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

BRIEF FOR CENTER FOR TAXPAYER RIGHTS, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, THE JANET R. SPRAGENS FEDERAL TAX CLINIC AT AMERICAN UNIVERSITY'S WASHINGTON COLLEGE OF LAW, AND THE VILLANOVA FEDERAL TAX CLINIC AT VILLANOVA UNIVERSITY'S CHARLES WIDGER SCHOOL OF LAW AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The Center for Taxpayer Rights ("CTR") is a non-profit organization dedicated to furthering taxpayers' awareness of, and access to, taxpayer rights. CTR accomplishes its mission in part by educating the public and government officials about the role that taxpayer rights play in promoting compliance and trust in systems of taxation. CTR's Executive Director is Nina E. Olson, who served as the National Taxpayer Advocate from 2001 to 2019. In that capacity, Ms. Olson was responsible for, among other things, identifying areas "in which taxpayers have problems in dealings with the Internal Revenue Service" ("IRS") and assisting "taxpayers in resolving problems with the" IRS—including problems related to IRS summonses. 26 U.S.C. § 7803(c)(2)(A)(i)-(ii). CTR's Board of Directors includes Leslie M. Book, a Professor of Law at the Villanova Charles Widger School of Law. Professor Book is a leading scholar on IRS practice and procedure, and has published on summons-related issues, including on the question presented. *See, e.g.*, Michael Saltzman & Leslie Book, *IRS Practice and Procedure* ¶ 13.02[2][d] (Westlaw online ed. 2022) ("*IRS Practice and Procedure*"). CTR is dedicated to championing taxpayers' rights, including the congressionally granted rights to prevent undue and unwarranted intrusions on privacy by the IRS at the heart of this case.

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[1] No counsel for a party authored this brief in whole or in part; and no such counsel, any party, or any other person or entity—other than amici curiae and their counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

The American Civil Liberties Union Foundation ("ACLU") is a nationwide, nonprofit, nonpartisan organization with approximately two million members and supporters dedicated to defending the principles embodied in the Bill of Rights and our nation's civil rights laws. Since its founding in 1920, the ACLU has frequently appeared before this Court, the lower federal courts, and state courts in cases defending Americans' privacy rights in a wide range of contexts.

The Janet R. Spragens Federal Tax Clinic at American University's Washington College of Law and the Villanova Federal Tax Clinic at Villanova University's Charles Widger School of Law ("the Clinics") represent low-income individuals in disputes before the IRS and the United States Tax Court, with the goals of maximizing financial well-being and protecting the rights of low-income taxpayers while teaching law students. Clients of the Clinics regularly include individuals subject to IRS compliance and collection activities that could include third-party summonses. Typically, these clients are individuals who operated a small business as a sole proprietorship before falling on hard times, or low-income individuals who are subject to an investigation or assessment relating to trust fund taxes under 26 U.S.C. § 6672.

INTRODUCTION AND SUMMARY OF ARGUMENT

The IRS has broad power to seek records to carry out its myriad investigatory, collections, and other duties. *See* 26 U.S.C. § 7602(a). But over the years, the IRS has gone too far in the exercise of that power. The notice statute at issue in this case, 26 U.S.C.

§ 7609, was enacted as a guard against IRS overreach. This Court should not interpret that provision in a way that would eviscerate this important check on the IRS's authority.

Congress enacted § 7609 to protect the right to privacy from government intrusion without unduly interfering with tax collection and procedure. Section 7609 sets the baseline expectation that when the IRS issues a summons seeking third-party records, it will provide notice of the summons to identified persons. For example, if the IRS seeks bank records in the course of an audit, it generally must also notify the accountholder of the summons. The statute then gives the accountholder a brief window to seek to quash the summons based on recognized privileges and defenses, such as lack of relevance or the attorney-client privilege.

The protections afforded by § 7609 are not absolute. The statute includes exceptions which deny notice of the summons in certain circumstances, and only persons entitled to notice have a right to challenge the summons. But those exceptions are narrow, and the ones most ripe for abuse come with additional safeguards, such as court authorization.

