# SUPREME COURT
# OF THE UNITED STATES

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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. )

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Pages: 1 through 59

Place: Washington, D.C.

Date: March 29, 2023

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4 Petitioners, )

5 v. ) No. 21-1599

6 INTERNAL REVENUE SERVICE, )

7 Respondent. )

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10 Washington, D.C.

11 Wednesday, March 29, 2023

12

13 The above-entitled matter came on for oral

14 argument before the Supreme Court of the United

15 States at 11:44 a.m.

16

17 APPEARANCES:

18 SHAY DVORETZKY, ESQUIRE, Washington, D.C.; on behalf

19 of the Petitioners.

20 EPHRAIM MCDOWELL, Assistant to the Solicitor General,

21 Department of Justice, Washington, D.C.; on behalf

22 of the Respondent.

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1 P R O C E E D I N G S

2 (11:44 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear

4 argument next in Case 21-1599, Polselli versus

5 the Internal Revenue Service.

6 Mr. Dvoretzky.

7 ORAL ARGUMENT OF SHAY DVORETZKY

8 ON BEHALF OF THE PETITIONERS

9 MR. DVORETZKY: Mr. Chief Justice, and

10 may it please the Court:

11 Congress enacted Section 7609 to give

12 the public critical privacy rights to notice and

13 an opportunity to quash third-party IRS

14 summonses. Congress carefully limited the

15 exceptions to those rights. In clause (1),

16 Congress allowed the IRS to forgo notice for a

17 summons issued "in aid of the collection of an

18 assessment against the person with respect to

19 whose liability the summons is issued."

20 In clause (2), Congress separately

21 dispensed with notice for summonses "issued in

22 aid of the collection of the liability of any

23 transferee or fiduciary of a delinquent taxpayer

24 with an assessment or judgment."

25 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 summonsing 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 -- which means getting
25 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 me try an example. "In aid of"
12 isn't really an expression that I think people
13 use in common speech, but -- but let's try it
14 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 labor
19 market.
20 The Court interpreted the language
21 "affecting" to mean directly affecting. And "in
22 aid of" here in this statute has to have that
23 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, 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 helps, again, in
8 the way that going to law school helped me here
9 today, but the question is whether, when
10 Congress wrote this "in aid of" language, it
11 meant to create an exception that as soon as the
12 IRS makes an assessment, which is an internal
13 bookkeeping notation, at that point, any summons
14 that the IRS wants to issue against a third
15 party -- an innocent third party, like a law
16 firm, at that point, there's no opportunity for
17 notice and it becomes completely unreviewable as
18 to the scope --
19 CHIEF JUSTICE ROBERTS: No, no, I
20 understand. Yes, I -- I -- I think your
21 argument looks to confining the scope of "in aid
22 of collection" and there may be a lot of reasons
23 to do that, but the -- the nature of the phrase
24 and the language doesn't seem to be, to me, very
25 helpful.

1 I think "in aid of collection" is
2 exactly what you would say if you want to expand
3 the reach of (D)(i) as far as -- you know, as
4 far as the government's arguing for.
5 MR. DVORETZKY: Well, and, of course,
6 that is what they want to say in order to expand
7 the reach of (D)(i) as far as possible.
8 Our point is that the other
9 indications in this statute show that Congress
10 did not mean to create an exception that expands
11 so far as to effectively swallow the rule.
12 And "in aid of" can -- is at least
13 susceptible to the more limited interpretation
14 that I'm advancing and that Judge Kethledge
15 recognized in the -- in the Sixth Circuit. It's
16 at least susceptible to that, and that's the
17 better interpretation in this context because,
18 again, of the significant surplusage concerns
19 that reading the statute the government's way
20 would create as for the rest of the -- the
21 exception in (D) that Congress wrote here.
22 Under the government's reading, if
23 an -- if a summons is not -- does not call for
24 notice or the ability to quash, if it is in aid
25 of collection, period, Congress didn't need to

1 write clause (2) at all because collecting from
2 a transferee or a fiduciary is collecting the
3 liability or the assessment, the underlying
4 liability or assessment, as to the taxpayer.
5 So that too, summonsing a fiduciary or
6 a transferee, would be in aid of collection of
7 the underlying assessment under the government's
8 reading of clause (1).
9 JUSTICE KAGAN: So, Mr. Dvoretzky --
10 yeah, I understand the -- the surplusage matter
11 as a technical point, but, of course, all the
12 time Congress, you know, uses belt-and-
13 suspender approaches, we really mean this.
14 And even beyond that, I mean, I think
15 actually, if you think about the person who
16 wrote this language and why they wrote this
17 language, it's -- this language is written in
18 recognition of the fact that there are sort of
19 two -- two sources of money that the IRS can try
20 to collect from. You know, sometimes the IRS is
21 collecting from an individual taxpayer, and
22 sometimes the IRS is collecting from the
23 taxpayer's fiduciary or transferee.
24 And, you know, basically, I read this
25 language just to say, whoever we're collecting

1 from, and it could be this group of people or it
2 could be that group of people, if it's in aid of
3 collecting, then -- then we don't have to issue
4 a notice.
5 MR. DVORETZKY: There's no indication
6 that Congress had that kind of framework in mind
7 when it was writing this statute. Every
8 indication is that what Congress was concerned
9 with in writing this statute was responding to
10 this Court's decisions in cases like Donaldson
11 and protecting third-party privacy rights.
12 The government tries --
13 JUSTICE KAGAN: Well, I -- I -- I
14 mean, there -- there actually is an indication
15 because all over the code, the code uses, like,
16 this -- this dichotomy between taxpayers and
17 their fiduciaries and transferees. So that --
18 that is in many provisions of the code.
19 And, essentially, this just matches
20 it. You know, you can collect from either one.
21 There are two sources of -- there are two pots
22 that one can collect from, and, you know, this
23 is reflective of that. Is it absolutely
24 necessary? It's not for exactly the reason you
25 say.

1 But it's totally understandable as a
2 way of drafting, if you're thinking about
3 Congress saying, after the liability judgment
4 has been made, after an assessment is -- is put
5 on the books, do whatever you need to do to
6 collect money from either the taxpayer or the
7 beneficiary/transferee.
8 MR. DVORETZKY: And --
9 JUSTICE KAGAN: Excuse me, the
10 fiduciary.
11 MR. DVORETZKY: -- look, I think the
12 only indication that the government has given
13 that Congress -- that Congress might have been
14 thinking that is in responding to a 1927 Western
15 District of Kentucky case that seemed to exhibit
16 some confusion about the difference between
17 collecting directly from the taxpayer and
18 collecting from a transferee or fiduciary.
19 I just think the much more plausible
20 inference in this context, when we have all --
21 the nature of this statute and all over the
22 legislative history for those who care to look
23 at it is a concern about privacy rights, that
24 that was the overarching concern that Congress
25 had here.

