No. 21-1599

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

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

The government's response underscores the need for this Court's review. *Conceding* the circuit split, Opp. 19-21, the government fixates on the merits. But the Ninth Circuit, including in opinions by Judge O'Scannlain and Judge Ikuta, rejects the government's reading of the statute. *See Ip v. United States*, 205 F.3d 1168, 1177 (9th Cir. 2000) (O'Scannlain, J., specially concurring); *Viewtech, Inc. v. United States*, 653 F.3d 1102, 1104-06 (9th Cir. 2011) (Ikuta, J.). So does Judge Kethledge's dissent below. App. 25a-30a. And the government's novel arguments (Opp. 12-16)—all to defend keeping broad, unreviewable power in the hands of "[a] single IRS agent," App. 26a—misinterpret the Tax Code and make no sense.

When it finally confronts the split, the government misrepresents Ninth Circuit precedent, claiming that *Viewtech* narrowed *Ip*. Opp. 21. But Judge Ikuta reiterated in *Viewtech* that the court was applying "the *Ip* standard" "the same" way *Ip* had. 653 F.3d at 1106; *see id.* at 1104. The taxpayer must have "a sufficient legal interest" in the summonsed account to trigger I.R.C. § 7609(c)(2)(D)(i)'s exception from the notice requirement. *Id.* at 1106. Here, the Sixth Circuit and district court rejected that test, refusing to make findings needed to apply it. App. 7a n.5. Thus, the government's arguments that it would prevail under *Ip*, while wrong anyway, are at most remand issues.

The government doesn't dispute that the question presented implicates critical privacy rights. It says only that the question rarely recurs. But that's because the Sixth and Seventh Circuits' rule—and the government's self-serving misinterpretation of the

Ninth Circuit's rule—allows unaccountable IRS agents to secretly and unreviewably decide to withhold notice. Even a resilient and well-resourced accountholder cannot fight a secret summons.

This case gives the Court a rare, ideal vehicle for deciding this important question. The Court should grant review.

I. The circuits are split, as the government concedes, and this case is an ideal vehicle.

A. 1. The government doesn't deny that the circuits are split over § 7609(c)(2)(D)(i). Pet. 14-20. In *Ip*, the Ninth Circuit held 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 underlying account. 205 F.3d at 1176; *accord Viewtech*, 653 F.3d at 1105 ("[T]he rule [is] that a third party should receive notice" unless the "taxpayer had 'some legal interest or title'" in the account (quoting *Ip*, 205 F.3d at 1175)). *Ip* 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." 205 F.3d at 1176 n.13 (quoting *Barmes v. United States*, 199 F.3d 386, 389-90 (7th Cir. 1999) (per curiam)). Here, over Judge Kethledge's dissent agreeing with *Ip*, the Sixth Circuit sided with the Seventh. App. 9a-24a.

2. This case is an ideal vehicle for resolving the conflict. Pet. 21-22. The government does not dispute that (a) the Sixth Circuit squarely decided the question presented; (b) the court's resolution of the question was outcome-determinative; and (c) neither the district court nor the Sixth Circuit even asked, let alone made any factual findings, about Remo Polselli's

interest in the summonsed accounts, App. 7a n.5. What's more, as discussed below (at 7-9), the Court should not pass up this opportunity to decide what § 7609(c)(2)(D)(i) requires, because the government's self-serving reading of the statute, disregard for the Ninth Circuit's requirements, and forum-shopping combine to prevent third parties from discovering summonses in the first place. *Accord* Center for Taxpayer Rights Amicus Br. 15-17.

B. Conceding the split, the government misleadingly plucks quotes from *Viewtech* to reinvent the Ninth Circuit's rule and suggest that Petitioners would not prevail under it. But the Ninth Circuit's test is clear, and no court has found it satisfied here (or even tried to apply it).

1. The government calls "the difference between the Ninth Circuit's approach and that of other circuits … more apparent than real." Opp. 21. The government claims that *Viewtech* relaxed *Ip*'s standard, so that a third party has no right to notice if the assessed taxpayer so much as transfers funds into a third party's account. *Id.* That suggestion misrepresents *Viewtech*.