This case concerns the "in aid of collection" exception found in 26 U.S.C. § 7609(c)(2)(D)(i). Petitioners argue (correctly) that the "in aid of collection" exception applies only to records of accounts in which the delinquent taxpayer herself has a legal interest. *See Ip v. United States*, 205 F.3d 1168, 1174-76 (9th Cir. 2000) (adopting the interpretation now advanced by petitioners). That interpretation is consistent with the other exceptions in the statute; is protective of the privacy rights that Congress specifically sought to protect in the enacting

legislation; has a legitimate justification; and directly addresses concerns that a delinquent taxpayer may hide assets after receiving notice of the summons.

The IRS's contrary interpretation does none of those things. The IRS argues that it may issue a summons seeking the records of people who do not owe it a single penny—without any notice or opportunity to be heard—so long as the IRS does so as part of the collection of *someone else's* tax liability. This interpretation allows the IRS to drive a truck through this limited exception and to swallow the remainder of the statute, making notice the exception rather than the rule. *See* Pet. App. 30a (Kethledge, J., dissenting). If this interpretation is adopted, notice will become a mere grace. And innocent third parties will have no opportunity to assert fundamental privileges and protections, such as the attorney-client privilege (and similar privileges applying to accountants and other tax practitioners).

This case strikes at the heart of privacy rights that Congress specifically created in response to IRS overreaches. The scope of this exception determines whether individuals or entities have a meaningful right to keep their private information out of the IRS's hands. And honoring the balance struck by Congress brings with it only the barest of administrative inconveniences: the delay of a scant 23 days. If such expediencies are enough to overcome the text, context, and historical backdrop against which Congress legislated, then the IRS's powers are truly unfettered.

ARGUMENT

A. Section 7609 Is Part Of A Decade-Long Expansion Of Privacy Rights In Response To Inadequate Protections And IRS Overreach

"'[T]he privacies of life'" must be secure "against 'arbitrary power.'" *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)); *see Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992) (noting the "interest in maintaining the privacy of [one's] 'papers and effects'" (quoting U.S. Const. amend. IV)). Bank statements and similar financial data like those commonly sought by the IRS are precisely the type of information entitled to privacy protections. *See Riley v. California*, 573 U.S. 373, 394-96 (2014). Taxpayers and other persons have an interest in keeping their records safe from government intrusion. In enacting § 7609 of the Internal Revenue Code, Congress recognized, and expanded protections for, that interest vis-à-vis the IRS.

1. Congress enacted § 7609 during a decade of upheaval in the privacy landscape. There had been "increasing computerization of information and the burgeoning repositories of personal data in federal agencies"; Executive Branch abuses of government data; and decisions of this Court narrowing Fourth Amendment protections for certain personal records. Daniel J. Solove, *A Brief History of Information Privacy Law, in Proskauer on Privacy* 1-1, 1-23 to -24 (2d ed. 2016); *see id.* at 1-26 (noting "[m]any . . . developments [that] involved the lessening of financial privacy").

Most relevant here, reports of IRS overreaches and Executive Branch abuses of IRS powers were widespread. President Nixon, for example, had issued executive orders authorizing the Department of Agriculture "to inspect the tax returns of all farmers 'for statistical purposes.'" Office of Tax Pol'y, U.S. Dep't of the Treasury, *Report to The Congress on Scope and Use of Taxpayer Confidentiality and Disclosure Provisions* 20 (Oct. 2000) ("*Report on Taxpayer Confidentiality and Disclosure Provisions*");[2] *see* Privacy Protection Study Comm'n, *Personal Privacy in an Information Society* 539 (1977) (recognizing that these executive orders "aroused intense controversy").[3] An operation had been uncovered "involv[ing] widespread spying by IRS agents into the private lives of prominent figures." 121 Cong. Rec. 14245-46 (May 14, 1975) (statement of Sen. Bentsen). *See generally Operation Leprechaun: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 94th Cong. 1 (1975), *reprinted in* 4 Bernard D. Reams, Jr. & Emelyn B. House, *Tax Reform-1976: A Legislative History of the Tax Reform Act of 1976* (1992). And Congress had heard testimony indicating that the IRS was using its civil summons power to request records to assist in criminal tax investigations. *See Jeopardy and Termination Assessments and Administrative Summonses: Hearing Before the Subcomm. on the Admin. of the Internal Revenue Code of the S. Comm. on Finance*, 94th Cong. 81 (1975).

