No. 21-1599

IN THE
Supreme Court of the United States

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

Petitioners,

v.

INTERNAL REVENUE SERVICE,

Respondent.

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

BRIEF OF NATIONAL TAXPAYERS UNION FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, producing scholarly analyses and engaging in direct litigation and *amicus curiae* briefs upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce.

Because *Amicus* has written extensively on the issues involved in this case, because this Court's decision may be looked to as authority, and because any decision will significantly impact taxpayers and tax administration, *Amicus* has an institutional interest in this Court's ruling.

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[1] Pursuant to Supreme Court Rule 37, counsel for *Amicus* represents that none of the parties or their counsel, nor any other person or entity other than *Amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Sixth Circuit granted the IRS dangerous powers by reading 26 U.S.C. § 7609(c)(2)(D) broadly to allow almost any summons or seizure of assets that are "in aid of" collection of delinquent tax debt. In this case, the IRS sought, without notice or due process, the private financial records of law firms, banks, and Hanna Karcho Polselli in the hopes that perhaps *some* information *might* lead to a way to collect on Remo Polselli's back taxes. Br. of Pet. at 10-12.

Overzealous enforcement is a perennial problem for the IRS. NTU members and others have been subject to the overconfident overreaching from IRS agents, and it has led to ruined lives. Congress has reacted to some of these stories by providing protections to taxpayers and bystanders alike that give early warning and a chance to contest illegal searches from wayward agents. There is a narrow exception to keep delinquents from being "tipped off" that the IRS may seize their accounts to satisfy back taxes, fees, and penalties. Yet if the decision below stands, the exception will swallow the rule.

The situation is all the more serious now that the IRS has billions of dollars in new funds to pay for enforcement. The middle class and poor alike already suffer with each iteration of more enforcement focus from the tax agency. And this Court should clarify now when and how the exceptions in § 7609(c)(2)(D) may be used to surreptitiously investigate and seize bank accounts from those with little affirmative legal connection with the delinquent taxpayer.

There is certainly a circuit split this Court needs to resolve in how to read § 7609(c)(2)(D). *Amicus* points this Court to a little-used but helpful district court case. *Barnhart v. United Penn Bank*, 515 F. Supp. 1198 (M.D. Pa. 1981), looked to what it means to be a "fiduciary" in 26 U.S.C. § 7609, the Internal Revenue Code as a whole, and the Treasury regulations. Finding that "fiduciary" means something more than a mere "agent" shows that Congress directed the need for a closer legal relationship between the taxpayer and the third party who may be investigated.

The general rule is that third parties must be notified and have the chance to quash illicit IRS demands. Only if the taxpayer or his *fiduciary* are in control of assets is the notice requirement lifted. This is a workable test that stays true to the statutory text.

ARGUMENT

I. THE PAST IS PROLOGUE: THE IRS' LONG HISTORY OF ENFORCEMENT ABUSE

Notice is essential to fighting unconstitutional tax enforcement. The text and purpose of 26 U.S.C. § 7609(c)(2)(D) is a *narrow* exception of the otherwise broad protections Congress enacted to bolster the Due Process rights of taxpayers and innocent third parties alike. The facts of the case at bar are outrageous: the IRS sought, without notice or due process, the private financial records of law firms, banks, and Hanna Karcho Polselli in the hopes that perhaps *some* information *might* lead to a way to collect on Remo Polselli's back taxes. Br. of Pet. at 10-12. But overzealous enforcement has long plagued the tax agency.

Perfectly innocent and unrelated third parties to transactions under IRS scrutiny have been bombarded with Information Document Requests and tax form filing requirements. *See*, *e.g.*, *Husby v. United States*, 672 F. Supp. 442, 443–44 (N.D. Cal. 1987) (detailing multiple demand letters and eventual levies, when even the IRS attorney acknowledged the assessment was in error). Advisors as well as professionals who perform arm's-length services for compiling information to substantiate a tax deduction are threatened with penalties and other disciplinary actions.