First, *Viewtech* "appl[ies] the same analysis" as *Ip*. *Viewtech*, 653 F.3d at 1106. *Viewtech*'s very first paragraph explains that the issue there was simply "[a]pplying *Ip*" to "the circumstances of th[e] case." *Id.* at 1103. Nothing in the opinion purports to change or "clarif[y]," Opp. 10, 21, *Ip*'s test. The question under § 7609(c)(2)(D)(i), *Viewtech* reaffirms, is "whether a taxpayer ha[s] a sufficient legal interest in the object of the summons"—"i.e., [the] bank account." 653 F.3d at 1106. (And the government's footnote that *Ip* addressed an "earlier version" of the statute, Opp. 19 n.5,

doesn't change anything, because *Viewtech* applied *Ip* to "the current version," 653 F.3d at 1105 n.4.)

Second, the government conflates *Ip*'s tests for § 7609(c)(2)(D)'s two exceptions and ignores the one at issue. Under *Ip* and *Viewtech*, when "considering whether a third party could be deemed a fiduciary or transferee of the taxpayer" under § 7609(c)(2)(D)(ii), a court asks "whether the taxpayer had transferred funds into the third party's account" so as to show that the account holds the taxpayer's funds "for [the taxpayer's] use." *Viewtech*, 653 F.3d at 1105-06. But § 7609(c)(2)(D)(ii) isn't at issue—the question is what § 7609(c)(2)(D)(i) requires. The § 7609(c)(2)(D)(i) test asks "whether a taxpayer had a sufficient legal interest in the object of the summons." *Id.* at 1106. Indeed, *Viewtech* separately analyzed the facts under each exception. *Id.*

Third, the government suggests that *any* "employment, agency, or ownership relationship between the taxpayer and third party" establishes the taxpayer's interest in the third party's account. Opp. 21 (quoting *Viewtech*, 653 F.3d at 1106). But that makes no sense, and it's not what *Viewtech* or *Ip* says. To be sure, *Ip* noted the *absence* of such a relationship in *ruling out* the possibility that the taxpayer had "any legal interest in Ip's personal bank account." 205 F.3d at 1176. But when the Ninth Circuit found in *Viewtech*, conversely, that a corporation had no right to notice under § 7609(c)(2)(D)(i), it relied on factual findings establishing that the taxpayer and the corporation were *alter egos* (as the government itself elsewhere suggests is the question, Opp. 4; App. 66a). The taxpayer "had a sufficient interest in the [corporation's] account to disqualify [the corporation] from receiving notice" because the taxpayer (a) "had a significant

ownership interest" as "a 100 percent and 97 percent shareholder … entitled to substantially all of [the corporation's] income," and (b) "was also a[n] … employee and an officer of the corporation." *Viewtech*, 653 F.3d at 1106. In short, the Ninth Circuit—unlike the Sixth and Seventh Circuits, App. 7a n.5—requires a finding that the taxpayer has a legal interest in the third party's account before § 7609(c)(2)(D)(i) deprives the third party of notice and an opportunity to move to quash.

2. The government next says Petitioners "would not be entitled to notice" under *Viewtech* and *Ip* anyway. Opp. 21. Those arguments are wrong, and would at most be questions for remand. The Sixth Circuit and district court thought they didn't need to make any factual findings, so they didn't. *See* App. 7a n.5. Indeed, the IRS asked the Sixth Circuit to remand for factfinding if it adopted the Ninth Circuit's interpretation. Pet. 22; IRS CA6 Br., Doc. 22, at 37-40.

Start with the government's sweeping claim that there was an "agency relationship between Mr. Polselli and the law-firm petitioners" just because the law firms were Mr. Polselli's lawyers. Opp. 21. Again, *Ip* and *Viewtech* make clear that the "agency" inquiry is an alter-ego inquiry—an assessment of whether the taxpayer has some legal interest in the third party's account. In *Viewtech*, for example, the taxpayer almost entirely owned the third-party corporation and treated its bank account as his own. *See* 653 F.3d at 1106.

It would come as quite a surprise to countless lawyers—and do substantial harm to the attorney-client privilege—if the attorney-client relationship somehow gave clients a legal interest in the bank accounts

where their lawyers deposit the fees they earn. In fact, what the IRS revenue officer here swore he really thought—as the government admits, Opp. 4—is that Remo was using Dolce Hotel Management, LLC, not his lawyers, as an alter ego. App. 66a-67a. Nothing in *Ip* or *Viewtech* suggests that the IRS can dispense with the notice requirement—and pierce the attorney-client privilege—just because an officer thinks a law firm's records might help identify entities a taxpayer used to pay legal fees, *see* App. 68a. *Ip* and *Viewtech* require a finding that the taxpayer has a legal interest in the law firm's accounts, and the government did not and cannot make that showing here.