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[2] Available at https://home.treasury.gov/system/files/131/Report-Taxpayer-Confidentiality-2010.pdf.

[3] Available at https://www.ojp.gov/pdffiles1/Digitization/49602NCJRS.pdf.

At the same time, this Court was severely cutting back on the public's ability to challenge the government's collection and use of information. In *Donaldson v. United States*, the Court held that a taxpayer could intervene to contest an IRS summons to a third-party recordkeeper only by showing a "significantly protectable interest" prohibiting disclosure. 400 U.S. 517, 531 (1971). The taxpayer's interest in the privacy of her records was insufficient. *See id.* In *United States v. Bisceglia*, the Court held that the IRS could issue a "John Doe" summons to third parties to investigate bank transactions indicating possible liability for unpaid taxes. 420 U.S. 141, 150 (1975). And in *United States v. Miller*, the Court held that a bank depositor had no "protectable Fourth Amendment interest" in his bank records and, as a result, could not "challenge the validity" of allegedly defective subpoenas to his bank. 425 U.S. 435, 437, 446 (1976).

2. All of these developments prompted Congress to enact substantive protections and procedural safeguards for sensitive "papers and effects" like personal records, tax, and financial information.

Congress began the decade by passing the Fair Credit Reporting Act to regulate how credit reporting agencies use data collected in consumer reports. *See* Pub. L. No. 91-508, § 601, 84 Stat. 1127, 1127-36 (1970). Several years later, it passed the Privacy Act of 1974, where it explicitly recognized a "right to privacy" and "provide[d] certain safeguards" against federal agencies "inva[ding] . . . personal privacy." Pub. L. No. 93-579, § 2(a)(4), (b), 88 Stat. 1896, 1896. The Privacy Act responded to Congress's increasing concerns "about the disclosure and use of information gathered from and about citizens by agencies

of the Federal government." *Report on Taxpayer Confidentiality and Disclosure Provisions*, *supra*, at 20.

Two years after that, Congress passed the Tax Reform Act of 1976 intending to strengthen taxpayer rights—including privacy rights. *See, e.g.*, Tax Reform Act of 1976, Pub. L. No. 94-455, § 1202(a), 90 Stat. 1520, 1667-85 (codified at 26 U.S.C. § 6103) (requiring confidentiality of tax returns); *id.* § 1201(a), 90 Stat. at 1660-67 (codified at 26 U.S.C. § 6110) (permitting public inspection of written determinations but exempting from disclosure information which "constitute[s] a clearly unwarranted invasion of personal privacy"); *id.* § 1205(a), 90 Stat. at 1699-702 (codified at 26 U.S.C. § 7609) (increasing procedural protections related to IRS summonses). Every contemporaneous account of the Act recognized that it was "designed to strengthen taxpayers' rights" and to protect privacy. Staff of the J. Comm. on Tax'n, *General Explanation of the Tax Reform Act of 1976*, at 11 (1976) ("*General Explanation*");[4] *see, e.g.*, S. Rep. No. 94-938, at 2 (1976) (noting a desire "to make improvements in the administration of the tax laws, particularly to strengthen taxpayers' rights"); H.R. Rep. No. 94-658, at 4 (1975) ("[A]nother high priority is to improve the administration of the tax laws, particularly in the terms of protecting taxpayers' rights *vis a vis* the government.").