1 And from that perspective, Congress
2 wrote a carefully crafted exception that under
3 the government's view could have just been
4 limited to collection in -- any summons in aid
5 of collection, period, doesn't trigger the
6 privacy protection. And that's not what
7 Congress wrote here.
8 JUSTICE JACKSON: Do you concede that
9 the law firms at issue here were some sort of
10 fiduciary or transferee?
11 MR. DVORETZKY: No.
12 JUSTICE JACKSON: So --
13 MR. DVORETZKY: And the government's
14 not relying on clause --
15 JUSTICE JACKSON: They're not relying
16 on that, so I guess I'm asking a factual
17 question about the summons, which is it appeared
18 to -- it appeared to want all of the financial
19 records of these law firms. Is it limited to
20 the records of the law firms related to Mr.
21 Polselli?
22 MR. DVORETZKY: No.
23 JUSTICE JACKSON: So -- so the law
24 firms weren't themselves fiduciaries, or at
25 least the government's not relying on that, and

1 the records they're seeking are not the ones
2 just related to Mr. Polselli. So how -- how,
3 under that operation of the statute, could
4 somebody challenge it as overbroad?
5 MR. DVORETZKY: Well, under our
6 reading of the statute, the law firms were
7 entitled to notice and an opportunity to quash.
8 JUSTICE JACKSON: Right. And under
9 the government's, they wouldn't be because --
10 MR. DVORETZKY: Right.
11 JUSTICE JACKSON: -- these records
12 would some -- through their theory of "in aid
13 of" would be in aid of collection, and so there
14 wouldn't really be an opportunity for anybody to
15 complain about the scope of the subpoena under
16 the government's theory.
17 MR. DVORETZKY: Under the government's
18 theory, that's right.
19 JUSTICE JACKSON: Okay. Sorry.
20 MR. DVORETZKY: Whereas, under our
21 theory, that is -- whatever the government's
22 interest might be in getting any records from
23 the law firm, particularly pertaining to the
24 delinquent taxpayer, they surely have no
25 interest in getting all of the unredacted bank

1 records from the law firm over a two-year
2 period.
3 JUSTICE JACKSON: What is -- what is
4 your -- what is your -- I understood their
5 argument to be, well, it's in aid of because
6 there might be a clue somewhere in the two years
7 of financial records of the law firm as to some
8 way in which Mr. Polselli paid or we're -- we're
9 looking for where his assets are, and so we want
10 two years of the bank records of the law firm
11 about anybody so that we can find Polselli's
12 information.
13 What's your response to that?
14 MR. DVORETZKY: Two points in response
15 to that.
16 One, that is precisely the sort of
17 egregious invasion of privacy of the law firm's
18 interests, as well as the law firm's other
19 clients' interests, that Congress was concerned
20 with. And Congress didn't write this exception
21 "in aid of collection" in order to -- to blow up
22 the privacy protections that were put in place
23 in 7609(a) and (b).
24 With respect to the actual utility of
25 such information, in an attenuated way, perhaps

1 that fishing expedition would be helpful. In an
2 attenuated way, going to law school is helpful
3 to me here today. In an attenuated way, you
4 know, taping up a basketball player's ankle
5 before she goes on -- on the court to score a
6 basket is helpful.
7 None of that is directly in aid of
8 arguing this case, scoring a basket, or
9 collecting. Is it helpful in some attenuated
10 way? Sure. And for that reason, perhaps they
11 could get that narrow information if they
12 properly served the summons with notice and if
13 then the summons, which, in this case, you can
14 see an example of one at Petition Appendix 71a,
15 if that had been subject to district court
16 review, and the district court might well have
17 had the reaction, look, maybe, IRS, you can get
18 some of this information, but what you've asked
19 for is way overbroad, so let's narrow it.
20 In addition to all of that, from an ex
21 ante point of view, just thinking about what
22 rule makes sense here, under the IRS's view, as
23 soon as they make an assessment, again, an
24 internal bookkeeping notation, as soon as they
25 do that, that turns off the notice and judicial

1 review provisions that Congress created in
2 7609(a) and (b).
3 That gives them no incentive to be
4 reasonable, and it leads them to issue overbroad
5 summonses, like the ones that you can see in the
6 Petition Appendix at 71a.
7 In a universe like the one that
8 Congress actually designed, where, before
9 Congress can get information from innocent third
10 parties, it actually has to think what do we
11 really need here because it's going to be
12 subject to judicial review, probably they
13 wouldn't have issued such an overbroad summons
14 in the first place.
15 JUSTICE BARRETT: Mr. Dvoretzky, I
16 think you are obviously helped by the canon
17 against surplusage. Do you want to address the
18 government's argument that we also have to
19 account for waivers of immunity should be
20 narrowly construed? I mean, how do we pick
21 between them? If we accept that there's some
22 ambiguity that justifies resort to a canon in
23 the first place, how do we choose between those?
24 MR. DVORETZKY: So I think this Court,
25 in applying the -- in considering sovereign

1 immunity cases, this Court has not construed
2 exceptions to sovereign -- to -- exceptions to
3 waivers broadly. It has construed them
4 narrowly.
5 So, in the Federal Tort Claims Act
6 context, for example, you have a broad waiver of
7 sovereign immunity, just as here, in 7609(a) and
8 (b), you have a very broad waiver of sovereign
9 immunity referring to any person, referring to
10 any summons.
11 Once you have that kind of a broad
12 waiver of immunity, courts are not going to claw
13 that back by broadly construing exceptions. At
14 that point, you construe exceptions narrowly.
15 That's the Yellow Cab case and that's the cases
16 interpreting the Federal Tort Claims Act. So
17 that -- that would be the framework for thinking
18 about this here.
19 You know, the -- the government, I
20 think, doesn't really have any -- the government
21 doesn't have any good textual arguments for
22 avoiding the surplusage problem that's been
23 created -- that is created by their reading of
24 the statute.
25 They make a couple of arguments about

1 clause (2) here. One is that clause (2) applies
2 only pre -- that clause (2) applies
3 pre-assessment, whereas clause (1) does not.
4 That doesn't make any sense as a
5 practical matter to think that what Congress was
6 doing here was giving greater protections to
7 delinquent taxpayers pre-assessment than to
8 fiduciaries and transferees.
9 It also doesn't work as a textual
10 matter. Clause (2) refers back to the taxpayer
11 in clause (1), and that's the taxpayer who has
12 had an assessment made against them.
13 The other argument they make is that
14 clause (2) applies where you -- where you can't
15 collect directly from the taxpayer, such as in a
16 situation where a corporation has liquidated.
17 But, even in those situations, you are still
18 collecting on account of the underlying
19 liability and assessment.
20 And so clause (2) just creates -- this
21 is not a minor belt-and-suspenders problem.
22 It's creating massive surplusage problems that
23 -- that, again, gave Judge Kethledge pause below
24 and ought to give this Court significant pause
25 here.

