No. 21-1316

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JAMES HARPER

Plaintiff-Appellant

v.

CHARLES P. RETTIG, in his official capacity as Commissioner of the Internal Revenue Service; INTERNAL REVENUE SERVICE,

Defendants-Appellees,

JOHN DOE IRS AGENTS 1-10,

Defendants

ON APPEAL FROM THE ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

BRIEF FOR THE APPELLEES

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Counsel for the appellee suggest that oral argument may be beneficial to the Court's understanding of the legal issues presented in this case.

GLOSSARY

APA	Administrative Procedure Act (5 U.S.C. § 701 *et al.*)
AIA	Anti-Injunction Act (26 U.S.C. § 7421(a))
CSLI	Cell-site location information, as addressed in *Carpenter v. United States*, — U.S. —, 138 S. Ct. 2206 (2018)
DJA	Declaratory Judgment Act (28 U.S.C. § 2201)
I.R.C.	Internal Revenue Code (26 U.S.C.)
IRS	Internal Revenue Service
Taxpayer	James Harper, appellant

JURISDICTIONAL STATEMENT

Appellant James Harper (taxpayer) filed suit in the District Court seeking injunctive and declaratory relief, alleging that the IRS unlawfully obtained his financial information from virtual currency exchanges in violation of the Fourth and Fifth Amendments and of 26 U.S.C. (Internal Revenue Code) ("I.R.C." or "the Code") § 7609(f). (A9-35.)[1] The complaint also sought damages against unnamed IRS agents for constitutional violations pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). (A25-34.)

As discussed at pages 18-39, *infra*, the District Court lacked subject matter jurisdiction over taxpayer's claims for injunctive and declaratory relief. The District Court had jurisdiction over the *Bivens* claims pursuant to 28 U.S.C. § 1331.

On March 23, 2021, the District Court entered a final, appealable judgment in favor of the Government on all claims. (A99; *see also* A76-

[1] "A" references are to the appendix submitted with taxpayer's brief. "Br." references are to the opening brief. "Doc." references are to the District Court record.

98 (order dismissing claims).) Taxpayer filed a timely notice of appeal.[2] (A7-8.) Fed. R. App. P. 4(a)(1)(B)(i). This Court has jurisdiction pursuant to 28 U.S.C § 1291.

STATEMENT OF THE ISSUE

Whether the District Court correctly dismissed taxpayer's claims for injunctive and declaratory relief for lack of jurisdiction, or, assuming, *arguendo*, that the District Court had jurisdiction, whether the claims should be dismissed for failure to state a claim.

STATEMENT OF THE CASE

Taxpayer sued Commissioner of Internal Revenue Charles Rettig, the IRS, and unnamed IRS agents, alleging that they violated (1) his Fourth Amendment rights by obtaining information relating to his transactions from virtual currency exchanges without a warrant; (2) his Fifth Amendment procedural due process rights by failing to provide pre-seizure notice and opportunity to challenge the seizure; and (3) statutory requirements applicable to so-called "John Doe" summons, which are issued to third parties to obtain information about persons

[2] In his opening brief, taxpayer abandoned his challenge to the dismissal of the *Bivens* claims. (Br. 6.) We do not further address those claims.

whose identities are unknown to the IRS. I.R.C. § 7609(f). Taxpayer sought declaratory and injunctive relief, including an order expunging his financial information from IRS records. (A29, 32, 34.) The United States, as the real party-in-interest, moved, *inter alia*, to dismiss the claims for injunctive and declaratory relief for lack of jurisdiction. The District Court granted the motion and dismissed the action. Taxpayer now appeals.

A. The IRS administrative summons process

"Congress has 'authorized and required' the IRS 'to make inquiries, determinations, and assessments of all taxes' the Internal Revenue Code imposes." *United States v. Clarke*, 573 U.S. 248, 249-50 (2014) (quoting I.R.C. § 6201(a)). "[I]n support of that authority, Congress has granted the Service broad latitude to issue summonses 'for the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax . . . or collecting any such liability.'" *Id.* at 250 (quoting I.R.C. § 7602(a)) (cleaned up); *see also* I.R.C. § 7602(b) (clarifying that the purposes for which a summons may be

issued "include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws").

Summonses directed to third parties are subject to special procedures prescribed by I.R.C. § 7609. Congress required the IRS to provide notice of a third-party summons seeking the production of documents only to "any person . . . who is identified in the summons." I.R.C. § 7609(a). Where, however, "the IRS *does not know* the identity of the taxpayer under investigation, advance notice to the taxpayer is, of course, not possible." *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 316-17 (1985) (emphasis in original). In such a case, the IRS must obtain judicial approval pursuant to § 7609(f) before issuing a summons. *Id.* at 317. Such summonses are known as a "John Doe summons." *Id.* at 313 & n.4.

Section § 7609(f) imposes three pre-issuance requirements. As relevant here, the Government must establish that: (1) "the summons relates to the investigation of a particular person or ascertainable group or class of persons"; (2) "there is a reasonable basis for believing that such person or group . . . may fail or may have failed to comply" with internal revenue laws; and (3) "the information sought to be obtained

from the examination of the records or testimony (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources." I.R.C. § 7609(f). That determination is made in an *ex parte* proceeding, and is based "solely on the [Government's] petition and supporting affidavits." I.R.C. § 7609(h)(2).

If the person to whom a summons is issued fails to comply, the Government must seek judicial enforcement under I.R.C. §§ 7402(b) and 7604(a). To obtain enforcement, the Government must meet the standards set forth in *United States v. Powell*, 379 U.S. 48, 57-58 (1964). The Government "need not meet any standard of probable cause to obtain enforcement of his summons." *Powell*, 379 U.S. at 57. This is so because "[t]he purpose of a summons is not to accuse, much less to adjudicate, but only to inquire." *Clarke*, 573 U.S. at 254 (cleaned up). Analogizing to other agencies' investigatory powers, the *Powell* court reasoned that the IRS, like a grand jury, "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." 379 U.S. at 57.

Instead, the Government must demonstrate that the investigation is being conducted for a legitimate purpose, the information sought may be relevant to that investigation, the information sought is not already in the Government's possession, and the administrative steps required by the Code have been followed. *Powell*, 379 U.S. at 57–58. This showing is "minimal" and can be satisfied by an affidavit of the investigating agent. *Sugarloaf Funding, LLC v. U.S. Dep't of the Treasury*, 584 F.3d 340, 345 (1st Cir. 2009). "Once the IRS has made this showing, the burden shifts to the [summonee] to disprove one or more of the *Powell* requirements, or to show that enforcement would be an 'abuse of process.'" *Sugarloaf Funding*, 584 F.3d at 346 (citation omitted). The burden of rebutting the Government's showing is a "heavy" one. *Id.* "Enforcement proceedings are designed to be summary, and the court's role is simply to ensure that the IRS is using its broad authority in good faith and in compliance with the law." *United States v. Gertner*, 65 F.3d 963, 965 (1st Cir. 1995) (cleaned up).

B. IRS Notice 2014-21

In Notice 2014-21, *IRS Virtual Currency Guidance*, 2014-16 I.R.B. 938, 2014 WL 1224474 (April 14, 2014), the IRS stated its position that

any virtual currency which can be converted into traditional currency is property for tax purposes, and a taxpayer can have a taxable gain or loss on the sale or exchange of a virtual currency, depending on the taxpayer's cost to purchase it. (*Id.* (FAQ Q&As 1, 6, 7).) The Notice identified bitcoin as one example of a convertible virtual currency.[3] *Id.*

C. Taxpayer's virtual currency activities

Taxpayer alleges that he opened an account with Coinbase (a virtual currency exchange) in 2013, that he made deposits of bitcoin into his Coinbase account in 2013 and 2014, and that he fully liquidated his bitcoin holdings at Coinbase from 2015 through 2016. (A13 ¶18, A16-17 ¶¶29, 32, 34-36.) From 2016 to the present, taxpayer and his wife liquidated bitcoin through two other virtual currency exchanges, Abra and Uphold. (A30 ¶56.) Taxpayer alleged that he has no significant financial records related to accounts containing bitcoin or

[3] For a further explanation as to what bitcoin is and the role virtual currency exchanges play in handling bitcoin transactions, *see United States v. Gratkowski*, 964 F.3d 307, 309 (5th Cir. 2020), and *Zietzke v. United States*, 426 F. Supp. 3d 758, 761 (W.D. Wash. 2019).

other virtual currency transactions other than those related to his Coinbase, Abra, and Uphold accounts.[4] (A23 ¶70.)

