No. 21-1599

In the Supreme Court of the United States

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

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE TREASURY—INTERNAL REVENUE SERVICE,

Respondent.

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

BRIEF FOR THE RUTHERFORD INSTITUTE AND THE CATO INSTITUTE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

The Cato Institute is a non-partisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999 and focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

Amici file this brief because the issues in this case touch upon core values protected by our Constitution, lying at the heart of what it means to be a free

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[1] No counsel for any party authored this brief in whole or in part, and no person other than amici's counsel made a monetary contribution to fund the preparation or submission of this brief.

society—the right secured by the Fourth Amendment to be free from unreasonable government searches.

INTRODUCTION & SUMMARY OF ARGUMENT

"The makers of our Constitution * * * conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Under that fundamental principle, no "unjustifiable intrusion by the government upon the privacy of the individual" can stand. *Ibid*.

This case is about tax collection efforts. On that front, Congress has authorized the IRS to obtain documents from third parties in connection with tax-auditing and collection efforts. But consistent with the Fourth Amendment, Congress naturally established procedural guardrails for the exercise of that power. When the IRS issues a summons for information held by a third party but pertaining to another individual, the agency ordinarily must notify that individual about the request. I.R.C. § 7609(a). The law then gives the third party an opportunity to intervene or to quash the summons. *Id*. at 7609(b).

But there are exceptions. No additional notice is required if the person who received the summons is the person whose potential tax debt prompted the investigation in the first place. *Id*. at 7609(c)(2)(A). Nor is it needed if the purpose of the summons is simply to confirm the existence of business records, rather than to review their contents. *Id*. at 7609(c)(2)(B). And so on. In total, the statute enumerates eight exceptions, most of them modest, and each of them a matter of common sense—at least until you reach Section 7609(c)(2)(D)(i). This provision exempts from the notice requirement "any summons * * * issued in aid

of the collection of— (i) an assessment made or judgment rendered against the person with respect to whose liability the summons is issued." The government takes this language to mean that IRS agents may dive into practically any person's most sensitive financial and personal information, siphon up anything of interest, and do it all in complete secrecy, so long as they are doing it while collecting someone's (*anyone's*) taxes.

That is a chilling way to construe the statute. Cf. *McDonald* v. *United States*, 335 U.S. 451, 455–456 (1948) ("The right of privacy [is] too precious to entrust to the discretion of those whose job is the detection of crime."). Because such sprawling investigatory authority is odious to the Nation's core values and flatly inconsistent with the statute's plan and context, this Court must reverse the decision below.

A. Such a sprawling assertion of authority to investigate, particularly clandestinely and beyond the reproach of courts, is repugnant to the Nation's dearest values. The drafters of the Fourth Amendment had just such government excesses in mind. And they were inspired, in particular, by developments in English law that recognized that "[p]apers are the owner's good and chattels; they are his dearest property, and are so far from enduring a seizure, that they will hardly bear an inspection." *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (1765). This history warrants careful consideration as the Court interprets a statute such as this, implicating the privacy interests at the heart of our constitutional order. The Court always construes statues consistent with constitutional underpinnings, and it is imperative to do so here.

B. Petitioners advance the only reading of Section 7609 that is consistent with the relevant constitu-

tional backdrop. In their view, the exception found in Section 7609(c)(2)(D)(i) to the general scheme of notice and judicial review is limited to the government's efforts to collect taxes owed by the target of the summons. Though still invasive, this view of the statute at least is reasonable—the touchstone of the Fourth Amendment. More, it embraces longstanding pillars of Fourth Amendment jurisprudence, such as requiring the government to have individualized suspicion before invading privacy.

C. In contrast, the government's asserted authority is breathtaking in scope and inconsistent with core Fourth Amendment values. It lacks any cognizable limit on whose information the government may access in secret and free from judicial constraint. Worse, the power it claims for itself touches on some the most sensitive information an American citizen can have—papers locked in bank vaults, data encrypted on computers, and confidences shared only with an attorney. It risks exposure of not just people who owe taxes, and not just the people directly connected to them, but also anyone else who has entrusted personal information to their care.

D. When one construction of a statute aligns with bedrock constitutional values, and the other stands in serious tension with them, this Court has traditionally favored the reading that respects cherished liberties. The power the government reads into Section 7609 is an invitation for abuse, enabling IRS agents to rifle through virtually anyone's private papers in hopes that a crime turns up. The Fourth Amendment violations threatened by this reading of the law counsel strongly in favor of petitioner's alternative reading, which better preserves the People's privacy.