1 CHIEF JUSTICE ROBERTS: Justice
2 Thomas?
3 Justice Alito?
4 Justice Gorsuch?
5 Justice Kavanaugh?
6 Justice Barrett?
7 Justice Jackson?
8 Okay. Thank you, counsel.
9 Mr. McDowell.
10 ORAL ARGUMENT OF EPHRAIM MCDOWELL
11 ON BEHALF OF THE RESPONDENT
12 MR. MCDOWELL: Thank you, Mr. Chief
13 Justice, and may it please the Court:
14 The statute in this case requires that
15 notice and judicial review be given to persons
16 identified in a third-party summons issued in
17 aid of a liability investigation. But Congress
18 made an express exception to those entitlements
19 for summonses issued in aid of collection of an
20 assessment made against a delinquent taxpayer.
21 We would read that collection
22 exception by its terms, and because the
23 summonses here were issued in aid of collection
24 of a $2 million assessment against Mr. Polselli,
25 the collection exception applies in this case.

1 Petitioners, however, would disturb
2 the balance that Congress struck by inserting
3 two artificial limitations into the statute,
4 namely, a direct connection requirement that
5 supposedly leads into a legal interest test.
6 But nothing in the statutory text,
7 context, or history even hints at those
8 limitations, and those limitations lack any
9 established legal meaning, so their boundaries
10 are amorphous.
11 Petitioners say their limitations are
12 necessary to impose a check on the IRS's summons
13 authority. But multiple other checks exist,
14 including the prospect of a challenge by the
15 recipient of the third-party summons.
16 Ultimately, Petitioners' position is
17 that the statute is an unqualified pro-privacy
18 guarantee. But, in fact, like many statutes,
19 this one is a compromise. While Congress
20 prioritized privacy rights at the liability
21 investigation phase, it prioritized prompt and
22 efficient collection of taxes at the collection
23 phase, and it did so because, when we're at the
24 collection phase, that necessarily means that
25 there's a delinquent taxpayer who's refusing to

1 pay an assessed liability and likely
2 deliberately evading collection. In that narrow
3 but important context, Congress wanted the IRS
4 to have some latitude to seek out and recover
5 the delinquent taxpayer's assets.
6 I welcome the Court's questions.
7 JUSTICE THOMAS: Well, Mr. McDowell,
8 this is quite a broad statute. I was interested
9 in the -- the way this is initiated is through
10 an assessment, and I was interested in how you
11 established an assessment to start this process.
12 And you cite us in your brief on page
13 17 to Laing versus U.S., number -- Footnote
14 Number 13, which has some issues with
15 circularity because it says the assessment,
16 essentially -- the assessment, essentially a
17 bookkeeping notation, is made when the Secretary
18 or its delegate establishes an account against a
19 taxpayer on the tax rolls. And, in other words,
20 that boils down to it is when -- there's an
21 assessment when the Secretary says there is an
22 assessment.
23 So the -- what would limit what you
24 can do after you establish an assessment and
25 then begin a collection process?

1 MR. MCDOWELL: Sure. So the first
2 point I would make is that they -- they're
3 basically saying that an assessment is a
4 bookkeeping notation.
5 But it's important to understand that
6 the assessment comes after a very long process
7 in which the taxpayer has gotten the opportunity
8 to get Tax Court review of the liability
9 determination and then seek court of appeals
10 review of the liability determination.
11 So there's a whole liability process.
12 Only after that would there be an assessment.
13 At that point, this statute kicks in, clause (1)
14 kicks in, and we are limited by the phrase "in
15 aid of collection." I mean, that's fairly
16 broad, general language, but, if it's not in aid
17 of collection, then that would be the limit.
18 JUSTICE THOMAS: So tell me how that
19 limits you.
20 MR. MCDOWELL: Sure. So I think, in
21 practice, the types of heartland summonses that
22 we're -- that we provide -- that we issue are
23 the ones like those in this case, which is
24 records -- seeking records of financial
25 transactions between a third party and the

1 delinquent taxpayer or records of third parties
2 who have intertwined assets with the delinquent
3 taxpayer.
4 So, beyond that, if we're not seeking
5 the -- the -- if we're not seeking information
6 about the delinquent taxpayer's assets, I think
7 that's not going to be --
8 JUSTICE THOMAS: So --
9 MR. MCDOWELL: -- in aid of
10 collection.
11 JUSTICE THOMAS: But that doesn't seem
12 to be so much. If you can say we're seeking
13 records about the delinquent taxpayer's records,
14 we're seeking information about that, why can't
15 you also then summon -- issue summons to clients
16 of the law firm, to other partners of the law
17 firm, associates in the law firm, who may have
18 had some connection to this client --
19 MR. MCDOWELL: Well --
20 JUSTICE THOMAS: -- or to this
21 taxpayer?
22 MR. MCDOWELL: Right. So it does -- I
23 mean, "in aid of collection" is not limitless.
24 We know this is an exception to a general rule
25 in the statute. So we're not saying it's

1 limitless. It has to be -- it has to assist the
2 Service in moving the ball forward towards
3 collecting the assets, and that means locating
4 the delinquent taxpayer's assets.
5 JUSTICE THOMAS: Well, but you don't
6 know if another partner or another client of the
7 firm also participated in an activity to hide or
8 secret the funds.
9 MR. MCDOWELL: Right. So that gets to
10 the question of what is the level of knowledge
11 we need before we can issue the summons. And I
12 think I take Petitioners to be saying we have to
13 have a pretty strong level of certainty before
14 we issue -- issue the summons. We don't think
15 that's correct. We also don't think it can be a
16 shot in the dark because then the exception
17 swallows the default rule.
18 JUSTICE THOMAS: So where would you
19 get the limiting language?
20 MR. MCDOWELL: So we would say that
21 the limiting language is something like it has
22 to be reasonably calculated to assisting in
23 collection. And we get that from the Rule 69
24 context, which is Federal Rule of Civil
25 Procedure 69, which uses the very similar

