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.

INTERNAL REVENUE SERVICE,
Respondent.

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

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

Like all taxpayers, the members of the Chamber have a strong interest in ensuring that their records remain private against government intrusion. At the same time, because many of the Chamber's members serve as third-party recordkeepers for their clients or customers, they also have unique concerns that are implicated by the Sixth Circuit's expansive interpretation of section 7609(c)(2)(D)(i). The Chamber is well-positioned to assist the Court in understanding these concerns, as well as the broader impact that the Sixth Circuit's ruling will have on the business community if not reversed.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an important question about the power of the Internal Revenue Service ("IRS") to seek documents from third-party recordkeepers without notifying the individual person associated with those records. The Internal Revenue Code gives the IRS broad authority to issue summonses to third-party recordkeepers in furtherance of the agency's investigatory and collections duties. See I.R.C. §§ 7602(a), 7603(b). But that authority is subject to an important safeguard: the IRS must give notice "to any person" "who is identified in the summons"—*i.e.* it must notify the person whose records it is trying to obtain. *Id.* § 7609(a)(1). Moreover, any person who receives such notice has the opportunity to petition a federal district court to quash the summons. See *id.* § 7609(b)(2), (h)(1).

Although Congress was concerned about privacy interests when it passed section 7609, it did not intend to hinder legitimate collection activities by, for example, forcing the IRS to tip off the targets of its investigations. See H.R. Rep. No. 94-658, at 310 (1975); S. Rep. No. 94-938, at 371–72 (1976). Section 7609's notice requirement is therefore subject to several narrow exceptions. See I.R.C. § 7609(c)(2). One of these exceptions, subsection (c)(2)(D), states that the IRS need not provide notice of any summons "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)." *Id.* § 7609(c)(2)(D).

The proper interpretation of section 7609(c)(2)(D)(i) has divided the lower courts. The Ninth Circuit has

held that this exception "applies only where the assessed taxpayer has a recognizable legal interest in the records summoned." *Ip* v. *United States*, 205 F.3d 1168, 1176 (9th Cir. 2000) (alteration adopted) (internal quotation marks omitted). "To hold otherwise," the court explained, would mean that the exception "would swallow the rule itself," *id.* at 1175, because "any taxpayer [could] be summonsed . . . , so long as the IRS [could] show that the summons is related to the collection of another's assessed tax liability," *id.* at 1174.

The Sixth Circuit, on the other hand, held in the decision below that the exception applies whenever the IRS issues a summons to aid in the collection of *any* person's tax liability. Put another way, the IRS does not need to provide notice to an innocent person whose records it is seeking, so long as the records will aid the IRS in collecting another person's assessed tax liability. That interpretation leaves little, if any, meaningful protection in place for taxpayers whose records are kept by third parties.

If affirmed, the Sixth Circuit's ruling will undermine the important safeguards that Congress put in place when it adopted section 7609. The deleterious consequences of that decision will be felt by all taxpayers, including the nation's business community.

I. Businesses have particularly strong interests in maintaining the privacy of their records. Whether it is in the context of a law firm or an accounting firm or a hotel, business records often contain particularly sensitive customer or client data—exactly the type of information that Congress sought to protect when it adopted section 7609. The Sixth Circuit's unbounded interpretation of subsection (c)(2)(D)(i) fails to protect those privacy interests and undermines the purpose of the statute.

II. In addition to infringing upon privacy interests, affirming the Sixth Circuit will increase the costs imposed on businesses that serve as third-party recordkeepers. The Sixth Circuit's interpretation of section 7609(c)(2)(D)(i) puts businesses that receive non-notice summonses for client records in an untenable position: either notify their clients and provoke the IRS, or provide no notification and alienate their clients. Moreover, affirming the decision below will almost certainly increase the number of summonses issued by the IRS, which will no longer be constrained by the risk of follow-on litigation over the legitimacy of the IRS's summons. And that increase will drive up the costs to businesses of complying with those additional summonses.

ARGUMENT

I. THE PRIVACY CONCERNS THAT MOTIVATED CONGRESS TO ENACT SECTION 7609 ARE PARTICULARLY PRONOUNCED IN THE CONTEXT OF BUSINESS RECORDS.