STATEMENT

At issue in this case are secret IRS summonses served not on the targets of the government's investigation—petitioners Hanna Karcho Polselli, Jerry R. Abraham, P.C., and the law firm Abraham & Rose, P.L.C.—but on their third-party banks. Pet. App. 4a. Ordinarily, the law requires the IRS to notify the subjects of such third-party summonses and provide them with an opportunity to quash. I.R.C. § 7609. But petitioners received no such notice here. Pet. App. 4a. And when they learned of the investigation and attempted to stop it in federal district court, the IRS insisted they had no standing to do so. *Id*. at 5a.

According to the government, the notice requirement did not apply because "the IRS was seeking their bank records 'in aid of the collection'" of an assessed liability of another individual: Remo Polselli, who is Hanna's husband and the law firm's long-time client. Pet. App. at 5a (quoting I.R.C. § 7609(c)(2)-(D)(i)). Thus, even though the IRS had no reason to suspect that any of the petitioners themselves owed federal taxes, the government insisted that merely because they were connected to another person who did, the court lacked any power to protect the privacy of their sensitive financial information. *Ibid*.

The district court agreed, finding that "[p]etitioners are not entitled to notice under the circumstances, and as a consequence have no right to bring a petition to quash." Pet. App. at 6a. And the Sixth Circuit affirmed, stating that the concerns petitioners raised about the government's far-reaching claim of investigative power "do not defeat Congress's prerogative to prioritize the IRS's collection efforts over taxpayer privacy." *Id*. at 23a. Declining to embrace the Ninth Circuit's view that the government's claimed author-

ity is out of step with the privacy-enhancing scheme of Section 7609 as a whole (see *Ip* v. *United States*, 205 F.3d 1168, 1174 (9th Cir. 2000)), the court thus further deepened a divide among the circuits over the proper scope of the tax collection exception to Section 7609 found at U.S.C. § 7609(c)(2)(D)(i). Now, with a chance to resolve that debate, this Court should adopt the more limited construction—that of petitioners—because that construction better aligns with the text and context of the law and fits more comfortably with the bedrock values of privacy at stake.

ARGUMENT

The right of privacy lies at the center of the Bill of Rights. Of the indignities of colonial rule, perhaps none was more pervasive or pronounced than the King's wanton disregard for personal security—not only of one's home and person, but of papers and effects as well. The right to be left alone—from the government most of all—was a leading motive for the Revolution and the Constitution that followed.

These are not forgotten lessons of history—they are enduring principles that cast light upon every word written into American law. When read against the background of core Fourth Amendment values, the flaws in the government's interpretation of Section 7609 come into sharp focus. Such a sweeping assertion of investigatory power—one that would cede to the government the unchecked right to pore over virtually any taxpayer's intimate personal records in secret—offends every constitutional sensibility.

The Court should not, as the government urges, imagine that Congress so readily would have disregarded traditional notions of civil liberty when it enacted Section 7609. That is particularly because, with Section 7609, Congress sought to *protect* privacy, not

undermine it. It makes no sense to say that Congress, in seeking to protect the right to be left alone, would adopt an exception that swallows the rule entirely. From first principles to plain text, the government's conception of its power cannot stand. Accordingly, the Court should reverse the judgment below.

THE COURT SHOULD READ SECTION 7609 NARROWLY TO AVOID RAISING DANGEROUS FOURTH AMENDMENT CONCERNS

A. The Fourth Amendment protects the right to privacy in papers and effects

"The Fourth Amendment, and the personal rights which it secures" (*Silverman* v. *United States*, 365 U.S. 505, 511 (1961)) was designed to correct a "necessarily simple" evil: that, without "specific language" in the Constitution to ward off government "invasion of 'the sanctit[y] of * * * the privacies of life,'" the State would resort to blunt tools—"force and violence"—to "directly effect self-incrimination." *Olmstead* v. *United States*, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting).

These blunt tools were well-known to the pre-Revolution colonists. "Writs of assistance" issued "to revenue officers" empowered "them, in their discretion, to search a place for smuggled goods." *Boyd* v. *United States,* 116 U.S. 616, 625-628 (1886). By "plac[ing] 'the liberty of every man in the hands of every petty officer,'" the writs of assistance struck the founding generation as "'the worst instrument of arbitrary power, the most destructive of English liberty,'" and were "fresh in the memories of those who achieved our independence and established our form of government." *Id.* at 625. (quoting James Otis, Against Writs of Assistance (1761)).

