No. 21-1599

In The
Supreme Court of the United States

HANNA KARCHO POLSELLI, ET AL.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF THE TREASURY—
INTERNAL REVENUE SERVICE,
Respondent.

On Certiorari to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

CONSTITUTIONAL PROVISIONS

FEDERAL REGULATIONS

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

The Institute for Justice (IJ)[1] is a nonprofit, public-interest law firm committed to securing the foundations of a free society by defending constitutional rights. A central pillar of IJ's mission is the protection of private property rights, both because the ability to control one's property is an essential component of individual liberty and because property rights are bound up with all other civil rights. *See United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993) ("Individual freedom finds tangible expression in property rights.").

To that end, IJ challenges warrantless government surveillance of people and their property. *See, e.g.*, *Long Lake Twp. v. Maxon*, No. 349230, 2022 WL 4281509 (Mich. Ct. App. Sept. 15, 2022) (challenging warrantless drone surveillance); *LMP Servs., Inc. v. City of Chicago*, 160 N.E.3d 822 (Ill.), *cert. denied*, 140 S. Ct. 468 (2019) (challenging warrantless GPS tracking); *Rainwaters v. Tenn. Wildlife Res. Agency*, No. 20-CV-6, 2022 WL 17491794 (Tenn. Cir. Ct. Mar. 22, 2022) (challenging warrantless patrols of private farmland). IJ also regularly files amicus briefs in Fourth Amendment cases before this Court. *See, e.g.*, *Tuggle v. United States*, 142 S. Ct. 1107 (2022); *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *Riley v. California*, 573 U.S. 373 (2014).

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[1] Amicus affirms no attorney for either party authored this brief in whole or in part, and no person or entity other than Amicus made a monetary contribution specifically for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case concerns whether the IRS must give notice to innocent third parties when it seeks their financial records to assist the IRS in collecting taxes from a delinquent taxpayer. The Sixth Circuit, below, held that the IRS need not provide any notice or opportunity to object to the scope of an IRS summons. Under that ruling, the IRS has effectively unfettered power to seek the complete financial records of anyone with even a tenuous connection to a delinquent taxpayer. The agency may comb through these third parties' most sensitive financial records without their knowledge, let alone any opportunity to object.

That ruling raises serious problems under the Fourth Amendment's "property-rights baseline." *Florida v. Jardines*, 569 U.S. 1, 11 (2013). Although this Court's third-party doctrine holds that people do not have a reasonable expectation of privacy in financial records held under contractual agreements by third parties—itself a dubious proposition—their contractual rights do secure property interests in those records. And under this Court's recent precedents, which have reiterated the historical centrality of property rights to Fourth Amendment analysis, those rights should count for something.

At a minimum, the property interests that Americans hold in their financial records are enough to raise significant constitutional doubts about the Sixth Circuit's interpretation of I.R.C. § 7609(c)(2)(D)(i), the statute under which the IRS sought Petitioners' bank records. And those constitutional doubts are sufficient to invoke the well-established doctrine of

constitutional avoidance. Under that doctrine, a law that is susceptible to two interpretations, one of which raises serious constitutional doubts, must be interpreted to avoid those doubts if it is fairly possible to do so.

Here, as developed at length in Petitioners' opening brief, there is a strong textual basis for avoiding these constitutional doubts. Most notably, the IRS's preferred interpretation of § 7609(c)(2)(D)(i) runs afoul of the canon against surplusage, because it renders the following section, § 7609(c)(2)(D)(ii), wholly redundant. But this Court can give effect to *all* the language of § 7609(c)(2)(D)—and to the presumed intent of Congress—by interpreting § 7609(c)(2)(D)(i) to apply only to accounts held by the delinquent taxpayer under investigation, and not those of innocent third parties. So holding would honor the text of both § 7609(c)(2)(D)(i) and the Fourth Amendment.

ARGUMENT

In Section I, Amicus will discuss the Fourth Amendment concerns raised by the Sixth Circuit's interpretation of § 7609(c)(2)(D)(i). In Section II, Amicus will discuss why the canon of constitutional avoidance counsels against this interpretation and instead favors an interpretation that limits summonses without notice under § 7609(c)(2)(D)(i) to accounts held by the delinquent taxpayer under investigation.

I. Interpreting § 7609(c)(2)(D)(i) to Require No Notice to Third Parties Whose Bank Records Are Summoned Raises Serious Fourth Amendment Concerns.

Virtually all Americans have entered multiple contracts governing in great detail how their private information—whether the contents of their email, their DNA test results, or their banking records—may be used. And most Americans would be shocked to learn that, under this Court's third-party doctrine, none of that information is protected against the entity that the U.S. Constitution is most concerned with protecting us against: the government.

