No. 21-1599

# In the Supreme Court of the United States

HANNA KARCHO POLSELLI, ET AL., PETITIONERS

*v.*

INTERNAL REVENUE SERVICE

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

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

ELIZABETH B. PRELOGAR
*Solicitor General*
*Counsel of Record*
DAVID A. HUBBERT
*Deputy Assistant Attorney General*
MICHAEL J. HAUNGS
GEOFFREY J. KLIMAS
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTION PRESENTED

Congress has authorized the Secretary of the Treasury and the Internal Revenue Service (IRS), as her delegee, to issue summonses to obtain records necessary for enforcement of the revenue laws. See 26 U.S.C. 7602(a). Where the IRS seeks records from a third party such as a bank, the IRS is required in some circumstances to provide notice to the person whose records are at issue, and a person entitled to such notice may bring a proceeding to quash the summons. 26 U.S.C. 7609(a) and (b)(2)(A). Congress made the notice requirement and the attendant right to bring an action to quash the summons expressly inapplicable, however, to "any summons" that is, *inter alia*, "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)." 26 U.S.C. 7609(c)(2)(D).

The question presented is whether Section 7609(c)(2)(D)(i) applies to any summons issued in aid of the collection of an assessment made or judgment entered against the person with respect to whose liability the summons is issued, or instead applies only to a subset of those summonses.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 23 F.4th 616. A subsequent order of the court of appeals (Pet. App. 43a-44a) is not yet reported. The order of the district court (Pet. App. 31a-42a) is not published in the Federal Supplement but is available at 2020 WL 12688176.

## JURISDICTION

The judgment of the court of appeals was entered on January 7, 2022. A petition for rehearing en banc was denied on March 28, 2022 (Pet. App. 45a-46a). The petition for a writ of certiorari was filed on June 24, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioners filed this action in the United States District Court for the Eastern District of Michigan, seeking to quash summonses for bank account records issued by the Internal Revenue Service (IRS) as part of its effort to collect more than $2 million in tax liabilities assessed against Remo Polselli. Pet. App. 65a-66a. The district court granted the government's motion to dismiss for lack of jurisdiction. *Id.* at 31a-42a. The court of appeals affirmed. *Id.* at 1a-30a.

1. In order to facilitate the work of the Secretary of the Treasury and the IRS in enforcing the Nation's revenue laws, ascertaining taxes owed, and collecting unpaid taxes, Congress has given the government "broad latitude" to issue summonses requiring the production of financial records. *United States* v. *Clarke*, 573 U.S. 248, 250 (2014); see 26 U.S.C. 7602(a). The government may issue those summonses directly to a "person liable for tax," and may also issue them to "any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax" or to "any other person the Secretary may deem proper." 26 U.S.C. 7602(a)(2).

When the government uses a summons to obtain records from a third party such as a bank, the government is required in some circumstances to provide notice to the person whose records are at issue, and a person entitled to such notice may bring a proceeding to quash the summons. 26 U.S.C. 7609(a) and (b)(2)(A); see 26 U.S.C. 7609(h)(1) (providing district courts with "jurisdiction to hear and determine any proceeding brought under subsection (b)(2)"). The notice requirement is expressly inapplicable, however, to, "any summons" that is, *inter alia*,

> (A) served on the person with respect to whose liability the summons is issued * * * ; [or]
>
> * * * * *
>
> (D) issued in aid of the collection of—
>
> (i) an assessment made or judgment rendered against the person with respect to whose liability the summons is issued; or
>
> (ii) the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (i).

26 U.S.C. 7609(c)(2)(A) and (D). Where one of those provisions makes the notice requirement inapplicable, the authorization to initiate a proceeding to quash a summons, see 26 U.S.C. 7609(b)(2)(A), is also inapplicable.

2. This case relates to the government's effort to collect unpaid taxes owed by non-party Remo Polselli in multiple tax years since 2005. See Pet. App. 65a-66a. When the case was filed, the outstanding balance of Mr. Polselli's assessed tax liability exceeded $2 million. *Id.* at 66a. Because Mr. Polselli has not paid the taxes owed, the government has undertaken an investigation to locate assets that may be applied to his assessed liabilities. *Id.* at 66a-67a.