How to protect against such "arbitrary power" was also "fresh in the memories" of the founding generation. Familiar to "every American statesman, during our revolutionary and formative period as a nation" and "in the minds of those who framed the [F]ourth [A]mendment to the [C]onstitution" (*Boyd*, 116 U.S. at 627) was Lord Camden's opinion overturning a government seizure of papers in *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (1765). There, Lord Camden remarked that "[p]apers are the owner's goods and chattels; they are his dearest property, and are so far from enduring a seizure, that they will hardly bear an inspection." *Boyd*, 116 U.S. at 627. "[T]he essence of the offense" extended beyond the physical intrusion to "the invasion of [the] indefeasible right of personal security, personal liberty, and private property." *Id.* at 630. These strong words "furnish[ed] the true criteria of the reasonable and 'unreasonable' character" of a search or seizure under the Fourth Amendment. *Id*. at 630.

These principles have no less traction in the digital age. Of course, "time works changes," Justice Brandeis warned, and for a "principle to be vital [it] must be capable of wider application than the mischief which gave it birth." *Olmstead*, 277 U.S. at 472-473 (dissent). No matter what "[s]ubtler and more far-reaching means of invading privacy have become available to the government" through the advance of technology—there, a wiretap—the Fourth Amendment is a bulwark against government intrusion, regardless of form or means. *Ibid*.

Although the papers and effects colonists kept under the bed at the time of the Founding are now entrusted to banks, accountants, and law firms, the principle retains relevance today. "Privacy is not a

discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes." *Smith* v. *Maryland*, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting). See also *Carpenter* v. *United States,* 138 S. Ct. 2206, 2219 (2018) (noting that "the [private] nature of the particular documents sought" determines the force of the Fourth Amendment in guarding them).

It would be wrong to say that the Fourth Amendment has lost all relevance in this case simply because the documents sought were entrusted to third parties like banks, attorneys, and accountants. To be sure, the Court held nearly 50 years ago that people lose a "reasonable expectation of privacy" in certain personal documents when shared with third parties. See*, e.g.*, *United States* v. *Miller,* 425 U.S. 435 (1976). But the so-called third-party doctrine—which was questionable even at its inception—was adopted at a time when smart phones, the Internet, electronic records, emails, and instant messaging were the stuff of science fiction. What was reasonable to expect in a time of paper records, analog telephone calls, and eight-cent postage stamps assuredly differs from what is reasonable to expect today. And the Court "has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy." *Carpenter*, 138 S. Ct. at 2221.

Just as using a cell phone "is indispensable to participation in modern society" and creates a "detailed chronicle of a person's physical presence" (*Carpenter*, 138 S. Ct. at 2220) "it is impossible to participate in the economic life of contemporary society without

maintaining a bank account" in which "the totality of bank records provides a virtual current biography" revealing a person's "personal affairs, opinions, habits, and associations" (*Miller*, 425 U.S. at 451 (Brennan, J., dissenting)). Indeed, the irony is that people typically retain the services of third parties like banks not *despite* having to share sensitive information with them, but *because* those third parties are expert custodians and can better safeguard sensitive personal information that people can on their own. Thus, as one Member of the Court mildly explained, "Fourth Amendment protections for your papers and effects do not automatically disappear just because you share them with third parties." *Carpenter*, 138 S. Ct. at 2268 (Gorsuch, J., dissenting).

Section 7602 authorizes demands for "any books, papers, records, or other data" as they exist and are used *today in 2023*, implicating privacy and property interests fundamentally different from the far narrower interests considered in *Miller*. And it is in that context that the Court must "consider the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of [government] power." *United States* v. *Jones*, 565 U.S. 400, 416–417 (2012) (Sotomayor, J., concurring).

B. Petitioners' narrow reading is more consistent with Fourth Amendment values

"As the text makes clear, 'the ultimate touchstone of the Fourth Amendment is 'reasonableness.''" *Riley* v. *California*, 573 U.S. 373, 381 (2014) (quoting *Brigham City* v. *Stuart*, 547 U.S. 398, 403 (2006)). Petitioners advance a vision of Section 7609 that, while still allowing substantial government intrusion into

the private sphere, at least passes that most basic Fourth Amendment smell test. They recognize that Congress, in enacting the statute, sought to balance the government's legitimate aim of collecting revenue in an efficient and orderly manner with fundamental principles of privacy.

