No. 21-____

In the Supreme Court of the United States

HANNA KARCHO POLSELLI, ABRAHAM & ROSE, P.L.C., AND JERRY R. ABRAHAM, P.C., PETITIONERS

v.

UNITED STATES DEPARTMENT OF THE TREASURY—INTERNAL REVENUE SERVICE

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Internal Revenue Code generally requires the IRS, when it serves a summons on a third-party recordkeeper for records pertaining to a person "identified in the summons," to give that identified person notice of the summons. I.R.C. § 7609(a)(1). If the IRS issues a summons directing a bank to produce an accountholder's records, for example, it must generally notify that accountholder of the summons. Section 7609 then provides that "any person who is entitled to notice of a summons under subsection (a) shall have the right to begin a proceeding to quash" that summons in district court. *Id.* § 7609(b)(2); *see id.* § 7609(h)(1). In other words, only a person entitled to notice of a summons can seek judicial review of that summons.

There are a few exceptions to the notice requirement. As relevant here, the IRS need not provide notice of "any summons … 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)." *Id.* § 7609(c)(2)(D).

The question presented is whether the § 7609(c)(2)(D)(i) exception applies only when the delinquent taxpayer owns or has a legal interest in the summonsed records (as the Ninth Circuit holds), or whether the exception applies to a summons for *anyone's* records whenever the IRS thinks that person's records might somehow help it collect a delinquent taxpayer's liability (as the Sixth Circuit, joining the Seventh Circuit, held below).

PARTIES TO THE PROCEEDING

Petitioners are Hanna Karcho Polselli, Abraham & Rose, P.L.C., and Jerry R. Abraham, P.C. Petitioners asked the district court to quash the summonses the IRS issued for their bank records, and they were the appellants before the court of appeals.

Respondent is the Internal Revenue Service, an agency of the United States Department of the Treasury. The IRS was the respondent before the district court and the appellee before the court of appeals.

RELATED PROCEEDINGS

United States Court of Appeals (6th Cir.):

Polselli v. United States Dep't of the Treasury—IRS, No. 21-1010 (Jan. 7, 2022)

United States District Court (E.D. Mich.):

Polselli v. United States, No. 19-10956 (Nov. 16, 2020)

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTION AND STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

This case presents an acknowledged circuit split over an important issue of federal law: when the IRS summons an innocent party's records from a third-party recordkeeper (like a bank, accountant, or attorney), after issuing an assessment against a delinquent taxpayer, does § 7609 of the Internal Revenue Code entitle the innocent party to notice and an opportunity to petition to quash the summons? The Ninth Circuit says "yes." But the Sixth Circuit here, joining the Seventh Circuit, says "no." The question implicates fundamental, constitutionally recognized privacy rights, and this case is an excellent vehicle for resolving it.

1. In 1976, after a pair of this Court's decisions left few checks on the IRS's summons power, Congress enacted § 7609 to protect the public's privacy interests by granting the right to challenge IRS summonses. *See Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 315-16 (1985). Under § 7609's default rule, when the IRS issues a summons to a third-party recordkeeper (like a bank, accountant, or law firm), it must give notice to any person named in the summons (typically the bank accountholder or the accountant's or lawyer's client). I.R.C. § 7609(a)(1). Any person entitled to notice then has a limited time to petition a district court to quash the summons. *Id.* § 7609(b)(2).

Congress made just a few exceptions. As relevant here, the right to notice does not extend to a summons "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"—*i.e.*, the delinquent taxpayer—"or (ii) the liability at law or in equity of any transferee or fiduciary of any

person referred to in clause (i)," *id.* § 7609(c)(2)(D). When the exception applies, the right to petition to quash is never triggered, and the government's sovereign immunity locks the record's owner out of court. The question presented here concerns the reach of § 7609(c)(2)(D)(i) and what relationship the summonsed records must have to the delinquent taxpayer.

2. The question has divided the courts of appeals. In the Ninth Circuit, the § 7609(c)(2)(D)(i) notice exception applies only when the delinquent taxpayer *owns* (or has a similar legal interest in) the summonsed records. *Ip v. United States*, 205 F.3d 1168, 1176 (9th Cir. 2000). Thus, the IRS need not give notice when it seeks records belonging to someone who owes the government money and might use the heads-up to hide assets held in accounts that he *owns*. But if the IRS summonses records belonging to innocent third parties (because, say, it thinks those records might contain information relevant to collecting an assessment against a delinquent taxpayer), it must give notice, and the innocent party may then petition to quash the summons. That is the balance Congress struck between giving the IRS tools to collect delinquent taxes, on the one hand, and protecting the privacy interests of innocent parties, on the other.

The Sixth and Seventh Circuits, in contrast, do not recognize any distinction between delinquent taxpayers and innocent third parties. In their view, once the IRS has issued an assessment against a delinquent taxpayer, § 7609(c)(2)(D)(i) allows it to summons *anyone's* private records, without notice, as long as it thinks the records might aid its collection efforts. App. 11a (opinion below); *Barmes v. United States*, 199 F.3d 386, 390 (7th Cir. 1999) (per curiam). The subject of the records cannot petition to quash the

summons, even if the IRS seeks too much information, or even privileged information.

3. The question presented is important. "A person's interest in maintaining the privacy of his 'papers and effects' is of sufficient importance to merit constitutional protection." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992) (quoting U.S. Const. amend. IV). Under the Sixth and Seventh Circuits' rule, however, an innocent third party has no way to protect her constitutionally recognized interest in the privacy of her papers if the IRS claims it can use her records to help it collect somebody else's tax liability. That perverse approach destabilizes the careful balance Congress struck in § 7609 between the IRS's investigatory needs and the public's privacy rights. It gives the public fewer procedural rights for responding to IRS summonses for their bank records than they would have if an ordinary civil litigant served a Rule 45 subpoena on their bank. In short, it permits abusive and overbroad summonses.