Congress also responded directly to each of this Court's three privacy-limiting decisions. It enacted the Right to Financial Privacy Act of 1978 in response

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[4] Available at https://www.jct.gov/publications/1976/jcs-33-76/.

to *Miller*, limiting government access to nonpublic financial records. *See* Pub. L. No. 95-630, §§ 1102-1103, 92 Stat. 3697, 3697-98; *see also* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 Mich. L. Rev. 561, 596 (2009) (noting that the "RFPA responds to *Miller* by limiting government access to 'the information contained in the financial records of any customer from a financial institution'" (quoting 12 U.S.C. § 3402)). And it enacted § 7609, the section of the Internal Revenue Code at issue here, to limit the IRS's otherwise-unbridled summons power under *Donaldson* and *Bisceglia*. *See Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 316 (1985) (noting that § 7609 "was clearly a response to" *Donaldson* and *Bisceglia*).[5]

3. In enacting § 7609, Congress was cognizant of the need to allow for efficient tax collection while not "unreasonably infring[ing] on the civil rights of taxpayers, including the right to privacy." S. Rep. No. 94-938, at 368, 371; *see* H.R. Rep. No. 94-658, at 307 (same); *see also Report on Taxpayer Confidentiality and Disclosure Provisions*, *supra*, at 22 (discussing Congress's "balanc[ing]" a "particular

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[5] Congress has continued to expand and codify privacy protections in the tax context. Most prominently, Congress codified a general "right to privacy" in the Taxpayer Bill of Rights. Pub. L. No. 114-113, § 401(a), 129 Stat. 2242, 3117 (2015) (codified at 26 U.S.C. § 7803(a)(3)). The Taxpayer Bill of Rights collected rights that had previously been "scattered throughout the tax code and Internal Revenue Manual," 161 Cong. Rec. 18902 (Nov. 30, 2015) (statement of Rep. X. Becerra), and gave them the "force of law" to impose obligations on the IRS and "ensure public trust," H.R. Rep. No. 114-70, at 4 (2015); *see also* IRS, Publication 1, *Your Rights as a Taxpayer* 1 (Sept. 2017), https://www.irs.gov/pub/irs-pdf/p1.pdf.

office or agency's need for the information with the citizen's right to privacy"). To account for these competing interests, § 7609 does not curtail the IRS's ability to collect information by issuing a summons or grant any new substantive rights, privileges, or defenses. It instead strengthens taxpayer rights by providing new procedural protections. *See* S. Rep. No. 94-938, at 368, 370.

Specifically, § 7609 generally requires the IRS to notify the subject of the records sought. *See* 26 U.S.C. § 7609(a). It also grants "any person who is entitled to notice of a summons" a short window of time in which to challenge the summons based on any ground recognized by law, such as relevance or the attorney-client privilege. *Id.* § 7609(b)(1); *see* S. Rep. No. 94-938, at 370-71. For example, if the IRS issues a summons to a bank for a taxpayer's records in the course of an audit, it must notify the taxpayer of the summons, giving the taxpayer an opportunity to prevent disclosure of her records by challenging the summons. *See IRS Practice and Procedure*, *supra*, ¶ 13.02[2][d]. To ensure that "these procedures" do not "produce a problem for sound tax administration greater than the one they seek to solve," Congress imposed strict timing and other limitations. S. Rep. No. 94-938, at 371; *see, e.g.*, 26 U.S.C. § 7609(a)(1). Notably, a person is able to challenge the summons only if they are entitled to notice of that summons. *See* 26 U.S.C. § 7609(b)(1), (2)(A).

Congress also included certain exceptions to account for the rare instances in which this privacy-protecting rule may be unnecessary or inappropriate. *See id.* § 7609(c)(2)-(3). These exceptions are narrowly drawn. The IRS need not give notice of a summons "served on the person with respect to whose

liability the summons is issued, or any officer or employee of such person"—*i.e.*, a summons issued to the person whose tax liability is at issue for her own records rather than a third-party recordkeeper like a bank. *Id.* § 7609(c)(2)(A). That makes sense; such a person would almost by definition already have received notice of the summons and would have been able to prevent disclosure of the records by not complying with the summons—and, if necessary, litigating privilege or any other basis for withholding the records in an enforcement proceeding. *See id.* § 7604(b). Nor does the IRS need to give notice of a summons issued for the limited purposes of "determin[ing] whether or not records of the business transactions or affairs of an identified person have been made or kept," "determin[ing] the identity of any person having a numbered account (or similar arrangement) with a bank," or seeking records from entities other than "third-party recordkeeper[s]" for criminal investigation purposes. *Id.* § 7609(c)(2)(B), (C), (E).