"Mrs. Polselli's spousal relationship with Mr. Polselli," Opp. 21, doesn't satisfy *Ip* or *Viewtech*, either—just as the third party's engagement to the taxpayer's operating agent failed the test in *Ip*. *See Viewtech*, 653 F.3d at 1105-06 (discussing *Ip*, 205 F.3d at 1169-71, 1176); *Ip*, 205 F.3d at 1177 (remanding for consideration of motion to quash on the merits). The IRS must show that Remo has a legal interest in Hanna's account, but it has not done so. To the contrary, the government concedes that an IRS agent merely thought "that Mr. Polselli *might* have access to, and *might* use, accounts titled in Mrs. Polselli's name." Opp. 3 (emphases added). That wouldn't fly in the Ninth Circuit. Of course, the government could still *summons* Mrs. Polselli's records, but it would have to give her notice, and she would also have the right to move to quash.

Finally, although § 7609(c)(2)(D)(ii) isn't at issue—despite the government's conflating the clause (i) and (ii) exceptions—the government also has not shown that Petitioners were Remo's fiduciaries or transferees. *Viewtech* relied on the taxpayer's clear

use of the third party's account "for [his own] use" after transferring his funds into the third party's account. 653 F.3d at 1106. The mere transfer of funds into the third party's account isn't enough. If it were, *anybody* an assessed taxpayer paid could lose § 7609's protections.

C. This Court alone can resolve the circuit split. Not only do the circuits openly disagree, but the government's own conduct likely will prevent the lower courts from deciding this question and giving the Court further opportunities to address it. Pet. 19-20. The government's brief confirms the point. Unless this Court steps in now, the government will persist in its unreviewable disregard for the Ninth Circuit's legal-interest test—or avoid it altogether based on major banks' presence in the Sixth or Seventh Circuits, *see* I.R.C. § 7609(h)(1)—to continue denying third parties notice.

II. The question presented is important.

The petition explained that the question presented is critical for the public's right to privacy against unreasonable government intrusion. Pet. 20. The government's only response is that the question presented must present few "real-world effects" because it arises infrequently. Opp. 21-22. That response underscores the need to grant, not deny, review. The reason the issue arises infrequently, as the petition and amicus brief explained, is that the government does not give third parties notice when it summonses records of their accounts. *See* Pet. 20-21; Center for Taxpayer Rights Amicus Br. 12-13.

The government tries to dodge the point by arguing that third parties in the Ninth Circuit would have

moved to quash summonses. Opp. 22. That response is unconvincing.

First, in many cases, the government can forum-shop, avoiding the Ninth Circuit, simply by maintaining that venue is proper somewhere else. Section 7609 provides for jurisdiction and venue in the district in which the third party recordkeeper "resides or is found," I.R.C. § 7609(h)(1), and major banks, like those in this case, *see* Opp. 3-5, can be found nationwide, including in the Sixth and Seventh Circuits.

Second, the government appears to think it rarely needs to give notice in the Ninth Circuit anyway. *See supra* pp. 3-7. By misinterpreting *Ip* and *Viewtech*, the government likely is refusing to provide notice when the Ninth Circuit's rule requires it.

Third, note what the government *doesn't* say. The petition explained that "there's no way the *Federal Reporter* or *Federal Supplement* chronicles even a fraction of the IRS's efforts … precisely because the IRS don't think it has to tell anyone when it goes behind their back and invades their privacy." Pet. 20. In response, the government, which knows exactly what it has summonsed "in the 22 years since *Ip* was decided," Opp. 22, doesn't say *anything* about what types of summons it has issued or their quantity. You don't have to be Holmes to recognize the dog that isn't barking. ("Sherlock or Oliver Wendell: either Holmes will do here." *United States v. Takhalov*, 827 F.3d 1307, 1319 n.9 (11th Cir. 2016).)

Finally, even taking the rare case in which the third party learns of the summons from a bank, how often will that third party have the resources and resolve to take on the IRS, especially over someone else's tax liability? Just because there are so many hurdles

to vindicating critical privacy rights doesn't mean those rights are unimportant. To the contrary, the IRS's claim of broad, secret, and unreviewable power for "[a] single IRS agent" to summons third party records, with few opportunities for judicial scrutiny, App. 26a, confirms the need for cert.