"What's left of the Fourth Amendment?" *Carpenter v. United States*, 138 S. Ct. 2206, 2262 (2018) (Gorsuch, J., dissenting). In our modern economy, there are vast troves of data held by third parties, detailing practically our whole lives and that citizens consider to be theirs. Yet under this Court's precedent, Americans often have no legitimate expectation of privacy in even this most sensitive data and, hence, no Fourth Amendment right to be free from its unreasonable search and seizure. *United States v. Miller*, 425 U.S. 435 (1976).

"But no one believes that, if they ever did." *Carpenter*, 138 S. Ct. at 2262 (Gorsuch, J., dissenting). And Justice Gorsuch's dissent in *Carpenter* provides guidance on how this Court might think about these

issues outside of *Miller*'s privacy-based analysis.[2] Specifically, Justice Gorsuch looked to the historical understanding that the Fourth Amendment was rooted in property, an approach consistent with this Court's reaffirmation of a "property- rights baseline." *Florida v. Jardines*, 569 U.S. 1, 11 (2013); *see also United States v. Jones*, 565 U.S. 400 (2012).

With that "baseline" in mind, the Sixth Circuit's interpretation of § 7609(c)(2)(D)(i) raises serious Fourth Amendment concerns. It grants the IRS sweeping power to seize documents in which the Petitioners, along with millions of Americans, have a property interest. Specifically, it trenches on the right to exclude, "'one of the most treasured' rights of property ownership." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021). And there can be no doubt that Americans have at least some right to exclude others from access to their banking records, even when those records are held by a third party.

This right is limned, in part, by the private contractual agreements between Americans and their banking institutions. But it also derives, in part, from the positive law,[3] which imposes strict obligations on

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[2] Although Justice Gorsuch dissented from this Court's application of the third-party doctrine in *Carpenter*, his dissent chiefly offered an alternative, property-focused approach to the Fourth Amendment that the petitioner did not raise and the majority, therefore, did not address.

[3] "[P]ositive law may help provide detailed guidance on evolving technologies without resort to judicial intuition. State (or sometimes federal) law often creates rights in both tangible and intangible things. . . . Both the States and federal government are

banks to protect accountholders' right to exclude by requiring banks to get permission before they may share certain information with third parties. *See, e.g.*, Stored Communications Act, 18 U.S.C. §§ 2701 *et seq.*; Financial Services Modernization Act of 1999, Financial Privacy Rule, 15 U.S.C. §§ 6801–09.

Americans' right to exclude others from their banking records supports at least as strong a Fourth Amendment interest as the one at issue in *Carpenter*, where the Court held that the government needs a warrant to subpoena customers' cell-location data from wireless carriers where customers have a reasonable expectation of privacy in that data. *Carpenter*, 138 S. Ct. at 2222. Even more so than cell-location data, financial data "touch[es] upon intimate areas of an individual's personal affairs" and "can reveal much about a person's activities, associations, and beliefs." *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 78–79 (1974) (Powell, J., concurring); *see also Carpenter*, 138 S. Ct. at 2232 (Kennedy, J., dissenting) (observing that financial records can disclose "troves of intimate information" about a person's life). At the very least, these interests raise the question of whether the government's searches and seizures of such data are "unreasonable."

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actively legislating in the area of third party data storage and the rights users enjoy. . . . If state legislators or state courts say that a digital record has the attributes that normally make something property, that may supply a sounder basis for judicial decisionmaking than judicial guesswork about societal expectations." *Carpenter*, 138 S. Ct. at 2270 (Gorsuch, J., dissenting).

And here, it is hard to conclude otherwise. The IRS's position, adopted by the Sixth Circuit below, is that the agency may demand the production of anyone's most private financial records based on no standard other than that some government agent wants to see them. These demands are not required to be limited in time or in scope. Banks may be required to turn over even the most tenuously connected financial information, or even wholly unconnected financial information, and those with ownership interests in that information are not even given notice, let alone an opportunity to object.

Because property rights matter under the Fourth Amendment, the power the IRS claims here is intolerable. It would be rejected out of hand for papers in a person's physical custody. In *City of Los Angeles v. Patel*, 576 U.S. 409 (2015), for example, this Court held that government officials could not demand that hotel operators grant immediate access to registries of hotel guests that the operators were required by law to maintain specifically for the purpose of government inspection. Instead, the Fourth Amendment required that officials obtain at least an administrative warrant and that records' owners be given an opportunity for pre-compliance review. *Id.* at 421–22.

There is no reason to believe that these Fourth Amendment concerns disappear when the people to whom this information belongs allow others to hold it for them. Just the opposite. *See Ex parte Jackson,* 96 U.S. 727, 733 (1877) ("The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection,

wherever they may be."); *Carpenter*, 138 S. Ct. at 2268 (Gorsuch, J., dissenting) ("Entrusting your stuff to others is a *bailment*.").