1. As a starting point, petitioner's interpretation of Section 7609(c)(2)(D)(i) is the one more consistent with the statute's text. The statute's reference to "the person with respect to whose liability the summons is issued" covers only "an assessed taxpayer [who] 'has a recognizable [legal] interest in the records summoned.'" *Ip*, 205 F.3d at 1176 (quotation marks omitted). Only then, when the target of the summons owes taxes themselves, may the government summons their financial records to collect those taxes without providing notice.

This interpretation is also consistent with the purpose of the statute, which "sprang from a conviction that taxpayers deserved greater safeguards against improper disclosure of records held by third parties." *Id.* at 1172.

While the government's position is premised largely on its fear that alerting the target of the summons to its existence will lead them to tip off the person who owes taxes, the statute already has that covered. Section 7609(g) exempts from the notice requirement summonses that "may lead to attempts to conceal, destroy, or alter records relevant to the examination, to prevent the communication of information from other persons through intimidation, bribery, or collusion, or to flee to avoid prosecution, testifying, or production of records." But the government has to earn the right to invoke that exception—it must "petition" the court, alleging "facts and circumstances"

that establish "reasonable cause to believe" that the summons will lead to obfuscation. The government's construction invents for itself a way around those requirements, simply by withholding notice anytime the summons is issued with respect to any tax-collection effort. But Congress would not go to such lengths to make the government earn the right to serve a summons in secret only to give the government a virtually unlimited right to do exactly that.

2. Just as crucially, petitioners' reading of the statute accords with settled Fourth Amendment principles, such as modest and limited government investigatory power and the importance of individualized suspicion in most government searches.

As discussed above, "[t]he Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty." *Marcus* v. *Search Warrant of Prop. at 104 E. Tenth St.*, 367 U.S. 717, 729 (1961). Petitioners put forward a statutory construction that appropriately limits the government's investigatory power—the government can go about its business of collecting revenue, but it must do so subject to the limitations of reasonableness, which frequently turns on the availability of notice and judicial review. Cf. *Donovan* v. *Lone Steer, Inc.*, 464 U.S. 414-415 (1984) (explaining that first-party subpoenas generally satisfy the Fourth Amendment in part because they permit the subject to challenge the subpoena before his privacy is invaded). And the circumstances in which it may dispense with those procedures are truly exceptional—as they were written into the statute to be—rather than the rule.

It is well settled that the Fourth Amendment's reasonableness requirement applies to administra-

tive subpoenas, including the summonses at issue here. See*, e.g.*, *Donovan*, 464 U.S. at 415 ("It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." (quotation marks omitted)); see also *McLane Co.* v. *Equal Emp. Opportunity Comm'n*, 137 S. Ct. 1159, 1165–1167 (2017); *United States* v. *Powell*, 379 U.S. 48, 57–58 (1964); Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.13(a), (c) (6th ed. 2021) ("The second standard of reasonableness suggested in [*Okla. Press Publ'g Co. v.*] *Walling*[, 327 U.S. 186 (1946),] is the requirement that the subpoenaed documents be relevant to the investigatory body's inquiry.").

Petitioners' interpretation of Section 7609 respects the Fourth Amendment's preeminence in this domain, and thus succeeds at "defin[ing] the scope of investigative power in terms of [its] inherent limitations," much in line with the traditional "application of the Bill of Rights as a restraint upon the assertion of governmental power." *Watkins* v. *United States*, 354 U.S. 178, 195 (1957).

Moreover, petitioners' view of the statute accords with the fundamental principle that to "be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing." *Chandler* v. *Miller*, 520 U.S. 305, 313 (1997). This "requirement has a legal pedigree as old as the Fourth Amendment itself." *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 678 (1995) (O'Connor, J., dissenting). For the government to serve a notice-free, unchallengeable summons of bank records, it at least

must have solid evidence that the target of the summons has personally failed to pay taxes, and thus that their financial records likely hold the key to locating the missing funds.

Even in contexts where the warrant requirement does not apply, when the government wades into the private lives of its citizens, the Court must deploy "traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming* v. *Houghton*, 526 U.S. 295, 300 (1999).