Taxpayer alleged that he declared all appropriate income from bitcoin payments and reported capital gains on relevant federal tax returns for 2013 through 2019 and paid all applicable taxes for those years. (A16-17, 22, ¶¶30-33, 37, 64-65.)[5]

D. The John Doe summons served on Coinbase and subsequent summons enforcement proceeding

In 2016, the United States filed an *ex parte* petition pursuant to I.R.C. § 7609(h) requesting an order permitting the IRS to serve a "John Doe" administrative summons on Coinbase as part of an investigation into the reporting gap between the number of virtual currency users Coinbase claimed to have and the number of U.S. bitcoin users reporting gains or losses to the IRS during 2013 through 2015. (A17 ¶38.) *See United States v. Coinbase, Inc.*, No. 17-CV-01431-JSC, 2017

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[4] After Uphold represented that it had no record of any request from the defendants to produce information relating to taxpayer or of disclosing any such information to the defendants, taxpayer limited his claims in the amended complaint to Coinbase and Abra. (A23 ¶¶71-74; A27-34 ¶¶97, 100, 106, 108, 121, 124, 129, 138, 141, 143, 146.)

[5] As explained below, the District Court determined that this conclusory claim was not well pled. (A88.)

WL 5890052, at *1, *4 (N.D. Cal. Nov. 28, 2017). The summons sought nine categories of information for all U.S. persons who conducted transactions at Coinbase at any time in 2013 through 2015. The District Court entered an order allowing the IRS to serve the summons on Coinbase. *Id.*

After Coinbase failed to comply with the summons, the IRS petitioned to enforce it. *Id.* at *1. Although not a party to the enforcement proceeding, taxpayer participated in it as an "expert" in an amicus filing opposing enforcement. (A19 ¶51; Br. 42 n.6; *United States v. Coinbase*, Case No. 17-CV-01431-JSC, Doc. 50-2 (Competitive Enterprise Institute filing, signed by taxpayer as one counsel).) "John Doe 4," a Coinbase user, moved to intervene in the enforcement proceeding as of right and permissively under Fed. R. Civ. P. Rule 24. (A18 ¶47.) The *Coinbase* court granted the motion on both grounds. *United States v. Coinbase, Inc.*, No. 17-CV-01431-JSC, 2017 WL 3035164, at *7 (N.D. Cal. Sept. 18, 2017).

The *Coinbase* court issued an order enforcing the summons, after first narrowing its scope. *Coinbase*, 2017 WL 5890052, at *1. The order directed that, with respect to accounts with at least the equivalent of

$20,000 in one transaction (buy, sell, send, or receive) in any one year during the 2013 to 2015 time period, Coinbase must produce (1) the user's taxpayer ID number, name, birth date, and address; (2) records of account activity (including transactions logs or other records identifying the date, amount, and type of transaction), the post-transaction balance, and names of counterparties; (3) all periodic statements of account or invoices. *Id.* at *8. Neither party appealed the order.

E. The IRS's August 2019 letter to taxpayer

In a letter dated August 9, 2019, titled "Reporting Virtual Currency Transactions," the IRS informed taxpayer that it "ha[s] information that you have or had one or more accounts containing virtual currency but may not have properly reported your transactions involving virtual currency, which include cryptocurrency and non-crypto virtual currencies." (A67; A22 ¶¶67-68.) The letter did not indicate the source of the information. (A67-69.)

The letter informed taxpayer of the requirements for reporting virtual currency transactions on income tax returns. (A68.) It also informed taxpayer that if he believed he had not accurately reported such transactions, he should file amended or delinquent returns. (A67.)

The letter warned that if taxpayer had not "accurately report[ed his] virtual currency transactions," then he "may be subject to future civil and criminal enforcement activity." (*Id.*)

F. Proceedings in the District Court

1. Taxpayer's suit and the motion to dismiss

Taxpayer sued (A9-35) the IRS, Commissioner Rettig in his official capacity, and unnamed IRS agents in their personal capacities. (A11.) Counts I and II asserted that the IRS and unnamed agents had violated his Fourth Amendment rights and Fifth Amendment procedural due process rights by obtaining his financial information from Coinbase and/or Abra. With respect to both Counts I and II, taxpayer asserted that the summons statutory scheme, I.R.C. § 7602(a), *et seq.*, was unconstitutional as applied to him if it permitted the IRS to obtain his financial information without a warrant or prior notice and opportunity to challenge the seizure. (A28 ¶107; A31 ¶130.) In Count III, taxpayer alleged that the IRS had violated Section 7609(f) when obtaining his financial information from Coinbase and/or (allegedly) Abra through a John Doe summons. (A32-34 ¶¶136-48.)

Taxpayer requested a declaration that the IRS violated his constitutional rights and Section 7609(f) and requested injunctive relief, including an order directing the IRS to expunge his financial information from its records. (A29, 32, 34.)

The United States, as the real party-in-interest, moved to dismiss the claims for lack of jurisdiction and failure to state a claim. (Doc. 12-1; Doc. 16.) Taxpayer opposed the motion. (Doc. 14.)

2. The District Court's order

The District Court granted the motion to dismiss as to all counts. (A76-98.) The court found that taxpayer's claims against the IRS and Commissioner Rettig are functionally against the United States and that sovereign immunity principles therefore apply. (A81-82; *see also* Doc. 12 at 2.)

The District Court concluded that taxpayer's claims were barred by the Anti-Injunction Act, I.R.C. § 7421(a) ("AIA"), which prohibits suits "for the purpose of restraining the assessment or collection of any tax," and the tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201(a), which prohibits declaratory relief "with respect to Federal taxes." (A85.) The court found that, although taxpayer's suit

"ostensibly challenges the validity of non-tax activity"—namely, summons enforcement—taxpayer's suit would prevent the IRS from assessing taxpayer's taxes using information it had obtained. (A86.)

On that score, the court found that taxpayer's allegation that he had paid all taxes due was an "unsupported conclusory statement and not well pled" because he also alleged that the IRS's August 2019 letter informed taxpayer "that it had information—information [he] wants the court to direct the IRS to expunge—that he may have additional tax liability." (A88 (emphasis in original).) The court also noted (A88-89) the *Coinbase* court's finding that "the IRS's purpose is related to tax compliance, not research" and that the summons served a legitimate investigative purpose. Consequently, the District Court rejected taxpayer's argument that his suit was not "aimed" at restraining the assessment or collection of taxes. (A89.)

The court rejected taxpayer's argument that the AIA does not bar his suit because he lacks other remedies. (A89-90.) The court found that taxpayer could have intervened in the *Coinbase* enforcement proceeding and that he has additional remedies if the IRS determines that he has additional tax liabilities. (*Id.*) *See* I.R.C. §§ 6213, 7422.

SUMMARY OF ARGUMENT

The IRS alerted taxpayer that it had information indicating that he may not have properly reported his virtual currency transactions on federal income tax returns and may face additional taxes and/or future civil or criminal enforcement. Taxpayer sued, seeking an order directing the IRS to expunge from its records the financial information on which the IRS's potential enforcement was based. The District Court correctly dismissed the suit for lack of jurisdiction. Moreover, even if the court had jurisdiction, taxpayer's claims were subject to dismissal for failure to state a claim.

1. The United States is immune from suit except as it consents to be sued, with the scope of its consent defining the court's jurisdiction. In the tax context, a plaintiff seeking injunctive and declaratory relief must do more than identify a statute waiving sovereign immunity; he must also overcome the Anti-Injunction Act (AIA) and the tax exception to the Declaratory Judgment Act. The limited waiver of sovereign immunity invoked by taxpayer does not override those statutes.

Further, taxpayer's argument that sovereign immunity does not "attach" here—made for the first time on appeal—is without merit.

Taxpayer has never denied that his suit seeks relief from the United States. Indeed, the requested relief would compel the IRS to destroy information collected for a tax investigation and restrain all defendants from collecting information for purposes of tax administration. Taxpayer also fails to allege facts sufficient to establish that the individual defendants acted outside their statutory authority or constitutional requirements. And the AIA still applies to his claims, regardless of their purportedly constitutional nature.

The District Court correctly held that the AIA bars taxpayer's suit because the suit is "aimed" (A.89) at restraining the assessment or collection of tax. There is nothing attenuated about the causal chain here, in which taxpayer seeks to direct the IRS to expunge the financial information on which the IRS has based its belief that he may not have properly reported his transactions for federal income tax purposes. Taxpayer points to no authority compelling a different conclusion or that an exception to the AIA applies here.