Through its investigation, the government learned that Mr. Polselli and his wife, petitioner Hanna Karcho Polselli, have had extensive business dealings. See D. Ct. Doc. 9-2 (Sept. 4, 2019). Because those dealings suggest that Mr. Polselli might have access to, and might use, accounts titled in Mrs. Polselli's name, the government determined that obtaining Mrs. Polselli's financial records might aid the government in locating assets that Mrs. Polselli held as Mr. Polselli's nominee

or alter ego. Pet. App. 66a. Accordingly, an IRS Revenue Officer issued a summons under Section 7602(a) to Wells Fargo Bank, N.A. in April 2019, seeking records about Mrs. Polselli's accounts and finances dating back to January 2018. *Id.* at 66a, 70a-77a.

The government also learned in its investigation that Mr. Polselli was a long-time client of petitioner Abraham and Rose, P.L.C., a law firm, and that he had previously used third-party entities to control assets while shielding them from collection. Pet. App. 67a-68a. For example, in 2018, Mr. Polselli remitted approximately $290,000 toward his tax liabilities using a check drawn on an account of Dolce Hotel Management, LLC, rather than an account in his own name. *Id.* at 67a. The government accordingly determined that it would aid in its tax collection efforts to obtain records disclosing (i) the source of funds that Mr. Polselli used to pay Abraham and Rose, (ii) the bank accounts used by Mr. Polselli, (iii) the entities in which Mr. Polselli either had an ownership interest or exerted control over funds, and (iv) the bank accounts associated with such entities. *Id.* at 68a.

The government initially issued a summons under Section 7602(a) to Abraham and Rose, seeking documents concerning Mr. Polselli's payments to the firm, such as invoices, billing notices, cancelled checks, wire transfer and credit documents, or other payment instruments. Pet. App. 66a-68a. The firm responded by letter, asserting that it did not have any responsive documents that might shed light on how Mr. Polselli had paid the firm for its services. *Id.* at 67a-68a. A representative of the firm thereafter reiterated that assertion in a telephone conversation with an IRS Revenue Officer. *Ibid.* But Abraham and Rose failed to make a

representative available to participate in an interview "under oath" about its efforts to comply with the summons, as the government had requested and as authorized by 26 U.S.C. 7602(a)(3). See Pet. App. 68a.

The government accordingly pursued an alternative avenue to obtain records concerning Mr. Polselli's payments to Abraham and Rose. In April 2019, the government issued summonses under Section 7602(a) to two banks where Abraham and Rose and a related entity, petitioner Jerry R. Abraham, P.C., held accounts: JP Morgan Chase Bank, N.A., and Bank of America, N.A. Pet. App. 67a-68a, 78a-84a, 85a-91a. Those summonses sought account and financial records dating back to January 2017 that, like the records requested directly from Abraham and Rose, might show (i) the source of funds that Mr. Polselli used to pay the firm, (ii) the bank accounts used by Mr. Polselli, (iii) the entities in which Mr. Polselli either had an ownership interest or exerted control, and (iv) the bank accounts associated with such entities. *Ibid.*

3. The three banks informed petitioners of the government's summonses, see Pet. 9, and petitioners filed this action asking the United States District Court for the Eastern District of Michigan to quash the summonses issued to all three banks. See D. Ct. Doc. 1 (Apr. 1, 2019); D. Ct. Doc. 3 (Apr. 29, 2019).[1]

The district court granted the government's motion to dismiss the action. Pet. App. 31a-42a. It observed

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[1] The government offered to allow petitioners Jerry R. Abraham, P.C. and Abraham and Rose, P.L.C. to review bank records subject to the summonses before they were turned over to the government, in order to ensure that those records related only to Mr. Polselli or entities affiliated with him. Pet. App. 5a. They declined that opportunity to review the records before production. *Id.* at 6a.

that district courts "ha[ve] jurisdiction over a petition to quash only if the petitioner is entitled to notice [of the summons]." *Id.* at 34a; see 26 U.S.C. 7609(b)(2) and (h). The court determined that petitioners lacked any right to notice here. Pet. App. 38a-42a.

The district court explained that notice is not required under Section 7609(c)(2)(D) "when a third-party summons is 'issued in the aid of the collection of . . . (i) an assessment made or judgment rendered against the person with respect to whose liability the summons is issued.'" Pet. App. 35a (quoting 26 U.S.C. 7609(c)(2)(D)). The court concluded that the summonses here come within a "plain-text reading" of that provision because "the IRS has assessed an aggregate tax liability of over $2 million against Remo Polselli" and "the IRS issued the summonses in question to aid in the collection of these assessed liabilities." *Id.* at 38a-39a. Accordingly, the court held that petitioners "were not entitled notice." *Id.* at 39a.

