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IN THE SUPREME COURT OF THE UNITED STATES

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HANNA KARCHO POLSELLI, ET AL.,)

Petitioners,)

v.) No. 21-1599

INTERNAL REVENUE SERVICE,)

Respondent.)

- - - - -

Washington, D.C.

Wednesday, March 29, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:44 a.m.

APPEARANCES:

SHAY DVORETZKY, ESQUIRE, Washington, D.C.; on behalf of the Petitioners.

EPHRAIM MCDOWELL, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:44 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 21-1599, Polselli versus the Internal Revenue Service.

Mr. Dvoretzky.

ORAL ARGUMENT OF SHAY DVORETZKY

ON BEHALF OF THE PETITIONERS

MR. DVORETZKY: Mr. Chief Justice, and may it please the Court:

Congress enacted Section 7609 to give the public critical privacy rights to notice and an opportunity to quash third-party IRS summonses. Congress carefully limited the exceptions to those rights. In clause (1), Congress allowed the IRS to forgo notice for a summons issued "in aid of the collection of an assessment ... against the person with respect to whose liability the summons is issued."

In clause (2), Congress separately dispensed with notice for summonses "issued in aid of the collection of the liability of any transferee or fiduciary" of a delinquent taxpayer with an assessment or judgment.

But the Sixth Circuit, like the IRS,

1 nullified most of what Congress wrote. It read
2 clause (1) to contain just nine words, a summons
3 "issued in aid of the collection of an
4 assessment." Period.

5 The IRS says those nine words mean
6 that anytime it's made an assessment, there are
7 no judicially reviewable limits on its power to
8 issue secret, overbroad, third-party summonses.

9 So nothing stops the IRS from secretly
10 summoning all unredacted bank records of anyone
11 who ever received money from a delinquent
12 taxpayer: a lawn care company, a friend
13 splitting a dinner check through Venmo, or, as
14 here, a law firm.

15 Never mind clause (2). Never mind the
16 rest of the words in clause (1). Never mind the
17 different language Congress used in another
18 exception for summonses issued "in connection
19 with" a criminal investigation.

20 The Sixth Circuit and IRS's
21 interpretation is inconsistent with the
22 statute's text, context, and purpose, and it
23 would create the same opportunity for abuse that
24 Congress sought to eradicate.

25 The question isn't whether the IRS can

1 summons the records it needs, only whether it
2 can do so secretly and without judicial
3 oversight.

4 The IRS says trust us, we police
5 ourselves. But Congress repudiated that
6 approach when it enacted Section 7609's privacy
7 protections for innocent third parties.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: You said that the IRS
10 is not reading the entire -- entirety of the
11 clauses. Would you tell us exactly what you're
12 relying on?

13 MR. DVORETZKY: We are relying on the
14 -- well, the -- the broad -- the broad notice
15 rights in Section 7609(a) and (b), and then, for
16 purposes of the exception in clause (1), we are
17 relying on the fact that an assessment -- that
18 -- that it has to be in aid of the collection of
19 an assessment made with respect to a particular
20 taxpayer.

21 So the "aid of the collection"
22 language has to be understood to require a
23 direct connection between the summons and the
24 act of collecting, which the -- which means
25 getting the money into the federal fisc.

1 "Aid of collection" has to be
2 understood to -- to mean a direct connection in
3 light of a few considerations. One is the
4 ordinary usage of that term. Two is the
5 contrast between the language that Congress used
6 there, "in aid of," and the language that
7 Congress used in (c)(2)(E), "in connection
8 with," which is broader, and "relates to" in
9 (f)(1), which this Court also has said has a
10 broadening effect.

11 This Court has interpreted similar
12 language, such as in the Electric Power Supply
13 case, where it interpreted "affecting" to mean
14 directly affecting, in order to put reasonable
15 limits on seemingly broad terms.

16 And, lastly, we're relying on the fact
17 that under our interpretation, there is separate
18 meaning to clause (1) and clause (2), whereas
19 the government's interpretation creates massive
20 surplusage by rendering all of clause (2) and
21 much of clause (1) meaningless within this
22 statute. Congress was simply wasting its time
23 in writing those provisions, which is what Judge
24 Kethledge recognized in dissent below.

25 JUSTICE THOMAS: The only problem --

1 the problem is that the limiting language that
2 you're asking about isn't there. It says the --
3 "issued in aid of the collection of an
4 assessment made or judgment rendered against the
5 person." So where's the rest of your limiting
6 language?

7 MR. DVORETZKY: Well, I -- I think the
8 question is what "in aid of" means, and I think
9 the limiting language is inherent in "in aid
10 of."

11 Let -- let me try an example. "In aid
12 of" isn't really an expression that I think
13 people use in common speech, but -- but let's
14 try it anyway.

15 You might say that I wrote this
16 introduction "in aid of" presenting this
17 argument today. You wouldn't say that I went to
18 law school "in aid of" presenting this argument
19 today. You wouldn't say that not only because I
20 went to Yale Law School --

21 (Laughter.)

22 JUSTICE THOMAS: Definitely I wouldn't
23 say that.

24 MR. DVORETZKY: -- but you also
25 wouldn't say that because whatever I learned

1 about advocacy in law school, however many years
2 ago, while perhaps helpful to me here today in
3 some sense, just doesn't have a close enough
4 relationship to what I'm doing here today to say
5 that that is "in aid of" my presentation of this
6 argument.

7 So the concept, the very concept of
8 "in aid of" in common parlance, to the extent
9 it's used in common parlance, has a limiting
10 principle, and that takes me, again, back to the
11 Electric Power Supply case, and in that case,
12 this Court interpreted the language "affecting"
13 in the Federal Power Act, what affects a
14 wholesale power rate. And the Court said, look,
15 lots of things could affect wholesale power
16 rates. The labor market could affect wholesale
17 power rates. That doesn't mean that FERC has
18 the authority to regulate the whole -- the --
19 the labor market.

20 You and -- the Court interpreted the
21 language "affecting" to mean directly affecting.
22 And "in aid of" here in this statute has to have
23 that same sense.

24 CHIEF JUSTICE ROBERTS: Why is that?
25 I think it would be very -- I mean, what you

1 learned in law school and here, there's
2 obviously a lot happened between them, but,
3 here, if -- it's in aid of collecting. I think
4 getting a summons against your lawyer is a lot
5 of help in collecting the assessment against
6 you, right?

7 MR. DVORETZKY: It -- it -- it helps,
8 again, in the way that going to law school
9 helped me here today, but the question is
10 whether, when Congress wrote this "in aid of"
11 language, it meant to create an exception that
12 as soon as the IRS makes an assessment, which is
13 an internal bookkeeping notation, at that point,
14 any summons that the IRS wants to issue against
15 a third party -- an innocent third party, like a
16 law firm, at that point, there's no opportunity
17 for notice and becomes completely unreviewable
18 as to the scope --

19 CHIEF JUSTICE ROBERTS: No, no, I
20 understand. I -- I -- yes, I -- I -- I think
21 your argument looks to confining the scope of
22 "in aid of collection" and there may be a lot of
23 reasons to do that, but the -- the nature of the
24 phrase and the language doesn't seem to be, to
25 me, very helpful.