2. Even if the District Court had jurisdiction, the amended complaint must be dismissed for failure to state a claim.

a. Taxpayer's claim that the IRS violated his Fourth Amendment rights by failing to get a warrant supported by probable cause lacks any merit. Indeed, the Supreme Court has long held that the probable-cause standard does not apply to issuance or enforcement of IRS administrative summonses. Moreover, under the third-party doctrine, taxpayer lacked any Fourth Amendment privacy interest here. And, contrary to taxpayer's claims, Coinbase's and Abra's privacy policies permit sharing his information with the government in circumstances well beyond the narrow circumstances taxpayer asserts.

b. Taxpayer's Fifth Amendment claim also fails. Taxpayer lacks a protected interest in the financial information held by Coinbase and Abra. Taxpayer also failed to identify any procedures the IRS violated in serving and enforcing the Coinbase summons. Taxpayer was not entitled to additional pre-deprivation procedural safeguards beyond those established by Section 7609(f), and available post-deprivation procedures satisfy due process in the tax context.

c. Finally, taxpayer failed to state a claim for violation of § 7609(f). Section 7609 does not provide for a suit or a remedy for violations of its requirements and does not give unnamed taxpayers

(like taxpayer) standing to enforce anything with respect to a John Doe summons. Taxpayer also failed to identify any procedures that were violated.

ARGUMENT

The District Court correctly dismissed taxpayer's suit

Standard of review

This Court reviews *de novo* orders granting motions to dismiss for lack of jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6) and applies "the same basic principles . . . in both situations." *Lyman v. Baker*, 954 F.3d 351, 359-60 (1st Cir. 2020). This Court "isolate[s] and ignore[s] statements in the complaint that simply offer legal labels and conclusions or merely rehash cause-of-action elements." *Id.* at 360 (cleaned up). It also "take[s] the complaint's well-pled (*i.e.*, non-conclusory, non-speculative) facts as true, drawing all reasonable inferences in the pleader's favor, and see if they plausibly narrate a claim for relief." *Id.* Finally, this Court "can consider (a) implications from documents attached to or fairly incorporated into the complaint, (b) facts susceptible to judicial notice, and (c) concessions in the plaintiff's response to the motion to dismiss." *Id.* (cleaned up).

A. The District Court correctly dismissed all claims for injunctive and declaratory relief for lack of jurisdiction

1. Sovereign immunity, the Anti-Injunction Act, and the Declaratory Judgment Act

As the party invoking federal jurisdiction, taxpayer had the burden of establishing subject matter jurisdiction. *Amoche v. Guarantee Tr. Life Ins. Co.*, 556 F.3d 41, 48 (1st Cir. 2009). Where, as here, sovereign immunity is implicated, general jurisdictional statutes such as § 1331 "do not waive sovereign immunity" and a waiver therefore must be found in another statute. *Berman v. United States*, 264 F.3d 16, 20 (1st Cir. 2001).

The United States "is immune from suit, save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain suit." *United States v. Dalm*, 494 U.S. 596, 608 (1990) (citations omitted); *Muirhead v. Mecham*, 427 F.3d 14, 17 (1st Cir. 2005). Any waiver of sovereign immunity "to be effective, must be unequivocally expressed." *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 33-34 (1992) (citations omitted). The provisions of a waiver define its scope. *Ironshore Specialty Ins. Co. v. United States*, 871 F.3d 131, 140 (1st Cir. 2017). A waiver "must be strictly construed in favor

of the sovereign, with ambiguities construed against waiver." *In re Rivera Torres*, 432 F.3d 20, 24 (1st Cir. 2005). The plaintiff "has the burden of proving sovereign immunity has been waived." *Mahon v. United States*, 742 F.3d 11, 14 (1st Cir. 2014).

In the tax context, however, if a plaintiff seeks injunctive relief, it is not enough to identify a statute that "unequivocally expresse[s]" a waiver of sovereign immunity. *Nordic Vill. Inc.*, 503 U.S. at 33-34. The requested relief must also not be barred by the Anti-Injunction Act, I.R.C. § 7421(a) ("AIA"), in which Congress has affirmatively forbidden suits to restrain the Government's tax assessment and collection activities.

The Anti-Injunction Act provides, with statutory exceptions not relevant here, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." I.R.C. § 7421(a). Contrary to taxpayer's position (Br. 27), the AIA prohibits suits in "sweeping terms." *Alexander v. "Americans United," Inc.*, 416 U.S. 752, 760 (1974). The AIA's principal purpose is the "protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial

interference," *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736-37 (1974), "and to require that the legal right to the disputed sums be determined in a suit for refund." *Id.* (cleaned up); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 543 (2012). A claim that falls within the Act's proscription must be dismissed for lack of subject matter jurisdiction. *See Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962).

With stated exceptions not relevant here, the DJA likewise expressly bars claims to declaratory relief "with respect to Federal taxes." 28 U.S.C. § 2201(a). The Declaratory Judgment Act is not a jurisdictional statute, but instead defines the scope of available declaratory relief. The scope of the DJA is "at least as broad as" the AIA. *See McCarthy v. Marshall*, 723 F.2d 1034, 1037 (1st Cir. 1983). Accordingly, we generally refer herein only to the AIA.

2. Because taxpayer seeks relief from the sovereign, he must identify an applicable waiver of sovereign immunity

Although nominally brought against a government official—the Commissioner of Internal Revenue—and unnamed IRS agents in their personal capacities, as well as the IRS, this lawsuit in essence is one against the United States. (A11.) *See Muirhead*, 427 F.3d at 18

("Where, as here, a plaintiff brings suit against a federal employee . . . an inquiring court must analyze the claim to ascertain whether, despite the nomenclature, the suit is, in reality, a suit against the United States.") Thus, taxpayer seeks an order directing the IRS to expunge from its records financial information which he alleges was obtained from Coinbase and/or Abra—the information he alleges was the basis for the IRS's August 2019 letter informing him he may not be in compliance with reporting obligations relating to his virtual currency transactions on federal income tax returns. (A29, 32, 34.) He also seeks an order restraining the defendants from exercising their statutory summons authority to obtain his financial information at digital currency exchanges in the future. (A28-29, 31-32, 34.)

Taxpayer has never denied that his lawsuit seeks relief from the United States. Indeed, in the District Court, he did not deny that sovereign immunity applied in this context and solely responded to the Government's jurisdictional argument by trying to identify an applicable waiver of sovereign immunity. (Doc. 14 at 2; A81-82.) Moreover, taxpayer sued the Commissioner in his official capacity and only challenged actions taken by the unnamed IRS agents in their

official capacities as IRS employees. (A24-34.) On appeal, taxpayer makes a new argument (Br. 9-12), namely, that because his suit alleges that government officials acted unconstitutionally and "beyond statutory authority," sovereign immunity "never attached in the first place."

Even if taxpayer is not precluded from raising his new theory, he is wrong that sovereign immunity does not "attach" here. Taxpayer's theory relies on *Larson v. Domestic and Foreign Com. Corp.*, 337 U.S. 682, 689-90 (1949), which identified two situations "in which the acts of a government official would not enjoy the prophylaxis of sovereign immunity": (1) where a government official acts beyond statutory authority, or "ultra vires"; and (2) where the statute that confers the power to act is unconstitutional or if the officer exercises that power in an unconstitutional manner. *See also Muirhead*, 427 F.3d at 19.

As an initial matter, *Larson* addressed claims against a government official, and not an agency. 337 U.S. at 686-95; *Am. Policyholders Ins. Co. v. Nyacol Prod., Inc.*, 989 F.2d 1256, 1265 (1st Cir. 1993). And with respect to the Commissioner and unnamed IRS agents, it is plain that "despite the nomenclature, the suit is, in reality,

a suit against the United States" because the requested relief would both "interfere with the public administration" and "restrain the Government from acting [and] compel it to act." *Muirhead*, 427 F.3d at 18 (citing *Dugan v. Rank*, 372 U.S. 609, 620 (1963)); *cf. Larson*, 337 U.S. at 687 (in deciding whether a suit against a government officer is an official-capacity or individual-capacity suit, "the crucial question is whether the relief sought . . . is relief against the sovereign"). The injunctive relief requested by taxpayer would compel the IRS to destroy information collected for a tax investigation and/or restrain all defendants from collecting information for purposes of tax administration. (A28-29, 31-32, 34.)

Moreover, this suit does not implicate the first (*i.e.*, "ultra vires") exception in *Larson* because taxpayer fails to allege facts sufficient to establish that officers acted "without any [statutory] authority whatever" or without any "colorable basis for the exercise of authority." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n. 11 (1984). The amended complaint pleads no facts at all about the Commissioner's conduct. (A1-34.) Regarding the unnamed agents, it alleges violations occurring in the exercise of statutory summons and

investigatory authority. (A28, 31, 32-34.) Further, the fact that the IRS and its agents had a "colorable basis for the exercise of [statutory] authority" is clearly shown by the *Coinbase* order enforcing the John Doe summons. *Pennhurst*, 465 U.S. at 101 n.11. At most, taxpayer alleges that the individual defendants "misapplied" (Br. 41) summons statutes, which is insufficient to strip immunity from a government official. *Muirhead*, 427 F.3d at 19-20.