Here, for example, Petitioners are Abraham & Rose, P.L.C., and Jerry R. Abraham, P.C., two law firms that represented delinquent taxpayer Remo Polselli; and Hanna Karcho Polselli, Remo's wife. An IRS agent summonsed all of Petitioners' bank records over a multiyear period—without notice—on the notion that the law firms' bank records might reveal the sources of funds Remo used to pay the firms, and that Remo might have access to his wife's accounts. App. 26a (Kethledge, J., dissenting); *see also* App. 70a-91a (summonses). The bank records of *law firms* reveal information about the firms' other clients who have nothing to do with Remo Polselli. But under the Sixth and Seventh Circuits' rule, a single IRS agent can summons all of those records without regard for the

firms' or their clients' privacy rights, or the privileged nature of the information. The Ninth Circuit, in contrast, would have asked whether Remo owned those records, and if not would have allowed the law firms to challenge the summons. Remo does not, but because they adopted the Seventh Circuit's standard, the district court and the Sixth Circuit refused to confront that question. As a result, the Sixth Circuit deepened a circuit split implicating a crucial divide over privacy interests and governmental overreach.

4. The decision below is wrong. Section 7609's text, structure, and purpose all make clear that § 7609(c)(2)(D)(i) applies only when the IRS summonses a delinquent taxpayer's records, as the Ninth Circuit holds. Start with the text. As Judge Kethledge explained in dissent below, § 7609(c)(2)(D)(ii) already excuses notice for summonses that aid the IRS's collection efforts against a delinquent taxpayer's *transferee or fiduciary*. App. 27a-28a (Kethledge, J., dissenting). The Sixth and Seventh Circuits' reading of § 7609(c)(2)(D)(i) makes § 7609(c)(2)(D)(ii) superfluous, because transferee and fiduciary liabilities are derivative of the taxpayer's assessment.

The statute's structure and purpose also support Judge Kethledge's reading. Section 7609(a)(1) and (b)(2) confer a broad right to notice and an equally broad waiver of sovereign immunity to contest IRS summonses. Congress added those provisions to restore procedural rights curtailed by this Court's decisions in the early 1970s. *See Tiffany Fine Arts*, 469 U.S. at 315-16. Exceptions to broad, remedial waivers of sovereign immunity should be interpreted narrowly, particularly when "generous interpretations of the exceptions run the risk of defeating the central purpose of the statute." *Kosak v. United States*, 465

U.S. 848, 853 n.9 (1984). Just so here, where the IRS's broad reading of § 7609(c)(2)(D)(i) "produce[s] a result demonstrably at odds with the intention of its drafters." *Ip*, 205 F.3d at 1177 (O'Scannlain, J., specially concurring) (citation omitted); *accord* App. 28a (Kethledge, J., dissenting). The Ninth Circuit's reading, in contrast, preserves Congress' choice to give the public the right to notice and an opportunity to petition to quash, while depriving notice to delinquent taxpayers who might abuse it.

Only this Court can resolve the entrenched circuit split on this important question. The Court should grant review.

OPINIONS BELOW

The court of appeals' opinion (App. 1a-30a) is reported at 23 F.4th 616. The district court's opinion (App. 31a-42a) is unpublished but available at 2020 WL 12688176.

JURISDICTION

The court of appeals issued its judgment on January 7, 2022, and denied rehearing en banc on March 28, 2022. This petition is timely filed within 90 days of the denial of rehearing. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment and the relevant provisions of the Internal Revenue Code are reproduced in the appendix. *See* App. 47a-64a.

STATEMENT

A. Statutory background

1. The Internal Revenue Code authorizes the IRS to issue summonses to third-party recordkeepers—including banks, consumer reporting agencies, credit card companies, and attorneys—for documents to help its collect taxes from delinquent taxpayers. *See* I.R.C. §§ 7602(a), 7603(b). But the Code also provides important procedural protections for persons whose records the IRS targets. *First*, the IRS must give notice "to any person" who "is identified in the summons" (usually the subject of the records) at least 23 days before the recordkeeper must produce documents. *Id.* § 7609(a)(1). *Second*, "any person who is entitled to notice of a summons" has 20 days to file a petition to quash the summons in district court. *See id.* § 7609(b)(2) (right to petition to quash); *id.* § 7609(h)(1) (district court jurisdiction over petitions to quash). The notice must "contain an explanation of the right" to petition to quash. *Id.* § 7609(a)(1).

The statute makes a handful of exceptions to the notice requirement (and thus also to the right to petition to quash). Relevant here, the statute exempts any summons "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)." *Id.* § 7609(c)(2)(D). When this exception applies, the IRS need not give the record owner notice of the summons. As a result, the record owner also has no right to petition to quash the summons. In turn, the government's sovereign immunity prevents the record owner from seeking to quash the summons in

any court. The question presented here concerns the scope of § 7609(c)(2)(D)(i).

2. Congress enacted § 7609's notice and petition-to-quash provisions to overturn Supreme Court decisions that unduly restricted the public's right to challenge IRS summonses. *See Tiffany Fine Arts*, 469 U.S. at 315-16 (explaining § 7609's history and purpose). Before the mid-1970s, the subject of third-party records could contest an IRS summons to a third-party recordkeeper only by: (i) raising the issue with the IRS agent who issued it; or (ii) trying to intervene in a proceeding to contest or enforce the summons, and then only if the bank or IRS filed one. *See Reisman v. Caplin*, 375 U.S. 440, 449 (1964) (explaining that "in the event the taxpayer is not a party to the summons before the hearing officer, he … may intervene").

In *Donaldson v. United States*, 400 U.S. 517, 530-31 (1971), however, the Court held that taxpayers could intervene under Federal Rule of Civil Procedure 24 to contest an IRS summons issued to a third-party recordkeeper only if they could show a "significantly protectable interest" prohibiting disclosure, like the attorney-client privilege. The Court made clear that a taxpayer's general interest in protecting the privacy of his records was not enough to intervene, even if the taxpayer claimed that "the summonses were overly broad and 'without a showing of particularized relevancy.'" *Id.* at 521, 531. *Donaldson* thus left persons whose records the IRS summonsed from third-party recordkeepers powerless "to prevent compliance with a summons that called for irrelevant or immaterial records." *United States v. New York Tel. Co.*, 644 F.2d 953, 956 (2d Cir. 1981).