1 I -- I -- I think "in aid of
2 collection" is exactly what you would say if you
3 want to expand the reach of (D)(i) as far as --
4 you know, as far as the government's arguing
5 for.

6 MR. DVORETZKY: Well, and, of course,
7 that is what they want to say in order to expand
8 the reach of (D)(i) as far as possible.

9 Our point is that the other
10 indications in this statute show that Congress
11 did not mean to create an exception that expands
12 so far as to effectively swallow the rule.

13 And "in aid of" can -- is at least
14 susceptible to the more limited interpretation
15 that I'm advancing and that Judge Kethledge
16 recognized in the -- in the Sixth Circuit. It's
17 at least susceptible to that, and that's the
18 better interpretation in this context because,
19 again, of the significant surplusage concerns
20 that reading the statute the government's way
21 would create as for the rest of the -- the
22 exception in (D) that Congress wrote here.

23 Under the government's reading, if
24 an -- if a summons is not -- does not call for
25 notice or the ability to quash, if it is in aid

1 of collection, period, Congress didn't need to
2 write clause (2) at all because collecting from
3 a transferee or a fiduciary is collecting the
4 liability or the assessment, the underlying
5 liability or assessment, as to the taxpayer.

6 So that too, summoning a fiduciary or
7 a transferee, would be in aid of collection of
8 the underlying assessment under the government's
9 reading of clause (1).

10 JUSTICE KAGAN: So, Mr. Dvoretzky --
11 yeah, I -- I understand the -- the surplusage
12 matter as a technical point, but, of course, all
13 the time Congress some -- you know, uses
14 belt-and- suspender approaches, we really mean
15 this.

16 And even beyond that, I mean, I -- I
17 -- I -- think actually, if you think about the
18 person who wrote this language and why they
19 wrote this language, it's -- it -- this language
20 is written in recognition of the fact that there
21 are sort of two -- two sources of money that the
22 IRS can try to collect from. You know,
23 sometimes the IRS is collecting from an
24 individual taxpayer, and sometimes the IRS is
25 collecting from the taxpayer's fiduciary or

1 transferee.

2 And, you know, basically, I read this
3 language just to say, whoever we're collecting
4 from, and it could be this group of people or it
5 could be that group of people, if it's in aid of
6 collecting, then -- then we don't have to issue
7 a notice.

8 MR. DVORETZKY: There's no indication
9 that Congress had that kind of framework in mind
10 when it was writing this statute. The -- every
11 indication is that what Congress was concerned
12 with in writing this statute was responding to
13 this Court's decisions in cases like Donaldson
14 and protecting third-party privacy rights.

15 The government tries --

16 JUSTICE KAGAN: Well, I -- I -- I -- I
17 -- I mean, there -- there actually is an
18 indication because all over the code, the code
19 uses, like, this -- this dichotomy between
20 taxpayers and their fiduciaries and transferees.
21 So that -- that is in many provisions of the
22 code.

23 And, essentially, this just matches
24 it. You know, you can collect from either one.
25 There are two sources of -- there are two pots

1 that one can collect from, and, you know, this
2 is reflective of that. Is it absolutely
3 necessary? It's not for exactly the reason you
4 say.

5 But it's totally understandable as a
6 way of drafting, if you're thinking about
7 Congress saying, after the liability judgment
8 has been made, after an assessment is -- is put
9 on the books, do whatever you need to do to
10 collect money from either the taxpayer or the
11 beneficiary/transferee.

12 MR. DVORETZKY: And --

13 JUSTICE KAGAN: Excuse me, the
14 fiduciary.

15 MR. DVORETZKY: -- look, I think the
16 only indication that the government has given
17 that Congress -- that Congress might have been
18 thinking that is in responding to a 1927 Western
19 District of Kentucky case that seemed to exhibit
20 some confusion about the difference between
21 collecting directly from the taxpayer and
22 collecting from a transferee or fiduciary.

23 I just think the much more plausible
24 inference in this context, when we have all --
25 the nature of this statute and all over the

1 legislative history for those who care to look
2 at it is a concern about privacy rights, that
3 that was the overarching concern that Congress
4 had here.

5 And from that perspective, Congress
6 wrote a carefully crafted exception that under
7 the government's view could have just been
8 limited to collection in -- any summons in aid
9 of collection, period, doesn't trigger the
10 privacy protections. And that's not what
11 Congress wrote here.

12 JUSTICE JACKSON: Do you concede that
13 the law firms at issue here were some sort of
14 fiduciary or transferee?

15 MR. DVORETZKY: No.

16 JUSTICE JACKSON: So --

17 MR. DVORETZKY: And -- and -- and the
18 government's not relying on clause --

19 JUSTICE JACKSON: They're not relying
20 on that, so I guess I'm asking a factual
21 question about the summons, which is it appeared
22 to -- it appeared to want all of the financial
23 records of these law firms. Is it limited to
24 the records of the law firms related to Mr.
25 Polselli?

1 MR. DVORETZKY: No.

2 JUSTICE JACKSON: So -- so the law
3 firms weren't themselves fiduciaries, or at
4 least the government's not relying on that, and
5 the records they're seeking are not the ones
6 just related to Mr. Polselli. So how -- how,
7 under that operation of the statute, could
8 somebody challenge it as overbroad?

9 MR. DVORETZKY: Well, it -- under our
10 reading of the statute, the law firms were
11 entitled to notice and an opportunity to quash.

12 JUSTICE JACKSON: Right. And under
13 the government's, they wouldn't be because --

14 MR. DVORETZKY: Right.

15 JUSTICE JACKSON: -- these records
16 would some -- through their theory of "in aid
17 of" would be in aid of collection, and so the --
18 there wouldn't really be an opportunity for
19 anybody to complain about the scope of the
20 subpoena under the government's theory.

21 MR. DVORETZKY: Under the government's
22 theory, that's right.

23 JUSTICE JACKSON: Okay. Sorry.

24 MR. DVORETZKY: Whereas, under our
25 theory, that is -- whatever the government's

1 interest might be in getting any records from
2 the law firm, particularly pertaining to the
3 delinquent taxpayer, they surely have no
4 interest in getting all of the unredacted bank
5 records from the law firm over a two-year
6 period.

7 JUSTICE JACKSON: What is -- what is
8 your -- what is your -- I understood their
9 argument to be, well, it's in aid of because
10 there might be a clue somewhere in the two years
11 of financial records of the law firm as to some
12 way in which Mr. Polselli paid or we're -- we're
13 looking for where his assets are, and so we want
14 two years of the bank records of the law firm
15 about anybody so that we can find Polselli's
16 information.

17 What -- what's your response to that?

18 MR. DVORETZKY: Two points in response
19 to that.

20 One, that is precisely the sort of
21 egregious invasion of privacy of the law firm's
22 interests, as well as the law firm's other
23 clients' interests, that Congress was concerned
24 with. And Congress didn't write this exception
25 "in aid of collection" in order to -- to blow up

1 the privacy protections that were put in place
2 in 7609(a) and (b).

3 With respect to the actual utility of
4 such information, in an attenuated way, perhaps
5 that fishing expedition would be helpful. In an
6 attenuated way, going to law school is helpful
7 to me here today. In an attenuated way, you
8 know, taping up a basketball player's ankle
9 before she goes on -- on the court to score a
10 basket is helpful.