1 language of "in aid of the judgment" and also
2 deals with a similar problem where you have a
3 judgment creditor who's seeking to satisfy a
4 judgment by looking for the judgment debtor's
5 assets.
6 JUSTICE GORSUCH: So let me see if I
7 --
8 CHIEF JUSTICE ROBERTS: Tell me --
9 JUSTICE GORSUCH: Oh, I'm sorry,
10 Chief.
11 CHIEF JUSTICE ROBERTS: -- tell me
12 exactly how -- how you read this notice section
13 different -- differently from this. It really
14 says you get no notice if we want documents that
15 might be relevant to how much you have and how
16 much you owe us. That's all this says.
17 MR. MCDOWELL: Once there is an
18 assessment at the very end of a long process --
19 CHIEF JUSTICE ROBERTS: But the
20 assessment is, okay, we think -- I think you owe
21 me a hundred thousand dollars.
22 MR. MCDOWELL: Mr. Chief Justice, I --
23 I respectfully disagree. I think an assessment
24 comes at the end of a very long process where
25 there's been a liability determination. They've

1 issued liability investigation summonses, which
2 the person has gotten notice and judicial review
3 of.
4 CHIEF JUSTICE ROBERTS: Okay. They
5 think you owe a particular amount of money after
6 they --
7 MR. MCDOWELL: Well --
8 CHIEF JUSTICE ROBERTS: -- do some
9 work and look at it.
10 MR. MCDOWELL: Well, there's tax --
11 CHIEF JUSTICE ROBERTS: But, I mean,
12 the question is notice. I mean, they're not --
13 MR. MCDOWELL: Right.
14 CHIEF JUSTICE ROBERTS: -- going to
15 give you notice we're looking at you. Notice is
16 no notice.
17 MR. MCDOWELL: That's -- that is --
18 once the collection phase kicks in, this
19 provision does apply. And there's a good reason
20 for that, because, when we're at the collection
21 phase, that necessarily means that the
22 delinquent taxpayer has gotten this full
23 process, and he's --
24 CHIEF JUSTICE ROBERTS: Well, I'm sure
25 there's a good reason for it. It helps you

1 collect the money that you think the person
2 owes.
3 MR. MCDOWELL: Right.
4 CHIEF JUSTICE ROBERTS: But, in terms
5 of notice that anybody can do anything about, I
6 just don't see where -- where it is.
7 MR. MCDOWELL: Sure. So --
8 CHIEF JUSTICE ROBERTS: He doesn't get
9 notice. People who might help figure out how
10 much he owes don't get notice. Nobody else
11 matters.
12 MR. MCDOWELL: So two points about
13 that, Mr. Chief Justice.
14 First, the recipient of the summons
15 can always challenge the summons. So, here, the
16 banks could have challenged it. That's pursuant
17 to Section 7604 of the statute. And the
18 recipient of the summons will generally have an
19 incentive to do that, if you're talking about a
20 bank, if the summons is particularly sweeping
21 into other customers' rights. That's when
22 they're going to have the incentive to bring
23 that sort of challenge.
24 The second point is Congress made the
25 deliberate decision --

1 CHIEF JUSTICE ROBERTS: But what
2 exactly would their challenge consist of?
3 MR. MCDOWELL: It would consist of the
4 general motion to quash challenge that would
5 exist, which is overbreadth, relevance, scope,
6 things like that. So they could say that this
7 is actually not sufficiently tailored or
8 sufficiently relevant to the collection case.
9 So that's number one.
10 Number two, Congress made a deliberate
11 decision in the statute not to restrict banks
12 and other third-party recordkeepers from
13 providing notice to their customers about these
14 summonses. That's why we have Petitioner --
15 that's why this case arose, because the banks
16 told Petitioners about the notice. So the
17 idea that this is all happening --
18 JUSTICE JACKSON: But -- but you say
19 they can't go in on that basis, right?
20 MR. MCDOWELL: The --
21 JUSTICE JACKSON: So what -- what
22 difference does it make if the banks notify the
23 people whose records are being collected? I
24 thought your point was they are not entitled to
25 notice under the statute and, therefore, they

1 can't bring a challenge.
2 MR. MCDOWELL: That's correct as far
3 as bringing a motion to quash. What I'm saying
4 is I think that it cuts against Petitioners'
5 argument that this is all shrouded in secrecy if
6 the banks are able to give notice.
7 And Congress made a deliberate
8 decision to do this because, in other statutes,
9 Congress has allowed -- has -- has allowed the
10 government to seek nondisclosure orders against
11 banks and other third-party recordkeepers, but
12 it made a deliberate decision not to do that
13 here because I think it wanted this process to
14 be -- it wanted to give banks the option of
15 keeping these processes open.
16 JUSTICE GORSUCH: If I understand your
17 colloquy with the Chief Justice and Justice
18 Thomas, you do accept that "in aid of" can't
19 mean a shot in the dark.
20 MR. MCDOWELL: Yes.
21 JUSTICE GORSUCH: Right?
22 MR. MCDOWELL: Yes.
23 JUSTICE GORSUCH: There has to be some
24 causal link, some close connection of some kind
25 between the liability and -- and -- and the

1 IRS's actions?
2 MR. MCDOWELL: I -- I wouldn't say --
3 JUSTICE GORSUCH: Between the
4 request -- request for information and the IRS's
5 actions?
6 MR. MCDOWELL: I would -- I would not
7 say close connection.
8 JUSTICE GORSUCH: Some connection.
9 MR. MCDOWELL: Some connection.
10 Correct.
11 JUSTICE GORSUCH: And so that's -- so
12 what we're really fighting about -- everyone
13 agrees "in aid of" can't mean the universe.
14 MR. MCDOWELL: Yes.
15 JUSTICE GORSUCH: And -- and it's just
16 how -- how closely connected it has to be.
17 That's what the debate is really about.
18 MR. MCDOWELL: I don't disagree with
19 that, and I would say two things about why we
20 think that the limit should be broader than
21 those --
22 JUSTICE GORSUCH: Sure, but we don't
23 disagree on principle that "in aid of" has to
24 have some limiting -- some limit to it. We're
25 just disagreeing over -- and I just want to

1 clarify --

2 MR. MCDOWELL: Yeah.

3 JUSTICE GORSUCH: -- the nature of our

4 dispute is how close that causal connection has

5 to be.