For example, Thomas Treadway and Shirley Lojeski had long been friends, and Mr. Treadway eventually moved onto Ms. Lojeski's farm in Pennsylvania. *Lojeski v. Boandl*, 602 F. Supp. 918, 919 (E.D. Pa. 1984) *rev'd* 788 F.2d 196 (3d Cir. 1986). But when he moved on the farm in 1980, Mr. Treadway brought unexpected baggage: IRS Agent Richard Boandl was auditing Mr. Treadway for tax years 1977-1980. *Id*. Agent Boandl initiated termination and jeopardy assessments against Mr. Treadway in the amount of $247,891.57, or about $750,000 in today's dollars.[2] *Id*. at 919–20.

A standard tax dispute then erupted further when Agent Boandl then assessed Ms. Lojeski for the same amount and seized her farm and personal assets. *Id*. at 920. Mr. Treadway protested and sent a letter to

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[2] $753,055.01, to be exact in comparing August 1982 dollars to December 2022, the latest calculation date available. Bureau of Labor Statistics, CPI Inflation Calculator *available at*: https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=247%2C891.57&year1=198208&year2=202212.

the Service's internal Appeals Office, and the Appeals Office found the Agent's actions unreasonable. *Id*. The Appeals office recommended that the jeopardy and termination assessments be abated in full, the liens lifted, and refunds remitted. *Id*. Nonetheless, Ms. Lojoski never was able to recover attorneys' fees and compensatory damages in compensation for the loss of her constitutional rights without due process. *Lojeski*, 788 F.2d at 200.

Ms. Lojoski and Mr. Treadway were able to fight the unreasonable actions of the wayward agent, only because they had *notice* of what was going on. Sadly, surprise assessments and draconian collection practices can have more grave circumstances.

In a 1990 Senate Finance Committee proceeding, Kay Council (a NTU member) described how her husband, Alex, was driven to suicide after an IRS audit of the Council's real estate development business. *IRS Implementation of the Taxpayers Bill of Rights*, *Hearing before the Subcomm. On Priv. Retirement Plans and Oversight of the Int. Rev. Serv., Comm. on Finance, U.S. Senate*, 101st Cong. 18-21 (Apr. 6, 1990) (Testimony of Kay Council).[3] The tax agency never contacted the Councils or their accountant about the deficiency until four years after the fact, at which point the tax bill had soared to nearly $300,000. *Council v. Burke*, 713 F. Supp. 181,

[3] *Available at* https://www.finance.senate.gov/download/irs-implementation-of-the-taxpayers-bill-of-rights-subcommittee-on-private-retirement-plans-and-oversight-of-the-internal-revenue-service.

183 (M.D.N.C. 1988).[4] The IRS destroyed their business, and Kay Council only prevailed after spending tens of thousands of dollars on legal fees drawn partially from the life insurance policy of her deceased husband.

The Council family's plight, however, could have been resolved without the tragedy if only they had received notice earlier and could contest the IRS's allegations before the assessed fines and penalties reached hundreds of thousands of dollars. A federal district court recounted how unreasonable the IRS was in trying (or not trying) to contact the couple. *Council*, 713 F. Supp. at 181–83 (discussing unreasonable actions by IRS agents). Even though Ms. Council eventually recovered minimal awarding attorneys' fees and costs, *Council v. Burke*, No. CIV. C-87-457-WS, 1989 WL 119066, at *6 (M.D.N.C. Aug. 29, 1989) (unreported), the financial repercussions lasted for years as the reported tax lien remained on Ms. Council's credit report. Kay Council Testimony at 21. Their lives—financially and bodily—were ruined for lack of notice.

While Mr. Treadway and the Councils have the most famous instances of IRS overreach, it is hardly a novel phenomenon. A plumber/general contractor in California tried to create a business rehabilitating depilated buildings in San Francisco, only to be illegally hounded by IRS staff who seized property and ruined his credit. *See Morris v. United States*, 521 F.2d

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[4] The ultimate demand was $284,718.69, *id.* at 183, or about $749,810.59 today. Bureau of Labor Statistics, CPI Inflation Calculator *available at*: https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=284%2C718.69&year1=198704&year2=202212.