11 None of that is directly in aid of
12 arguing this case, scoring a basket, or
13 collecting. Is it helpful in some attenuated
14 way? Sure. And for that reason, perhaps they
15 could get that narrow information if they
16 properly served the summons with notice and if
17 then the -- the summons, which, in this case,
18 you can see an example of one at Petition
19 Appendix 71a, if that had been subject to
20 district court review, and the district court
21 might well have had the reaction, look, maybe,
22 IRS, you can get some of this information, but
23 what you've asked for is way overbroad, so let's
24 narrow it.

25 In addition to all of that, from an ex

1 ante point of view, just thinking about what
2 rule makes sense here, under the IRS's view, as
3 soon as they make an assessment, again, an
4 internal bookkeeping notation, as soon as they
5 do that, that turns off the notice and judicial
6 review provisions that Congress created in
7 7609(a) and (b).

8 That gives them no incentive to be
9 reasonable, and it leads them to issue overbroad
10 summonses, like the ones that you can see in the
11 Petition Appendix at 71a.

12 In a universe like the one that
13 Congress actually designed, where, before
14 Congress can get information from innocent third
15 parties, it actually has to think what do we
16 really need here because it's going to be
17 subject to judicial review, probably they
18 wouldn't have issued such an overbroad summons
19 in the first place.

20 JUSTICE BARRETT: Mr. Dvoretzky, I
21 think you are obviously helped by the canon
22 against surplusage. Do you want to address the
23 government's argument that we also have to
24 account for waivers of immunity should be
25 narrowly construed? I mean, how do we pick

1 between them? If -- if we accept that there's
2 some ambiguity that justifies resort to a canon
3 in the first place, how do we choose between
4 those?

5 MR. DVORETZKY: So I -- I think this
6 Court, in applying the -- in -- in considering
7 sovereign immunity cases, this Court has not
8 construed exceptions to sovereign -- to --
9 exceptions to waivers broadly. It has construed
10 them narrowly.

11 So, in the Federal Tort Claims Act
12 context, for example, you have a broad waiver of
13 sovereign immunity, just as here, in 7609(a) and
14 (b), you have a very broad waiver of sovereign
15 immunity referring to any person, referring to
16 any summons.

17 Once you have that kind of a broad
18 waiver of immunity, courts are not going to claw
19 that back by broadly construing exceptions. At
20 that point, you construe exceptions narrowly.
21 That's the Yellow Cab case and that's the -- the
22 -- the cases interpreting the Federal Tort
23 Claims Act. So that -- that would be the
24 framework for thinking about this here.

25 You know, the -- the -- the

1 government, I think, doesn't really have any --
2 the government doesn't have any good textual
3 arguments for avoiding the surplusage problem
4 that's been created -- that is created by their
5 reading of the statute.

6 They make a couple of arguments about
7 clause (2) here. One is that clause (2) applies
8 only pre -- that clause (2) applies
9 pre-assessment, whereas clause (1) does not.

10 That doesn't make any sense as a
11 practical matter to think that what Congress was
12 doing here was giving greater protections to
13 delinquent taxpayers pre-assessment than to
14 fiduciaries and transferees.

15 It also doesn't work as a textual
16 matter. Clause (2) refers back to the taxpayer
17 in clause (1), and that's the taxpayer who has
18 had an assessment made against them.

19 The other argument they make is that
20 clause (2) applies where you -- where you can't
21 collect directly from the taxpayer, such as in a
22 situation where a corporation has liquidated.
23 But, even in those situations, you are still
24 collecting on account of the underlying
25 liability and assessment.

1 And so clause (2) just creates -- this
2 is not a minor belt-and-suspenders problem.
3 It's creating massive surplusage problems that
4 -- that, again, gave Judge Kethledge pause below
5 and ought to give this Court significant pause
6 here.

7 CHIEF JUSTICE ROBERTS: Thank you.
8 Justice Thomas?

9 Justice Alito?

10 Justice Gorsuch?

11 Justice Kavanaugh?

12 Justice Barrett?

13 Justice Jackson?

14 Okay. Thank you, counsel.

15 Mr. McDowell.

16 ORAL ARGUMENT OF EPHRAIM MCDOWELL

17 ON BEHALF OF THE RESPONDENT

18 MR. MCDOWELL: Thank you, Mr. Chief
19 Justice, and may it please the Court:

20 The statute in this case requires that
21 notice and judicial review be given to persons
22 identified in a third-party summons issued in
23 aid of a liability investigation. But Congress
24 made an express exception to those entitlements
25 for summonses issued in aid of collection of an

1 assessment made against a delinquent taxpayer.

2 We would read that collection
3 exception by its terms, and because the
4 summonses here were issued in aid of collection
5 of a \$2 million assessment against Mr. Polselli,
6 the collection exception applies in this case.

7 Petitioners, however, would disturb
8 the balance that Congress struck by inserting
9 two artificial limitations into the statute,
10 namely, a direct connection requirement that
11 supposedly leads into a legal interest test.

12 But nothing in the statutory text,
13 context, or history even hints at those
14 limitations, and those limitations lack any
15 established legal meaning, so their boundaries
16 are amorphous.

17 Petitioners say their limitations are
18 necessary to impose a check on the IRS's summons
19 authority. But multiple other checks exist,
20 including the prospect of a challenge by the
21 recipient of the third-party summons.

22 Ultimately, Petitioners' position is
23 that the statute is an unqualified pro-privacy
24 guarantee. But, in fact, like many statutes,
25 this one is a compromise. While Congress

1 prioritized privacy rights at the liability
2 investigation phase, it prioritized prompt and
3 efficient collection of taxes at the collection
4 phase, and it did so because, when we're at the
5 collection phase, that necessarily means that
6 there's a delinquent taxpayer who's refusing to
7 pay an assessed liability and likely
8 deliberately evading collection. In that narrow
9 but important context, Congress wanted the IRS
10 to have some latitude to seek out and recover
11 the delinquent taxpayer's assets.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: Well, Mr. McDowell,
14 this is quite a broad statute. I was interested
15 in the -- the way this is initiated is through
16 an assessment, and I was interested in how you
17 established an assessment to start this process.

18 And you cite us in your brief on page
19 17 to Laing versus U.S., number -- Footnote
20 Number 13, which has some issues with
21 circularity because it says the assessment,
22 essentially -- the assessment, "essentially a
23 bookkeeping notation," is made when the
24 Secretary or its delegate establishes an account
25 against a taxpayer on the tax rolls. And, in

1 other words, that boils down to it is when --
2 there's an assessment when the Secretary says
3 there is an assessment.

4 So the -- what would limit what you
5 can do after you establish an assessment and
6 then begin a collection process?

7 MR. MCDOWELL: Sure. So the first
8 point I would make is that they -- they're
9 basically saying that an assessment is a
10 bookkeeping notation.

11 But it's important to understand that
12 the assessment comes after a very long process
13 in which the taxpayer has gotten the opportunity
14 to get Tax Court review of the liability
15 determination and then seek court of appeals
16 review of the liability determination.

17 So there's a whole liability process.
18 Only after that would there be an assessment.
19 At that point, this statute kicks in, clause (1)
20 -- kicks in, and we are limited by the phrase
21 "in aid of collection." I mean, that's fairly
22 broad, general language, but, if it's not in aid
23 of collection, then that would be the limit.