The constitutional exception in *Larson* (Br. 10-12) also fails. Again, taxpayer pleads no facts about the Commissioner's conduct. Further, and notwithstanding taxpayer's conclusory legal assertions in the amended complaint, there is no indication that any summons statute is unconstitutional or that unnamed IRS agents exercised the summons authority in an unconstitutional manner. *See, e.g.*, Part B(1)-(2), *infra*. Even if the constitutional exception applied here, taxpayer's suit remains subject to the AIA. As the Supreme Court has made "unmistakably clear," "the constitutional nature of a taxpayer's claim, as distinct from its probability of success, is of no consequence under the Anti-Injunction Act." *"Americans United,"* 416 U.S. at 759-60; *accord United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 9-10

(2008); *Bob Jones Univ.*, 416 U.S. at 749 (AIA barred claims predicated on "First Amendment, due process, and equal protection contentions").

3. The District Court correctly concluded that the Anti-Injunction Act applies here to bar taxpayer's claims against the Government

a. The only identified waiver of sovereign immunity is subject to the AIA's bar

As taxpayer cannot rely on the narrow exception to sovereign immunity found in *Larson*, he still must identify a valid waiver of sovereign immunity. To that end, taxpayer invokes 5 U.S.C. § 702. (Br. 12-17; *see also* Doc. 14 at 2-3.) Section 702 provides a limited waiver of sovereign immunity from suits "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." *See Match-EBe-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012). Its waiver applies to non-monetary claims even if the suit itself does not arise under the APA. *Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 57–58 (1st Cir. 2007).

Section 702, however, "does not override the limitations of" the AIA and the tax exception to the DJA. *Fostvedt v. United States*, 978

F.2d 1201, 1203-04 (10th Cir. 1992); *Hughes v. United States*, 953 F.2d 531, 537 (9th Cir. 1992) (same); *see also Smith v. Booth*, 823 F.2d 94, 97 (5th Cir. 1987) (Congress did not intend § 702 to alter the effect of the AIA); H.R. Rep. No. 94-1656, at 12, *reprinted in* 1976 U.S.C.C.A.N. 6121, 6132-33. Indeed, Section 702 limits its waiver by providing that "[n]othing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *See also* 5 U.S.C. § 701(a)(1) (APA does not waive sovereign immunity where "statutes preclude judicial review").

And a taxpayer cannot avoid the reach of the AIA by framing his claims as constitutional violations. "*Americans United*," 416 U.S. at 759-60; *Clintwood Elkhorn Min. Co.*, 553 U.S. at 9-10; *Bob Jones Univ.*, 416 U.S. at 749; *We the People Found., Inc. v. United States*, 485 F.3d 140, 142 (D.C. Cir. 2007).

b. The Anti-Injunction Act applies here to preserve the Government's sovereign immunity and to bar taxpayer's claims

The District Court correctly held that taxpayer's suit is barred by the AIA because it is "for the purpose of restraining the assessment or collection of any tax." I.R.C. § 7421(a). (A83-90.) "The prohibition against restraint on the assessment and collection of taxes 'is applicable not only to the assessment or collection itself, but . . . to activities which are intended to or may culminate in the assessment or collection of taxes.' " *Colangelo v. United States*, 575 F.2d 994, 996 (1st Cir. 1978) (quoting *United States v. Dema*, 544 F.2d 1373, 1376 (7th Cir. 1976)). Thus, a suit "designed to prohibit the use of information to calculate an assessment is a suit designed 'for the purpose of restraining an assessment' under the AIA." *Dickens v. United States*, 671 F.2d 969, 971 (6th Cir. 1982) (quoting § 7421(a)). So is a suit seeking to prohibit the use of evidence, alleged to have been illegally seized, as the basis for intended tax assessments. *Koin v. Coyle*, 402 F.2d 468, 469 (7th Cir. 1968). *See also Judicial Watch, Inc. v. Rossotti*, 317 F.3d 401, 405 (4th Cir. 2003); *Kemlon Prods. and Dev. Co. v. United States*, 638 F.2d 1315,

1320 (5th Cir.), *modified on other grounds* 646 F.2d 223 (5th Cir. 1981) (collecting cases).

Determining whether a suit is for the "purpose" of restraining the assessment or collection of tax under the AIA requires "inquir[ing] not into a taxpayer's subjective motive, but into the action's objective aim—essentially, the relief the suit requests." *CIC Services, LLC v. Internal Revenue Serv.*, 141 S. Ct. 1582, 1589 (2021). The "purpose" of a measure is "the end or aim to which [it] is directed." *Id.* To determine the "end or aim," or "object," of the suit, the Supreme Court looks to (1) "the face of the taxpayer's complaint"; (2) "the substance of the suit—the claims brought and injuries alleged"; and (3) the " 'relief requested'—the thing sought to be enjoined." *Id.* at 1589-90 (quoting "*Americans United*," 416 U.S. at 761).

The District Court correctly determined (A86) that taxpayer's claims "call[s] in[to] question a specific provision of" the Code. *McCarthy*, 723 F.2d at 1037 (claim "would clearly come under the general bars to jurisdiction and declaratory relief" in the AIA if it "called in question a specific provision of the Internal Revenue Code, or to a ruling or regulation issued under the Code"). Counts I and II assert

as-applied challenges to the constitutionality of the summons statutory scheme, "26 U.S.C. § 7602(a) et seq.," while Count III asserts a claim for violation of the John Doe procedures in I.R.C. § 7609(f). (A28 ¶107; A31 ¶130; A32-34.)

The District Court also correctly held that taxpayer's suit is "aimed" (A89) at restraining the assessment and collection of taxes. As the court found (A88), taxpayer's suit seeks to direct the IRS to expunge the very information it identified in the August 2019 letter (A67-68) as indicating that taxpayer may not have correctly reported his virtual currency transactions, may face additional taxes, and may be subject to future civil and criminal enforcement. "[T]he face of taxpayer's complaint" (A22-23, 27-28, 31-34) establishes that the "substance of the suit" is directed at the alleged harm of having the IRS retain and use information about taxpayer's virtual currency transactions for use in determining taxpayer's compliance with his income tax obligations. *CIC Services*, 141 S. Ct. at 1589. The "relief requested" (A29, 32, 34) is the expungement of information that would allow the IRS to do so. *Id.* at 1590.

Contrary to taxpayer's position (Br. 19), the August 2019 letter did not need to determine that taxpayer owed additional tax or seek to collect a tax for taxpayer's suit to fall within the AIA. As explained above, "[t]he prohibition against restraint on the assessment and collection of taxes is applicable not only to the assessment or collection itself, but . . . to activities which are intended to or may culminate in the assessment or collection of taxes." *Colangelo*, 575 F.2d at 996 (cleaned up); *see also* cases at pp. 27-28, *supra*.

For this reason, courts of appeals consistently have held that suits challenging the IRS's investigatory processes leading up to assessment and collection are barred. Thus, the AIA prohibits a suit requiring the IRS "to show cause before requesting corroborative information about their tax returns," *Smith v. Rich*, 667 F.2d 1228, 1232 (5th Cir. 1982), and a suit to enjoin local officials from providing information to the IRS, because "the information is used by the Service for assessment and levy [and] an injunction drying up the source of the information would unwarrantedly impede collection of the revenue," *Lewis v. Sandler*, 498 F.2d 395, 398-399 (4th Cir. 1974). *See also Gaetano v. United States*, 942 F.3d 727, 729, 734 (6th Cir. 2019) (suit to prevent IRS from

discussing attorney-client confidences with taxpayers' former legal advisor during audit); *Judicial Watch*, 317 F.3d at 405 (suit to enjoin audit); *Lowrie v. United States*, 824 F.2d 827, 830 (10th Cir. 1987) (suit seeking return of records and injunction against their use); *Dema*, 544 F.2d at 1366 (suit seeking to enjoin subpoenas for taxpayer's books).

On that score, as the District Court noted (A88-89), the *Coinbase* court found that the John Doe summons served a "legitimate investigative purpose" (*id.*) that was "related to tax compliance, not research" (*id.*)—specifically, to "ascertain if U.S. taxpayers are correctly filing returns, filing returns at all, or self-reporting their proper tax liability" related to bitcoin property gains. *Coinbase*, 2017 WL 5890052, at *6. And taxpayer has not alleged or argued that the information he says was obtained by the IRS is not related to the determination of his correct tax liability. An injunction, as sought here, ordering the IRS to destroy information obtained pursuant to an enforcement order as part of a legitimate investigation is barred by the AIA.

4. None of taxpayer's counterarguments undermine the correctness of the District Court's holding

Taxpayer cites several cases (Br. 17-22, 27-29) to argue that the AIA does not bar this suit. None of the cases supports that position.