4. The court of appeals affirmed in a divided opinion. Pet. App. 1a-30a.

a. The majority explained that, like any waiver of sovereign immunity, the waiver of immunity in Section 7609 must be "construe[d] strictly * * * in favor of the United States." Pet. App. 8a. The majority was "particularly careful to construe [Section] 7609(c)(2)(D)(i) in favor of immunity," moreover, "because 'restrictions upon the IRS summons power should be avoided "absent unambiguous directions from Congress."'" *Ibid.* (quoting *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 816 (1984)).

The majority found no such congressional direction allowing a suit by petitioners here. On the contrary, the majority held that Section 7609(c)(2)(D)(i) "unequivo-

cally provides that the IRS may summon the third-party recordkeeper of any person without notice to that person if (1) an assessment was made or a judgment was entered against a delinquent taxpayer and (2) the summons was issued 'in aid of the collection' of that delinquency." Pet. App. 10a-11a. Accordingly, if the government "demonstrates that these conditions are satisfied, it may issue a summons to a third-party recordkeeper without notice to the person or entity identified in the summons," *id.* at 11a, and no waiver of sovereign immunity will apply to permit a suit to quash the summons by that person or entity.

The majority found that the government had "satisfied its burden here." Pet. App. 11a. It explained that it was undisputed that "the IRS issued assessments against [Mr. Polselli] totaling over $2 million," and likewise undisputed that the government had issued the summonses at issue "solely to 'locate assets' to satisfy [Mr. Polselli's] 'existing assessed federal tax liability, and not to determine additional federal tax liabilities.'" *Ibid.* (citation omitted). The summonses were thus issued "'in aid of the collection' of 'an assessment made . . . against the person with respect to whose liability the summons [wa]s issued.'" *Ibid.* Under Section 7609(c)(2)(D)(i), therefore, petitioners were not entitled to notice of the summons, and the district court "lacked subject-matter jurisdiction over the[ir] petitions to quash." *Ibid.*

The majority was not persuaded by petitioners' criticism of that approach as "hyperliteral." Pet. App. 14a (quoting Pet. C.A. Br. 10). It likewise rejected petitioners' invocation of *Ip* v. *United States*, 205 F.3d 1168 (2000), in which "[t]he Ninth Circuit examined [Section] 7609's legislative history and concluded that the stat-

ute's stated purpose was generally to facilitate notice to taxpayers and to enable them to challenge summonses in district court." Pet. App. 13a (citation omitted). The Ninth Circuit in *Ip* "assumed that Congress would not have allowed the IRS to summon a third-party record-keeper for the information of any person without notice," and it therefore "held that the notice exception applies 'only where the assessed taxpayer "has a recognizable [legal] interest in the records summoned."'" *Ibid.* (quoting *Ip*, 205 F.3d at 1176, in turn quoting and adding bracketed word to *Robertson* v. *United States*, 843 F. Supp. 705, 706 (S.D. Fla. 1993)). In the decision below, however, the majority observed that the statute is structured "generally to exempt from its notice requirements summonses issued in aid of collection of assessments"; the majority thus found no warrant to "depart from the literal text of the statute" by adopting *Ip*'s additional, extra-textual limitation. *Id.* at 14a.

The majority also rejected petitioners' argument that it is necessary to add an additional limitation to Section 7609(c)(2)(D)(i) to avoid "render[ing] clause (ii) meaningless." Pet. App. 15a. Unlike clause (i)—which addresses circumstances (such as those in this case) in which a summons is issued in aid of the collection of "an assessment made or judgment rendered" against a delinquent taxpayer—clause (ii) addresses circumstances in which a summons is issued in aid of the collection of "the liability at law or in equity of any *transferee or fiduciary* of" a delinquent taxpayer. 26 U.S.C. 7609(c)(2)(D) (emphasis added). The majority explained that clause (ii) thus "clarifies that the IRS could summon" a fiduciary or transferee's bank records without having made a formal assessment or obtained a judgment against the delinquent taxpayer (as is neces-

sary to proceed under clause (i)). Pet. App. 16a. While there might often be "'redundancy'" between the two clauses when a formal assessment has been issued or a judgment entered against the taxpayer, the majority determined that it was reasonable for Congress to have included clause (ii) in order to make it clear that the government is never required "to give notice when it issues summonses in aid of the collection of a liability of a transferee or fiduciary," regardless of what steps the government has taken with respect to the taxpayer himself. *Id.* at 17a (citation omitted).