24 JUSTICE THOMAS: So tell me how that
25 limits you.

1 MR. MCDOWELL: Sure. So I think, in
2 practice, the types of heartland summonses that
3 we're -- that we provide -- that we issue are
4 the ones like those in this case, which is
5 records -- seeking records of financial
6 transactions between a third party and the
7 delinquent taxpayer or records of third parties
8 who have intertwined assets with the delinquent
9 taxpayer.

10 So, if -- beyond that, if we're not
11 seeking the -- the -- if we're not seeking
12 information about the delinquent taxpayer's
13 assets, I think that's not going to be --

14 JUSTICE THOMAS: So --

15 MR. MCDOWELL: -- in aid of
16 collection.

17 JUSTICE THOMAS: But that doesn't seem
18 to be so much. If you can say we're seeking
19 records about the delinquent taxpayer's records,
20 we're seeking information about that, why can't
21 you also then summons -- issue summons to
22 clients of the law firm, to other partners of
23 the law firm, associates in the law firm, who
24 may have had some connection to this client --

25 MR. MCDOWELL: Well --

1 JUSTICE THOMAS: -- or to this
2 taxpayer?

3 MR. MCDOWELL: Right. So it does -- I
4 mean, "in aid of collection" is not limitless.
5 We know this is an exception to a general rule
6 in the statute. So we're not saying it's
7 limitless. It has to be -- it has to assist the
8 Service in moving the ball forward towards
9 collecting the assets, and that means locating
10 the delinquent taxpayer's assets.

11 JUSTICE THOMAS: Well, but you don't
12 know if another partner or another client of the
13 firm also participated in an activity to hide or
14 secret the funds.

15 MR. MCDOWELL: Right. So that gets to
16 the question of what is the level of knowledge
17 we need before we can issue the summons. And I
18 think I take Petitioners to be saying we have to
19 have a pretty strong level of certainty before
20 we issue -- issue the summons. We don't think
21 that's correct. We also don't think it can be a
22 shot in the dark because then the exception
23 swallows the default rule.

24 JUSTICE THOMAS: So where would you
25 get the limiting language?

1 MR. MCDOWELL: So we would say that
2 the limiting language is something like it has
3 to be reasonably calculated to assisting in
4 collection. And we get that from the Rule 69
5 context, which is Federal Rule of Civil
6 Procedure 69, which uses the very similar
7 language of "in aid of the judgment" and also
8 deals with a similar problem where you have a
9 judgment creditor who's seeking to satisfy a
10 judgment by looking for the judgment debtor's
11 assets.

12 JUSTICE GORSUCH: So let me see if I
13 --

14 CHIEF JUSTICE ROBERTS: Tell me --

15 JUSTICE GORSUCH: Oh, I'm sorry,
16 Chief.

17 CHIEF JUSTICE ROBERTS: -- tell me
18 exactly how -- how you read this notice section
19 different -- differently from this. It really
20 says you get no notice if we want documents that
21 might be relevant to how much you have and how
22 much you owe us. That's all this says.

23 MR. MCDOWELL: Once there is an
24 assessment at the very end of a long process --

25 CHIEF JUSTICE ROBERTS: But the

1 assessment is, okay, we think -- I think you owe
2 me a hundred thousand dollars.

3 MR. MCDOWELL: Mr. Chief Justice, I --
4 I respectfully disagree. I think an assessment
5 comes at the end of a very long process where
6 there's been a liability determination. They've
7 issued liability investigation summonses, which
8 the person has gotten notice and judicial review
9 of.

10 CHIEF JUSTICE ROBERTS: Okay. They
11 think you owe a particular amount of money after
12 they --

13 MR. MCDOWELL: Well --

14 CHIEF JUSTICE ROBERTS: -- do some
15 work and look at it.

16 MR. MCDOWELL: Well, there's tax --

17 CHIEF JUSTICE ROBERTS: But, I mean,
18 the question is notice. I mean, they're not --

19 MR. MCDOWELL: Right.

20 CHIEF JUSTICE ROBERTS: -- going to
21 give you notice we're looking at you. Notice is
22 no notice.

23 MR. MCDOWELL: That's -- that is --
24 once the collection phase kicks in, this
25 provision does apply. And there's a good reason

1 for that, because, when we're at the collection
2 phase, that necessarily means that the
3 delinquent taxpayer has gotten this full
4 process, and he's --

5 CHIEF JUSTICE ROBERTS: Well, I'm sure
6 there's a good reason for it. It helps you
7 collect the money that you think the person
8 owes.

9 MR. MCDOWELL: Right. Right.

10 CHIEF JUSTICE ROBERTS: But, in terms
11 of notice that anybody can do anything about, I
12 just don't see where -- where it is.

13 MR. MCDOWELL: Sure. So --

14 CHIEF JUSTICE ROBERTS: He doesn't get
15 notice. People who might help figure out how
16 much he owes don't get notice. Nobody else
17 matters.

18 MR. MCDOWELL: So -- so two points
19 about that, Mr. Chief Justice.

20 First, the recipient of the summons
21 can always challenge the summons. So, here, the
22 banks could have challenged it. That's pursuant
23 to Section 7604 of the statute. And the
24 recipient of the summons will generally have an
25 incentive to do that, if you're talking about a

1 bank, if the summons is particularly sweeping
2 into other customers' rights. That's when
3 they're going to have the incentive to bring
4 that sort of challenge.

5 The second point is Congress made the
6 deliberate decision --

7 CHIEF JUSTICE ROBERTS: But what
8 exactly would their challenge consist of?

9 MR. MCDOWELL: It would consist of the
10 general motion to quash challenge that would
11 exist, which is overbreadth, relevance, scope,
12 things like that. So they could say that this
13 is actually not sufficiently tailored or
14 sufficiently relevant to the collection case.
15 So that's number one.

16 Number two, Congress made a deliberate
17 decision in the statute not to restrict banks
18 and other third-party recordkeepers from
19 providing notice to their customers about these
20 summonses. That's why we have Petitioner --
21 that's why this case arose, because the banks
22 told Petitioners about the notice. So the
23 idea that this is all happening --

24 JUSTICE JACKSON: But -- but you say
25 they can't go in on that basis, right?

1 MR. MCDOWELL: The --

2 JUSTICE JACKSON: So what -- what
3 difference does it make if the banks notify the
4 people whose records are being collected? I
5 thought your point was they are not entitled to
6 notice under the statute and, therefore, they
7 can't bring a challenge.

8 MR. MCDOWELL: That's correct as far
9 as bringing a motion to quash. What I'm saying
10 is I think that it cuts against Petitioners'
11 argument that this is all shrouded in secrecy if
12 the banks are able to give notice.

13 And Congress made a deliberate
14 decision to do this because, in other statutes,
15 Congress has allowed -- has -- has allowed the
16 government to seek nondisclosure orders against
17 banks and other third-party recordkeepers, but
18 it made a deliberate decision not to do that
19 here because I think it wanted this process to
20 be -- it wanted to give banks the option of
21 keeping these processes open.

22 JUSTICE GORSUCH: If I understand your
23 colloquy with the Chief Justice and Justice
24 Thomas, you do accept that "in aid of" can't
25 mean a shot in the dark.