Taxpayer relies heavily (Br. 17-22) on the Supreme Court's recent opinion in *CIC Services v. Internal Revenue Service*, — U.S. —, 141 S. Ct. 1582 (2021). But *CIC Services* does not undermine the correctness of the District Court's conclusion that the AIA bars taxpayer's lawsuit.

In *CIC Services*, a tax-shelter advisor made a pre-enforcement challenge to IRS reporting requirements relating to micro-captive insurance transactions. 141 S. Ct. at 1582. Noncompliance with the reporting requirements could result in civil and criminal penalties, with the civil penalties treated as a tax for purposes of the Code, including the AIA. *Id.* The Supreme Court held that the AIA did not prohibit the suit "because the injunction [CIC] requests does not run against a tax at all." *Id.* at 1593. Rather, the Court explained, "[t]he suit contests, and seeks relief from, a separate legal mandate; the tax appears on the scene—as criminal penalties do too—only to sanction that mandate's violation." *Id.*

Nothing in *CIC Services* suggests that it applies to the IRS's investigations of a person's tax liability or to administrative summonses issued in the course of that investigation. *See, e.g.*, pp. 30-31, *supra* (collecting cases). On the contrary, the Supreme Court was emphatic in

clarifying that its holding in *CIC Services* does not apply to suits seeking to foreclose the determination of a tax liability. *CIC Services*, 141 S. Ct. 1592-93. The Court stated: "the Anti-Injunction Act bars pre-enforcement review, prohibiting a taxpayer from bringing . . . a 'preemptive' suit to foreclose tax liability. And it does so always—whatever the taxpayer's subjective reason for contesting the tax at issue." *Id.* at 1593 (cleaned up). Unlike *CIC Services*, this plainly is a suit about taxes, as taxpayer seeks to force the IRS to expunge information it received that might show he owes more taxes. Taxpayer attempts to squeeze into the *CIC Services* mold by characterizing this suit as a suit challenging information reporting (Br. 22), but this case bears no resemblance to *CIC Services*. The plaintiff in *CIC Services* sought to avoid the economic burdens of providing information about other taxpayers to the IRS and challenged its legal obligation to do so; here, taxpayer simply does not want the IRS to possess information bearing on his tax liability.

Taxpayer also attempts to shoehorn his suit into the regulatory mandate framework of *CIC Services* (Br. 19-22) by likening the IRS's August 2019 letter to the notice challenged in *CIC Services*. The

August 2019 letter is not akin to a "separate legal mandate" to report information. *See CIC Services*, 141 S. Ct. at 1593. Further, from "the face of the taxpayer's complaint" (Br. 19), he does not challenge the letter or seek to enjoin it in some way; it is not the "object" of the suit. *CIC Services*, 141 S. Ct. at 189. Rather, after the IRS warned taxpayer that it had obtained information indicating that he was at risk of additional taxes and/or future civil or criminal enforcement (A67-69), taxpayer sued seeking to direct the IRS to expunge from its records the information on which the IRS based its belief that taxpayer may have misreported his income. There is nothing "attenuated" about that "causal chain." (Br. 23.) Taxpayer's assertion that the IRS has not yet determined to assess additional taxes does not alter that the purpose of taxpayer's suit is to delay or prevent the IRS from using his financial information to do so. (*Id.*)

Likewise, this suit is readily distinguishable from *Cohen v. United States*, 650 F.3d 717, 733 (D.C. Cir. 2011), and *Z St. v. Koskinen*, 791 F.3d 24 (D.C. Cir. 2015) (Br. 27-29). In both cases, the D.C. Circuit found that the AIA did not apply because the claims at issue were unrelated to assessment or collection. *See Cohen*, 650 F.3d at 725-26

(suit challenged refund procedures); *Z St.*, 791 F.3d at 26, 31-32 (suit challenged tax-exemption processing delays). In contrast, the "causal chain" (Br. 24) between taxpayer's suit and the assessment or collection of a tax is closely linked.

5. Taxpayer failed to establish that any exception to the AIA applies

The Supreme Court has recognized two equitable exceptions to the AIA: (1) where "it is clear that under no circumstances could the Government ultimately prevail" on the merits of the underlying dispute and that the plaintiff will suffer irreparable injury absent an injunction, *see Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962); and (2) where Congress has not provided an alternative remedy, *see South Carolina v. Regan*, 465 U.S. 367, 373, 378 (1984). The plaintiff has the burden of proving that an exception to the AIA applies. *McCarthy*, 723 F.2d at 1040; *see also Elias v. Connett*, 908 F.2d 521, 525 (9th Cir. 1990);

The District Court correctly concluded that taxpayer failed to show that an exception to the AIA applies here. (A89-90.) Taxpayer has waived any claim that his suit fits within the first exception by failing to assert it in either the District Court or his opening brief.

White v. Hewlett Packard Enter. Co., 985 F.3d 61, 68 n.6 (1st Cir. 2021) (issues not raised in district court are waived); *Vazquez-Rivera v. Figueroa*, 759 F.3d 44, 46–47 (1st Cir. 2014) (issues not raised in opening brief are waived). Although taxpayer did invoke the second exception below (Doc. 14 at 10), his opening brief did not challenge the District Court's finding that he had a pre-seizure remedy (Br. 25). As such, he waived any such challenge. *Vazquez-Rivera*, 759 F.3d at 46-47.

In all events, taxpayer's claim to fit within the second AIA exception fails on the merits. Courts construe the *Regan* exception "very narrowly" because of "the strong policy animating the Anti–Injunction Act, and the sympathetic, almost unique, facts in *Regan*." *Judicial Watch*, 317 F.3d at 408 n.3 (collecting cases); *see also Ambort v. United States*, 392 F.3d 1138, 1140 (10th Cir. 2004). In *Regan*, the Supreme Court held that South Carolina did not have a remedy to a tax statute rendering taxable interest earned from certain state-issued bonds because, as a non-taxpayer, it could not avail itself of the remedies afforded taxpayers under the Code. *Regan*, 465 U.S. at 378. The Supreme Court's ruling turned on the unfairness of the State's having to convince a friendly bondholder to challenge the tax to

vindicate the State's right, which was distinct from any right of the bondholders. *Id.* at 380-81. Thus, the AIA did not bar the state's action challenging the constitutionality of the statute. *Id.* To avail itself of the narrow *Regan* exception, taxpayer must show not merely that it lacks "access to a legal remedy for the precise harm that it has allegedly suffered," but rather that it lacks "any access at all to judicial review." *Judicial Watch*, 317 F.3d at 408.

Here, the District Court identified two sets of alternative remedies potentially available to taxpayer—only one of which taxpayer bothered to mention. First, the court held that taxpayer could have sought to intervene in the *Coinbase* summons case. (A89-90.) To be sure, under I.R.C. § 7609, only a person who is entitled to notice of a summons is entitled to intervene in an enforcement proceeding, and taxpayer was not entitled to notice because he was not "identified in the summons." I.R.C. § 7609(a), (b)(1)-(2); *see Tiffany*, 469 U.S. at 316-17. But as the District Court noted (A89-90), the *Coinbase* court granted the motion of a John Doe to intervene in the enforcement proceeding, holding that he could intervene both as of right and permissibly under Fed. R. Civ. P. Rule 24. *Coinbase*, 2017 WL 3035164, at *4-*7. Further, taxpayer

knew about *Coinbase*, as he participated in an amicus brief in that case. *See* p. 9, *supra*. Taxpayer does not challenge the District Court's determination regarding this first potential remedy.

Moreover, the Coinbase summons illustrates that the John Doe summons procedure provides judicial review, unlike in *Regan*. Congress designed procedures for judicial review of the sufficiency of John Doe summonses in the *ex parte* proceeding before the summons is issued and in a later enforcement proceeding (under standards applicable to all summonses), if the third-party recipient does not comply with the summons. *See* pp. 4-5, *supra*. Both layers of review happened in the *Coinbase* litigation. Further, the *Coinbase* court's determination that the summons there met the *Powell* factors (*see* pp. 5-6, *supra*) was sufficient to satisfy Fourth Amendment requirements. *See Coinbase*, 2017 WL 5890052 at *4-*8; *United States v. Allee*, 888 F.2d 208, 213 n.3 (1st Cir. 1989) ("The Fourth Amendment is not violated as long as the IRS has complied with the requirements of" *Powell*); *see also* p. 40-42, *infra*.

Second, as the District Court held, taxpayer potentially may raise his challenges before assessment in Tax Court (§6213(a)), or after

assessment and payment in a refund suit (§ 7422), if the IRS determines he owes additional tax. (A90.) On appeal, taxpayer (Br. 25) barely addresses the District Court's determination regarding potential post-seizure remedies, merely calling it "odd" (Br. 25) for the District Court to "suggest" (*id.*) the availability of future proceedings because the IRS may not determine that he owes additional tax. The potential for future proceedings is sufficient to find that a taxpayer has not been deprived of a remedy, if his suit is not otherwise permitted to proceed under the AIA. *See McCarthy*, 723 F.2d at 1040 (AIA barred an action challenging a regulation that affected a pension fund's tax-exempt status; explaining that the appellants had alternative remedies in the event that their tax-exempt status was revoked). As in *McCarthy*, taxpayer has alternative remedies if the IRS determines that he owes additional tax.