Other exceptions with a high potential for abuse come with *additional* safeguards. To protect against fishing expeditions, the IRS must make a specific showing in district court before issuing a "John Doe" summons. *Id.* § 7609(c)(3), (f). Likewise, if the IRS wants to withhold notice of a summons out of a concern that notice would "lead to attempts to conceal, destroy, or alter records relevant to the examination, . . . or to flee to avoid prosecution, testifying, or production of records," it must first petition a district court to demonstrate "reasonable cause to believe" that one of the listed grounds exists. *Id.* § 7609(g); *see id.* § 7609(c)(3).

This case concerns an exception to the notice requirement for "any summons"

> (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)(D).

This "in aid of collection" exception was aimed at one specific scenario: "[I]n the case of a summons used solely for purposes of collection," where the IRS "made an assessment or obtained a judgment against a taxpayer and serves a summons on a bank . . . to determine whether the taxpayer has an account in that bank, and whether the assets in that account are sufficient to cover the tax liability which has been assessed, the Service is not required . . . to give notice to *the taxpayer* whose account is involved." H.R. Rep. No. 94-658, at 310 (emphasis added); *accord* S. Rep. No. 94-938, at 371-72. Congress determined that notice is not required in this narrow circumstance to prevent an assessed taxpayer (or a fiduciary or transferee liable for the taxpayer's debt) from using the window of time in which a summons could otherwise be challenged to "withdraw the money in his account, thus frustrating the collection activity of the [IRS]." S. Rep. No. 94-938, at 372; *accord* H.R. Rep. No. 94-658, at 310.

Petitioners' interpretation of the "in aid of collection" exception is consistent with this enactment

history of § 7609. Narrowly construing the exception to situations in which an assessed taxpayer "has some legal interest or title in the object of the summons" comports with Congress's intent to strengthen privacy rights and limit IRS overreach. *Ip v. United States*, 205 F.3d 1168, 1175 (9th Cir. 2000). When there is a meaningful risk of malfeasance—*i.e.*, when the taxpayer "has a recognizable [legal] interest in the records summoned"—the IRS is not required to provide notice of a summons. *See id.* at 1174-76 (citation omitted). That interpretation appropriately balances privacy rights against the need for sound tax administration and is consistent with the only circumstance for applying the "in aid of collection" exception mentioned in the legislative history. *See* S. Rep. No. 94-938, at 371-72; H.R. Rep. No. 94-658, at 310.

B. Only Petitioners' Interpretation Honors The Balance Congress Struck

This case involves two competing interpretations of the "in aid of collection" exception. Only petitioners' interpretation comports with the legislative history and the balance Congress struck in § 7609. By contrast, the interpretation adopted by the Sixth Circuit below—which was urged by the IRS and previously adopted by the Seventh Circuit—neuters § 7609's protections when they are needed the most.

The two interpretations of the "in aid of collection" exception differ significantly in terms of (i) who is entitled to notice of a summons and (ii) who has the opportunity to challenge a summons. Under petitioners' interpretation (previously adopted in the Ninth Circuit) the exception applies "only where the assessed taxpayer 'has a recognizable [legal] interest

in the records summoned.'" *Ip*, 205 F.3d at 1176 (alteration in original) (citation omitted); *see Viewtech, Inc. v. United States*, 653 F.3d 1102, 1106 (9th Cir. 2011); *see also* Pet. App. 30a (Kethledge, J., dissenting). In the Sixth and Seventh Circuits, the exception sweeps much more broadly: "[A]s long as the third-party summons is issued to aid in the collection of *any assessed tax liability* the notice exception applies." Pet. App. 13a (emphasis added) (quoting *Barmes v. United States*, 199 F.3d 386, 390 (7th Cir. 1999)).