1 MR. MCDOWELL: Yes.

2 JUSTICE GORSUCH: Right?

3 MR. MCDOWELL: Yes.

4 JUSTICE GORSUCH: There has to be some
5 causal link, some close connection of some kind
6 between the liability and -- and -- and the
7 IRS's actions?

8 MR. MCDOWELL: I -- I wouldn't say --

9 JUSTICE GORSUCH: Between the
10 request -- request for information and the IRS's
11 actions?

12 MR. MCDOWELL: I would -- I would not
13 say close connection.

14 JUSTICE GORSUCH: Some connection.

15 MR. MCDOWELL: Some connection.

16 Correct.

17 JUSTICE GORSUCH: And so that's -- so
18 what we're really fighting about -- everyone
19 agrees "in aid of" can't mean the universe.

20 MR. MCDOWELL: Yes.

21 JUSTICE GORSUCH: And -- and it's just
22 how -- how closely connected it has to be.
23 That's what the debate is really about.

24 MR. MCDOWELL: I don't disagree with
25 that, and I would say two things about why we

1 think that the limit should be broader than
2 those --

3 JUSTICE GORSUCH: Sure, but we don't
4 disagree on principle that "in aid of" has to
5 have some limiting -- some limit to it. We're
6 just disagreeing over -- and I just want to
7 clarify --

8 MR. MCDOWELL: Yeah.

9 JUSTICE GORSUCH: -- the nature of our
10 dispute is how close that causal connection has
11 to be.

12 MR. MCDOWELL. I -- I agree.

13 JUSTICE GORSUCH: It doesn't matter
14 whether your co-counsel went to Yale or --

15 (Laughter.)

16 JUSTICE GORSUCH: -- or it doesn't
17 matter what he did last night. You know --

18 MR. MCDOWELL: Right.

19 JUSTICE GORSUCH: -- it's somewhere in
20 between --

21 MR. MCDOWELL: Yes.

22 JUSTICE GORSUCH: -- is what we're
23 fighting about.

24 MR. MCDOWELL: I -- I do agree with
25 that. We don't think "in aid of" can be

1 limitless. This is an exception to a default
2 rule. And also, we think --

3 JUSTICE GORSUCH: And do you think
4 that informs our analysis, that the default rule
5 is notice, and so, that when we're construing an
6 exception to that, we should do so reasonably in
7 light of the general rule?

8 MR. MCDOWELL: Well, reasonably but
9 not narrowly. I mean, you're --

10 JUSTICE GORSUCH: Reasonably.

11 MR. MCDOWELL: Yeah. I -- I think --

12 JUSTICE GORSUCH: You'd agree with
13 that?

14 MR. MCDOWELL: Yes.

15 JUSTICE GORSUCH: Okay.

16 MR. MCDOWELL: Reasonably, fairly,
17 yes.

18 JUSTICE GORSUCH: Okay. Thank you.

19 MR. MCDOWELL: And -- and I guess the
20 -- the two things I was going to say about --
21 about the -- the phrase "in aid of" and why we
22 think the limit should be broader than they
23 suggest are, number one, I think "in aid of" is
24 fairly broad, general language. I don't think I
25 read that as a narrowing -- a narrowing phrase

1 like Petitioners do. I don't think that's how
2 it's naturally understood.

3 JUSTICE GORSUCH: Do -- do you think
4 the government could have done what Justice
5 Thomas posited? And that is, say, well, you
6 know, this law firm has lots of clients, some of
7 whom might have come into contact with the
8 Petitioner here and might be aware of his
9 assets, and so we want information about all of
10 their transactions too.

11 MR. MCDOWELL: I -- I -- based on
12 those facts alone, I don't think so. I think --

13 JUSTICE GORSUCH: Well, isn't that
14 what you did here, though? Because you -- you
15 sought two years' worth of records from the firm
16 without regard to its clients, I mean, with no
17 sensitivity to the attorney-client privilege of
18 those clients or -- or their -- their interests.

19 MR. MCDOWELL: So I'd like to clarify
20 that because, on page 21a -- this is the court
21 of appeals opinion -- the court of appeals said
22 that the -- the limitation in this summons has
23 borne out that the summonses the IRS issued to
24 the banks in this case all specify that they
25 seek information concerning the person

1 identified in the summons.

2 So the way that we read the summonses
3 and the way that the court of appeals read them
4 is that they were asking for information from
5 the bank about the law firm's bank statements.
6 And it could have -- other stuff could have been
7 redacted.

8 JUSTICE GORSUCH: Okay.

9 MR. MCDOWELL: Okay. So --

10 JUSTICE GORSUCH: So you -- so there
11 is a limit to "in aid of" in your mind right
12 there. You -- you don't think the government
13 could seek other information about other
14 clients, or -- or do you?

15 MR. MCDOWELL: No -- well, what -- the
16 way we would talk about the limit is the limit
17 -- the -- the point here is to locate the
18 delinquent taxpayer's assets.

19 JUSTICE GORSUCH: I understand that.

20 MR. MCDOWELL: So -- so the third
21 party should have some financial ties or has
22 engaged in financial transactions with the
23 delinquent taxpayer. Otherwise, the point is
24 not to locate the delinquent taxpayer's assets.
25 So that's how we would articulate it, and --

1 JUSTICE GORSUCH: Well, John may know
2 Susie, who may know Joe, who may know Mr.
3 Polselli. But you'd say at some level that
4 becomes too attenuated.

5 MR. MCDOWELL: At some level, but,
6 here, the summonses were quite close in
7 connection because --

8 JUSTICE KAGAN: And would -- would you
9 say a word more about that? How is it that the
10 summonses were close in connection?

11 MR. MCDOWELL: Sure. So, for the law
12 firm summons, because I think that's the real
13 delta in some ways between our position, the
14 summons seeking the law firm's bank records, Mr.
15 Polselli was a long-time client of this law
16 firm. He'd made numerous payments to the law
17 firm over time.

18 So, by seeing the law firm's records
19 of his payments, they could figure out what
20 accounts or what entities Mr. Polselli was using
21 to make those payments, and then they could
22 begin the collection process by seizing funds
23 from those accounts or entities.

24 So it's really only one step removed
25 from the actual collection. I mean, direct

1 connection is just kind of a phrase that they're
2 using, but it doesn't really have any content.

3 I think the idea here is that this
4 actually was fairly -- there is a fairly close
5 nexus because they were looking for this account
6 information and they could have begun the
7 process of issuing a notice of levy from those
8 accounts.

9 JUSTICE KAGAN: And could -- could I
10 ask you -- you -- there's been some talk about,
11 oh, it's the IRS, they just think that he owes
12 money, but what is the process before the IRS
13 decides he owes money?

14 MR. MCDOWELL: Sure. So there's
15 initially an in -- in -- information-gathering
16 process where there could be audits and
17 examinations that -- it's a long process. Any
18 summonses issued to third parties during that
19 process would be subject to notice and judicial
20 review under subsections (a) and (b).

21 Then, once that process concludes, the
22 IRS will make a liability determination, meaning
23 this person is liable for some amount of taxes
24 owed. That liability determination is
25 challengeable in the Tax Court, and then the Tax

1 Court decision is reviewable in the court of
2 appeals.

3 So this is a thorough process with
4 lots of layers of review. And then I'd also add
5 that if we issue a collection summons and that
6 collection summons would be --

7 JUSTICE KAGAN: So, at this point, we
8 can say, if we're going to be trusting courts at
9 all, he owes money.

10 MR. MCDOWELL: Exactly. And I think
11 that's a critical point because the only time
12 we're in this situation when this provision
13 comes into play is when there is someone who has
14 adjudicated or assessed liability and he's
15 refusing to pay that liability and likely
16 deliberately evading tax collection.