The majority recognized that allowing the government to issue summonses without notice could have privacy implications, but it observed that Congress has provided other safeguards through which petitioners can mitigate any harm to their privacy interests, and that it is "Congress's prerogative to prioritize the IRS's collection efforts" over additional privacy protections. Pet. App. 23a; see *id.* at 20a-23a.

b. Judge Kethledge dissented. Pet. App. 25a-30a. In his view, Section 7609(a) "prescribes a general rule that persons whose records are the object of a summons are entitled to notice of that summons," and Section 7609(b) gives "such persons a 'right to begin a proceeding to quash' summonses that order production of their records." *Id.* at 29a. In order "to avoid the 'vitiation' of [Sections] 7609(a) and (b)," and to give "concrete meaning" to both clause (i) and clause (ii) of Section 7609(c)(2)(D), Judge Kethledge would have "read 'in aid of [the] collection of' more narrowly than it would ordinarily be read." *Id.* at 30a. Specifically, he would have read that phrase to require a "direct connection between the summons and the 'collection' of the liability of the persons described in" clauses (i) and (ii), which

would be present "'only where the assessed taxpayer,' * * * or a fiduciary or transferee, * * * 'has a recognizable legal interest in the records summoned.'" *Ibid.* (quoting *Ip*, 205 F.3d at 1176) (brackets omitted). Judge Kethledge did not suggest that his reading was a natural understanding of the statute's text, but in his view, it was "the least bad interpretation available to us here." *Ibid.*

5. The court of appeals denied rehearing, with no judge calling for a vote on whether to rehear the case en banc. Pet. App. 45a-46a.

**ARGUMENT**

Petitioners renew their contention (Pet. 22-30) that the exception to the notice requirement in 26 U.S.C. 7609(c)(2) does not actually apply to "any summons" that is "issued in aid of the collection of * * * an assessment made * * * against the person with respect to whose liability the summons is issued," 26 U.S.C. 7609(c)(2)(D)(i), because that exception should instead be limited to the subset of summonses that seek records that "the delinquent taxpayer owns or has a legal interest in," Pet. 23. The court of appeals correctly rejected that contention, which is directly contrary to the statutory text. And while petitioners assert that the decision below conflicts with the approach taken by the Ninth Circuit in a decision more than two decades ago, the Ninth Circuit itself has clarified the limited effects of its earlier analysis. Petitioners do not identify a single case in the past twenty-plus years in which the Ninth Circuit (or any other court) has permitted a proceeding to quash a summons issued in aid of the collection of assessed taxes. Accordingly, no further review is warranted.

1. Although Congress has required notice of a summons in many circumstances, it has specifically provided that the IRS is not required to give notice for "any summons" that is "issued in aid of the collection of * * * an assessment made or judgment rendered against the person with respect to whose liability the summons is issued." 26 U.S.C. 7609(c)(2)(D)(i). That exception from the notice requirement helps to ensure that a delinquent taxpayer or his associates cannot use advance notice of the summons to "withdraw the money" or otherwise conceal assets, "thus frustrating the collection activit[ies] of the [IRS]." H.R. Rep. No. 658, 94th Cong., 1st Sess. 310 (1975) (House Report).

As the court of appeals correctly recognized, Pet. App. 11a, the notice exception in Section 7609(c)(2)(D)(i) applies by its plain terms to the summonses at issue here. It is undisputed that the government has "issued assessments against [Mr. Polselli] totaling over $2 million." *Ibid.* And petitioners "do not dispute" that the summonses here were issued "to the banks solely to locate assets to satisfy [Mr. Polselli's] existing assessed federal tax liability." *Ibid.* (citation and internal quotation marks omitted); see *id.* at 70a (indicating, at top of summons to Wells Fargo Bank, N.A., that the summons was issued "[i]n the matter of REMO POLSELLI"); *id.* at 78a, 85a (same for other summonses). In the terms of the statute, the summonses were therefore "issued in aid of the collection of * * * an assessment made * * * against" Mr. Polselli, who is the "person with respect to whose liability the summons[es] [were] issued." 26 U.S.C. 7609(c)(2)(D)(i). Because the government is not required to provide notice of "any summons" that falls within that statutory description, it was not required to provide notice of the summonses here. 26 U.S.C.

7609(c)(2). And because petitioners were not "entitled to notice of [the] summons[es]," Section 7609(b)(2) also does not authorize them to initiate "a proceeding to quash such summons[es]." 26 U.S.C. 7609(b)(2)(A).