Following widespread criticism of *Donaldson*, *see generally Ip*, 205 F.3d at 1172, and concerned that the IRS "might 'unreasonably infringe on the civil rights of taxpayers, including the right to privacy,'" Congress enacted § 7609 in 1976 to overturn "the result reached in *Donaldson*," *Tiffany Fine Arts*, 469 U.S. at 316 (citation omitted). In 1976, Congress gave the subjects of records the right to intervene in a proceeding to enforce the summons. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, Title XII, § 1205(a), 90 Stat. 1520, 1699. And in 1982, Congress added the right to petition to quash. *See* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, Title III, § 331(a), 96 Stat. 324, 620.

When amending the statute, Congress recognized that giving notice of a summons could prompt a delinquent taxpayer to move his money. So it did not require the IRS to give a taxpayer notice when issuing a summons "to determine whether the taxpayer has an account in [a] bank, and whether the assets in that account are sufficient to cover the tax liability which has been assessed." H.R. Rep. No. 94-658, at 310 (1975); *see also* S. Rep. No. 94-938, pt. 1, at 371-72 (1976) (similar). Congress similarly chose not to require notice "where the [IRS] is attempting to enforce fiduciary or transferee liability for a tax which has been assessed," to avoid enabling the taxpayer, transferee, or fiduciary to move money during "the 14-day grace period." H.R. Rep. No. 94-658, at 310; S. Rep. No. 94-938, pt. 1, at 371-72.

B. Factual and procedural background

1. The IRS issued a tax assessment against Remo Polselli, who is not a party here. Then, "[a] single IRS agent issued summonses to three banks—

Wells Fargo, JP Morgan Chase, and Bank of America—directing them to 'appear before' the agent 'to give testimony' and 'to produce for examination[,]' among other things, 'all bank statements relative to the accounts' of Hanna and the two law firms." App. 26a (Kethledge, J., dissenting). The agency claimed that those records might help it collect Remo's liabilities. App. 66a-68a. The IRS sought the law firms' records because it wanted to know how Remo had paid them. App. 68a. It sought Mrs. Polselli's bank records because it thought Remo might have access to, and keep his assets in, her accounts. App. 66a. Each summons sought, among other things, "[c]opies of all bank statements" from January 1, 2017, or January 1, 2018, to May 2019. App. 70a, 73a, 76a.

2. The IRS did not notify Petitioners of the summonses. Fortunately, the banks did. Petitioners then petitioned to quash the summonses under § 7609(b)(2). They explained that (1) the summonses were overbroad and sought irrelevant information and (2) the IRS had failed to provide notice. *See* D. Ct. Doc. 3, at 4 (Apr. 29, 2019).

The district court granted the IRS's motion to dismiss for lack of subject-matter jurisdiction. App. 31a-42a. The court reasoned that because the IRS had claimed that Petitioners' bank records would aid its collection efforts against Remo Polselli, the § 7609(c)(2)(D)(i) exception to the notice requirement applied. App. 41a-42a. And since Petitioners had no right to notice, the district court reasoned, they also had no right to petition to quash the summonses, meaning that the United States' sovereign immunity barred suit. *Id.*

3. A panel of the Sixth Circuit affirmed over a dissent by Judge Kethledge. App. 1a-30a. The court then denied rehearing but granted Petitioners' motion to stay the mandate pending a cert petition.

a. The panel majority held that § 7609(c)(2)(D)(i) stripped Petitioners of the right under § 7609(a) and (b) to notice of and an opportunity to challenge the IRS's summonses because the IRS issued those summonses "in aid of" its efforts to collect Remo's assessed tax liability. App. 11a. Although the majority was "sympathetic" to the concern that its holding could allow the IRS "to access information regarding blameless third parties without notice," it thought that § 7609(c)(2)(D)(i)'s text compelled that result. App. 21a.

In reaching that conclusion, the majority sided with the Seventh Circuit and an unpublished decision from the Tenth Circuit. *See* App. 11a-12a (citing *Barmes*, 199 F.3d at 390, and *Davidson v. United States*, 149 F.3d 1190 (Table), 1998 WL 339541, at *2 (10th Cir. June 9, 1998)). The majority also expressly disagreed with the Ninth Circuit's decision in *Ip*. App. 14a.

In *Ip*, the Ninth Circuit looked to § 7609's text, structure, purpose, and legislative history to hold that § 7609(c)(2)(D)(i)'s exception to § 7609(a)(1)'s broad pro-notice rule applies "only where the assessed taxpayer has a recognizable legal interest in the records summoned." App. 13a (quoting *Ip*, 205 F.3d at 1176; bracket and quotation marks omitted). And because "[t]he taxpayer corporation in *Ip* lacked a legal interest in petitioner's bank account," the Sixth Circuit panel acknowledged, the Ninth Circuit "concluded

that the petitioner was entitled to notice." App. 13a (citing *Ip*, 205 F.3d at 1176-77).

The Sixth Circuit rejected *Ip*'s reasoning. *See* App. 14a. The majority first disagreed that its "interpretation renders [§ 7609(c)(2)(D)(ii)] meaningless" because, in its view, the "IRS's efforts to collect a taxpayer's liability" are "legally and procedurally distinct from [its] collection efforts of the transferee or fiduciary's liability—which liability must be rooted in state law." App. 15a-16a. Next, the majority acknowledged "[t]he Ninth Circuit's concern that 'it is virtually impossible to conceive of any situation where the notice requirement would apply once an assessment of tax liability against anyone has been made.'" App. 17a (quoting *Ip*, 205 F.3d at 1173). In the panel majority's view, however, the statutory text was clear. *Id.* Finally, the majority reasoned that its holding did not undermine § 7609's pro-notice purpose because the IRS must still "provide notice when issuing summonses related to any of its non-collection functions." App. 18a.

b. Judge Kethledge dissented, explaining that he would have followed the Ninth Circuit's approach. App. 29a-30a. He began by warning that this Court "has expressed 'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.'" App. 25a (quoting *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990)). But the majority's reading of § 7609(c)(2)(D)(i), he explained, "maul[s] the bulk of § 7609" by making not only § 7609(c)(2)(D)(ii) but also § 7609(a) and (b) superfluous. App. 30a.