B. The amended complaint fails to state any claims upon which relief could be granted

Even if the District Court had jurisdiction over taxpayer's claims for injunctive and declaratory relief, the claims in the amended complaint should be dismissed for failure to state a claim, as we argued below. (Doc. 12-1 at 20-25.) Although the District Court did not

address the Government's arguments on that score, this Court "can affirm on any ground appearing in the record—including one that the [district] judge did not rely on." *Rivera-Colon v. AT&T Mobility Puerto Rico, Inc.*, 913 F.3d 200, 207 (1st Cir. 2019).

1. Count I fails to state a claim of a Fourth Amendment violation

a. Probable cause is not required before the IRS may obtain taxpayer's information

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." "[T]he basic purpose" of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter v. United States*, —U.S.—, 138 S. Ct. 2206, 2213 (2018). The Fourth Amendment is accordingly "applicable to the activities of civil as well as criminal authorities." *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985). To determine whether government action constitutes a search or seizure, courts must assess whether the action invades "a justifiable, a reasonable, or a legitimate expectation of privacy." *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (citations omitted). Courts consider

whether an individual alleging a Fourth Amendment violation "exhibited an actual (subjective) expectation of privacy," and, if so, whether that "subjective expectation of privacy is one that society is prepared to recognize as reasonable." *Id.* (citations omitted); *see also Carpenter*, 138 S. Ct. at 2213; *Johnson v. Duxbury, Mass.*, 931 F.3d 102, 106, 107-08 (1st Cir. 2019).

Even if government action constitutes a search or seizure, the Government does not violate Fourth Amendment rights if its action was reasonable. *See United States v. William*, 603 F.3d 66, 68 (1st Cir. 2010). Outside the context of a criminal investigation, reasonableness "depends on balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *McCabe v. Life-Line Ambulance Serv., Inc.*, 77 F.3d 540, 546-47 (1st Cir. 1996) (cleaned up). "[W]hen it comes to the IRS's issuance of a summons, compliance with the *Powell* factors satisfies the Fourth Amendment's reasonableness requirement." *Presley v. United States*, 895 F.3d 1284, 1293 (11th Cir. 2018); *Allee*, 888 F.2d at 213 n.3 (same). As relevant here, the *Coinbase* court ordered a narrowed version of the Coinbase

summons enforced after finding that it satisfied *Powell*. *Coinbase*, 2017 WL 5890052, at *4-*8. Taxpayer cites nothing permitting him to use an action like this one to challenge that final decision.

Taxpayer relies heavily (Br. 1, 25-26, 33, 35, 39, 40) on the claim that the IRS was required to show probable cause—a "particularized suspicion" (Br. 24) that he has violated tax laws—before it obtained his financial information. (A27-28.) But the Supreme Court has long held that the broad investigatory authority provided in I.R.C. § 7601 (to investigate and audit persons who may be liable for taxes) and § 7602(a) and (b) (to examine records and to issue summonses, respectively) "is not limited to situations in which there is probable cause, in the traditional sense, to believe that a violation of the tax laws exists." *United States v. Bisceglia*, 420 U.S. 141, 146 (1975); *see also United States v. Arthur Young & Co.*, 465 U.S. 805, 813 n.10 (1984) (declining to adopt a "probable cause" standard for issuance of an IRS summons); *Powell*, 379 U.S. at 57 ("[T]he Commissioner need not meet any standard of probable cause to obtain enforcement of his summons."). This is so because "[t]he purpose of the statutes is not to accuse, but to inquire." *Bisceglia*, 420 U.S. at 146. The IRS "can investigate merely

on suspicion that the law is being violated, or even just because it wants assurance that it is not." *Powell*, 379 U.S. at 57.

In short, regardless of whether taxpayer had a protected interest for Fourth Amendment purposes, no probable cause is required before the IRS may obtain taxpayer information, and the existing summons procedures satisfy reasonableness requirements.[6]

b. The third-party doctrine applies to preclude any privacy right

Moreover, taxpayer had no privacy interest in the financial information held by Coinbase and Abra relating to his transactions there. "[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith*, 442 U.S. at 743-44 (citing, *inter alia*, *United States v. Miller*, 425 U.S. 435, 442–44 (1976)). This principle, known as the third-party doctrine, applies "even if the information is revealed on the assumption that it will be

[6] Taxpayer also errs in suggesting (Br. 23) that the flush language in § 7609(f)—which requires that information sought in the John Doe summons be "narrowly tailored" to information that pertains to the failure or potential failure to comply with tax laws—is akin to a probable cause standard for believing that a specific taxpayer has or may have violated tax laws. Further, the flush language was not added to § 7609(f) until 2019, after the *Coinbase* summons was enforced. *See* Pub. L. No. 116-25, 133 Stat. 988, § 1204(a) (July 1, 2019).

used only for a limited purpose and the confidence placed in the third party will not be betrayed." *Miller*, 425 U.S. at 443 (citations omitted).

The Supreme Court first stated the third-party doctrine in *Miller*, where it held that a person lacks a reasonable expectation of privacy in bank records pertaining to him. The government had subpoenaed bank records for Miller, whom it was investigating for tax evasion. 425 U.S. at 437-38. The Court found that the "depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." *Id.* at 443. *See also Smith*, 442 U.S. at 741-44 (citing *Miller* and determining that use of a pen register (a device that records the phone numbers dialed from a particular phone) is not a Fourth Amendment search on the same ground). The Supreme Court recognized that in enacting the Bank Secrecy Act, Congress assumed that individuals lacked "any legitimate expectation of privacy concerning the information kept in bank records." *Miller*, 425 U.S. at 442-43. The Court also observed that bank records "[were] not the respondent's 'private papers'" but were instead "the business records of the banks." *Id.* at 440; *see also Duxbury*, 931 F.3d at 107.

Accordingly, the Government could subpoena those records without infringing on an accountholder's Fourth Amendment rights. *Id.* at 444.

Taxpayer incorrectly asserts (Br. 35) that, after the Supreme Court's recent decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), "the Fourth Amendment requires a warrant based on probable cause for seizure of sensitive personal information from third parties." In *Carpenter*, 138 S. Ct. at 2217, the Supreme Court declined to extend the third-party doctrine to what it described as "novel circumstances": obtaining cell site location information ("CSLI") from mobile phone records that provided a comprehensive record of a person's location over a period of more than three months. The Court expressly stated that its decision was a "narrow one" limited to the CSLI context and that it expressed no view "on matters not before" the Court. *Id.* at 2220; *see also id.* (relying on the "unique nature of cell phone location information").

Far from "diminish[ing]" *Miller* (Br. 36), the *Carpenter* Court "reaffirmed the continuing vitality of *Miller*'s holding." *Presley*, 895 F.3d at 1291. Indeed, the Supreme Court expressly stated that its decision did "not disturb the application of *Smith* and *Miller*."

Carpenter, 138 S. Ct. at 2220. Rather, it simply declined to "extend *Smith* and *Miller* to cover the[] novel circumstances" presented in *Carpenter*. *Id.* at 2217. The Supreme Court also recognized that it would be a "rare" case in which a warrant would be required to obtain records held by a third party. *Id.* at 2222. This Court and other appellate courts have declined to extend *Carpenter* beyond the "unusual concern" posed by CSLI in *Carpenter*. *United States v. Hood*, 920 F. 3d 87, 92 (1st Cir. 2019) (no reasonable expectation of privacy in Internet Protocol (IP) address or subscriber information held by online service providers); *see also United States v. Gratkowski*, 964 F.3d 307, 310-13 (5th Cir. 2020); *Standing Akimbo, LLC v. United States*, 955 F.3d 1146 (10th Cir. 2020); *Presley*, 895 F.3d at 1291.