The text of Section 7609 thus unambiguously forecloses petitioners' action. Permitting suits by persons in petitioners' position would be particularly unwarranted, moreover, because the proceeding they seek to pursue is a suit against the United States. See Pet. App. 8a-9a. Sovereign immunity ordinarily bars such suits, and while Congress has authorized proceedings to quash summonses in certain specified circumstances, see 26 U.S.C. 7609(b)(2), "[a]ny ambiguities in the statutory language are to be construed in favor of immunity, so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires." *FAA* v. *Cooper*, 566 U.S. 284, 290 (2012) (citation omitted). The court of appeals properly respected that principle in declining to engraft an additional, unwritten condition onto Section 7609(c)(2)(D)(i) that would enable additional suits against the United States. See Pet. App. 8a-9a.

2. Notwithstanding the express application of Section 7609(c)(2)(D) to "*any* summons" that is "issued in aid of the collection of * * * an assessment made * * * against the person with respect to whose liability the summons is issued," 26 U.S.C. 7609(c)(2)(D)(i) (emphasis added), petitioners contend (Pet. 23) that that provision in fact covers only the subset of summonses that seek records that "the delinquent taxpayer owns or has a legal interest in." That contention lacks merit.

a. When Congress sought to impose a limitation like the one petitioners propose, it did so expressly. In the very next section of the Internal Revenue Code, Con-

gress provided that the Secretary of the Treasury may not reimburse a summoned party for its costs of compliance if "the person with respect to whose liability the summons is issued *has a proprietary interest in the books, papers, records or other data required to be produced.*" 26 U.S.C. 7610(b)(1) (emphasis added). Section 7609(c)(2)(D)(i), in contrast, contains no such limitation regarding records in which the person with respect to whose liability the summons is issued has a proprietary (or other) interest. And "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Sebelius* v. *Cloer*, 569 U.S. 369, 378 (2013) (quoting *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997)) (brackets omitted).

Petitioners contend that it is necessary to limit Section 7609(c)(2)(D)(i) to the subset of summonses seeking records in which the assessed taxpayer has a legal interest in order to "give[] effect" to "the provision's focus on 'the person with respect to whose liability the summons is issued.'" Pet. 24 (citation omitted). But, by its terms, that statutory phrase addresses whose *liability* is at issue, not whose *records* are at issue. And as Section 7610(b)(1) makes clear, Congress recognized that those persons would not always be the same. Petitioners' reading accordingly does not "give[] effect" to the statutory language focusing on whose liability is at issue (*ibid.*), but controverts it by focusing instead on whose records are at issue.[2]

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[2] Relatedly, petitioners assert (Pet. 27) that their interpretation is necessary to avoid making the phrase "against the person with respect to whose liability the summons is issued" superfluous. 26 U.S.C. 7609(c)(2)(D)(i). For the reason given in the text, petitioners'

b. Petitioners also contend (Pet. 27-28) that their proposed limitation is necessary to avoid rendering superfluous clause (ii), which covers summonses "issued in aid of the collection of * * * the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (i)." 26 U.S.C. 7609(c)(2)(D)(ii). Echoing the dissent below, they claim that "'every summons that falls within [Section] 7609(c)(2)(D)(ii) already falls within the government's (and now the majority's) interpretation of [Section] 7609(c)(2)(D)(i).'" Pet. 27 (quoting Pet. App. 28a). Petitioners are incorrect.

A taxpayer's liability under the Internal Revenue Code arises automatically when all events necessary to establish that liability have occurred. See, *e.g.*, *IRS* v. *Luongo* (*In re Luongo*), 259 F.3d 323, 334 (5th Cir. 2001); *Centerpoint Props.* v. *Montgomery Ward Holding Corp.* (*In re Montgomery Ward Holding Corp.*), 268 F.3d 205, 212 (3d Cir. 2001). After a liability arises, the IRS can make a formal assessment by recording the liability in accordance with applicable rules and regulations. *Hibbs* v. *Winn*, 542 U.S. 88, 100 (2004). But while making an assessment allows the government to avail itself of certain remedies to collect the liability, it is not a prerequisite to liability. See, *e.g.*, *Williams-Russell & Johnson, Inc.* v. *United States*, 371 F.3d 1350, 1353 (11th Cir.), cert. denied, 543 U.S. 1022 (2004); *United States* v. *Latham*, 754 F.2d 747, 750 (7th Cir. 1985); *Marvel* v. *United States*, 719 F.2d 1507, 1513-1514 (10th Cir. 1983). And nothing in the Internal Revenue Code requires that the government make a formal assessment against a taxpayer before issuing a summons to

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interpretation does not actually give that statutory phrase effect. Instead, it effectively substitutes language that Congress included in Section 7610(b)(1) but omitted from Section 7609(c)(2)(D)(i).

locate assets that may be available to satisfy his liability. See 26 U.S.C. 7602 (2018 & Supp. II 2020).