6 MR. MCDOWELL. I -- I agree.

7 JUSTICE GORSUCH: It doesn't matter

8 whether your co-counsel went to Yale or --

9 (Laughter.)

10 JUSTICE GORSUCH: -- or it doesn't

11 matter what he did last night. You know --

12 MR. MCDOWELL: Right.

13 JUSTICE GORSUCH: -- it's somewhere in

14 between --

15 MR. MCDOWELL: Yes.

16 JUSTICE GORSUCH: -- is what we're

17 fighting about.

18 MR. MCDOWELL: I -- I do agree with

19 that. We don't think "in aid of" can be

20 limitless. This is an exception to a default

21 rule. And also, we think --

22 JUSTICE GORSUCH: And do you think

23 that informs our analysis, that the default rule

24 is notice, and so, when we're construing an

25 exception to that, we should do so reasonably in

1 light of the general rule?

2 MR. MCDOWELL: Well, reasonably but

3 not narrowly. I mean, you're --

4 JUSTICE GORSUCH: Reasonably.

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

6 JUSTICE GORSUCH: You'd agree with

7 that?

8 MR. MCDOWELL: Yes.

9 JUSTICE GORSUCH: Okay.

10 MR. MCDOWELL: Reasonably, fairly,

11 yes.

12 JUSTICE GORSUCH: Okay. Thank you.

13 MR. MCDOWELL: And -- and I guess the

14 -- the two things I was going to say about --

15 about the -- the phrase "in aid of" and why we

16 think the limit should be broader than they

17 suggest are, number one, I think "in aid of" is

18 fairly broad, general language. I don't think I

19 read that as a narrowing -- a narrowing phrase

20 like Petitioners do. I don't think that's how

21 it's naturally understood.

22 JUSTICE GORSUCH: Do -- do you think

23 the government could have done what Justice

24 Thomas posited? And that is, say, well, you

25 know, this law firm has lots of clients, some of

1 whom might have come into contact with the
2 Petitioner here and might be aware of his
3 assets, and so we want information about all of
4 their transactions too.
5 MR. MCDOWELL: I -- I -- based on
6 those facts alone, I don't think so. I think --
7 JUSTICE GORSUCH: Well, isn't that
8 what you did here, though? Because you -- you
9 sought two years' worth of records from the firm
10 without regard to its clients, I mean, with no
11 sensitivity to the attorney-client privilege of
12 those clients or -- or their -- their interests.
13 MR. MCDOWELL: So I'd like to clarify
14 that because, on page 21a -- this is the court
15 of appeals opinion -- the court of appeals said
16 that the -- the limitation in this summons has
17 borne out that the summonses the IRS issued to
18 the banks in this case all specify that they
19 seek information concerning the person
20 identified in the summons.
21 So the way that we read the summonses
22 and the way that the court of appeals read them
23 is that they were asking for information from
24 the bank about the law firm's bank statements.
25 And it could have -- other stuff could have been

1 redacted.

2 JUSTICE GORSUCH: Okay.

3 MR. MCDOWELL: Okay. So --

4 JUSTICE GORSUCH: So you -- so there

5 is a limit to "in aid of" in your mind right

6 there. You -- you don't think the government

7 could seek other information about other

8 clients, or -- or do you?

9 MR. MCDOWELL: No -- well, what -- the

10 way we would talk about the limit is the limit

11 -- the point here is to locate the delinquent

12 taxpayer's assets.

13 JUSTICE GORSUCH: I understand that.

14 MR. MCDOWELL: So -- so the third

15 party should have some financial ties or has

16 engaged in financial transactions with the

17 delinquent taxpayer. Otherwise, the point is

18 not to locate the delinquent taxpayer's assets.

19 So that's how we would articulate it, and --

20 JUSTICE GORSUCH: Well, John may know

21 Susie, who may know Joe, who may know Mr.

22 Polselli. But you'd say at some level that

23 becomes too attenuated.

24 MR. MCDOWELL: At some level, but,

25 here, the summonses were quite close in

1 connection because --

2 JUSTICE KAGAN: And would you say a

3 word more about that? How is it that the

4 summonses were close in connection?

5 MR. MCDOWELL: Sure. So, for the law

6 firm summons, because I think that's the real

7 delta in some ways between our position, the

8 summons seeking the law firm's bank records, Mr.

9 Polselli was a long-time client of this law

10 firm. He'd made numerous payments to the law

11 firm over time.

12 So, by seeing the law firm's records

13 of his payments, they could figure out what

14 accounts or what entities Mr. Polselli was using

15 to make those payments, and then they could

16 begin the collection process by seizing funds

17 from those accounts or entities.

18 So it's really only one step removed

19 from the actual collection. I mean, direct

20 connection is just kind of a phrase that they're

21 using, but it doesn't really have any content.

22 I think the idea here is that this

23 actually was fairly -- there is a fairly close

24 nexus because they were looking for this account

25 information and they could have begun the

1 process of issuing a notice of levy from those
2 accounts.
3 JUSTICE KAGAN: And could -- could I
4 ask you -- you -- there's been some talk about,
5 oh, it's the IRS, they just think that he owes
6 money, but what is the process before the IRS
7 decides he owes money?
8 MR. MCDOWELL: Sure. So there's
9 initially an information-gathering process where
10 there could be audits and examinations that --
11 it's a long process. Any summonses issued to
12 third parties during that process would be
13 subject to notice and judicial review under
14 subsections (a) and (b).
15 Then, once that process concludes, the
16 IRS will make a liability determination, meaning
17 this person is liable for some amount of taxes
18 owed. That liability determination is
19 challengeable in the Tax Court, and then the Tax
20 Court decision is reviewable in the court of
21 appeals.
22 So this is a thorough process with
23 lots of layers of review. And then I'd also add
24 that if we issue a collection summons and that
25 collection summons would be --

1 JUSTICE KAGAN: So, at this point, we
2 can say, if we're going to be trusting courts at
3 all, he owes money.
4 MR. MCDOWELL: Exactly. And I think
5 that's a critical point because the only time
6 we're in this situation when this provision
7 comes into play is when there is someone who has
8 adjudicated or assessed liability and he's
9 refusing to pay that liability and likely
10 deliberately evading tax collection.
11 CHIEF JUSTICE ROBERTS: Did I
12 understand you to respond to Justice Gorsuch
13 that it is a limitation on this that the
14 information has to concern assets?
15 MR. MCDOWELL: It has -- I think
16 relate to or concern assets of the delinquent
17 taxpayer and --
18 CHIEF JUSTICE ROBERTS: How -- how
19 broadly do you read that?
20 MR. MCDOWELL: Well, I think, you
21 know, so just to give --
22 CHIEF JUSTICE ROBERTS: I mean, it's
23 more than just I want to see how much money you
24 have in the bank, right? I mean, it's -- could
25 you get records of family members because maybe