Under the third-party doctrine, taxpayer had no reasonable expectation of privacy in account information held by Coinbase or Abra. Taxpayer does not argue that Coinbase and Abra are meaningfully different from traditional banks for purposes of the third-party doctrine under *Miller*. (Br. 36.) Indeed, as the Fifth Circuit has explained, an account-holder's records at Coinbase are "more akin to" the bank records in *Miller* than to the CSLI in *Carpenter*. *United States v.*

Gratkowski, 964 F.3d 307, 312 (5th Cir. 2020) (holding that criminal defendant had no Fourth Amendment protected interest in Coinbase records). Like traditional banks, Coinbase is a financial institution "subject to the Bank Secrecy Act as [a] regulated financial institution[]," and both Coinbase and traditional banks "keep records of customer identities and currency transactions." *Id.* The court also concluded that "the nature of the information and the voluntariness of the exposure weigh heavily against finding a privacy in Coinbase records." *Id.* at 312 (citing *Carpenter*, 138 S. Ct. at 2219). In that regard, the court found that Coinbase records "provide[d] only information about a person's virtual currency transactions" and did not provide agents with the "intimate window of a person's life" that formed the basis of the *Carpenter* ruling. *Id.* It also found that "transacting bitcoin through Coinbase or other virtual currency exchange institutions requires an affirmative act on part of the user," unlike the collection of CSLI in *Carpenter*. *Id.*

Similarly, the enforcement order in *Coinbase* directs the exchange to produce the same identifying information—taxpayer's name, date of birth, address, and tax ID number—that a traditional bank would

collect from a customer when opening an account. *Coinbase*, 2017 WL 5890052, *8. Coinbase was also required to produce its own "records of account activity including transaction logs or other records identifying the date, amount, and type of transaction (purchase/sale/exchange), the post transaction balance, and the names of counterparties to the transaction," and "periodic statements of account or invoices (or the equivalent)." *Id.* Information regarding the purchase, sale, or exchange of currency is precisely the sort of commercial information that *Miller* held does not implicate privacy interests. *Miller*, 425 U.S. at 442.

By any measure, taxpayer voluntarily conveyed his information to the exchanges and therefore had "no legitimate expectation of privacy" in it. *Smith*, 442 U.S. at 743-44. Like the defendant in *Gratkowski*, taxpayer chose to use digital currency exchanges and thereby "elect[ed] to sacrifice some privacy."[7] *Gratkowski*, 964 F.3d at 312.

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[7] So far as the record shows, Abra operates similarly to Coinbase in terms of the digital currency exchange services offered to customers, and taxpayer does not suggest otherwise. (A20-21, 47-54.) And like Coinbase and traditional banks, Abra is subject to the Bank Secrecy Act. (*See* A51.) *See also Miller*, 425 U.S. at 442-43; *Gratkowski*, 964 F.3d at 310-11.

Two district courts also likewise held that customers have no privacy interest in financial information at digital currency exchanges in cases involving IRS summonses directed to Coinbase and another digital currency exchange for records of a taxpayer's bitcoin transactions. *See Zietzke v. United States*, 426 F. Supp. 3d 758 (W.D. Wash. 2019); *Zietzke v. United States*, No. 19-CV-03761-HSG(SK), 2020 WL 264394 (N.D. Cal. Jan. 17, 2020), *report and recommendation adopted*, 2020 WL 6585882 (N.D. Cal. Nov. 10, 2020). This Court should hold the same.

c. Taxpayer's contracts with Coinbase and Abra did not create a reasonable expectation of privacy in the account information held by those exchanges

Taxpayer errs in arguing that the third-party doctrine does not apply because he "contracted" with Coinbase and Abra "to ensure that they would not share his information with the government without a lawful directive of the government". (Br. 36; *see also* Br. 1, 30, 37-40.) *See Duxbury*, 931 F.3d at 108 (suggesting that an agreement to keep information confidential may be relevant to whether a reasonable expectation of privacy exists). The Supreme Court, however, has held that there is no reasonable expectation of privacy in information shared

with a third party even when the information was shared "on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *Miller*, 425 U.S. at 443 (emphasis added).

Even if the exchanges' privacy policies were relevant, they are not as robust as taxpayer claims. Coinbase's privacy policy states that in certain circumstances it may share a customer's "personal information" (A44), including "information that can be associated with a specific person and can be used to identify that person," (A42), with "[l]aw enforcement, government officials, or other third parties" when Coinbase is "compelled to do so by a subpoena, court order, or similar legal procedure" (A44). That is precisely what Coinbase was required to do under the enforcement order.

In addition, Coinbase's privacy policy allows it to share "personal information" if it "believe[s] in good faith that the disclosure of personal information is necessary to . . . report suspected illegal activity." (A44.) Coinbase was therefore free to share taxpayer's "personal information" with the IRS on its own initiative, or upon a request from the IRS, if it

believed "in good faith" that disclosure was necessary to report suspected illegal behavior. (*Id.*)

Abra's policy provides even less protection. It provides that Abra may, "in its sole discretion, disclose [the customer's] information if we believe that it is reasonable to do so." (A50.) And while Abra assures customers that "such disclosure is limited to situations where the personal data are required for" limited purposes, one of those purposes is "pursuing Abra's legitimate interests," which are undefined. (*Id.*) Among the nonexhaustive list of examples of "reasonable disclosure[s]" under the privacy policy is "responding to requests, such as discovery, criminal, civil, or administrative process, subpoenas, court orders, or writs from law enforcement or other government or legal bodies." *Id.* The policy therefore expressly permits disclosure of customers' information in response to "requests" falling far short of a "directive of the government," let alone an order supported by probable cause, as taxpayer contends (Br. 36). A John Doe summons, which taxpayer alleges was issued to Abra (A33 ¶141), fits comfortably into the nonexhaustive category of "requests" (A50), "administrative" (*id.*) or

otherwise, for which disclosure of taxpayer's information is permitted in Abra's "sole discretion" (*id.*).

Taxpayer relies (Br. 38) on inapposite criminal cases to argue that contractual arrangements can create a privacy interest. *See United States v. Dorais*, 241 F.3d 1124, 1130 (9th Cir. 2001); *United States v. Boruff*, 909 F.2d 111, 117 (5th Cir. 1990). Neither case addresses the third-party doctrine or financial information provided to a third party. Instead, both cases address Fourth Amendment interests in relation to physical intrusions on property, which did not occur here.

Similarly, *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010) (Br. 39), is inapt. Nothing in the record suggests that any information the IRS may have obtained from Coinbase or Abra included "confidential communications" akin to the content of emails, letters, or phone calls held protected in *Warshak*. *Id.* at 288.

d. Taxpayer's property rights theory fails

Taxpayer's argument (Br. 39-40) that he stated a claim for a violation of his property rights is without merit. His theory (Br. 34-35, 39) appears to rest on Justice Gorsuch's lone dissent in *Carpenter*, in which he explained that he would have resolved that case by applying a

"bailment" theory under a "traditional" property analysis that requires a warrant before the government may obtain an individual's property. *Carpenter*, 138 S. Ct. at 2268-69 (Gorsuch, J., dissenting).

But the majority in *Carpenter* did not adopt the bailment theory. And whatever merit taxpayer believes the theory has, it cannot withstand the *Carpenter* majority's express language confirming the continuing vitality of *Miller* and *Smith*. 138 S. Ct. at 2220. As we have explained, *supra*, at 46-47, account and transaction information held by a digital currency exchange is the kind of third-party information covered by the third-party doctrine set forth in *Miller* and *Smith*.

Taxpayer relies (Br. 33-34, 39-40) on *United States v. Jones*, 565 U.S. 400 (2012), and *Florida v. Jardines*, 569 U.S. 1 (2013), but those cases are of no help to him. Both cases addressed only physical intrusions onto property, and did not address acquisition of third-party account information. *See Jones*, 565 U.S. at 404; *Jardines*, 569 U.S. at 6-7. Indeed, the majority in *Jones* made clear that its holding did not reach non-trespassory searches. 565 U.S. at 412-13.

2. Count II fails to state a Fifth Amendment violation

Taxpayer likewise failed to state a claim for violation of the Fifth Amendment procedural due process clause. Generally, "some form of hearing is required before an individual is finally deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *accord Perrier-Bilbo v. United States*, 954 F.3d 413, 433 (1st Cir. 2020). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333. In determining whether an administrative system affords a meaningful opportunity to be heard, "due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334.

To state a procedural due process claim, a plaintiff must (1) identify a protected liberty or property interest, and (2) allege that the defendants deprived him of that interest without constitutionally adequate process. *Air Sunshine, Inc. v. Carl*, 663 F.3d 27, 34 (1st Cir. 2011). Taxpayer fails to show that his purported privacy interest in the financial information is a protected interest for Fifth Amendment procedural due process purposes. In *Lepelletier v. FDIC*, 164 F.3d 37,

46-49 (D.C. Cir. 1999) (cited Br. 42), the D.C. Circuit addressed privacy interests protected solely under Exemption 6 of the Freedom of Information Act, 5 U.S.C § 552(b)(6). Similarly, its discussion of due process solely addressed bank depositors' property interest in unclaimed funds at issue there. *Lepelletier*, 164 F.3d at 45-46. By contrast, taxpayer has no property interest in the financial information at Coinbase or Abra, *see* pp. 52-53, *supra*. This Court therefore need not determine "whether any deprivation occurred without constitutionally adequate process." *Perrier-Bilbo*, 954 F.3d at 434.