The government can in some circumstances also collect a taxpayer's unpaid tax liability from the taxpayer's transferee or fiduciary. See, *e.g.*, 26 U.S.C. 6324(a)(2) (liability of transferees for estate tax); 26 U.S.C. 6901 (procedural mechanism for collection from transferees where state law provides a substantive basis for imposing liability); see also *Commissioner* v. *Stern*, 357 U.S. 39, 45 (1958) (addressing such derivative liability). As with investigations of assets held by the taxpayer himself, nothing in the Internal Revenue Code (or any other law) requires the government to make a formal assessment before issuing a summons to locate assets of the transferee or fiduciary that may be available to satisfy the taxpayer's outstanding liability. See 26 U.S.C. 7602 (2018 & Supp. II 2020).[3]

Section 7609(c)(2)(D)(ii) accounts for the circumstances in which the government is investigating the assets of fiduciaries or transferees before a formal assessment has been made. The prospect of collecting from a transferee is greater when a taxpayer has already sought to transfer or hide assets before any assessment. In such circumstances (as when an assessment has al-

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[3] The court of appeals stated in passing that a fiduciary's or transferee's liability is "derivative of the taxpayer's *assessment*," such that "the former cannot exist without the latter." Pet. App. 15a (emphasis added). But as the source on which the court relied indicates, the necessary predicate for derivative liability can sometimes be a mere "deficiency," even without a formal assessment. 4 Laurence F. Casey, *Federal Tax Practice* § 12:04, at 12-13 (Edward J. Smith ed., rev. ed. Nov. 2015 & June 2022 supp.) (quoted in Pet. App. 15a); see, *e.g.*, *United States* v. *Henco Holding Corp.*, 985 F.3d 1290, 1297-1305 (11th Cir. 2021) (transferee liability established without formal assessment).

ready been made), if notice of the government's summons is provided, "there might be a possibility that the taxpayer, transferee or fiduciary would * * * withdraw the money in his account" before the response to the summons is made, "thus frustrating the collection activity of the Service." House Report 310; see, *e.g.*, *Fourth Inv. LP* v. *United States*, 720 F.3d 1058, 1071 (9th Cir. 2013) (finding that transferees held property as nominees where, among other things, property had been transferred "to protect against 'future liabilities'"); *Berkshire Bank* v. *Town of Ludlow*, 708 F.3d 249, 252-253 (1st Cir. 2013) (factors supporting nominee theory include whether title was placed in the name of a third party "in anticipation of the taxpayer's liability") (citation omitted). But because no "assessment [has been] made or judgment rendered," the exception to the notice requirement in clause (i) does not apply. 26 U.S.C. 7609(c)(2)(D)(i). Section 7609(c)(2)(D)(ii) accordingly provides a more tailored notice exception that applies only to a summons issued "in aid of the collection of * * * the liability at law or in equity of any transferee or fiduciary," but that—unlike clause (i)—does not require a pre-existing assessment or judgment. 26 U.S.C. 7609(c)(2)(D)(ii). Contrary to petitioners' assertion (Pet. 27), clause (ii) thus serves a separate purpose from clause (i).

In addition, clause (ii) also clarifies that when the government issues a summons in aid of the collection of a fiduciary's or transferee's derivative liability, it "may seek information only obliquely related to the underlying taxpayer." Pet. App. 16a. Even where an assessment has been made against the taxpayer, some uncertainty might exist about whether the connection between that "outstanding assessment" and a summons

for records related to the potential derivative liability of a fiduciary or transferee is "too tangential" to bring that summons within clause (i). *Ibid.* Petitioners express doubt (Pet. 28) that courts would ever impose such limitations on an investigation when the government declares that the records it seeks would "aid the IRS's collection efforts," but Congress may have been less confident about that result. By speaking directly to that important class of potential summonses, Congress simply "employed a belt and suspenders approach to make sure" that the notice exception would be extended to summonses issued in aid of the collection of derivative fiduciary or transferee liability. *Atlantic Richfield Co.* v. *Christian*, 140 S. Ct. 1335, 1350 n.5 (2020). Even if that congressional choice creates "some redundancy," there is no warrant for rejecting "the better overall reading of the statute" in favor of petitioners' atextual approach. *Ibid.* (quoting *Rimini St., Inc.* v. *Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019)).