Privacy was the chief concern that Congress had in mind when it enacted section 7609. The procedural safeguards that Congress adopted in section 7609—notice and the right to petition to quash the summons—protect businesses just as much as they do individuals. Indeed, many businesses have a far greater need for these protections because their records contain the privileged or confidential information of their customers or clients. But the Sixth Circuit's unbounded interpretation of the subsection (c)(2)(D)(i) exception undermines these safeguards and, in the case of businesses that provide highly sensitive client services, would routinely permit the disclosure of privileged and confidential customer or client information to the IRS. That

result is fundamentally at odds with what Congress designed in section 7609.

A. The Purpose of Section 7609 Is to Protect the Privacy Rights of Taxpayers.

Congress adopted section 7609 in response to a pair of decisions from this Court that construed the IRS's summonses power broadly and left taxpayers with no recourse to intervene to protect their records in the hands of third parties. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 314–17 (1985) (explaining section 7609's statutory history and purpose). In *Donaldson* v. *United States*, the Court held that a non-summonsed party generally could not intervene in a challenge to an IRS summons of her records from a third-party recordkeeper. 400 U.S. 517, 530–31 (1971). And in *United States* v. *Bisceglia*, the Court held that the IRS had the power to issues a summons to a bank to disclose the identity of a person whom the IRS suspected of having committed tax fraud. 420 U.S. 141, 150 (1975).

The frightening import of these decisions was not lost on either this Court or Congress; both recognized the inherent danger of giving the IRS a broad summons power without any procedural safeguards. Although the Court upheld the IRS's exercise of broad powers in *Bisceglia*, it at the same time acknowledged its own fear that such power "could be used to conduct 'fishing expeditions' into the private affairs of bank depositors." *Id.* at 150–51. Congress similarly worried that the IRS's use of its summons power might "unreasonably infringe on the civil rights of taxpayers, including the right to privacy." S. Rep. No. 94-938, at 368; H.R. Rep. No. 94-658, at 307; see also *Tiffany Fine Arts*, 469 U.S. at 320 ("Congress determined that when the IRS uses its summons power not to conduct a legit-

imate investigation of an ascertainable target, but instead to look around for targets to investigate, the privacy rights of taxpayers are infringed unjustifiably."). A commission created by Congress to study this and other privacy-related problems warned that IRS summonses "may reach to any conceivable record about an individual." Privacy Protection Study Comm'n, *Personal Privacy in an Information Society* at 367 (1977).[2]

To address these concerns, Congress passed section 1205 of the Tax Reform Act of 1976, which was later codified at section 7609 of the Internal Revenue Code. See Tax Reform Act of 1976, Pub. L. No. 94-455, § 1205(a), 90 Stat. 1520, 1699–1700. The statute required the IRS to provide notice of a third-party summons to "any person . . . identified in the summons" at least 23 days before the production deadline. I.R.C. § 7609(a)(1). Moreover, the statute gave any person who was entitled to receive notice of a third-party summons "the right to begin a proceeding to quash such summons" in federal district court. *Id.* § 7609(b)(2)(A); see also *id.* § 7609(h)(1) (granting jurisdiction to the federal district courts). A petition to quash must be filed within 20 days of receiving the notice. *Id.* § 7609(b)(2)(A).

Both the notification and the petition-to-quash requirements are subject to several exceptions, but those exceptions are narrow and do not detract from the privacy-advancing provisions of the statute. See *id.* § 7609(c)(2), (f)–(g). The exceptions are justified by the common-sense point that there are some instances where providing advance notification might severely hinder the IRS's investigation and collection efforts. See S. Rep. No. 94-938, at 371–72 ("Otherwise, there

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

might be a possibility that the taxpayer, transferee or fiduciary would use the . . . grace period . . . to withdraw the money in his account, thus frustrating the collection activity of the Service."); H.R. Rep. No. 96-658, at 310. But these are merely exceptions and by their nature they do not swallow the general rule that the IRS must provide advance notification. Cf. S. Rep. No. 94-938, at 372 (describing one exception as "very limited" and a "relatively unusual procedure"); IRS, *Taxpayer Bill of Rights 8: The Right to Confidentiality* (last updated Nov. 16, 2022) ("In general, the IRS can't contact third parties such as your employer, neighbors or bank, to get information to adjust or collect the tax you owe unless it gives you reasonable notice in advance.").[3]

In short, Congress adopted section 7609 in response to concerns that the IRS was infringing upon the civil rights of taxpayers by using its expansive summons power to obtain taxpayer records from third parties. Section 7609 creates a general presumption that the IRS must notify taxpayers before seeking their records, and it gives taxpayers a procedural vehicle for asserting their rights in court.