1 he's put his assets with them?
2 MR. MCDOWELL: So we don't think,
3 standing alone, the fact that someone is a
4 family member is enough to simply summon that
5 family member's bank records. There would have
6 to be some further evidence that there was some
7 financial dealing between the family member and
8 the taxpayer.
9 And, here, we had that with Mrs.
10 Polselli. It wasn't simply that this was a
11 husband and a wife. Mrs. Polselli and Mr.
12 Polselli had engaged in significant financial
13 dealings. They owned and managed several of the
14 same LLCs. And one of Mr. Polselli's LLCs paid
15 off a mortgage for Mrs. Polselli.
16 CHIEF JUSTICE ROBERTS: So you don't
17 generally -- if you're trying to seek the assets
18 of the wife, you don't normally get records
19 concerning the husband?
20 MR. MCDOWELL: We -- only if there's
21 some reason to believe that there is a financial
22 connection.
23 CHIEF JUSTICE ROBERTS: Like they're
24 married?
25 (Laughter.)

1 MR. MCDOWELL: Well, the marriage --
2 marriage in and of itself may not be enough.
3 There are some -- I mean, it depends if their
4 assets are intertwined. I think, normally, in a
5 communal property state, yes, that probably
6 would be okay. I think stretching out to
7 brothers, sisters, other family members, there's
8 no --
9 CHIEF JUSTICE ROBERTS: Well, don't
10 you normally assume that the financial records
11 of a husband and wife are intertwined?
12 MR. MCDOWELL: You would -- I think
13 that could be an assumption depending on the
14 state property law, I guess, but there would
15 have to be -- in our view, this is a
16 particularly clear case, I guess, because it
17 wasn't just that they were married, it's that
18 there was this other evidence of extensive
19 financial dealings, which is how the IRS officer
20 put the point.
21 JUSTICE JACKSON: Can we go back to
22 the --
23 JUSTICE SOTOMAYOR: Can I --
24 JUSTICE JACKSON: Oh, go ahead.
25 JUSTICE SOTOMAYOR: Can I focus us on

1 the case here?
2 MR. MCDOWELL: Yes.
3 JUSTICE SOTOMAYOR: There's a whole
4 lot about the IRS collection mechanism that has
5 been criticized and continues to be criticized
6 by the world, including me. If you've audited,
7 you know.
8 Okay. But my point is what I want to
9 figure out is why Congress would want to
10 distinguish between investigation and collection
11 that involves third parties.
12 I can understand why -- and this is
13 where I've been struggling with understanding
14 the Ninth Circuit and Judge Kethledge's concern,
15 okay? And I think, in this conversation, I'm
16 finally coming to understand it, which is that I
17 think what they're concerned about is, if you're
18 collecting from the taxpayer, then you could
19 understand not giving the taxpayer notice,
20 because you might have suspicions that they'll
21 continue in not wanting to pay you and to hide
22 the assets.
23 But, if it's an innocent third party,
24 why would you impose secrecy on them? Unless
25 the taxpayer is handed over to a fiduciary or

1 you have information that it is an alter ego or
2 a partner or something else, why shouldn't an
3 innocent taxpayer get notice? Why shouldn't the
4 law firm be able to come in and challenge the
5 broadness of a subpoena to a bank --
6 MR. MCDOWELL: Because the --
7 JUSTICE SOTOMAYOR: -- on
8 attorney-client privilege? Why shouldn't the
9 innocent third party say, you know, he -- they
10 got it wrong --
11 MR. MCDOWELL: Because --
12 JUSTICE SOTOMAYOR: -- I'm not
13 involved with this taxpayer?
14 MR. MCDOWELL: Because the necessary
15 implication of their position is not only that
16 the third party would be entitled to notice but
17 also that the taxpayer himself would have to be
18 entitled to notice, because their argument is
19 that --
20 JUSTICE SOTOMAYOR: No, that's the
21 exception built in by Judge Kethledge and the
22 Ninth Circuit.
23 MR. MCDOWELL: Well --
24 JUSTICE SOTOMAYOR: They said if it's
25 the taxpayer or -- or you have -- you have

1 knowledge or suspicion of or reasonable basis
2 for believing they're covered by the exception.
3 MR. MCDOWELL: Well, so -- so what I'm
4 saying is let's take the example of the -- the
5 summons seeking the law firm's bank records.
6 If we had to provide notice and an
7 opportunity for judicial review in that
8 situation, the law firm would not only get the
9 notice but also Mr. Polselli, and that's because
10 their entire argument is that subsection
11 (c)(2)(D)'s exception doesn't apply in that
12 case, right?
13 So, if that's true, then subsection
14 (a) and (b) have to apply because those are the
15 general rules. And subsection (a) says any
16 person who is identified in the summons is
17 entitled to notice. And Mr. Polselli was
18 identified in these summonses, and the taxpayer
19 will always be identified in these summonses in
20 the caption. So the necessary implication is
21 that he will also be entitled to notice, and
22 with that notice, he'll be able to move his
23 funds from whatever accounts and entities he was
24 using to pay the law firm into other funds and
25 other accounts.

1 JUSTICE JACKSON: I didn't hear them
2 as suggesting that the entirety of that -- the
3 subsection didn't apply in the law firm
4 situation, so I'm a little curious about the
5 argument that you just made.
6 I mean, you're suggesting that if we
7 go with them, it automatically means that the
8 taxpayer himself would always get the notice.
9 And I just thought they were saying it's -- it's
10 not in aid of collection if you're giving the
11 summons to a law firm and seeking all of the law
12 firm's records for two years.
13 MR. MCDOWELL: Well, first of all, we
14 disagree with the scope of that summons, but --
15 the characterization of that scope of that
16 summons, as I mentioned --
17 JUSTICE JACKSON: Just because you --
18 MR. MCDOWELL: -- before. Yeah.
19 JUSTICE JACKSON: -- read it that way,
20 but I'm -- you know, looking at the language of
21 the summons, it does -- it doesn't say anything
22 about -- it says copies of all bank statements
23 relative to the accounts of the law firm.
24 MR. MCDOWELL: Well, but -- but if you
25 go up on -- and I'll -- if you go up to the