Even if a protected interest were at stake, taxpayer fails to identify any procedures (or "set process," Br. 41) that the IRS failed to follow regarding either exchange. The only statutory provision identified in Count II as having been violated is § 7609(a), which requires that the IRS give notice to "any person . . . who is identified in the summons." *See* Br. 41-42; A31 ¶127. As an unnamed person in the John Doe summons issued to Coinbase and/or (allegedly) to Abra, taxpayer was not entitled to notice under § 7609(a) before the IRS sought or obtained the requested information. Indeed, prior notice to John Does is "not possible" because their identities are unknown to the

IRS when it issues the summons—and presumably will remain unknown until the IRS obtains the requested information. *Tiffany*, 469 U.S. at 317. Taxpayer cites nothing establishing that the government is required to provide additional due process under these circumstances.

Insofar as taxpayer's argument (Br. 41-42) is directed at § 7609(f), which sets forth the three factors the IRS must show in the *ex parte* proceeding, Count II makes no claim about a violation of § 7609(f). (A29-32.) In any event, the face of the complaint shows that the IRS followed all required procedures in § 7609 with respect to the Coinbase summons. (Br. 41-43; A32-34.) The IRS sought an *ex parte* order permitting it to serve the summons, as required by § 7609(f) and (h)(2), and the District Court determined that the IRS satisfied § 7609(f) requirements. (A17 ¶38.) *Coinbase*, 2017 WL 5890052, at *1. When Coinbase declined to comply with the summons, the IRS properly petitioned to enforce the summons. (A18 ¶46.) I.R.C. § 7604(b). The matter was fully litigated, and the District Court issued an order enforcing a narrowed version of the summons. (A19 ¶52.) *Coinbase*, 2017 WL 5890052, at *8. Nothing more was required. Taxpayer's

disagreement with the merits determinations in *Coinbase* is not a due process violation. (Br. 41-42; A19-20; *see also* Br. 31-32.)

Taxpayer also was not entitled to additional procedures under *Mathews* before the IRS obtained his information. 424 U.S. at 335. The test requires balancing : (i) the private interest affected; (ii) the risk of an erroneous deprivation of that private interest and probable value, if any, of additional procedures; and (iii) the Government's interest in the existing procedures, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirement would entail. *Id.*

Taxpayer fails to meet the first factor because he lacks a property interest here. On the second factor, taxpayer baselessly asserts (Br. 42) that the risk that the John Doe summons procedures wrongly deprived him of his purported interest is "especially high" because the IRS "did not even follow statutory procedures [in § 7609] before it intruded upon his protected interests. As the *Coinbase* enforcement order makes clear, however, the IRS complied with required procedures. *Coinbase*, 2017 WL 5890052 at *1-*3.

In the John Doe summons procedures, Congress provided additional safeguards to protect taxpayers whose identities are unknown to the IRS and entrusted district courts to enforce them. I.R.C. §§ 7609(f), (h)(2); *Tiffany*, 469 U.S. at 317; *Gertner*, 65 F.3d at 972. The Supreme Court has approvingly found that § 7609(f) "provide[s] some guarantee that the information that the IRS seeks through a summons is relevant to a legitimate investigation, albeit that of an unknown taxpayer." *Tiffany*, 469 U.S. at 321. This Court has found that judicial preapproval under § 7609(f) "permits the district court to act as a surrogate for the proceeding and to exert a restraining influence on the IRS." *Gertner*, 65 F.3d at 972 (cleaned up). Indeed, taxpayer concedes (Br. 41) that in adopting § 7609(f), Congress "attempted to approximate the requirements of the Due Process Clause."

The IRS has a strong interest in not providing additional or substitute procedures. *Mathews*, 424 U.S. at 335. It is difficult to imagine what additional pre-deprivation procedural safeguards could be provided to taxpayers whose identities are unknown to the IRS. Moreover, due process "does not invariably require a hearing before the

[government] can interfere with a protected property interest." *Gonzalez-Droz v. Gonzalez-Colon*, 660 F.3d 1, 14 (1st Cir. 2011). And taxpayer has not argued that post-deprivation procedures are inadequate. (Br. 40-43; Doc. 14 at 25.) Indeed, it is well-settled in the tax context that post-deprivation process is sufficient to satisfy due process. *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931). As the District Court explained in the context of the AIA, taxpayers have alternative means of challenging seizure of their information. (A89-90.) Moreover, taxpayer is not in a position to claim entitlement to additional procedures before the IRS obtained his information when, based on his participation in an amicus brief in *Coinbase*, he had actual notice of the Coinbase summons, but did not attempt to intervene in the proceeding under Fed. R. Civ. P. Rule 24.

3. Count III fails to state a claim for a violation of § 7609(f)

Count III fails at the outset because § 7609 does not provide for a cause of action and taxpayer lacks standing in any event. The statute imposes procedural requirements on the IRS when issuing third-party summonses; it does not provide for a suit or remedy for violations of those procedures. And as taxpayer concedes elsewhere in his brief (Br.

41), § 7609 does not give unnamed persons standing to enforce anything relating to third-party summonses. Unnamed taxpayers cannot participate in the *ex parte* proceeding and only persons entitled to notice under § 7609(a) have a statutory right to intervene in an enforcement proceeding (§ 7604(b)) or file a petition to quash the summons (§ 7609(b)(1)-(2)). Taxpayer lacks statutory standing to pursue Count III. *Vander Luitgaren v. Sun Life Assur. Co. of Canada*, 765 F.3d 59, 62 (1st Cir. 2014) (statutory standing addresses "whether Congress has accorded this injured plaintiff the right to sue the defendant [under the particular statute] to redress his injury.").

Taxpayer also fails to show any violation of § 7609(f). The IRS followed all § 7609 requirements relating to the *Coinbase* summons. *See* p. 55-56, *supra*. Because the amended complaint treats Abra and Coinbase the same for purposes of Count III, taxpayer has not identified any § 7609(f) procedures that were violated with respect to Abra.[8]

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[8] Taxpayer asserts that the IRS obtained his financial information from Abra "without any subpoena at all," suggesting that the IRS was required to issue a summons to obtain information from Abra and did not do so. (Br. 31; *see also* Br. 30.) This is inconsistent with Count III, which alleges that IRS agents "issued a John Doe subpoena [sic] . . . to Abra and/or Coinbase," that he did not receive notice of the

(continued…)

Further, taxpayer mistakenly thinks that matters determined in the *ex parte* proceeding remain at issue once the proceeding is over. (Br. 31-32.) A district court's determination in an *ex parte* proceeding is not open to collateral attack in a later enforcement proceeding. *See United States v. John G. Mutschler & Assocs., Inc.*, 734 F.2d 363, 366 (8th Cir. 1984); *United States v. Samuels, Kramer & Co.*, 712 F.2d 1342, 1346 (9th Cir. 1983); *Matter of Does*, 688 F.2d 144, 145-46, 148-49 (2d Cir. 1982); *but see United States v. Brigham Young Univ.*, 679 F.2d 1345 (10th Cir. 1982) (a third party may question whether there was a reasonable basis for issuing a John Doe summons when attempting to show an abuse of process in enforcement proceeding), *vacated and remanded for consideration of possible mootness*, 459 U.S. 1095 (1983).

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summons(es), and that the "John Doe summons issued to Abra and/or Coinbase" did not comply with the requirements of § 7609(f) (A33-34 ¶¶141-44). (*See also* A32 (heading).)

This Court should ignore the unsupported assertion that the IRS "probably" (Br. 30) obtained his financial information "without any subpoena issued to" an unidentified exchange "comparable" to Abra (*id.*). Count III only addresses John Doe summonses (allegedly) issued to Coinbase and Abra. (A33 ¶¶141, 143.) Moreover, taxpayer alleged that he held virtual currency accounts only at Coinbase, Abra, and Uphold (A33 ¶139) and that Uphold confirmed that it did not receive a request from, or provide information to, the IRS (A23 ¶71-74).

Finally, contrary to taxpayer's unsupported assertion (Br. 31), the fact that § 7609(f) sets forth factors required to obtain an *ex parte* order to issue a John Doe summons does not "expand beyond the *Powell* criteria the substantive grounds on which a record-keeping taxpayer can resist *enforcement* of a summons." *Samuels, Kramer & Co.*, 712 F.2d at 1346 (emphasis in original). *See also Matter of Does*, 688 F.2d at 149 (same); *United States v. Pittsburgh Trade Exch. Inc.*, 644 F.2d 302, 306 (3rd Cir. 1981) ("There is no indication that Congress intended a broader substantive protection of unknown than of known taxpayers.").

CONCLUSION

For the reasons discussed above, the order of the District Court should be affirmed.

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