B. Privacy Is No Less Important for the Business Community.

The fact that the records being summonsed belong to a corporation, business partnership, or other commercial entity instead of a natural person makes no difference to the consideration of privacy interests under section 7609. Businesses, like any other taxpayer, have strong reasons to maintain the privacy of their

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[3] Available at https://www.irs.gov/newsroom/taxpayer-bill-of-rights-8.

records. Not only do such records contain private information about businesses themselves, but they often contain personal information about customers or clients.

As an initial matter, nothing in the text of section 7609 suggests that Congress intended to apply a different standard to the privacy interests of businesses compared to those of other taxpayers. Indeed, Congress appears to have clearly anticipated that businesses would benefit from the notification and petition-to-quash protections. In the Senate and House Reports accompanying the Tax Reform Act of 1976, Congress offered the following example of how the notification provision would work: "[I]f the Service summons a bank to furnish records with respect to all deposits and withdrawals of the X *corporation* for the year 1976, the X *corporation* is to receive notice of the summons, because it is the records concerning the transactions of the X *corporation* which are being examined." S. Rep. No. 94-938, at 369 (emphases added); H.R. Rep. No. 94-658, at 307–08 (emphases added).

In all events, all private persons—natural and corporate—have an "interest in maintaining the privacy of [their] 'papers and effects.'" *Church of Scientology of Cal.* v. *United States*, 506 U.S. 9, 13 (1992) (quoting U.S. Const. amend. IV). The importance of that interest was understood at the Founding. In *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (1765), a case that "was undoubtedly familiar" to "every American statesman" during the late eighteenth century, *Boyd* v. *United States*, 116 U.S. 616, 626 (1886), Lord Camden observed: "Papers are the owner's goods and chattels; they are his dearest property, and are so far from enduring a seizure, that they will hardly bear an inspection," *id.* at 627–628 (quoting *Entick*, 19 How. St. Tr.

at 1066). The Founders explicitly guaranteed the protection of this interest when they adopted the Fourth Amendment. See U.S. Const. amend. IV ("The right of the people to be secure in their . . . papers . . . , against unreasonable searches and seizures, shall not be violated . . . .").

The interest in preserving the privacy of one's papers undoubtedly extends to ledgers, invoices, insurance policies, and other types of business records. Cf. *Boyd*, 116 U.S. at 622 (subpoenaed invoices were tantamount to "compulsory production of a man's private papers"); *Hale* v. *Henkel*, 201 U.S. 43, 76–77 (1906) (recognizing that the "books and papers" of a corporation are its "property"); *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 391 (1920) (treating business records seized as "papers" subject to Fourth Amendment protection); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 349–50 (1931) (describing a business's "papers, journals, account books, letter files, insurance policies, cancelled checks, index cards, and other things belonging" to it as "papers" subject to Fourth Amendment protection). Such records usually contain important information that reflects the current health of a business, its opportunities for future growth, and its potential vulnerabilities. For many businesses, their very survival often depends on keeping that information private from their competitors.

Business privacy interests also extend to less obvious types of records. The hospitality industry, for example, relies extensively on records databases containing the contact information of customers who are part of its rewards programs. See Clay M. Voorhees et al., *Assessing the Benefits of Rewards Programs*, 14 Cornell Hosp. Rep. 1, 4 (Jan. 2014) (finding that independent hotels experienced 50 percent growth in revenue

through loyalty programs).[4] Hotel chains use these records to send targeted advertisements and to build brand loyalty. Businesses have an interest in keeping such information to themselves, and in particular out of the hands of competitors.

Besides keeping their records of individual customers private, many businesses also have a strong interest in maintaining the privacy of their aggregate data. A growing number of industries rely upon aggregate customer data to analyze customer spending, anticipate opportunities for growth, ensure the most efficient allocation of resources, and make other important decisions. This type of analysis has become a crucial aspect of the business-planning process. See Tim McGuire et al., *Why Big Data is the New Competitive Advantage*, Ivey Bus. J. (Aug./July 2012)[5]; Thomas H. Davenport & Thomas C. Redman, *Your Organization Needs a Proprietary Data Strategy*, Harv. Bus. Rev. (May 4, 2020).[6] Customer data has become a prized commodity upon which many businesses depend for their livelihood.