17 CHIEF JUSTICE ROBERTS: Did I
18 understand you to respond to Justice Gorsuch
19 that it is a limitation on this that the
20 information has to concern assets?

21 MR. MCDOWELL: It has -- I think
22 relate to or concern assets of the delinquent
23 taxpayer and --

24 CHIEF JUSTICE ROBERTS: How -- how
25 broadly do you read that?

1 MR. MCDOWELL: Well, I think, you
2 know, so just to give --

3 CHIEF JUSTICE ROBERTS: I mean, it's
4 more than just I want to see how much money you
5 have in the bank, right? I mean, it's -- could
6 you get records of family members because maybe
7 he's put his assets with them?

8 MR. MCDOWELL: So we don't think,
9 standing alone, the fact that someone is a
10 family member is enough to simply summon that
11 family member's bank records. There would have
12 to be some further evidence that there was some
13 financial dealing between the family member and
14 the taxpayer.

15 And, here, we had that with Mrs.
16 Polselli. It wasn't simply that this was a
17 husband and a wife. Mrs. Polselli and Mr.
18 Polselli had engaged in significant financial
19 dealings. They owned and managed several of the
20 same LLCs. And one of Mr. Polselli's LLCs paid
21 off a mortgage for Mrs. Polselli.

22 CHIEF JUSTICE ROBERTS: So you don't
23 generally -- if you're trying to seek the assets
24 of the wife, you don't normally get records
25 concerning the husband?

1 MR. MCDOWELL: We -- only if there's
2 some reason to believe that there is a financial
3 connection.

4 CHIEF JUSTICE ROBERTS: Like they're
5 married?

6 (Laughter.)

7 MR. MCDOWELL: Well, the marriage --
8 marriage in and of itself may not be enough.
9 There are some -- I mean, it depends if their
10 assets are intertwined. I think, normally, in a
11 communal property state, yes, that probably
12 would be okay. I think stretching out to
13 brothers, sisters, other family members, there's
14 no --

15 CHIEF JUSTICE ROBERTS: Well, don't
16 you normally assume that the financial records
17 of a husband and wife are intertwined?

18 MR. MCDOWELL: You would -- I think
19 that could be an assumption depending on the
20 state property law, I guess, but there would
21 have to be -- in our view, this is a
22 particularly clear case, I guess, because it
23 wasn't just that they were married, it's that --
24 that there was this other evidence of extensive
25 financial dealings, which is how the IRS officer

1 put the point.

2 JUSTICE JACKSON: Can we go back to
3 the --

4 JUSTICE SOTOMAYOR: Can I --

5 JUSTICE JACKSON: Oh, go ahead.

6 JUSTICE SOTOMAYOR: Can I focus us on
7 the case here?

8 MR. MCDOWELL: Yes.

9 JUSTICE SOTOMAYOR: There's a whole
10 lot about the IRS collection mechanism that has
11 been criticized and continues to be criticized
12 by the world, including me. If you've audited,
13 you know.

14 Okay. But my point is what I want to
15 figure out is why Congress would want to
16 distinguish between investigation and collection
17 that involves third parties.

18 I can understand why -- and this is
19 where I've been struggling with understanding
20 the Ninth Circuit and Judge Kethledge's concern,
21 okay? And I think, in this conversation, I'm
22 finally coming to understand it, which is that I
23 think what they're concerned about is, if you're
24 collecting from the taxpayer, then you could
25 understand not giving the taxpayer notice,

1 because you might have suspicions that they'll
2 continue in not wanting to pay you and to hide
3 the assets.

4 But, if it's an innocent third party,
5 why would you impose secrecy on them? Unless
6 the taxpayer is handed over to a fiduciary or
7 you have information that it is an alter ego or
8 a partner or something else, why shouldn't an
9 innocent taxpayer get notice? Why shouldn't the
10 law firm be able to come in and challenge the
11 broadness of a subpoena to a bank --

12 MR. MCDOWELL: Because the --

13 JUSTICE SOTOMAYOR: -- on
14 attorney-client privilege? Why shouldn't the
15 innocent third party say, you know, he -- they
16 got it wrong --

17 MR. MCDOWELL: Because --

18 JUSTICE SOTOMAYOR: -- I'm not
19 involved with this taxpayer?

20 MR. MCDOWELL: Because the necessary
21 implication of their position is not only that
22 the third party would be entitled to notice but
23 also that the taxpayer himself would have to be
24 entitled to notice, because their argument is
25 that --

1 JUSTICE SOTOMAYOR: No, that's the
2 exception built in by Judge Kethledge and the
3 Ninth Circuit.

4 MR. MCDOWELL: Well --

5 JUSTICE SOTOMAYOR: They said if it's
6 the taxpayer or -- or you have -- you have
7 knowledge or suspicion of or reasonable basis
8 for believing they're covered by the exception.

9 MR. MCDOWELL: Well, so -- so what I'm
10 saying is let's take the example of the -- the
11 summons seeking the law firm's bank records.

12 If we had to provide notice and an
13 opportunity for judicial review to -- in that
14 situation, the law firm would not only get the
15 notice but also Mr. Polselli, and that's because
16 their entire argument is that subsection
17 (c)(2)(D)'s exception doesn't apply in that
18 case, right?

19 So, in -- if that's true, then
20 subsection (a) and (b) have to apply because
21 those are the general rules. And subsection (a)
22 says any person who is "identified in the
23 summons" is "entitled to notice." And
24 Mr. Polselli was identified in these summonses,
25 and the taxpayer will always be identified in

1 these summonses in the caption. So the
2 necessary implication is that he will also be
3 entitled to notice, and with that notice, he'll
4 be able to move his funds from whatever accounts
5 and entities he was using to pay the law firm
6 into other funds and other accounts.

7 JUSTICE JACKSON: I didn't hear them
8 as suggesting that the entirety of that -- the
9 subsection didn't apply in the law firm
10 situation, so I'm a little curious about the
11 argument that you just made.

12 I mean, you're suggesting that if we
13 go with them, it automatically means that the
14 taxpayer himself would always get the notice.
15 And I just thought they were saying it's -- it's
16 not in aid of collection if you're giving the
17 summons to a law firm and seeking all of the law
18 firm's records for two years.

19 MR. MCDOWELL: Well, first of all, we
20 disagree with the scope of that summons, but --
21 the characterization of that scope of that
22 summons, as I mentioned --

23 JUSTICE JACKSON: Just -- just because
24 you --

25 MR. MCDOWELL: -- before. Yeah.

1 JUSTICE JACKSON: -- read it that way,
2 but I'm -- you know, looking at the language of
3 the summons, it does -- it doesn't say anything
4 about -- it says copies of all bank statements
5 relative to the accounts of the law firm.

6 MR. MCDOWELL: Well, but -- but if you
7 go up on -- and I'll -- if you go up to the
8 earlier paragraph on -- this -- I'm looking at
9 79a of the Petition Appendix. It says -- it's
10 talking about concerning the person identified
11 above for the periods shown.