The difference is stark. Under petitioners' rule, the accountholder is entitled to notice and an opportunity to challenge the summons as long as the assessed taxpayer has no legal interest in the account. *See Ip*, 205 F.3d at 1173-76. Under the Sixth and Seventh Circuits' rule, the accountholder is entitled to neither. Once the IRS has assessed a tax liability, it can seek the records of any bank account it wants; it need only claim that the summons is "in aid of the collection" of that assessment. 26 U.S.C. § 7609(c)(2)(D). Since the IRS does not notify the accountholder of the summons, it will likely obtain the records without the accountholder ever finding out. But even if the accountholder finds out about the summons some other way—*e.g.*, from the bank, as happened here, *see* Pet. App. 5a—it still would have no right to challenge the summons, no matter how strong the legal basis for doing so, *see* 26 U.S.C. § 7609(b)(1), (2)(A) (allowing a person to challenge a summons only if that person "is entitled to notice of [the] summons").[6]

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[6] Nor can the accountholder rely on the bank to challenge the summons because, among other things, the bank is immunized

This case illustrates why the governing rule matters. Two of the petitioners are law firms. Pet. App. 4a. The IRS is seeking the firms' bank records—which may show transactions with many clients—"in aid of the collection" of the assessed liability of Remo Polselli, a single client. *Id.* at 5a. Under petitioners' rule, independent third parties like the firms are entitled to notice of the summons and an opportunity to prevent disclosure based on privilege and other available defenses. Under the IRS's preferred interpretation, it need not tell the firms about the summonses; the banks have to turn over the records even if they contain irrelevant, privileged, or confidential information; and no court can consider those defenses.[7]

The IRS has argued that the interpretation adopted by the Ninth Circuit and favored by petitioners is no better at protecting privacy than the broad interpretation because common real-world scenarios involve individuals not entitled to notice under *either* interpretation. *See* BIO 20-22. That is wrong. To make its point, the IRS cited *Viewtech* and *Cranford v. United States*, 35 F. Supp. 2d 981 (E.D. Cal. 2005). *See id.* In *Viewtech*, the assessed taxpayer was the majority shareholder of the petitioner corporation, which was considered a sufficient legal interest to deny notice to the corporation. *See* 653

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from liability for complying with the summons. *See* 26 U.S.C. § 7609(i)(3).

[7] Although the IRS offered to allow the banks to turn over the records to the firms first to ensure that the records included information about Mr. Polselli only, *see* Pet. App. 5a, it is under no legal obligation to do so. And if the banks had not notified the firms about the summonses, they presumably would have turned the records over to the IRS without any review at all.

F.3d at 1106. In *Cranford*, the district court held only that the petitioner had failed to carry her burden of proving the "absence of a legal relationship" or "refute" the government's evidence as required to satisfy the Ninth Circuit's test. 35 F. Supp. 2d at 988. That the two interpretations led to the same result in such circumstances is evidence that the narrow interpretation is sufficient to protect the IRS's interests. And for parties like the petitioners here, the distinction matters. *See, e.g.*, *Ip*, 205 F.3d at 1170-72 (holding that the petitioner was entitled to notice of a summons relating to her bank account because she had "never been an employee, owner, officer or director of" the delinquent taxpayer corporation owned by her fiancé); *Sunshine Behavioral Health Servs., Inc. v. United States*, No. 8:08-mc-134, 2009 WL 1850310, at *3 (M.D. Fla. June 26, 2009) (holding that delinquent taxpayer's law firm had standing to move to quash a summons regarding its trust account).

Such innocent third parties need the privacy protection afforded by petitioners' interpretation. A situation in which the assessed taxpayer has a "recognizable [legal] interest" in the records sought by the IRS presents fewer privacy concerns. Before a taxpayer is assessed, she generally has opportunities for administrative review, including in the IRS Independent Office of Appeals, *see* 26 U.S.C. § 7803(e)(4), and, for taxes subject to deficiency procedures, judicial review in the Tax Court, *see id.* § 6213(a). So the taxpayer's right to privacy in her records may reasonably give way to the IRS's need to collect the outstanding debt. *Cf. Tiffany Fine Arts*, 469 U.S. at 321 (the "IRS's interest in enforcing the tax laws" can outweigh incidental effects on "privacy

rights" when the IRS is pursuing a "legitimate investigation of a particular taxpayer"). The same is not true when the IRS seeks the records of an innocent third party.