872, 873–74 (9th Cir. 1975). And a few others have tried to make the arguments on the need for proper notice for third party demands (similar to those Petitioners bring today), but the other litigants often do not even have the assistance of counsel. *See*, *e.g.*, *My Freedom, Inc. v. United States*, No. 3:14-MC-43-J-32PDB, 2015 WL 13021232, at *2–4 (M.D. Fla. Aug. 24, 2015), *report and recommendation adopted* No. 3:14-MC-43-J-32PDB, 2015 WL 13021231 (M.D. Fla. Sept. 22, 2015) (*pro se* plaintiffs failing to persuade the court to adopt the rule advocated by Petitioners here).

And these are the instances that made it to court. Many others, afraid of the ever-growing demands of the IRS, just pay, unable to fight. In the aggregate, this means a large boon of illicit gains for the IRS. For example, in 2016, Congress discovered that the IRS had seized $40 million from 600 people: individuals and families who have been forced to forfeit their assets even though they have not been proven guilty of any crimes. *See* Transcript, *Hearing: Protecting Small Businesses from IRS Abuse (Part II), U.S. House Comm. On Ways & Means* 54 (May 25, 2016)[5] (discussing cases); *see also Statement of Pete Sepp to the House Subcommittee on Economic Growth, Tax, and Capital Access Regarding IRS Small Business Reforms* (Jun. 22, 2016) (discussing the $40 million illegally seized and other instances of overzealous IRS enforcement).[6]

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[5] *Available at*: https://waysandmeans.house.gov/wp-content/uploads/2016/10/20160525OS-Transcript.pdf.

[6] *Available at*: https://www.ntu.org/publications/detail/statement-ofpete-sepp-to-house-subcommittee-regarding-irs-small-business-reforms.

With a history of such enforcement abuses it is all the more important that innocent third parties be notified as soon as possible that the IRS is seeking records and enforcement for taxes they do not owe, but someone else—a roommate, or a law firm's client for example—*might* owe. Getting the matter before the internal Appeals Office within the IRS or before a competent jurisdiction is a key protection against overzealous agents.

II. PROTECTING THIRD PARTIES IS ESSENTIAL WHEN THE IRS WILL GET $45.6 BILLION FOR ENFORCEMENT.

The recent enactment of the Inflation Reduction Act of 2022 ("IRA") included $80 billion for the IRS. Inflation Reduction Act of 2022, Pub. L. No. 117-169 § 10301, 136 Stat. 1818, 1831 (2022). It's a large check that will pay for 87,000 new employees, including agents.

There has been debate about how many IRS new hires will be delving into the financial lives of people like Ms. Polselli. But as with all things in government, the budget determines staffing. The great majority of the IRA's spending for tax work—$45.6 billion—is slated for enforcement, with another $25 billion for operational support for enforcement and other duties. *Id*. at 1832. Only $3 billion was to improve taxpayer services, like answer the phones, reply to letters, and taxpayer assistance. *Id*.

The President and Treasury Secretary both promised that no one earning less than $400,000 per year would be impacted by the new enforcement measures. But past experience shows otherwise. As

NTUF's Demian Brady chronicled last September, the number of millionaires being audited has dropped significantly since 2015, from 40,000 returns down to a mere 11,000 in 2020. Demian Brady, *What the IRS's New Enforcement Budget Means for Taxpayers*, NTUF (Sep. 21, 2022).[7]

Even assuming, *arguendo*, the new funding promotes more millionaire audits, the greater likelihood is that the middle class gets swept in too. That is because the IRS is expected to put more scrutiny on the self-employed and small businesses. *Id*. Even then, among small business, about half do not pay their owners regular salaries, instead "withdraw[ing] funds from the business on an as-needed basis—a compensation arrangement that would likely not be exempted as payroll." Andrew Wilford, Demian Brady, Issue Brief: *A Deeper Dive on IRS Snooping* 2 (Oct. 27, 2021).[8]

But the IRS was also recently given broad authority to examine even small amounts of transactions under a lower threshold for triggering reporting on Form 1099-K. American Rescue Plan Act of 2021, Pub. L. 117-2 § 9674, 135 Stat. 4, 185 (2021) (codified at 26 U.S.C. § 6050W(e)). The new rules are confusing and catch people selling old baby clothes or trying resell concert tickets they won't use. *See*, *e.g.*, Andrew Lautz, *Navigating Tax Rules for Reselling Taylor Swift Tickets (and Other Tickets)*, NTUF (Dec.