Here, the IRS went after law firms that had the backbone to stand their ground. Countless other targets of summonses will not. The Court should not pass up this opportunity.

III. The Sixth Circuit's decision is wrong.

A. The Sixth Circuit's ruling is wrong for the reasons Judge Kethledge, Judge O'Scannlain, and Judge Ikuta have explained. *See* App. 25a-30a; *Viewtech*, 635 F.3d at 1104-06; *Ip*, 205 F.3d at 1177 (O'Scannlain, J., specially concurring). Section 7609's text, structure, and purpose 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. Pet. 23-26. The Sixth Circuit's and government's interpretation would make all of subsection (D)(ii) superfluous. Pet. 27-28. It also conflicts with § 7609's structure and shortchanges § 7609's purpose of safeguarding the public's privacy interests. Pet. 23-26, 28-30.

B. The government's counterarguments are unpersuasive.

First, the government contends that "[t]he text of Section 7609 … unambiguously forecloses petitioners' action." Opp. 12. As the petition explained, however, the government's and "court of appeals' plain-text reading," Opp. 17, ignores several features of statutory text and structure and makes all of subsection (D)(ii) superfluous. Pet. 27-28. That's why Judge Kethledge, Judge O'Scannlain, and Judge Ikuta have

all rejected it. *See* Pet. 17, 19; *Viewtech*, 653 F.3d at 1104 (Ikuta, J.) (explaining problems with the government's "plain language reading"). "Reading § 7609 as a whole," as Judge Kethledge has explained, shows that "'in aid of collection'" should be read "narrowly … to require a more direct connection between the summons and the 'collection' of the liability of the persons described in" subsections (D)(i) and (ii). App. 30a.

Second, the government contends that if the Ninth Circuit were right, Congress would have included in § 7609(c)(2)(D)(i) the language it used in I.R.C. § 7610(b)(1), the statute's reimbursement provision. The reimbursement provision states that the government may not reimburse production costs 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*." I.R.C. § 7610(b)(1) (emphasis added). But that argument doesn't make sense, because the italicized language doesn't track *Ip*'s test.

A "proprietary interest in the … records" doesn't mean a legal interest in the underlying account, as *Ip* requires. It means an ownership interest *in the records themselves*. Indeed, just sixth months before Congress enacted § 7610, Pub. L. No. 94-455, § 1205(a), 90 Stat. 1520, 1699-1701 (1976), this Court reaffirmed—in a tax evasion case—that the holder of a bank account "can assert neither ownership nor possession" over account records, which "are the business records of the banks." *United States v. Miller*, 425 U.S. 435, 440 (1976); *see Carpenter v. United States*, 138 S. Ct. 2206, 2216 (2018). The language in § 7610 prohibits the government from reimbursing delinquent taxpayers for coughing up *their own* records; it has nothing to do with the legal-interest test under

§ 7609(c)(2)(D)'s "in aid of" language. If the government's conflation were right, the IRS wouldn't be able to reimburse a bank for turning over its records of a delinquent taxpayer's account.

Finally, the government claims its reading of § 7609(c)(2)(D)(i) doesn't render § 7609(c)(2)(D)(ii) superfluous because clause (i) requires "a formal assessment" but clause (ii) does not. Opp. 14. That argument ignores the language of the two provisions. Clause (ii), the fiduciary or transferee provision, ties back to "any person referred to in clause (i)," I.R.C. § 7609(c)(2)(D)(ii), and clause (i) refers to a person against whom "an assessment" has been made "or judgment" has been "rendered," *id.* § 7609(c)(2)(D)(i). Clause (ii) thus doesn't kick in until there has been an assessment or a judgment—that is, until clause (i) has already kicked in (thus, on the government's view, making clause (ii) superfluous).

What's more, the government's argument makes no practical sense. If clause (ii) doesn't require an assessment or judgment, even though clause (i) does (as the government agrees, Opp. 16), then the government would have to give a delinquent taxpayer notice of a summons up until it makes an assessment or obtains a judgment against him. But it would *never* have to give his fiduciaries or transferees notice—even before any assessment or judgment. It makes little sense to afford the delinquent taxpayer greater privacy rights than third parties, especially when the taxpayer has the greatest incentive to hide assets.

CONCLUSION

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

Respectfully submitted.

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