12 So they're asking for it as they
13 relate to the person identified above, and
14 that's Mr. Polselli. But -- but --

15 JUSTICE JACKSON: All right. So
16 what's your position on all the law firm
17 records? That's -- that -- you -- you would
18 agree that's not in?

19 MR. MCDOWELL: Well, we don't think
20 that's what this summons sought. Yeah.

21 JUSTICE JACKSON: Hypothetically --

22 MR. MCDOWELL: So I think --

23 JUSTICE JACKSON: -- you asked for all
24 --

25 MR. MCDOWELL: Right.

1 JUSTICE JACKSON: -- the law firm
2 records because, for example, Mr. Polselli could
3 be using aliases or whatever, and you wanted to
4 see -- you knew, as you said, that he had a
5 longstanding relationship with this law firm,
6 and you didn't have the exact account numbers,
7 and you were afraid he had aliases, so you said
8 I'd like to get all the law firm records for the
9 bank. Is that --

10 MR. MCDOWELL: I think --

11 JUSTICE JACKSON: For -- for -- from
12 -- from the bank related to the law firm. Is
13 that in or out?

14 MR. MCDOWELL: I think, in an ordinary
15 case, that would be out. But I think this could
16 be a different type of case if you think about
17 the facts here, which were they first asked the
18 law firm for the records of Mr. Polselli's
19 payments to the law firm. They asked the law
20 firm directly, not the bank. The law firm said
21 we don't have any such records, even though they
22 knew that Mr. Polselli was a longtime client of
23 the law firm.

24 Only at that point, when they didn't
25 have cooperation of the law firm, did they ask

1 for the bank statements. So, if you did read it
2 more broadly, I think the rationale for that
3 more broad -- that broader reading would be that
4 they would have to have all of the relevant bank
5 statements in -- in order to figure out what the
6 shell companies he was using were, because the
7 bank itself wouldn't know what those shell
8 companies were.

9 So they may need a slightly broader --
10 a slightly broader set of information than just
11 the information that says line item, payment
12 from Mr. Polselli. They need -- they may need
13 more information that actually concern --
14 concerns his shell companies.

15 So I think that would be the potential
16 rationale. But, again, I don't think you need
17 to get into that because the court of appeals
18 read it the way we -- we read it, and I think
19 it's the fairest reading of the stat -- of the
20 summons.

21 But, to get to your statutory
22 question, they're saying that this is not in aid
23 of -- not in aid of collection. If it's not in
24 aid of collection, then we're outside of
25 (c)(2)(D) because (c)(2)(D) is the exception

1 that's talking about summonses in aid of
2 collection. And if we're outside of (c)(2)(D),
3 we're in (a) and (b), which are the general
4 rules that require notice and judicial review.

5 And if you look at (a)(1), Section --
6 subsection (a)(1), it says any person who is
7 identified in the summons is entitled to notice.
8 So Mr. Polselli would be entitled to notice.

9 But even if he weren't for whatever
10 reason, which I -- I don't know why that would
11 be, the -- the law firm could still tell him
12 about the summons, and he could then move his
13 assets.

14 JUSTICE GORSUCH: What do we do with
15 your friend's argument on the other side that --
16 the government's reading of the statute renders
17 subsection (ii), if not entirely superfluous,
18 almost so?

19 MR. MCDOWELL: So the way -- the way
20 --

21 JUSTICE GORSUCH: As well as -- as
22 well as about half of (D)(i).

23 MR. MCDOWELL: So the way I think
24 about the superfluity issue, I think, as a -- as
25 a threshold matter, is exactly the way that

1 Justice Kagan was describing.

2 JUSTICE GORSUCH: I understand that --

3 MR. MCDOWELL: Yeah.

4 JUSTICE GORSUCH: -- response. You
5 know, sometimes iteration is part of the
6 statutory construction. Putting that aside --

7 JUSTICE KAGAN: It was a little bit
8 more than that.

9 (Laughter.)

10 MR. MCDOWELL: Yeah. Yeah.

11 JUSTICE GORSUCH: What?

12 MR. MCDOWELL: Exactly. I actually --
13 I think it actually is -- I think it actually is
14 different than that. I think it's actually
15 different than the traditional belt-and-
16 suspenders --

17 JUSTICE GORSUCH: Okay.

18 MR. MCDOWELL: -- and the reason is
19 that if you look -- this is a structural point
20 about the entire Tax Code. There are two
21 avenues of collection within the Tax Code.
22 There's collection from the delinquent taxpayer
23 directly and collection from transferees or
24 fiduciaries.

25 JUSTICE GORSUCH: Right.

1 MR. MCDOWELL: You see that in the
2 Anti-Injunction Act and in Section 6901 --

3 JUSTICE GORSUCH: Yes.

4 MR. MCDOWELL: -- of the code. Okay?
5 So, in this provision that's all about
6 collection, it makes perfect sense that Congress
7 would just reference both avenues of collection
8 that exist in the entire Tax Code.

9 JUSTICE GORSUCH: Okay.

10 MR. MCDOWELL: So I think that's a
11 different -- that's different than just
12 belt-and-suspenders.

13 JUSTICE GORSUCH: Are -- is that,
14 though, an -- it may be a reason for (D)(ii)
15 being superfluous, but is there any response
16 from the government that (D)(ii) is, in fact,
17 superfluous?

18 MR. MCDOWELL: Yes. Yes. We have
19 those responses. They're at pages 25 to 31 of
20 our brief. The one that I'd like to focus on is
21 that -- is that clause (2) can apply
22 pre-assessment, whereas clause (1) applies only
23 post-assessment because, if you look at the
24 language of clause (1), clause (1) is clearly
25 requiring that an assessment has been made or a

1 judgment rendered. But clause (2) just talks
2 about the liability at law or in equity of a
3 transferee or fiduciary.

4 And, as we explain in our brief,
5 liability is distinct from an assessment. And
6 so what -- we -- we read that difference in
7 language to mean that clause (2) can apply
8 pre-assessment, whereas clause (1) can only
9 apply post-assessment. And that's a distinction
10 in scope that would mean that clause (2) is
11 doing work.

12 JUSTICE GORSUCH: Thank you.

13 JUSTICE SOTOMAYOR: Except don't you
14 have a regulation that says you won't engage (2)
15 until there is collection?

16 MR. MCDOWELL: It's not a -- it's not
17 a regulation. It's in the Internal Revenue
18 Manual, which is just a -- a -- basically a best
19 practices guide for line agents who are not
20 lawyers. And it's not meant to say what the
21 statute means or to say what -- the precise
22 scope of certain statutory language. It's just
23 saying, as a matter of best practice, we will
24 wait until after an assessment to issue a clause
25 (2) summons.

1 And I think the reason for that is
2 because I think line agents might be confused in
3 -- on the ground if there was a distinction
4 between pre- and post-assessment under clause
5 (1) and clause (2).

6 And I -- I guess just getting to
7 their -- I mean, their -- their principal --

8 JUSTICE SOTOMAYOR: Thank you,
9 counsel.

10 MR. MCDOWELL: Yep. Their principal
11 point in their briefing was the legal interest
12 test, but I actually didn't hear anything about
13 that legal interest test from them today. I
14 mean, the legal interest test is adding words to
15 the statute, and we know that when Congress
16 wanted to create a limitation based on the
17 taxpayer's interest in certain records, it did
18 so expressly. It did that in the very next
19 section of the code, Section 7610.