Judge Kethledge first explained that the majority's reading leaves nothing for § 7609(c)(2)(D)(ii) to

do. "*Every* summons 'issued in the aid of the collection of' the liability of a 'transferee or fiduciary' of an assessed taxpayer" under clause (ii) "is 'issued in the aid of the collection of' that assessment," and "nobody argues otherwise." App. 28a. As a result, Judge Kethledge continued, "every summons that falls within § 7609(c)(2)(D)(ii) already falls within the government's (and now the majority's) interpretation of § 7609(c)(2)(D)(i)." *Id.* Thus, under the majority's interpretation, "Congress was wasting its time in writing § 7609(c)(2)(D)(ii)." *Id.* Indeed, "[f]or all its experience administering the tax code, the government offer[ed] not a single concrete example of a summons that falls within § 7609(c)(2)(D)(ii) but not (D)(i)." *Id.*

What's more, Judge Kethledge explained, the IRS's and majority's interpretation made § 7609(a) and (b)'s notice and petition-to-quash provisions "entirely superfluous as to summonses issued in aid of collecting a previously assessed tax liability." App. 29a. The "mistake" was reading "§ 7609(c)(2)(D)(i) in isolation." *Id.* On the government and majority's reading, notice and an opportunity to petition to quash will *never* be required "once an assessment is rendered." App. 30a. That reading "vitiates completely the legislative purpose of providing notice to third parties." App. 29a (quoting *Ip*, 205 F.3d at 1174). Judge Kethledge thus agreed with the Ninth Circuit in *Ip* that the best approach was to read § 7609 "as a whole" by interpreting "'in aid of collection of' more narrowly than it would ordinarily be read." App. 30a.

c. The Sixth Circuit denied Petitioners' petition for rehearing en banc. App. 45a-46a. The court granted Petitioners' motion to stay the mandate pending a timely filed cert petition and this Court's resolution of the case. App. 43a-44a.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision deepens an acknowledged 1–2 circuit split over when the IRS may seize a person's private records without notice or an opportunity to assert defenses. The Ninth Circuit holds that the IRS may sidestep § 7609(a)'s notice requirement only when the summonsed records *belong* to the delinquent taxpayer. The Sixth and Seventh Circuits, by contrast, hold that the IRS has virtually unchallengeable authority to seize *any* third party's records without notice as long as the agency believes those records might help it collect a delinquent taxpayer's assessed liability. The split is clear. Indeed, the Ninth Circuit rejected the Seventh Circuit's rule, and the divided panel here rejected the Ninth Circuit's rule.

The question presented is important. The Sixth and Seventh Circuits' rule vitiates the public's privacy rights. As those courts see it, once the IRS has issued an assessment, it acquires vast and unusual powers to secretly and unreviewably summons innocent third parties' bank records. And even if a third party somehow learns of a summons, she still can't object that the summons is overbroad or even assert any evidentiary privileges. That approach departs profoundly from our legal tradition, which has long recognized "[t]he right of the people to be secure in their … papers … against unreasonable searches and seizures." U.S. Const. amend. IV. It replaces due process with "inquisitorial process." App. 26a (Kethledge, J., dissenting). Whether Congress intended to demolish the public's privacy rights is an important question deserving this Court's attention. And this case is an excellent vehicle for resolving it. Petitioners raised, and the courts below decided, the question presented, which will

determine whether Petitioners will have a chance to present their merits arguments to a federal judge.

The decision below is also wrong. The Sixth and Seventh Circuits' rule contravenes § 7609's text, structure, and purpose. It renders at least three parts of the statute superfluous: § 7609(c)(2)(D)(i)'s references to the delinquent taxpayer; all of § 7609(c)(2)(D)(ii); and § 7609(a) and (b) whenever the IRS has issued an assessment. It also undermines the statute's purpose by reading § 7609 to cut off, rather than extend, the public's procedural defenses to IRS summonses.

This case checks all the boxes for cert. The courts of appeals have split 1–2 over the question presented, which also divided the panel below. The courts of appeals will not resolve the disagreement on their own—to the contrary, they expressly disagree with each other. Still more, the question implicates fundamental privacy rights, and this case is an excellent vehicle for resolving it. Section 7609(c)(2)(D)(i) reflects Congress' careful balancing of public privacy rights and the IRS's investigatory needs. It does not give the IRS *carte blanche* to seize private records from innocent third parties whenever it is trying to collect a tax assessment. The Court should grant review.

I. The Sixth Circuit's decision deepens a circuit split over § 7609(c)(2)(D)(i)'s reach.

The courts of appeals have split 1–2 over the reach of the § 7609(c)(2)(D)(i) exception. In *Ip*, the Ninth Circuit held, considering § 7609's text, structure, and purpose, that § 7609(c)(2)(D)(i) allows the IRS to issue a third-party records summons without notice only when the delinquent taxpayer owns or has a legal interest in the summonsed records. 205 F.3d at 1176. In

reaching that conclusion, the Ninth Circuit rejected the Seventh Circuit's contrary view, which held that the exception applies "as long as the third-party summons is issued to aid in the collection of any assessed tax liability." *Id.* at 1176 n.13 (quoting *Barmes*, 199 F.3d at 389-90). Here, a divided panel of the Sixth Circuit deepened the split, siding with the Seventh Circuit and expressly rejecting the Ninth Circuit's approach. App. 11a-14a. And despite Judge Kethledge's panel dissent, the court refused to reconsider its holding en banc. Only this Court can resolve the circuit split.

A. In the Ninth Circuit, the § 7609(c)(2)(D)(i) exception applies only when the assessed taxpayer owns or has a similar legal interest in the summonsed records.

