Before: WARDLAW and KOH, Circuit Judges, and MCMAHON,* District Judge.

The panel has unanimously voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Therefore, both the petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

No future petitions for rehearing or rehearing en banc will be accepted.

* The Honorable Colleen McMahon, United States District Judge for the Southern District of New York, sitting by designation.

APPENDIX C

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Petitioner-Appellee, v. JEHAN AGRAMA, Respondent-Appellant.	No. 22-55447 D.C. No. 2:19-cv-09204-DDP-JC ORDER

Before: WARDLAW and KOH, Circuit Judges, and MCMAHON,* District Judge.

Appellant's Motion to Stay Issuance of the Mandate (Dkt. 49) is granted. Fed. R. App. P. 41(d). The mandate is stayed for 90 days pending the filing of a petition for a writ of certiorari in the Supreme Court. Appellant must notify this court in writing that the petition has been filed, in which case the stay will continue until the Supreme Court resolves the petition. Should the Supreme Court grant certiorari, the mandate will be stayed pending disposition of the case. Should the Supreme Court deny certiorari, the mandate will issue immediately. The parties shall inform this court immediately upon the Supreme Court's decision.

* The Honorable Colleen McMahon, United States District Judge for the Southern District of New York, sitting by designation.

CERTIFICATE OF SERVICE

I, David M. Lehn, a member of the bar of this Court, hereby certify that, on this 29th day of November 2023, all parties required to be served have been served copies of the foregoing in this matter by overnight courier and electronic mail to the addresses below.

ELIZABETH B. PRELOGAR
SOLICITOR GENERAL OF THE UNITED STATES
U.S. DEPARTMENT OF JUSTICE
ROOM 5616
950 Pennsylvania Avenue NW
Washington, DC 20530-0001
(202) 514-2217
SupremeCtBriefs@USDOJ.gov

FRANCESCA UGOLINI
ARTHUR T. CATTERALL
IVAN C. DALE
ATTORNEYS, TAX DIVISION
U.S. DEPARTMENT OF JUSTICE
P.O Box 502
Washington, DC 20044
(202) 514-8456
francesca.ugolini@usdoj.gov
ivan.c.dale@usdoj.gov
appellate.taxcivil@usdoj.gov

/s/ David M. Lehn
DAVID M. LEHN