Protecting innocent third parties further guards against IRS overreach. A summons issued for an assessed taxpayer's own records is more likely to reveal assets from which the IRS can collect. It is thus more likely to serve a bona fide collection-related purpose. An assessed taxpayer is also less likely to be able to assert a legitimate privilege or defense against disclosure of her own records. And since the universe of assessed taxpayers is much smaller than the universe of innocent third parties, so too is the pool of people who may be excepted from § 7609's procedural protections.

C. The IRS's Interpretation Eviscerates Important Protections Without Any Corresponding Benefit

The IRS's interpretation of the "in aid of collection" "exception to the notice rule would swallow the rule itself." *Ip*, 205 F.3d at 1175. Whatever small administrative benefit the IRS may derive from that interpretation pales in comparison to the harm to privacy.

1. The IRS's preferred interpretation imposes no meaningful limit on the agency. It allows the IRS, in essence, to seek records of any bank account it wants—without giving the accountholder notice or an opportunity to challenge the summons. All the IRS has to do is claim the records would help it collect someone else's assessed tax liability. *Cf. Arismendy v. Commissioner*, No. 4-17-cv-1139, 2017 WL 4339246, at *2 (S.D. Tex. June 30, 2017) (holding that

the petitioner was not entitled to notice or an opportunity to challenge a summons because "[t]he Summons invoked this ['in aid of collection'] exception on its face"), *reinstated*, 2017 WL 3335990, at *2 (S.D. Tex. Aug. 4, 2017) (dismissing action as moot because the government conceded that the petitioner was entitled to notice). That interpretation deprives § 7609 of any force 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." *Viewtech*, 653 F.3d at 1104-05 (citation omitted).

That interpretation is particularly perverse because once the IRS has decided to forgo notice and collected the records it seeks, it can use those records however it wants. Although the "in aid of collection" exception envisions that a summons will be issued for collection purposes, the statute does not restrict the IRS's use of records produced in response. So if the IRS seeks and obtains the bank records of a taxpayer's lawyer "in aid of the collection" of the taxpayer's assessed tax liability, it can turn around and use those records to audit the lawyer and her other clients—all without notifying the taxpayer, the lawyer, or the other clients and without giving any of them a chance to raise privilege or any other basis to quash the summons. Indeed, the IRS has urged, and lower courts have accepted, that the IRS can use the "in aid of collection" exception even when it issues a summons for *both* collection and non-collection purposes. *See Barmes*, 199 F.3d at 389 ("[T]he notice exception applies to every summons issued to aid in collection even if that is not the exclusive purpose.").

It is inconceivable that this is what Congress had in mind by enacting § 7609. Congress enacted § 7609

in part as a response to *Donaldson*. *See supra* at 7-9. There, a taxpayer was seeking to quash a summons issued to his employer and his employer's accountant; the summons was ostensibly issued to determine the taxpayer's tax liability but may really have been issued as part of a criminal investigation. *See Donaldson*, 400 U.S. at 519-21. This Court held that the taxpayer had no right to intervene to prevent disclosure of his records without a narrowly defined "significantly protectable interest." *Id.* at 531. Congress's legislative response—§ 7609—gave new procedural protections with respect to a third-party summons issued for audit or criminal-investigation purposes.[8] Yet the IRS's interpretation of the "in aid of collection" exception would largely negate those protections—without *any* of the safeguards Congress imposed on other exceptions with similar potential for abuse. *See supra* at 11; 26 U.S.C. § 7609(c)(3), (f), (g) (requiring the IRS seek district court approval for certain summonses).