In *Ip*, the Ninth Circuit held that when the IRS issues a summons to a third-party-recordkeeper, it must give notice to the person identified in the summons unless the delinquent taxpayer owns or has a similar legal interest in the summonsed records. 205 F.3d at 1176. That notice also entitles the identified person to petition to quash the summons. *Id.* at 1177.

1. *Ip* involved the IRS's assessment against a Hong Kong corporation named Diamond Trade. *Id.* at 1171. The IRS summonsed without notice the bank records of the fiancée of one of Diamond Trade's U.S.-based sales agents, even though she "had no outstanding tax liability and ha[d] never been under investigation by the IRS." *Id.* When the fiancée petitioned to quash the summons, the district court dismissed for lack of subject-matter jurisdiction, agreeing with the IRS that § 7609(c)(2)(D)(i) immunized the summons from any challenge. *Id.* at 1170.

The Ninth Circuit reversed, holding that § 7609(c)(2)(D)(i) applies only when the summonsed records belong to a delinquent taxpayer. *Id.* at 1176. Because the IRS had not presented evidence that Diamond Trade had any legal interest in the fiancée's account, the court held that the notice exception did not apply and remanded for the district court to consider the fiancée's petition to quash on the merits. *Id.* at 1177.

The court gave two main reasons for its holding. *First*, the IRS's reading conflicts with § 7609(c)(2)(D)'s text. The IRS argued that § 7609(c)(2)(D)(i) reaches all summonses that might help the IRS collect an assessment. *Id.* at 1175. But that interpretation, the court explained, "renders totally meaningless the explicit language of § 7609(c)(2)(B)(ii) which suspends notice when the summons is in aid of collection of 'the liability … of any transferee or fiduciary of any person referred to in clause (i).'" *Id.* at 1174.

Second, the court reasoned that the IRS's interpretation also flouts § 7609's purpose. Section 7609's protections were part of "a major overhaul of the Internal Revenue Code" enacted in response to this Court's decision in *Donaldson*. *Id.* at 1172; *see also Tiffany Fine Arts*, 469 U.S. at 315-16 (Congress enacted § 7609 to overturn *Donaldson*); *supra* pp. 7-8. The provisions "sprang from a conviction that taxpayers deserved greater safeguards against improper disclosure of records held by third parties" than were available under *Donaldson*. *Ip*, 205 F.3d at 1172. Reading the statute as a whole and considering its broad pro-notice purposes, the court concluded that Congress intended to require the IRS to give notice of most summonses. *Id.* at 1171-73. The purpose of § 7609(c)(2)(D) was to address the risk that the

delinquent taxpayer might hide assets if given notice. *Id.* In the court's view, the IRS's contrary interpretation of § 7609(c)(2)(D)(i) "vitiates completely the legislative purpose of providing notice to third parties because it would be difficult to hypothesize any situation where notice would be required once the IRS makes an assessment against any taxpayer and seeks to collect the tax." *Id.* at 1174.

2. In reaching that conclusion, the Ninth Circuit rejected *Barmes*, calling the Seventh Circuit's analysis "incomplete" and "improper." *Id.* at 1176 n.13 (discussing *Barmes*, 199 F.3d at 387-90). The Ninth Circuit observed that the Seventh Circuit, in adopting the IRS's position, ignored § 7609(c)(2)(D)'s "qualifying clauses … which limit 'aid of collection' to situations where the IRS is collecting from (i) a person against whom an assessment has been made or (ii) a transferee or fiduciary of the assessed person." *Id.*

3. Judge O'Scannlain specially concurred. He described § 7609 as a "difficult," "opaque," and "highly unusual statute." *Id.* at 1177 (O'Scannlain, J., specially concurring). But he found the court's opinion "eloquent and persuasive," reasoning that § 7609 was one of "'the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters." *Id.* (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989)). Judge O'Scannlain emphasized that in considering legislative purpose, he was "in no way departing from [his] previously expressed views regarding the proper approach to statutory interpretation in the typical case." *Id.*

B. In the Sixth and Seventh Circuits, the § 7609(c)(2)(D)(i) exception applies to any records the IRS thinks might help it collect a tax assessment.

The Sixth Circuit below recognized the split between the Seventh and Ninth Circuits, and it sided with the Seventh.

1. Contrary to the Ninth Circuit, the Seventh Circuit holds "that as long as the third-party summons is issued to aid in the collection of any assessed tax liability the notice exception [in § 7609(c)(2)(D)(i)] applies." *Barmes*, 199 F.3d at 389-90.

In *Barmes*, the IRS issued a tax assessment against a partnership and sought the general partners' bank records. *Id.* at 387. The partners petitioned to quash the summons, arguing that it was invalid because the IRS had not given notice under § 7609(a). *Id.* at 387-88. The Seventh Circuit disagreed, relying on an unpublished Tenth Circuit case, *Davidson v. United States*. *See id.* at 390. In *Davidson*, the IRS summonsed a wife's bank records without notice after levying an assessment against her husband. 1998 WL 399541, at *1. Relying on § 7609(c)(2)(D)(i), the Tenth Circuit held that the wife had no right to notice because the summons was issued to help the IRS collect her husband's tax liability. *Id.* at *2. "[A]gree[ing]" with *Davidson*'s analysis, the Seventh Circuit in *Barmes* affirmed the district court's dismissal of the partners' petition to quash. 199 F.3d at 390.

2. The Sixth Circuit likewise reads § 7609(c)(2)(D)(i) to hold that the IRS never needs to give notice of a summons issued "in aid of the collection" of a tax assessment. App. 11a. Indeed, the court noted below that its "holding aligns with the decisions

of two of [its] sibling circuits," the Seventh Circuit in *Barmes* and the Tenth Circuit in *Davidson*. *Id.* Picking sides, the Sixth Circuit dismissed "the Ninth Circuit's concern[s]" (and those of Judge Kethledge in dissent), concluding that a desire to avoid "some redundancy" was not a "license to add limiting language to the statue." App. 14a-16a; *see also supra* pp. 10-11. The Sixth Circuit thus "decline[d] to adopt the *Ip* rule." App. 14a.