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[7] *Available at*: https://www.ntu.org/foundation/detail/what-the-irss-new-enforcement-budget-means-for-taxpayers.

[8] *Available at*: https://www.ntu.org/library/doclib/2021/10/A-Deeper-Dive-on-IRS-Snooping.pdf.

22, 2022).[9] Going after reports of income, $600 at a time, is far beyond enforcement only for the nation's top earners.[10] And the new regime lacks statutory guidance, with Treasury recently delaying any further help on how to comply with the law. Laura Saunders and Richard Rubin, *IRS Delays Gig-Tax Filing Rule for Side Hustles of More Than $600: Reprieve for eBay and Etsy users comes after attempts to change law fall short*, Wall Street Journal (Dec. 23, 2022).[11]

It well established that the "IRS audits the working poor at about the same rate as the wealthiest 1%." Paul Kiel, *IRS: Sorry, but It's Just Easier and Cheaper to Audit the Poor*, ProPublica (Oct. 2, 2019).[12] The GAO found that one reason is that the Earned Income Tax Credit is a primary driver of this enforcement against the poor. U.S. Gov't Accountability Off., GAO-22-104960 *Tax Compliance:*

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[9] *Available at*: https://www.ntu.org/foundation/detail/navigating-tax-rules-for-reselling-taylor-swift-tickets-and-other-tickets.

[10] Even then, the largest corporations can be drained in contesting an IRS assessment and collection. *See*, *e.g.*, Molly Moses, *Retired Transfer Pricing Attorney Bemoans Long Delays In Cases*, Law360 Tax Authority (June 21, 2021) https://www.law360.com/tax-authority/federal/articles/1404919/retired-transfer-pricing-attorney-bemoans-long-delays-in-cases ("'When people would ask what I do, I would say I'm an historian, working on tax controversy matters that are quite old,' he joked, adding: 'When we tried the Amazon case in 2014, it dealt with a 2005 transaction; when we tried the Coke case in 2018, it involved the tax years 2007 through 2009.'").

[11] *Available at*: https://www.wsj.com/articles/irs-delays-gig-tax-filing-rule-for-side-hustles-of-more-than-600-11671815725?mod=panda_wsj_author_alert.

[12] *Available at*: https://www.propublica.org/article/irs-sorry-but-its-just-easier-and-cheaper-to-audit-the-poor.

Trends of IRS Audit Rates and Results for Individual Taxpayers by Income, 8 (May 2022).[13] (finding the "IRS audited taxpayers claiming the EITC at a higher rate than average"). That is because it is easier to audit EITC claims than fight over the tax returns of the wealthy. *Id*. at 9.

With this checkered history and new funding, it is essential this Court clarify that § 7609(c)(2)(D) is a *narrow* exception that applies to IRS investigations and that the IRS must generally provide proper notice to innocent third parties. No one wants to be trapped in an enforcement proceeding, particularly when it is not they who owe money to the government. If there is a reason to quash a subpoena of records, getting that resolved early is essential.

III. THIS COURT SHOULD CLARIFY THAT "IN AID OF" IS NARROWLY APPLIED.

Much of this case centers on the scope of the words "in aid of" collection in 26 U.S.C. § 7609(c)(2)(D) and whether that exception to the notice requirement applies only when the taxpayer has a legal interest in the account. Br. of Petitioners at 6. Petitioners focus on the circuit split between the Ninth Circuit, *Ip v. United States*, 205 F.3d 1168 (9th Cir. 2000), and the split Sixth Circuit panel decision here. Pet. App. 1a-30a. But two other cases shed some light on how to analyze the statutory language.