Congress understood that businesses, like other taxpayers, have a strong interest in maintaining the privacy of their records. Businesses therefore need the same procedural protections against the broad summons power of the IRS. In fact, there is a strong case that businesses dealing with particularly sensitive

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[4] Available at https://ecommons.cornell.edu/bitstream/handle/1813/71157/Vorhees_202014_20Assessing_20the_20benefits.pdf?sequence=1&isAllowed=y.

[5] Available at https://iveybusinessjournal.com/publication/why-big-data-is-the-new-competitive-advantage.

[6] Available at https://hbr.org/2020/05/your-organization-needs-a-proprietary-data-strategy.

customer records have an even greater need for these protections.

C. Privacy Concerns Are Especially Grave Where Uniquely Sensitive Customer or Client Information Is Involved.

The privacy concerns associated with business records are particularly pronounced when the business provides sensitive customer or client services because the records of those services may contain privileged or confidential information. Clients contract with professional services firms, such as law, accounting, and brokerage firms, in order to receive assistance in complex matters. To ensure that they receive the best legal, tax, and financial advice, clients must be willing to share sensitive—and sometimes damaging—information about themselves. But they will not share such information if they have reason to believe that it will be disclosed to the government without any opportunity to challenge the disclosure. Accordingly, professional services firms rely upon the protections of privilege and confidentiality in order to operate.

The attorney-client privilege, in particular, is exceptionally important to the provision of legal services. As "the oldest of the privileges for confidential communications known to the common law," *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981), the attorney-client privilege "is founded upon the necessity" that legal "assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure," *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888). The purpose of the privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389.

Recognizing the benefits that arise from frank communications between attorneys and their clients, Congress extended the common-law attorney-client privilege by statute to communications between taxpayers and federally authorized tax practitioners. See I.R.C. § 7525(a)(1). As a result, "the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney" now "also apply to a communication between a taxpayer and any federally authorized tax practitioner." *Id.* To be sure, the privilege is limited and may be asserted only in noncriminal tax matters before the IRS and noncriminal tax proceedings in federal court brought by or against the United States. See *id.* § 7525(a)(2). But it still provides a vital protection that enables the efficient provision of professional services.

As this Court has repeatedly recognized, the purpose of a privilege can be served only if the client and the service-provider are "able to predict with some degree of certainty whether particular discussions will be protected." *Upjohn*, 449 U.S. at 393; see also *Jaffee* v. *Redmond*, 518 U.S. 1, 17–18 (1996) (applying the logic of *Upjohn* to the psychotherapist privilege). "An uncertain privilege . . . is little better than no privilege at all." *Upjohn*, 449 U.S. at 393. Maintaining the integrity of the privilege is essential to ensuring that law firms, accounting firms, and other professional services firms can continue to assist their clients.

A summons power that allows the IRS to obtain privileged and confidential records from third parties without notification and an opportunity to challenge the summons would be disastrous for all involved. The proceedings below provide a clear example: two of the petitioners whose bank records were summonsed were law firms. If the banks had simply responded to the IRS's summonses without notifying the law firms,

privileged client information could have easily been disclosed to the government without giving the law firms the opportunity to assert the attorney-client privilege. If such disclosures become routine—as they will be if the Sixth Circuit's interpretation of section 7609(c)(2)(D)(i) is affirmed—clients will be unable to fully trust their law firms or tax preparers with privileged information again.

It is no answer to these privacy concerns that the IRS *might* offer to permit the subject of the records to review the summonsed documents prior to production. In the proceedings below, the IRS offered to permit the banks to submit the summonsed records to the law firms for review before turning them over to the IRS, to ensure that the records contained only the requested information. See Pet. App. 5a. But the IRS was under no legal obligation to extend that offer, and the law firms had no legal right to ask for pre-production review. Moreover, the IRS likely would not have extended the offer unless the banks had independently notified the law firms of the summonses, which section 7609 does not require them to do.

Nor does it matter whether the IRS has an immediate interest in investigating anyone other than the assessed taxpayer. No statute or regulation prohibits the IRS from using against one taxpayer documents that it acquired while investigating another. Likewise, nothing prevents the IRS from using records it acquired in a non-notification summons for an additional purpose that otherwise would have required a summons. Put another way, when the IRS issues a non-notification summons in aid of a collection and obtains the records of an innocent third party, it can use those records for a non-collection purpose against that third party, even though it normally would have had to provide a notification before acquiring those records.