Petitioners' construction of the statute achieves that balance. They put forward a reading of Section 7609 that recognizes common sense limitations on the government's ability to secretly summons financial records. The statute reaches all kinds of sensitive and private records, many of which will concern people or organizations far removed from any individualized suspicion of wrongdoing. Congress chose to channel the agency's wide-ranging discretion in this important and sensitive area by broadly providing for notice of summons as a means of ensuring enforcement of the Fourth Amendment's reasonableness requirement. Moreover, that enforcement is most crucial when the agency is operating at the outer bounds of its authority—by requesting the records of parties far removed from the basis of the agency's taxpayer investigation. And it is in precisely these circumstances where third-party custodians will be least knowledgeable and least incentivized to challenge a summons on relevance or overbreadth grounds. The government's interpretation of the exception to the notice requirement at issue in this case undermines Congress's

broadly protective intent and risks violating Fourth Amendment reasonableness by allowing the IRS to issue overbroad and irrelevant summonses for private records of all kinds of people in a potentially huge number of troubling cases.

At the same time, petitioners' construction does no violence to the government's legitimate interests. It would allow the government to circumvent the notice requirement in the most logical, and limited, circumstance: when it knows a taxpayer owes money and it has a legitimate basis to believe that notice to that taxpayer will only provide them with a means to obscure their holdings.

C. The government's construction threatens wide-ranging Fourth Amendment interests

The government's construction of Section 7609, in stark contrast, is anathema to all that the Fourth Amendment protects.

To begin, the IRS insists that it can serve a notice-free third-party summons targeting any person connected to another individual with a tax assessment, provided it is trying to collect those taxes. For instance, the IRS may seek the accounting records of an employer whose employee owes taxes, and it can serve a summons on the employer's accountant to obtain them. All without notifying the employer. But there is no guarantee that the records that surface from that summons will be limited to information regarding the employee. To the contrary, the records that the IRS summons may touch on any and all aspects of the employer's business.

And it is not only the person named in the summons whose private information is at risk of exposure, but also anyone else whose records may surface from

that search. In the example above, not only would summonsing the business records of a taxpayer's employer potentially yield embarrassing information about the employer, but it may also surface private details about all other employees as well. And according to the government, nobody up or down the whole chain has any right to know about this. And even if they do, they are powerless to stop it.

This is all by the IRS's design. Its whole purpose for summonsing the records of people connected to delinquent taxpayers is its assumption that it can glean valuable information about its primary target from these secondary sources. But as we have shown, it is just as likely that the IRS's search will sweep up the sensitive and protected records of other people with absolutely nothing to do with the taxpayer, except the unfortunate coincidence that they share an employer, lawyer, accountant, or so on.

Nothing is to the stop the government, in its search for the needle, from reviewing and pursuing anything else it pulls from the haystack. The IRS would be free to rifle through all that it uncovers, which can furnish the basis for new summons, search warrants, tax assessments, criminal investigations, and referrals to criminal prosecutors. See I.R.C. § 6103(h)(2). And all of this without those whose privacy was breached having a chance to raise legitimate legal objections—if they even learn of it at all.

Worst of all, the information at risk of exposure includes some of the most sensitive topics imaginable. Section 7602 makes clear that "any books, papers, records, or other data"—that is, practically anything containing information—is fair game. It is only natural that an IRS inquiry will surface records that are intimate and closely held, often placed in the care of

trusted safekeepers. For instance, targeting a lawyer's financial information, as the IRS did here, risks extraordinary breaches of confidences, encroaching on such delicate domains as the attorney-client privilege and litigation strategy. See *J.B.* v. *United States*, 916 F.3d 1161, 1174 (9th Cir. 2019) (quashing a third-party summons of an attorney's business records which "[t]he IRS should have known * * * were potentially covered by the attorney-client privilege and other litigation-related privileges, and could have revealed [the attorney's] litigation strategy representing persons on death row.").

It is no reply to say that the IRS's claimed power is limited because it reserves its secret, unaccountable searches only for its attempts to collect on taxes owed. In no other context does the government's power to search and seize go unchecked simply because it knows a law has been broken.