20 The other -- I guess the other -- the
21 other point I would just make is that I think
22 the statutory history, which my friend pointed
23 to, actually reinforces our reading of the text
24 because Congress passed this provision in
25 response to this Court's decision in Donaldson.

1 But Donaldson simply involved liability
2 investigation summonses, and it said that a
3 taxpayer who is the subject of a liability
4 investigation summons was not generally entitled
5 to judicial review of that summons.

6 Congress wanted to overturn that
7 result as to liability investigation summonses,
8 but it did not want to disturb the IRS's ability
9 to promptly and efficiently collect taxes at the
10 collection phase. And that's clear from the
11 text of the statute because subsections (a) and
12 (b) are all about liability investigations
13 summonses and they provide notice and judicial
14 review there, but then (c)(2)(D), the provision
15 we're dealing with here, is carving out an
16 express exception to those requirements for
17 collection phase summonses.

18 And then the -- the House and Senate
19 reports also both say that they're carving out
20 express -- they expressly say that they're
21 carving out an exception for summonses issued in
22 aid of collection.

23 And if I could just -- just step --
24 take a step back and put this in perspective a
25 little bit, and this, I think, goes to the

1 colloquy I had with the Chief Justice.

2 The IRS has long faced a persistent
3 problem of tax collection evasion. They have a
4 -- what they have called -- what's called a net
5 tax gap report, and that estimated that between
6 2014 and 2016, per year, there were \$428 billion
7 in uncollected taxes each of those years. And
8 that's available -- this is -- this is data on
9 the website of the IRS.

10 So we're dealing with a very difficult
11 problem, and I think Congress was acting against
12 that backdrop by giving the Service fairly broad
13 latitude to issue summonses seeking the assets
14 of people who, again, have adjudicated or
15 assessed liabilities and are refusing to pay
16 those liabilities and likely deliberately
17 evading the collection process.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Thomas?

21 Justice Alito?

22 Justice Sotomayor?

23 Justice Kagan? All right.

24 Justice Kavanaugh?

25 Justice Barrett?

1 Justice Jackson? No?

2 Thank you, counsel.

3 Rebuttal, Mr. Dvoretzky?

4 REBUTTAL ARGUMENT OF SHAY DVORETZKY

5 ON BEHALF OF THE PETITIONERS

6 MR. DVORETZKY: Thank you, Mr. Chief

7 Justice. Just a few points to wrap up.

8 So, first, I think everybody is
9 agreeing here today that "in aid of collection"
10 is not limitless, that it can't just be a shot
11 in the dark.

12 The Sixth Circuit's rule seemed to
13 think that it was, in fact, limitless. Petition
14 Appendix 11a and the Kethledge dissent at 27a
15 both adopt the understanding that the IRS gets
16 to decide what is helpful to it, and that could
17 -- could stretch as far as the IRS wants it to
18 stretch.

19 Second point, as a practical matter, I
20 think banks will often provide notice to their
21 customers. In this case, if you look in -- in
22 the district court record, there are copies of
23 form letters that the bank sent to the law
24 firms. That's how the law firms find -- found
25 out about these summonses. It seems to be a

1 common occurrence that banks do that.

2 And so taking those two points
3 together, it seems like the real issue here is,
4 is there going to be judicial review of the
5 IRS's determination that a particular summons is
6 sufficiently helpful or not?

7 The bank -- again, the banks, as a
8 practical matter, are going to give notice to
9 the third parties.

10 Going back to the question that
11 Justice Jackson asked me earlier, and, you know,
12 Mr. McDowell tried to narrow the summons here to
13 only information concerning Remo Polselli. The
14 problem with that is the banks, looking at the
15 law firm's bank records, don't know what line
16 items in there might concern Mr. Polselli.

17 The IRS's whole theory is that they're
18 looking for potential additional shell entities
19 that Mr. Polselli might have used in order to
20 pay the law firms.

21 How are the banks supposed to know
22 that? The only way to make that determination
23 and actually get the IRS what it needs is to
24 bring the law firms into the picture, and the
25 mechanism for bringing them into the picture is

1 providing them the official notice that the
2 statute requires and allowing them, if
3 necessary, to -- to move to quash -- to quash
4 the summons.

5 As far as the standard that the IRS
6 has to meet, we're not asking the IRS to be
7 certain of the -- of the direct connection. The
8 IRS just has to have a reasonable basis that the
9 information that it's seeking is going to lead
10 directly to collection, and, again, there ought
11 to be judicial review of that.

12 And, lastly, as to the legal interest
13 test, the -- the legal interest test is just an
14 application of the direct connection test in the
15 context of a bank account. In the context of a
16 bank account, what it means to have a direct
17 connection to collection is that the IRS can
18 take the information that it learns from the
19 summons and then levy on a bank account
20 belonging to the Petitioner or an -- through an
21 alter ego theory in order to collect money into
22 the federal fisc.

23 So the -- the legal interest test is
24 simply an application of the direct connection
25 test, and the -- the direct connection test is a

1 way of understanding the "in aid of" language,
2 which I think everybody agrees here today is not
3 limitless, as the Sixth Circuit thought that it
4 was.

5 I respectfully submit that that
6 determination ought to be made by a court rather
7 than by the IRS operating on its own, and so we
8 ask that the Sixth Circuit's decision be
9 reversed.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel. The case is submitted.

12 (Whereupon, at 12:35 p.m., the case
13 was submitted.)

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| <p style="text-align: center;">\$</p> <p>\$2 [1] 22:5 \$428 [1] 55:6</p> <hr/> <p style="text-align: center;">1</p> <p>1 [15] 3:15 4:2,16 5:16 6:18, 21 11:9 20:9,17 24:19 51: 22,24,24 52:8 53:5 11:44 [2] 1:15 3:2 11a [1] 56:14 12:35 [1] 59:12 13 [1] 23:20 17 [1] 23:19 1927 [1] 13:18</p> <hr/> <p style="text-align: center;">2</p> <p>2 [18] 3:20 4:15 6:18,20 11: 2 20:7,7,8,16,20 21:1 51: 21 52:1,7,10,14,25 53:5 2014 [1] 55:6 2016 [1] 55:6 2023 [1] 1:11 21 [1] 2:7 21-1599 [1] 3:4 21a [1] 35:20 25 [1] 51:19 27a [1] 56:14 29 [1] 1:11</p> <hr/> <p style="text-align: center;">3</p> <p>3 [1] 2:4 31 [1] 51:19</p> <hr/> <p style="text-align: center;">5</p> <p>56 [1] 2:10</p> <hr/> <p style="text-align: center;">6</p> <p>69 [2] 27:4,6 6901 [1] 51:2</p> <hr/> <p style="text-align: center;">7</p> <p>71a [2] 17:19 18:11 7604 [1] 29:23 7609 [1] 3:11 7609's [1] 5:6 7609(a) [4] 5:15 17:2 18:7 19:13 7610 [1] 53:19 79a [1] 46:9</p> <hr/> <p style="text-align: center;">A</p> <p>a)(1) [2] 49:5,6 a.m [2] 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