* * *

Section 7609 was clearly designed to protect privacy interests, and there is no doubt that those protections extend to businesses the same as they do to individuals. Indeed, the need for these protections is in a sense greater for businesses because many of the entities that are subject to IRS summonses deal with uniquely sensitive customer or client information. The Sixth Circuit's interpretation of subsection (c)(2)(D)(i), however, creates an unbounded exception that swallows the notice and petition-to-quash safeguards that Congress put in place to protect taxpayers. And it would allow for the routine disclosure of privileged or confidential client information—a result that Congress surely did not intend when it enacted a statute protecting taxpayer privacy.

The fact that the effects of the Sixth Circuit's interpretation of subsection (c)(2)(D)(i) are so "demonstrably at odds" with the purpose of section 7609 militates in favor of a narrower reading of the statute—one that does not exacerbate the problems that Congress designed section 7609 to address. *Ip.*, 205 F.3d at 1177 (O'Scannlain, J., specially concurring) (quoting *United States* v. *Ron Pair Enters.*, 489 U.S. 235, 242 (1989)); see also *CSX Transp., Inc.* v. *Ala. Dep't of Revenue*, 562 U.S. 277, 298 (2011) (Thomas, J., dissenting) (contending that ambiguity should be resolved to give a provision "a reach consistent with the problem the statute addressed").

II. AFFIRMING THE SIXTH CIRCUIT WILL INCREASE THE COSTS IMPOSED ON THIRD-PARTY RECORDKEEPERS.

Besides undermining an important procedural safeguard for taxpayer privacy, the Sixth Circuit's interpretation of section 7609(c)(2)(D)(i) will also increase

the costs that the statute places on third-party recordkeepers in at least two ways. First, it will put third-party recordkeepers in the untenable position of having to choose between antagonizing either the IRS or their customers or clients. To make matters worse, the Sixth Circuit's interpretation provides no guidance as to how to navigate this conundrum. Second, it will likely increase the overall number of summonses issued by the IRS, which in turn will increase the administrative costs to the recordkeepers of complying with those summonses. It is unlikely that Congress intended either result when it adopted section 7609.

A. Third-Party Recordkeepers Will Be Forced to Choose Between Upsetting the IRS or Alienating Their Customers or Clients.

A third-party recordkeeper that receives a non-notice summons from the IRS pursuant to section 7609(c)(2)(D) must immediately decide whether to notify the customer or client who is the subject of the records. Under the Sixth Circuit's interpretation of the subsection (c)(2)(D)(i) exception, that decision is fraught with risks. The petitioners are correct when they describe the Sixth Circuit's opinion as putting "third-party recordkeepers between a rock and a hard place." Pet'rs' Br. 35.

On the one hand, the recordkeeper can notify the customer or client of the IRS summons on its own initiative, just as the banks notified the petitioners in the proceedings below. But if it does so, the result could be a drawn-out litigation process, similar to the present five-year-old controversy that this Court has now been asked to resolve.

On the other hand, the recordkeeper can simply comply with the IRS summons without notifying the customer or client. But then, if and when the customer or client whose records were the subject of the summons finds out about the disclosure, she will likely be upset with her recordkeeper for turning over her private information to the government without her knowledge or consent. And that displeasure will be aggravated by the fact that she has no recourse against the government. The right to petition a federal district court to quash a summons issued by the IRS to third-party recordkeepers is limited to persons who are entitled to receive a notice of the summons. See I.R.C. § 7609(b)(2)(A). In other words: no notice, no petition to quash. For those customers or clients who are not entitled to a notice from the IRS, all they can do is watch helplessly as their bank or other recordkeeper complies with the IRS summons.

The Sixth Circuit's interpretation of section 7609(c)(2)(D)(i) leaves businesses that act as third-party recordkeepers with no guidance on how to escape this dilemma. As the petitioners correctly note, customer service is an important part of many industries, especially professional client services like banking, law, and accounting. See Pet'rs' Br. 35. As a result, notifying customers or clients when the IRS issues a summons for their records is essentially a de facto requirement of doing business.

By shifting the decision of whether to notify an innocent third party of a summons from the IRS to the recordkeeper, the Sixth Circuit's interpretation of section 7609(c)(2)(D)(i) imposes a heavy additional burden on third-party recordkeepers. And it puts many businesses in a no-win situation that requires them to choose between provoking the IRS or alienating their

customers or clients. But nothing in the text, structure, or history of section 7609 suggests that Congress intended to impose this administrative burden or to place businesses in such a dilemma. That fact counsels in favor of a narrower interpretation of subsection (c)(2)(D)(i). Cf. *Owasso Indep. Sch. Dist. No. I-011* v. *Falvo*, 534 U.S. 426, 434 (2002) ("We doubt Congress would have imposed such a weighty administrative burden . . . ."); *Burlington N. & Santa Fe Ry.* v. *White*, 548 U.S. 53, 75 (2006) (Alito, J., concurring) ("There is reason to doubt that Congress meant to burden the federal courts with claims involving relatively trivial differences in treatment.").