c. Finally, petitioners contend that the court of appeals' plain-text reading does not serve the "'legislative purpose of providing notice to third parties.'" Pet. 28-29 (citation omitted); see Pet. 16-17, 24-26, 28-30. That, too, is incorrect. The decision below furthers Congress's purpose of providing third parties with notice in a wide range of circumstances—while also honoring Congress's additional purpose, reflected in the exception at issue here, of preventing tax avoidance.

As petitioners observe (Pet. 6-7), Congress enacted Section 7609 in response to *Donaldson* v. *United States*, 400 U.S. 517 (1971), as well as *United States* v. *Bisceglia*, 420 U.S. 141 (1975), which held that the government generally did not need to provide notice when it issued a third-party summons. See *Tiffany Fine Arts,*

*Inc.* v. *United States*, 469 U.S. 310, 315-316 (1985). But contrary to petitioners' suggestion (Pet. 28-29), the adoption of Section 7609 did not simply replace an anti-notice rule with a pro-notice rule.

Instead, Congress established in Section 7609 a set of carefully crafted rules governing when the government need and need not provide notice of third-party summonses. See 26 U.S.C. 7609(a)(1), (c)(2) and (3), and (g). For example, the government must typically provide notice of a summons issued for the purpose of assessing a liability. See 26 U.S.C. 7609(a)(1). The government must also typically provide notice of a summons issued in aid of the collection of a liability that has not yet been assessed, unless it is in aid of the collection of the derivative liability of a transferee or fiduciary. See 26 U.S.C. 7609(a)(1), (c)(2)(D)(i) and (ii). Conversely, the government is typically not required to provide notice of a summons issued in aid of the collection of a liability that has already been assessed. See 26 U.S.C. 7609(c)(2)(D).

The court of appeals' approach to Section 7609 respects that reticulated structure, requiring that notice be provided in the mine-run of pre-assessment cases while honoring Congress's intent that Section 7609's notice requirement "not apply in the case of a summons used solely for purposes of collection." House Report 310; see Pet. App. 18a; see also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 168 (2012) ("[L]imitations on a statute's reach are as much a part of the statutory purpose as specifications of what is to be done."). Petitioners' approach, in contrast, would disregard the balance that Congress struck between pre- and post-assessment summonses, replac-

ing it with a monolithic pro-notice policy that lacks any sound basis in the statutory text.

3. The decision below also does not implicate a circuit conflict warranting this Court's review.

a. In the nearly half-century since Section 7609 was enacted, only two other courts of appeals have addressed the question presented in published opinions. As petitioners acknowledge (Pet. 18-19), the decision below is consistent with the Seventh Circuit's decision in *Barmes* v. *United States*, 199 F.3d 386 (1999) (per curiam). There, after reviewing Section 7609's text, structure, and purposes, the Seventh Circuit determined that "as long as the third-party summons is issued to aid in the collection of any assessed tax liability," Section 7609(c)(2)(D)'s "notice exception applies." *Id.* at 390.[4]

b. The only other court of appeals to have addressed the question in a published opinion is the Ninth Circuit. In *Ip* v. *United States*, 205 F.3d 1168 (9th Cir. 2000), that court addressed an earlier version of Section 7609(c)(2)(D)(i), which provided that "[a] summons shall not be treated as described in this subsection if * * * it is in aid of the collection of * * * the liability of any person against whom an assessment has been made or judgment rendered." 26 U.S.C. 7609(c)(2)(B)(i) (1994); see *Ip*, 205 F.3d at 1170 & n.4.[5] The court acknowledged that "the IRS can find support and comfort for its posi-

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[4] The Tenth Circuit reached the same conclusion in an unpublished opinion. See *Davidson* v. *United States*, 149 F.3d 1190, 1998 WL 339541 (1998) (Tbl.).