In dissent, Judge Kethledge agreed with the Ninth Circuit's interpretation. App. 30a. He explained that "[t]he literal sense of 'in aid of the collection of'" was "the problem with the government's interpretation," which "maul[ed] the bulk of § 7609." *Id.* "If the government and the majority are right about their interpretation of § 7609(c)(2)(D)(i)," he reasoned, then "Congress was wasting its time in writing § 7609(c)(2)(D)(ii)." App. 28a.

C. Only this Court can resolve the circuit split.

Only this Court can resolve the circuit split and return uniformity to this important area of federal law. The courts of appeals aren't going to resolve this split on their own. The Ninth Circuit expressly disagreed with the Seventh Circuit (and an unpublished decision of the Tenth Circuit). Then the Sixth Circuit sided with the Seventh Circuit, disagreeing with the Ninth Circuit—over Judge Kethledge's dissent. And after all that, the Sixth Circuit denied rehearing. If anything, the Sixth Circuit's decision to stay the mandate puts the ball in this Court. *See Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (a stay of the mandate is warranted only when there is "'a reasonable probability' that [the Supreme]

Court will grant certiorari" and "'a fair prospect' that the Court will then reverse" (citation omitted)). The Court should grant review.

II. The question presented is important, and this case is an excellent vehicle to resolve it.

A. The question presented has critical implications for the public's right to privacy against unreasonable government intrusion. This Court has recognized that "[a] person's interest in maintaining the privacy of his 'papers and effects' is of sufficient importance to merit constitutional protection." *Church of Scientology*, 506 U.S. at 13 (quoting U.S. Const. amend. IV). When the IRS seizes someone's private papers without sufficient justification, that person suffers an "affront to [her] privacy" that can never be fully remedied. *Id.*

Despite these serious concerns, the Sixth and Seventh Circuits' rule makes an IRS summons unchallengeable whenever the IRS thinks the summonsed records might "aid" in tax collection. The IRS thus has no reason to reasonably tailor its demands. Indeed, the IRS has not hesitated to summons records from people with only a tenuous relationship with the taxpayer. *See, e.g.*, *Ip*, 205 F.3d at 1169 (bank records of American fiancée of Hong Kong corporation's agent); *Robertson v. United States*, 843 F. Supp. 705, 705 (S.D. Fla. 1993) (bank and property records of third party with "no legal or business relationship with" taxpayers).

Of course, there's no way the *Federal Reporter* or *Federal Supplement* chronicles even a fraction of the IRS's efforts. That's precisely because the IRS doesn't think it has to tell anyone when it goes behind their back and invades their privacy. And there's no

guarantee that third-party recordholders, like the banks in this case, will clue them in. Banks may not think a summons for third-party records is their fight. Even if they do, how many people have the resources to take on an IRS summons when their bank happens to tell them what happened?

This case highlights these concerns. Two Petitioners are law firms. Their bank records reveal information about the clients who have sought their legal advice and who have nothing to do with Remo Polselli. But despite claiming to need only information about how Remo paid the firms, the IRS let a single IRS agent summons *all* the firms' bank records over a multiyear period without regard for the firms' or their clients' privacy rights. App. 28a, 70a-91a. Fortunately, Petitioners' banks let them know. But the Sixth Circuit's rule still keeps the firms out of court, giving them no way to contest or even seek to narrow the summonses. Indeed, by the Sixth Circuit's logic, Petitioners have less right to contest an overbroad government summons for their records than an ordinary civil litigant would have to resist a routine document request. That serious consequence deserves the Court's attention.

B. This case is an ideal vehicle to resolve the question presented—and for the reasons above, vehicles like this one don't come along every day. The Court should take the opportunity to resolve this important issue. The Sixth Circuit squarely weighed in on the circuit split, and there are no alternative holdings or other complications that would impede this Court's review.

The IRS summonsed Petitioners' bank records without notice, allegedly to help it collect Remo

Polselli's assessed tax liability. App. 3a-6a. According to the Sixth and Seventh Circuits, that is enough: § 7609(c)(2)(D)(i) allowed the IRS to summons, without notice, *any* third party's bank records that don't belong to a delinquent taxpayer. The Ninth Circuit, however, would have asked whether Remo Polselli *owns* or has a comparable legal interest in Petitioners' bank records. Remo does not, but both the district court and the Sixth Circuit refused to even ask that question or make factual findings about it. App. 7a n.5. Indeed, that is why the IRS asked the Sixth Circuit to remand for factfinding if it adopted the Ninth Circuit's interpretation of § 7609(c)(2)(D)(i). IRS CA6 Br., Doc. 22, at 37-40. This case is the perfect vehicle for resolving the pure legal question of what § 7609(c)(2)(D)(i) requires.

"Judicial review of the lawfulness of three summonses is all that Hanna Polselli and the petitioner law firms seek." App. 26a (Kethledge, J., dissenting). But because both the district court and Sixth Circuit adopted the IRS's reading of § 7609(c)(2)(D)(i), no federal judge has heard their challenge to the IRS's summons. No federal judge has considered whether the IRS' summonses seek far more information than the IRS could reasonably need to investigate potential sources of funds to collect Remo Polselli's tax assessment. Unless this Court grants review, Petitioners' privacy rights will continue to rest solely in the hands of "[a] single IRS agent." *Id.*

III. The Sixth Circuit's decision is wrong.

The Sixth Circuit's ruling that Petitioners had no right to notice of or an opportunity to challenge the summonses is wrong. Section 7609 does not authorize the IRS to seize innocent third parties' private records

without notice just because it thinks those records might help it collect an assessment. To the contrary, § 7609's text, structure, and purpose all show that the § 7609(c)(2)(D)(i) exception applies only when the delinquent taxpayer owns or has a legal interest in the records summoned. The Court should grant review to correct the Sixth Circuit's erroneous interpretation of the Internal Revenue Code.