B. The Administrative Burden on Third-Party Recordkeepers Will Increase Because the IRS Will Almost Certainly Increase Its Use of Summonses.

Regardless of whether the recordkeeper notifies the client or customer whose records are sought, it must still face the costs of complying with the IRS summons. If this Court affirms the decision below and adopts the Sixth Circuit's interpretation of section 7609(c)(2)(D)(i), the IRS will have every incentive to expand its use of summonses. And that expansion will in turn increase the costs to third-party recordkeepers of complying with those summonses.

As the petitioners explain, there is no way to know the full extent of those costs because the IRS does not publish how many summonses it issues per year. See Pet'rs' Br. 34–35. In 1976, during congressional debate over the Tax Reform Act, the IRS informed Congress that it had issued approximately 45,000 summonses over the preceding 12 months to third-party recordkeepers such as banks, insurance companies, brokers, accountants, and attorneys. See 122 Cong. Rec. 24,237, 24,250 (July 28, 1976). There is no publicly available

data on how that number has changed following the adoption of section 7609. Recent annual reports from the National Taxpayer Advocate, an independent organization within the IRS, show that the IRS has litigated several hundred summonses cases over the past few years. See Nat'l Taxpayer Advocate, *Annual Report to Congress 2021* at 189 (2021) (reporting at least 233 summons cases in the IRS Office of Chief Counsel's inventory at the end of Fiscal Year 2021)[7]; Nat'l Taxpayer Advocate, *Annual Report to Congress 2020* at 206 (2020) (reporting at least 433 summons cases in the IRS Office of Chief Counsel's inventory at the end of Fiscal Year 2020).[8] But those numbers include only the cases that are known publicly because they resulted in litigation. Anecdotally, one member bank informed the Chamber on condition of anonymity that it received approximately 3,900 summonses from the IRS over the last year, although it did not know how many of those summonses specifically involved the collection of someone else's tax liability.

Whatever the precise number of summonses issued by the IRS, that figure will almost certainly increase if the Sixth Circuit's opinion is affirmed. Whenever the IRS issues a notification of a summons, it runs the risk that it will be haled into court when the individual or entity whose records are sought files a petition to quash the summons. That risk undoubtedly requires the IRS to be at least somewhat circumspect in its use of its summons power. But, like any other government agency or private actor, the IRS has every incentive to use the procedural tools that carry the fewest burdens.

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

[8] Available at https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_FullReport.pdf.

Cf. *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996) (explaining that "police are more likely to use the warrant process" if the probable-cause determination for a warrant is subject to less scrutiny than warrantless searches); *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1644 (2018) (Ginsburg, J., dissenting) (explaining how the Court's decisions upholding employee arbitration agreements caused an increase in the use of such agreements by employers). Accordingly, if the notification and petition-to-quash safeguards of section 7609 are removed, the IRS will have less need for caution and every incentive to use non-notice summonses.

If the Court greenlights the use of non-notice summonses for the records of innocent third parties, then it follows, as a matter of common sense, that the IRS will make use of that power and that the number of summonses it issues will increase. That increase will be most clearly felt in the Ninth Circuit, where for the past two decades the IRS has been required to abide by a narrower interpretation of section 7609(c)(2)(D)(i). See *Ip.*, 205 F.3d at 1175–76. And it goes without saying that a dramatic increase in the number of summonses will increase the costs to third-party recordkeepers of complying with those summonses.

* * *

Affirming the Sixth Circuit's opinion will have deleterious consequences for third-party recordkeepers such as banks, law firms, and accounting firms. Not only will they be faced with the increased costs of complying with the IRS summonses, but the already difficult burden of deciding whether to notify a customer or client of the IRS summons will be magnified by the increased number of times that decision has to be made. It bears repeating that section 7609 was enacted to provide a procedural safeguard for taxpayers

to protect their privacy rights in court, not to shift the costs and administrative burdens of complying with those summonses onto the recordkeepers.

CONCLUSION

For the foregoing reasons and those set forth by the Petitioners, the Court should reverse the decision below.

Respectfully submitted,

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