[5] The current version of Section 7609(c)(2)(D)(i) was enacted as part of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3415(c), 112 Stat. 755. The summons in *Ip* was issued before the effective date of that amendment, however, and the Ninth Circuit addressed the earlier version.

tion by relying solely on the literal language of clause (i)." *Ip*, 205 F.3d at 1174. But "abjur[ing] a strictly semantic approach" in favor of the approach followed by "twentieth century 'intention' seekers," the Ninth Circuit sought "to ascertain the legislative purpose by the examination of legislative history." *Id.* at 1175 (quoting Lord Denning, *The Discipline of Law* 4 (1979)).

Based on its review of legislative history, the Ninth Circuit concluded that "[t]he purpose of the notice provision is to allow people to assert defenses * * * that would be unavailable to them in the absence of notice." *Ip*, 205 F.3d at 1172. And "in light of that legislative purpose, [the court] believe[d] that each clause must be interpreted in terms of the ownership interest in the records that are sought by the summons." *Id.* at 1175. Otherwise, the court believed, "the exception to the notice rule would swallow the rule itself." *Ibid.*; but see p. 18, *supra* (explaining that the notice requirement has broad applicability outside the context of post-assessment collection efforts). The court did not attempt to explain how its ownership-based limitation could be reconciled with the "literal language of clause (i)." *Ip*, 205 F.3d at 1174.[6]

The majority below correctly rejected "the *Ip* rule" as inconsistent with *both* the literal language of Section 7609 *and* Congress's careful balancing of multiple pur-

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[6] Judge O'Scannlain concurred in *Ip*, concluding that it was the "rare case[]" where "literal application of a statute w[ould] produce a result demonstrably at odds with the intention of its drafters." 205 F.3d at 1177 (quoting *United States* v. *Ron Pair Enters. Inc.*, 489 U.S. 235, 242 (1989)). But as discussed above, see pp. 17-19, *supra*, a plain-text interpretation of Section 7609(c)(2)(D)(i) gives effect to Congress's intention that the notice "procedure will not apply in the case of a summons used solely for purposes of collection." House Report 310.

poses in that provision. Pet. App. 14a. As it has played out in practice, however, the difference between the Ninth Circuit's approach and that of other circuits seems to be more apparent than real. In a follow-on decision in *Viewtech, Inc.* v. *United States*, 653 F.3d 1102 (2011), the Ninth Circuit clarified that *Ip*'s test should be applied "non-technically," such that a third party is still not entitled to receive notice of a summons if the assessed taxpayer "ha[s] transferred funds into the third party's account," or if "there [i]s an employment, agency, or ownership relationship between the taxpayer and third party." *Id.* at 1105-1106; see *Cranford* v. *United States*, 359 F. Supp. 2d 981, 987 (E.D. Cal. 2005) (holding that the relationship between the taxpayer and his wife was still excepted from the notice requirement under *Ip*). Thus, as the government explained in its motion to dismiss here, petitioners themselves would not be entitled to notice under the Ninth Circuit's own clarification of *Ip*, in light of Mrs. Polselli's spousal relationship with Mr. Polselli and the agency relationship between Mr. Polselli and the law-firm petitioners. See D. Ct. Doc. 6, at 15-16 (June 28, 2019); see also Pet. App. 24a (noting the IRS's argument but finding it unnecessary to apply the *Ip* test to the facts of this case).

Petitioners speculate that *others* might nevertheless benefit from their proposed approach if this Court were to adopt it, but the infrequency with which the issue arises makes that doubtful. Petitioners (Pet. 20-21) and the amicus supporting them (Center for Taxpayer Rights Amicus Br. 15-17) claim that the rarity of litigation over the issue just reflects the fact that under a plain-text reading of Section 7609, third parties are not entitled to notice of post-assessment summonses and

therefore cannot bring proceedings to challenge them. But if that were true, petitioners would presumably be able at least to point to third parties who had initiated proceedings to quash post-assessment summonses in the Ninth Circuit, which adopted their proposed rule more than two decades ago. Petitioners do not do so. Indeed, it appears that neither the Ninth Circuit itself nor any district court within its borders has allowed a single proceeding to quash a post-assessment summons issued in aid of collection in the 22 years since *Ip* was decided.

Given the infrequency with which the question presented has real-world effects, as well as the correctness of the decision below in light of the text, structure, and purposes of Section 7609(c)(2)(D)(i), any tension between that decision and the Ninth Circuit's decision in *Ip* does not warrant this Court's review at this time.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
*Solicitor General*
DAVID A. HUBBERT
*Deputy Assistant Attorney General*
MICHAEL J. HAUNGS
GEOFFREY J. KLIMAS
*Attorneys*

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