A. The § 7609(c)(2)(D) exception applies only when the summonsed records belong to the delinquent taxpayer.

Section 7609's text, structure, and purpose all show that the § 7609(c)(2)(D)(i) exception to § 7609(a) and (b)'s notice and petition-to-quash provisions applies only when the delinquent taxpayer owns or has a legal interest in the summonsed records.

1. Start with the text. "[O]ne of the most basic interpretive canons" is that "a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (citation and brackets omitted); *accord Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 & n.11 (1988) (collecting decisions). But the government's interpretation would "def[y] [that] canon of statutory construction" by leaving language in subsection (D)(i), as well as all of subsection (D)(ii), "with no work to perform." *Ysleta del Sur Pueblo v. Texas*, No. 20-493, 2022 WL 2135494, at *2 (U.S. June 15, 2022).

In crafting § 7609(c)(2)(D)'s exceptions to § 7609(a)(1)'s broad pro-notice rule, Congress didn't simply write that § 7609 "shall not apply to any summons issued in aid of the collection of an assessment."

Instead, Congress specified that § 7609(a)(1) "shall not apply to any summons … 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)*." I.R.C. § 7609(c)(2)(D) (emphases added).

All that italicized language must be given effect. The most logical way to do so is to read § 7609(c)(2)(D)(i) to apply only when the delinquent taxpayer owns or has a legal interest in the summonsed records. *First*, that reading tracks the provision's focus on "the person with respect to whose liability the summons is issued." *Id.* § 7609(c)(2)(D)(i). There would be little reason to include that language if § 7609(c)(2)(D)(i) reached records of *other people's* accounts. *See Ip*, 205 F.3d at 1176 & n.13. *Second*, that reading also preserves a role for § 7609(c)(2)(D)(ii). Subsection (D)(ii) applies to records in which transferees and fiduciaries who have wrongfully shielded the taxpayer's assets have an interest. *See id.* at 1175-76. As Judge Kethledge put it, if § 7609(c)(2)(D)(i) reached records of *anyone's* accounts just because the IRS had assessed a delinquent taxpayer's liability, then "Congress was wasting its time in writing § 7609(c)(2)(D)(ii)." App. 28a.

2. Section 7609's structure also supports reading § 7609(c)(2)(D)(i) to apply only when the delinquent taxpayer has a legal interest in the summonsed records. As the Court has explained, exceptions to waivers of sovereign immunity may be narrowly construed where "generous interpretations of the exceptions run the risk of defeating the central purpose of the statute." *Kosak*, 465 U.S. at 853 n.9; *see*

Block v. Neal, 460 U.S. 289, 298 (1983); *Franchise Tax Bd. v. USPS*, 467 U.S. 512, 517-19 (1984). And here, a generous interpretation of § 7609(c)(2)(D)(i) would obliterate § 7609's central purpose. That purpose, which is reflected in the statute's first two subsections, is to safeguard the public's privacy interests by extending the right to notice of a summons and the right to petition to quash it. Indeed, Congress conferred the right to notice on "*any person* … who is identified in the summons." I.R.C. § 7609(a)(1) (emphasis added). And Congress greenlit challenges to IRS summonses by anyone with the right to notice, "[n]otwithstanding any other law or rule of law." *Id.* § 7609(b)(2)(A). Reading § 7609(c)(2)(D)(i) to apply whenever the IRS issues an assessment renders § 7609(a)'s notice requirement "entirely superfluous as to summonses issued in aid of collecting a previously assessed tax liability" and vitiates § 7609(b)'s petition-to-quash provision as well. App. 29a (Kethledge, J., dissenting).

3. Section 7609's purpose also supports reading § 7609(c)(2)(D)(i) to reach only records in which the delinquent taxpayer has a legal interest. As noted, § 7609(a) and (b) overturned "the result reached in *Donaldson*," *Tiffany Fine Arts*, 469 U.S. at 315-16, in order "to facilitate the opportunity of the noticee to raise defenses which are already available under the law," *Ip*, 205 F.3d at 1172 (citation omitted). *See supra* pp. 7-8. Section 7609 (b)(1) overturns *Donaldson* by allowing persons whose records are summonsed to intervene in any IRS enforcement proceeding. And § 7609(b)(2) goes a step further by allowing that person to petition to quash the summons even if the third-party recordkeeper does not object to the summons. Reading § 7609(c)(2)(D)(i) narrowly promotes the

purpose of those provisions by allowing innocent third parties—whose taxes are not at issue—to raise objections like overbreadth and privilege to inappropriate IRS summonses. Reading § 7609(c)(2)(D)'s exceptions expansively, in contrast, undermines that purpose.

To be sure, Congress added § 7609(c)(2)(D) "to ensure that an interested taxpayer does not make collection difficult or impossible by, for example, hiding or dissipating assets in which the taxpayer has effective control." Michael Saltzman & Leslie Book, *IRS Practice and Procedure* ¶ 13.02[2][d] (2022); *accord Ip*, 205 F.3d at 1172-73. But reading § 7609(c)(2)(D)(i) narrowly honors that purpose too. That's because § 7609(c)(2)(D)(i) denies notice to the taxpayer, and § 7609(c)(2)(D)(ii) denies notice to the taxpayer's fiduciaries and transferees. But neither provision deprives innocent third parties of their right to notice and an opportunity to petition to quash.

B. The Sixth Circuit's broad interpretation of § 7609(c)(2)(D)(i) is wrong.

Disregarding these textual, structural, and contextual clues, the Sixth Circuit read § 7609(c)(2)(D)(i) in isolation as applying so long as the IRS is trying to collect *somebody's* assessed tax liability. App. 11a. But courts should "consider the entire text, in view of its structure and of the physical and logical relation of its many parts," A. Scalia & B. Garner, *Reading Law* 167 (2012), and should not disregard words or provisions, *see id.* at 174-79. The Sixth Circuit contravened these principles.

1. a. The Sixth Circuit asserted that its reading respects the statute's plain meaning. App. 14a. That's wrong for two reasons.