In *Barnhart v. United Penn Bank*, 515 F. Supp. 1198, 1204 (M.D. Pa. 1981), the district court there recognized that the statutory "language could have

[13] *Available at*: https://www.gao.gov/assets/gao-22-104960.pdf.

been expressed in a more concise manner." The court first focused on the difference between "assessment" and "collection," refusing to let the IRS "bootstrap a regular audit into a 'collection'" on mere suspicion that something might be found in the bank records. *Id.* at 1205.

In doing so, the *Barnhart* court looked at the structure of the statute. "In aid of" collection is either focused on the person who owes the taxes, 26 U.S.C. § 7609(c)(2)(D)(i) or to someone who has "liability at law or in equity of any transferee or fiduciary of" the delinquent taxpayer, 26 U.S.C. § 7609(c)(2)(D)(ii). *See Id*. at 1205.

Therefore, the court looked for a definition of "fiduciary." *Id*. Finding none in the particular section of the code, the *Barnhart* court looked to the general definitions in 26 U.S.C. § 7701. *Id*. Section 7701 defines a fiduciary as "a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person." 26 U.S.C. § 7701(a)(6). All of those synonyms, the *Barnhart* court reasoned, do not apply to situations like a bank record because "'[g]uardian,' 'trustee' and the other relevant designations all refer to a legal relationship." *Barnhart*, 515 F.Supp. at 1205. And here a "'fiduciary" manages property for the benefit" of the delinquent taxpayer. *Id.*

Even the Treasury regulations then, as now, define a fiduciary as "a term that applies to persons who occupy positions of peculiar confidence toward others, such as trustees, executors, and administrators." 26 C.F.R. § 301.7701-6(b)(1). This is distinct from a mere agent who may have "entire

charge of property," and have some "authority" to conduct business, but who merely turns "over the net profits from the property periodically to his principal." 26 C.F.R. § 301.7701-6(b)(2). Such an agent "is not a fiduciary within the meaning of the Internal Revenue Code." *Id.* The *Barnhart* court found this instructive that a mere agent cannot be a fiduciary and therefore cannot be in the ambit of 26 U.S.C. § 7609(c)(2)(D). *See Barnhart*, 515 F.Supp. at 1206–07.

Barnhart's focus on the structure and text of § 7609(c)(2)(D) is helpful for resolving the circuit split in this case. Congress, in using terms like "fiduciary" clearly meant a stronger legal tie between the assessed taxpayer and the controller of the funds the IRS wishes to investigate or seize.

Similarly in *Robertson v. United States*, as here, the IRS sent summonses to a bank for Robertson, demanding records of "checking, loan, and savings accounts" and regarding bank liens against Robertson's real estate. *Robertson v. United States*, 843 F. Supp. 705, 705 (S.D. Fla. 1993). The only problem: Robertson did not owe the IRS money, T.L. and JoAnn R. Sloan did. *Id.* Nevertheless, the agent claimed "the summonses are in aid of the collection of the unpaid tax liability of the Sloans." *Id.*

The *Robertson* court recognized that the "statutory language may afford room for" a broad interpretation of "in aid of" that the government wanted there (and here). *Id.* at 706. Yet it is nonsensesical because "the exception would swallow up the rule." *Id.* Indeed, the danger is that the IRS would then be allowed to surreptitiously issue summonses "'in aid of collection'" of *some* (even

completely unrelated) taxpayer's liability." *Id.* (emphasis in original). It would turn tax collection into a search for deep pockets, rather than focus on collecting from the person who owes the money.

Together, *Barnhart*'s focus on the structure of § 7609(c)(2)(D) and what it means to be a "fiduciary" and *Robertson*'s focus on the logic of the statute are helpful guideposts to protecting Due Process rights. These cases effectuate the intent of Congress in protecting third parties from intrusive IRS actions by mandating notice and a chance to quash overzealous actions. In this way, we may prevent the tragedies of the past.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court reverse the Sixth Circuit and hold that citizens have the rights to quash the IRS's unreasonable and untethered summonses.

Respectfully submitted,

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