In fact, the expansive power claimed by the government here is just what Justice Powell warned against in his controlling concurrence in *Schultz*, the case that first upheld federal financial reporting requirements. Justice Powell (joined by Justice Blackmun) provided the necessary vote to form a majority in that case, and, in doing so, noted that "[a]t some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy." 416 U.S. at 79. Further, "the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process," *id.*, or—as in this case—denies meaningful access to that process for the individuals who have the strongest interest in the records at issue. Any "significant extension" beyond the comparatively narrow financial reporting at issue in *Schultz* "would pose substantial and difficult constitutional questions." *Id.* at 78.

At a minimum, these "substantial and difficult constitutional questions" are enough to raise serious doubts about a law that would allow the government to search or seize bank records with no Fourth Amendment constraints—not even the constraint that searches and seizures be "reasonable." And, as discussed below, those concerns are fatal to the Sixth Circuit's interpretation of § 7609(c)(2)(D)(i).

II. Under the Doctrine of Constitutional Avoidance, This Court Should Interpret § 7609(c)(2)(D)(i) to Avoid Serious Constitutional Problems.

As shown above, there are potentially serious constitutional problems with the power the IRS claims here. But these problems can be avoided. Indeed, under this Court's well-established canon of constitutional avoidance, they *must* be avoided.

The canon of constitutional avoidance applies whenever a statute is subject to "competing plausible interpretations," one of which raises serious constitutional doubts. *Clark v. Martinez*, 543 U.S. 371, 381 (2005). The doctrine is an important part of interbranch comity, as it is based "on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Id.*

"[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). But the canon does not require this Court to conclude that one of the competing interpretations is *actually* unconstitutional. Instead, for more than a century, this Court has held that "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916).

As discussed in Section I, *supra*, granting the IRS essentially unfettered access to all the banking information of anyone whom the agency merely suspects may possess information relevant to the collection of another party's delinquent taxes, while granting those with ownership interests in that information neither notice nor an opportunity to object, raises serious constitutional questions under the Fourth Amendment's "property-rights baseline." *Jardines*, 569 U.S. at 11. Thus, the only remaining question is whether there is any plausible interpretation of § 7609(c)(2)(D)(i) that avoids these constitutional questions.

Here, the statute is open to another interpretation. Indeed, as Petitioners ably explain in their opening brief, their proffered interpretation—limiting the scope of § 7609(c)(2)(D)(i) to accounts held by the delinquent taxpayer—is not only plausible, it is far more plausible than the sweeping interpretation adopted by the Sixth Circuit below. Amicus will not recapitulate all of those arguments here. Instead, to establish the plausibility required to invoke the canon of constitutional avoidance, it is enough to look to the equally venerable canon against surplusage.

The canon against surplusage, "presum[es] that each word Congress uses is there for a reason." *Advoc. Health Care Network v. Stapleton*, 581 U.S. 468, 477 (2017). Thus, no provision "should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." A. Scalia & B. Garner, Reading Law 174 (2012). "The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory

scheme." *City of Chicago v. Fulton*, 141 S. Ct. 585, 591 (2021).

As Petitioners note, Opening Br. at 42–44, that is the case here, where the Sixth Circuit's interpretation of § 7609(c)(2)(D)(i) renders § 7609(c)(2)(D)(ii) utterly superfluous. If the IRS has statutory authority to summons—without notice—financial records held by any third party so long as doing so will assist in collecting *some other* taxpayer's liability, the IRS does not need the separately enumerated notice exception for transferees and fiduciaries of the taxpayer. Every summons that falls into this latter exception already falls into the former. Petitioners' narrower interpretation of § 7609(c)(2)(D)(i) avoids this redundancy. That is enough to render it a textually plausible interpretation under the canon against surplusage.

The only remaining question, then, is whether Petitioners' plausible, narrower interpretation of § 7609(c)(2)(D)(i) also avoids the serious constitutional problems posed by the Sixth Circuit's unconstrained interpretation. This is not a close call. On one hand, we have the Sixth Circuit's interpretation, which grants the IRS sweeping power to invade the Fourth Amendment rights of people, such as Petitioners, who are not even suspected of a crime yet affords them not a shred of procedural protection. On the other, we have Petitioners' interpretation, which limits the IRS to summonsing the records of only those who have already been adjudged delinquent on their

taxes[4]—and who in the process have already had various opportunities to contest the underlying basis for the summons. Because Petitioners' interpretation vastly reduces any potential Fourth Amendment problems with § 7609(c)(2)(D)(i), that is the interpretation that the canon of constitutional avoidance requires.

CONCLUSION

This Court should reverse the ruling below and interpret § 7609(c)(2)(D)(i) in a manner that both honors its plain text and respects the Fourth Amendment interests that Petitioners—and countless other Americans—have in their banking records.

[4] Amicus recognizes that § 7609(c)(2)(D)(ii) separately grants the IRS authority to summons records of fiduciaries and transferees of the delinquent taxpayer without notice, but whether that provision complies with the Fourth Amendment is not before this Court and is beyond the scope of this brief.

Respectfully submitted,

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January 30, 2023