First, the Sixth Circuit's reading terminates § 7609(c)(2)(D)(i) after the phrase "issued in aid of the collection of (i) an assessment made or judgment rendered," leaving no work for the words "against the person with respect to whose liability the summons is issued." *All* summonses "issued in aid of the collection of an assessment" necessarily relate to "the person with respect to whose liability the summons is issued." The majority's interpretation of § 7609(c)(2)(D)(i) excises from the statute the provision's reference to the delinquent taxpayer. *Accord Ip*, 205 F.3d at 1176 n.13.

Second, as explained, the Sixth Circuit's interpretation nullifies § 7609(c)(2)(D)(ii) as well, because "every summons that falls within § 7609(c)(2)(D)(ii) already falls within the government's (and now the majority's) interpretation of § 7609(c)(2)(D)(i)." App. 28a (Kethledge, J., dissenting); *see supra* pp. 11-12. Although the Sixth Circuit majority claimed it was giving § 7609(c)(2)(D) its plain meaning, it really gave an entire provision *no* meaning. "If a provision is susceptible of (1) a meaning that gives it an effect already achieved by another provision, or that deprives another provision of all independent effect, and (2) another meaning that leaves both provisions with some independent operation," however, "the latter should be preferred." *Reading Law*, *supra*, at 176. Reading § 7609(c)(2)(D)(i) to reach only summonses for records in which the delinquent taxpayer has a legal interest provides that obvious alternative. But the court of appeals rejected it.

b. Recognizing that its "interpretation of the statute leads to some redundancy," the Sixth Circuit tried to find some way to give § 7609(c)(2)(D)(ii) independent effect. App. 16a. The court stated that subsection (D)(ii) is not superfluous because

transferee and fiduciary liabilities are created by state law. App. 15a-16a. So what? The Sixth Circuit never explained why the source of substantive law makes any difference in interpreting the statute. It doesn't. The Sixth Circuit's categorical holding that the IRS never needs to give notice of summonses that aid its collection efforts doesn't turn on the legal source of the IRS's right to collect. The Sixth Circuit's interpretation doesn't just create "some redundancy." It leaves *nothing* for § 7609(c)(2)(D)(ii) to do.

The Sixth Circuit also claimed that its reading gave § 7609(c)(2)(D)(ii) effect because "[s]ummonses issued in aid of collecting a transferee's or fiduciary's liability … may seek information only obliquely related to the underlying taxpayer." App. 16a. Another red herring. Under the Sixth Circuit's interpretation, § 7609(c)(2)(D)(i) already gives the IRS authority to summons records only "obliquely related to the underlying taxpayer" so long as they aid the IRS's collection efforts. *Id.* Section 7609(c)(2)(D)(ii) still does no independent work. Indeed, "[f]or all its experience administering the tax code, the government offers not a single concrete example of a summons that falls within § 7609(c)(2)(D)(ii) but not (D)(i)." App. 28a (Kethledge, J., dissenting).

2. The panel majority also claimed that § 7609's purpose and history supported its reading because the statute "balance[s]" the public's "right to privacy with the IRS's ability to collect on an assessment or judgment." App. 19a. That reasoning is wrong. *First*, it ignores the extensive evidence of "legislative purpose of providing notice to third parties." App. 29a (Kethledge, J., dissenting) (quoting *Ip*, 205 F.3d at 1174). *Second*, it doesn't respect Congress' "balance" because it leaves *no* "balance." The Sixth Circuit's reading

forecloses *any* challenge to a summons in a broad range of scenarios with no rational connection to avoiding tax evasion, since the person whose records are summonsed need not have any relationship with the taxpayer. As Judge O'Scannlain put it, that result is "demonstrably at odds" with the statute's purpose. *Ip*, 205 F.3d at 1177 (O'Scannlain, J., specially concurring) (citation omitted). The Sixth Circuit had little answer to the concern that, in its own words, "the IRS may be able to access information regarding blameless third parties without notice." App. 21a.

3. The Sixth Circuit also defended its interpretation by claiming that accountholders "are free to challenge the summons in court" if they "suspect[] that the IRS harbors ulterior motives"—that is, that the IRS didn't really issue the summons "in aid of" a collection. App. 22a. But that reasoning just proves why the Sixth Circuit's rule can't be right.

First, an accountholder can make a pretext argument in court *only if the accountholder knows about the summons*, and, of course, the Sixth Circuit's premise is that the IRS—or perhaps even just "[a] single IRS agent," App. 26a (Kethledge, J., dissenting)—gets to decide whether the agency needs to give any notice. So unless the third-party recordkeeper voluntarily gives notice, the IRS gets to decide for itself whether the § 7609(c)(2)(D)(i) exception applies, with no need to make a showing in court. It's hard to believe that Congress intended to give the IRS—let alone a single IRS agent—such extraordinary and unreviewable power, divorced from any legitimate investigatory needs.

Second, for all the Sixth Circuit's talk of plain meaning, its reasoning grafts an atextual (and

unclear) standard onto the "in aid of" language. For example, the court seems to think that a summons issued "solely to investigate a criminal offense" would not be "tied to the IRS's *collection* efforts" and so would be challengeable in court. App. 22a. But if that's right, then why can't innocent third parties like Petitioners also challenge a summons for overbreadth, arguing that it seeks information that is not "in aid of the collection" of the delinquent taxpayer's liability? Does "in aid of collection" really turn solely on an IRS agent's subjective motivations, rather than on objective meaning? If so, what's the Sixth Circuit's textual hook? The panel majority doesn't say. The better reading, of course, is that § 7609(c)(2)(D)(i) reaches only summonses for records in which the delinquent taxpayer has an interest. That reading, unlike the Sixth Circuit's, finds support in the statute's text—*i.e.*, subsection (D)(i)'s reference to "the person with respect to whose liability the summons is issued."

* * *

The courts of appeals are split 1–2 over an important question of federal law about the reach of the IRS's secret and unreviewable summons power. The Sixth Circuit's opinion turns solely on this pure question of law, teeing up this case as the perfect vehicle. And only this Court can resolve the circuit disagreement and restore the balance Congress sought to achieve between the public's privacy rights and the IRS's investigatory needs.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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