Much of the IRS's efforts are spent collecting delinquent taxes. In 2021, the IRS collected nearly $100 billion in unpaid tax assessments, assessed $40 billion in civil penalties, and filed half a million liens and third-party levies. *Collections, Activities, Penalties, and Appeals*, IRS https://perma.cc/3545-2T89 (last visited Jan. 11, 2023) (tables 25 and 26). More than a third of the agency's budget is spent on enforcement. *IRS Budgets & Workforce*, https://perma.cc/6DX9-JSCG (table 30). And all of that is before the infusion of $45.6 billion for enforcement activity the IRS received in the Inflation Reduction Act. Pub. L. No. 117-169 § 10301(1)(A)(ii), 136 Stat. 1818, 1831-32 (2022). Against that background, it is hardly reassuring for the IRS to promise that its unchecked power secretly to sift through private papers will be used responsibly. In circumstances like these, courts should not be

left on the sidelines, deferring to the government's say-so; the whole point of judicial review is "to *verify* the [government]'s say-so." *Mach Mining, LLC* v. *E.E.O.C.*, 575 U.S. 480, 490 (2015).

If the right of privacy meant anything to the founding generation, it meant that "the secret cabinets and bureaus" of every citizen may not be "thrown open to [] search and inspection" on the whim of a government agent. *Carrington*, 19 How. St. Tr. 1029. When an individual's "papers and books" are "seized and carried away * * * [and] his most valuable secrets [are] taken out of his possession" without express adherence to the Fourth Amendment's standards, it is an affront to basic notions of law and liberty. *Ibid*. But that is precisely what the government now says it may do. The IRS insists that any person connected to anyone who owes a dollar of tax to the federal government becomes the object of suspicion—powerless to stop "the search and seizure of a man's private papers, or the compulsory production of them." *Boyd*, 116 U.S. at 623. And given the complexity of tax law and the difficulty of flawless compliance, the process is endlessly duplicative—a thousand flowers of IRS inquiry may bloom. "The struggles against arbitrary power in which [the founders] had been engaged for more than 20 years would have been too deeply engraved in their memories" to approve of such all-encompassing power for the government to seize and search the private records of the People. *Id*. at 630.

D. The Court should avoid the serious constitutional tensions arising from the government's position

When a debatable statutory construction is in such serious tension with cherished constitutional rights, that construction is disfavored, as "statutory

language [must be] construed to conform as near as may be to traditional guarantees that protect the rights of the citizen." *Lee* v. *Madigan*, 358 U.S. 228, 235 (1959). It is an "elementary rule" that when one construction of a statute raises constitutional difficulties, "every reasonable construction must be resorted to" so that the statute is saved "from unconstitutionality." *Gonzales* v. *Carhart*, 550 U.S. 124, 153 (2007).

Indeed, the Court will not "infer that Congress" yields unchecked power to the executive to interfere with "activity included in constitutional protection." *Kent* v. *Dulles*, 357 U.S. 116, 129 (1958). And, specifically, this Court will not "attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law." *Federal Trade Commission* v. *American Tobacco Company,* 264 U.S. 298, 307 (1924). Because "it is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up," the Court in *American Tobacco* stated that "nothing short of the most explicit language would induce us to attribute to Congress that intent" and allowed that assumption to guide its statutory analysis. *Ibid*.

A Fourth Amendment violation surely lurks in the government's version of the statute: The claimed authority is ripe for abuse. Taken to its logical conclusion, it would allow the IRS to issue summonses, in secret and without probable cause, naming an individual ostensibly because of their connection to a known tax delinquent but, in fact, for some ulterior purpose. Indeed, before Congress enacted Section 7609, the Court acknowledged that the IRS's "summons power could be used to conduct 'fishing

expeditions' into the private affairs of bank depositors" but that nothing in the tax law as it then stood prevented the IRS from doing so. *United States* v. *Bisceglia*, 420 U.S. 141, 150 (1975). In light of the capacious exception that the government now seeks to read back into the law, the Court's warning is just as relevant today. "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize * * * fishing expeditions into private papers on the possibility that they may disclose evidence of crime." *American Tobacco,* 264 U.S. at 305–306. The Court need not accept the government's invitation onto a field of Fourth Amendment landmines.

* * *

Previously harassed by sweeping, invasive, and unchecked government searches into their personal papers and effects, and inspired by advances in law that recognized the right of every person to be secure against such incursions, the authors of the Fourth Amendment intended to constrain the government's ability to peer secretly into the personal affairs of its citizens. The government's reading of Section 7609 would be odious to the Founding generation, which is reason enough to doubt that its reading of the statute could be correct.

CONCLUSION

The Court should reverse.

Respectfully submitted.

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