Congress did not give new procedural protections with one hand and then take them away with the other. And it certainly did not do so through legislation intended to "strengthen" the rights of taxpayers and others. *General Explanation*, *supra*, at 11. Nor is this consistent with the general statutory right to privacy inherent in the tax code, which was

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[8] Section 7609(c)(2)(E), which provides an exception to the notice requirement for certain summonses issued "in connection with the investigation of an offense connected with the administration or enforcement of the internal revenue laws," was not added until 1998. *See* Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3415(c)(2), 112 Stat. 685, 755-56.

one of the pre-existing rights collected for convenience in the Taxpayer Bill of Rights. *See supra* at 9 n.5.

2. The virtually unchecked power the IRS claims for itself provides potential for widespread, but literally immeasurable, harm. As far as CTR knows, the IRS does not publicly report how often it uses the "in aid of collection" exception. But data collected before the passage of § 7609 suggested that the IRS issued approximately 45,000 summonses annually to third-party recordkeepers like banks—the vast majority of which were intended to be covered by the procedural requirements of § 7609. 122 Cong. Rec. 24250 (July 28, 1976). And today, summons-related issues have become among the most frequently litigated issues in tax law. *See* Nat'l Taxpayer Advocate, *Annual Report to Congress 2021*, at 189-90 (2021).[9] In 2018 alone, the National Taxpayer Advocate identified 25 instances in which a third party petitioned to quash a summons after incidentally receiving notice. *See* Nat'l Taxpayer Advocate*, Annual Report to Congress 2018: Volume 1*, at 475 (2019).[10] Many of the proceedings were dismissed for lack of jurisdiction, including under procedural or notice grounds per § 7609(c)(2)(D)(i). *See id.* Despite the lack of concrete data, it is evident that the IRS frequently relies on the "in aid of collection" to deny § 7609's procedural protections to innocent third parties.

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[9] Available at https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2022/01/ARC21_Full-Report.pdf.

[10] Available at https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_Volume1.pdf.

And this harm is done for a vanishingly small administrative benefit to the IRS. The IRS has little to gain by not issuing notice to innocent third parties. The primary reason to deny notice in this context is to avoid giving advance warning to those who owe taxes that the IRS is embarking on collection activity. But, as noted above, the narrower interpretation of the "in aid of collection" exception still grants the IRS an exception from § 7609 in the only circumstances actually identified in the legislative history. *See supra* at 12-14. The broader interpretation preferred by the IRS expands a collections-related exception to innocent third parties from whom the IRS *cannot collect*. *See supra* at 13-14, 17-18.

Any potential for the narrow interpretation to delay collection is further mitigated by deadlines and the potential for an extension of the relevant statute of limitations. *See* 26 U.S.C. § 7609(a), (e). The IRS generally has 10 years to collect a tax assessment and even longer to collect a judgment. *See id.* § 6502(a). Complying with § 7609 requires only *23 days' notice*—a trivial portion of a 10-year collection period. *See id.* § 7609(a)(1). Even when notice of a summons leads to court proceedings to quash the summons, there is still plenty of time to collect any attendant tax liability. Moreover, the IRS routinely takes months or years to perform many of its core functions, including processing tax returns, issuing refunds to collect any tax liability, responding to taxpayer correspondence, and performing audits. *See, e.g.*, News Release, IRS, IR-2022-129, *National Taxpayer Advocate Issues Midyear Report to Congress; Expresses Concern About Continued Refund Delays and Poor Taxpayer Service*

(June 22, 2022).[11] The IRS should not be heard to complain about the relatively minimal delay necessary to protect privacy rights.

In any event, the benefit to providing notice to innocent third parties outweighs any prejudice to the IRS. Any perceived benefit to the IRS from the broader interpretation of the "in aid of collection" exception is speculative—and outweighed by the undeniable and far-reaching privacy harm it causes.

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[11] Available at https://www.irs.gov/newsroom/national-taxpayer-advocate-issues-midyear-report-to-congress-expresses-concern-about-continued-refund-delays-and-poor-taxpayer-service.

CONCLUSION

The Sixth Circuit's judgment should be reversed.

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