1 earlier paragraph on -- I'm looking at 79a of
2 the Petition Appendix. It says -- it's talking
3 about concerning the person identified above for
4 the periods shown.
5 So they're asking for it as they
6 relate to the person identified above, and
7 that's Mr. Polselli. But --
8 JUSTICE JACKSON: All right. So
9 what's your position on all the law firm
10 records? That's -- that -- you -- you would
11 agree that's not in?
12 MR. MCDOWELL: Well, we don't think
13 that's what this summons sought. Yeah.
14 JUSTICE JACKSON: Hypothetically --
15 MR. MCDOWELL: So I think --
16 JUSTICE JACKSON: -- you asked for all
17 --
18 MR. MCDOWELL: Right.
19 JUSTICE JACKSON: -- the law firm
20 records because, for example, Mr. Polselli could
21 be using aliases or whatever, and you wanted to
22 see -- you knew, as you said, that he had a
23 longstanding relationship with this law firm,
24 and you didn't have the exact account numbers,
25 and you were afraid he had aliases, so you said

1 I'd like to get all the law firm records for the
2 bank. Is that --
3 MR. MCDOWELL: I think --
4 JUSTICE JACKSON: For -- for -- from
5 the bank related to the law firm. Is that in or
6 out?
7 MR. MCDOWELL: I think, in an ordinary
8 case, that would be out. But I think this could
9 be a different type of case if you think about
10 the facts here, which were they first asked the
11 law firm for the records of Mr. Polselli's
12 payments to the law firm. They asked the law
13 firm directly, not the bank. The law firm said
14 we don't have any such records, even though they
15 knew that Mr. Polselli was a longtime client of
16 the law firm.
17 Only at that point, when they didn't
18 have cooperation of the law firm, did they ask
19 for the bank statements. So, if you did read it
20 more broadly, I think the rationale for that
21 more broad -- that broader reading would be that
22 they would have to have all of the relevant bank
23 statements in -- in order to figure out what the
24 shell companies he was using were, because the
25 bank itself wouldn't know what those shell

1 companies were.

2 So they may need a slightly broader --

3 a slightly broader set of information than just

4 the information that says line item, payment

5 from Mr. Polselli. They need -- they may need

6 more information that actually concerned --

7 concerns his shell companies.

8 So I think that would be the potential

9 rationale. But, again, I don't think you need

10 to get into that because the court of appeals

11 read it the way we read it, and I think it's the

12 fairest reading of the stat -- of the summons.

13 But, to get to your statutory

14 question, they're saying that this is not in aid

15 of -- not in aid of collection. If it's not in

16 aid of collection, then we're outside of

17 (c)(2)(D) because (c)(2)(D) is the exception

18 that's talking about summonses in aid of

19 collection. And if we're outside of (c)(2)(D),

20 we're in (a) and (b), which are the general

21 rules that require notice and judicial review.

22 And if you look at (a)(1), Section --

23 subsection (a)(1), it says any person who is

24 identified in the summons is entitled to notice.

25 So Mr. Polselli would be entitled to notice.

1 But even if he weren't for whatever
2 reason, which I -- I don't know why that would
3 be, the law firm could still tell him about the
4 summons, and he could then move his assets.
5 JUSTICE GORSUCH: What do we do with
6 your friend's argument on the other side that --
7 the government's reading of the statute renders
8 subsection (ii), if not entirely superfluous,
9 almost so?
10 MR. MCDOWELL: So the way -- the way
11 --
12 JUSTICE GORSUCH: As well as -- as
13 well as about half of (D)(i).
14 MR. MCDOWELL: So the way I think
15 about the superfluity issue, I think, as a -- as
16 a threshold matter, is exactly the way that
17 Justice Kagan was describing.
18 JUSTICE GORSUCH: I understand that --
19 MR. MCDOWELL: Yeah.
20 JUSTICE GORSUCH: -- response. You
21 know, sometimes iteration is part of the
22 statutory construction. Putting that aside --
23 JUSTICE KAGAN: It was a little bit
24 more than that.
25 (Laughter.)

1 MR. MCDOWELL: Yeah. Yeah.
2 JUSTICE GORSUCH: What?
3 MR. MCDOWELL: Exactly. I actually --
4 I think it actually is -- I think it actually is
5 different than that. I think it's actually
6 different than the traditional belt-and-
7 suspenders --
8 JUSTICE GORSUCH: Okay.
9 MR. MCDOWELL: -- and the reason is
10 that if you look -- this is a structural point
11 about the entire Tax Code. There are two
12 avenues of collection within the Tax Code.
13 There's collection from the delinquent taxpayer
14 directly and collection from transferees or
15 fiduciaries.
16 JUSTICE GORSUCH: Right.
17 MR. MCDOWELL: You see that in the
18 Anti-Injunction Act and in Section 6901 --
19 JUSTICE GORSUCH: Yes.
20 MR. MCDOWELL: -- of the code. Okay?
21 So, in this provision that's all about
22 collection, it makes perfect sense that Congress
23 would just reference both avenues of collection
24 that exist in the entire Tax Code.
25 JUSTICE GORSUCH: Okay.

1 MR. MCDOWELL: So I think that's a
2 different -- that's different than just
3 belt-and-suspenders.
4 JUSTICE GORSUCH: Are -- is that,
5 though, an -- it may be a reason for (D)(ii)
6 being superfluous, but is there any response
7 from the government that (D)(ii) is, in fact,
8 superfluous?
9 MR. MCDOWELL: Yes. Yes. We have
10 those responses. They're at pages 25 to 31 of
11 our brief. The one that I'd like to focus on is
12 that -- is that clause (2) can apply
13 pre-assessment, whereas clause (1) applies only
14 post-assessment because, if you look at the
15 language of clause (1), clause (1) is clearly
16 requiring that an assessment has been made or a
17 judgment rendered. But clause (2) just talks
18 about the liability at law or in equity of a
19 transferee or fiduciary.
20 And, as we explain in our brief,
21 liability is distinct from an assessment. And
22 so what -- we read that difference in language
23 to mean that clause (2) can apply
24 pre-assessment, whereas clause (1) can only
25 apply post-assessment. And that's a distinction

1 in scope that would mean that clause (2) is
2 doing work.
3 JUSTICE GORSUCH: Thank you.
4 JUSTICE SOTOMAYOR: Except don't you
5 have a regulation that says you won't engage (2)
6 until there is collection?
7 MR. MCDOWELL: It's not a -- it's not
8 a regulation. It's in the Internal Revenue
9 Manual, which is just basically a best practices
10 guide for line agents who are not lawyers. And
11 it's not meant to say what the statute means or
12 to say what -- the precise scope of certain
13 statutory language. It's just saying, as a
14 matter of best practice, we will wait until
15 after an assessment to issue a clause (2)
16 summons.
17 And I think the reason for that is
18 because I think line agents might be confused in
19 -- on the ground if there was a distinction
20 between pre- and post-assessment under clause
21 (1) and clause (2).
22 And I guess just getting to their -- I
23 mean, their -- their principal --
24 JUSTICE SOTOMAYOR: Thank you,
25 counsel.

1 MR. MCDOWELL: Yep. Their principal
2 point in their briefing was the legal interest
3 test, but I actually didn't hear anything about
4 that legal interest test from them today. I
5 mean, the legal interest test is adding words to
6 the statute, and we know that when Congress
7 wanted to create a limitation based on the
8 taxpayer's interest in certain records, it did
9 so expressly. It did that in the very next
10 section of the code, Section 7610.
11 The other -- I guess the other -- the
12 other point I would just make is that I think
13 the statutory history, which my friend pointed
14 to, actually reinforces our reading of the text
15 because Congress passed this provision in
16 response to this Court's decision in Donaldson.
17 But Donaldson simply involved liability
18 investigation summonses, and it said that a
19 taxpayer who is the subject of a liability
20 investigation summons was not generally entitled
21 to judicial review of that summons.
22 Congress wanted to overturn that
23 result as to liability investigation summonses,
24 but it did not want to disturb the IRS's ability
25 to promptly and efficiently collect taxes at the

1 collection phase. And that's clear from the
2 text of the statute because subsections (a) and
3 (b) are all about liability investigations
4 summonses and they provide notice and judicial
5 review there, but then (c)(2)(D), the provision
6 we're dealing with here, is carving out an
7 express exception to those requirements for
8 collection phase summonses.
9 And then the -- the House and Senate
10 reports also both say that they're carving out
11 express -- they expressly say that they're
12 carving out an exception for summonses issued in
13 aid of collection.
14 And if I could just -- just step --
15 take a step back and put this in perspective a
16 little bit, and this, I think, goes to the
17 colloquy I had with the Chief Justice.
18 The IRS has long faced a persistent
19 problem of tax collection evasion. They have a
20 -- what they have called -- what's called a net
21 tax gap report, and that estimated that between
22 2014 and 2016, per year, there were $428 billion
23 in uncollected taxes each of those years. And
24 that's available -- this is -- this is data on
25 the website of the IRS.

1 So we're dealing with a very difficult
2 problem, and I think Congress was acting against
3 that backdrop by giving the Service fairly broad
4 latitude to issue summonses seeking the assets
5 of people who, again, have adjudicated or
6 assessed liabilities and are refusing to pay
7 those liabilities and likely deliberately
8 evading the collection process.
9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.
11 Justice Thomas?
12 Justice Alito?
13 Justice Sotomayor?
14 Justice Kagan? All right.
15 Justice Kavanaugh?
16 Justice Barrett?
17 Justice Jackson? No?
18 Thank you, counsel.
19 Rebuttal, Mr. Dvoretzky?
20 REBUTTAL ARGUMENT OF SHAY DVORETZKY
21 ON BEHALF OF THE PETITIONERS
22 MR. DVORETZKY: Thank you, Mr. Chief
23 Justice. Just a few points to wrap up.
24 So, first, I think everybody is
25 agreeing here today that "in aid of collection"

1 is not limitless, that it can't just be a shot
2 in the dark.
3 The Sixth Circuit's rule seemed to
4 think that it was, in fact, limitless. Petition
5 Appendix 11a and the Kethledge dissent at 27a
6 both adopt the understanding that the IRS gets
7 to decide what is helpful to it, and that could
8 -- could stretch as far as the IRS wants it to
9 stretch.
10 Second point, as a practical matter, I
11 think banks will often provide notice to their
12 customers. In this case, if you look in -- in
13 the district court record, there are copies of
14 form letters that the bank sent to the law
15 firms. That's how the law firms find -- found
16 out about these summonses. It seems to be a
17 common occurrence that banks do that.
18 And so taking those two points
19 together, it seems like the real issue here is,
20 is there going to be judicial review of the
21 IRS's determination that a particular summons is
22 sufficiently helpful or not?
23 The bank -- again, the banks, as a
24 practical matter, are going to give notice to
25 the third parties.

1 Going back to the question that
2 Justice Jackson asked me earlier, and, you know,
3 Mr. McDowell tried to narrow the summons here to
4 only information concerning Remo Polselli. The
5 problem with that is the banks, looking at the
6 law firm's bank records, don't know what line
7 items in there might concern Mr. Polselli.
8 The IRS's whole theory is that they're
9 looking for potential additional shell entities
10 that Mr. Polselli might have used in order to
11 pay the law firms.
12 How are the banks supposed to know
13 that? The only way to make that determination
14 and actually get the IRS what it needs is to
15 bring the law firms into the picture, and the
16 mechanism for bringing them into the picture is
17 providing them the official notice that the
18 statute requires and allowing them, if
19 necessary, to -- to move to quash -- to quash
20 the summons.
21 As far as the standard that the IRS
22 has to meet, we're not asking the IRS to be
23 certain of the -- of the direct connection. The
24 IRS just has to have a reasonable basis that the
25 information that it's seeking is going to lead

1 directly to collection, and, again, there ought
2 to be judicial review of that.
3 And, lastly, as to the legal interest
4 test, the -- the legal interest test is just an
5 application of the direct connection test in the
6 context of a bank account. In the context of a
7 bank account, what it means to have a direct
8 connection to collection is that the IRS can
9 take the information that it learns from the
10 summons and then levy on a bank account
11 belonging to the Petitioner or, you know,
12 through an alter ego theory in order to collect
13 money into the federal fisc.
14 So the legal interest test is simply
15 an application of the direct connection test,
16 and the direct connection test is a way of
17 understanding the "in aid of" language, which I
18 think everybody agrees here today is not
19 limitless, as the Sixth Circuit thought that it
20 was.
21 I respectfully submit that that
22 determination ought to be made by a court rather
23 than by the IRS operating on its own, and so we
24 ask that the Sixth Circuit's decision be
25 reversed.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel. The case is submitted.
3 (Whereupon, at 12:35 p.m., the case
4 was submitted.)
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## $

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