No. 23-1565
ORAL ARGUMENT SCHEDULED FOR MARCH 4, 2024

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JAMES HARPER,

Plaintiff-Appellant,

v.

DANIEL I. WERFEL, in his official capacity as Commissioner of the Internal Revenue Service; INTERNAL REVENUE SERVICE; JOHN DOE IRS AGENTS 1-10,

Defendants-Appellees.

On Appeal from the U.S. District Court
for the District of New Hampshire
No. 1:20-cv-00771-JL; Judge Joseph N. Laplante

PLAINTIFF-APPELLANT'S REPLY BRIEF

Richard A. Samp
First Circuit Bar No. 19778
Sheng Li
NEW CIVIL LIBERTIES ALLIANCE
1225 19th Street NW, Suite 450
Washington, DC 20036
202-869-5210
rich.samp@ncla.legal
sheng.li@ncla.legal

January 31, 2024

Counsel for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Statutes and Constitutional Provisions:

Page(s)

Miscellaneous:

INTRODUCTION

Appellees assert that Appellant James Harper's Fourth Amendment claims "lack any merit," citing *United States v. Miller*, 425 U.S. 435, 443 (1976), for the proposition that "a person lacks a reasonable expectation of privacy in information voluntarily provided to a third party." IRS Br. 15-16. *Miller*'s applicability is limited; while it may have some relevance to reasonable-expectation-of-privacy claims, it is inapplicable to Harper's claim that Appellees literally searched and seized his personal "papers and effects" in violation of his Fourth Amendment rights.

Carpenter v. United States, 138 S. Ct. 2206, 2222 (2018), cautioned strongly against expanding *Miller*'s third-party doctrine to records other than the negotiable checks and other banking records at issue in that case. It held that the "entirely different species" of personal information at issue in *Carpenter* "implicate[d] basic Fourth Amendment concerns much more directly than corporate tax or payroll ledgers." *Ibid.*

Appellees assert there is no constitutional distinction between the seizure of a single taxpayer's bank records in *Miller* and the summons at issue here, which sought personal records linking to vast data stores about hundreds of thousands (later, tens of thousands) of Coinbase customers. IRS Br. 27. An intrusion of that magnitude would have been physically impossible when *Miller* was decided in 1976, before the age of modern digital records. Digital records are vulnerable to hacking as physical

documents never were. Indeed, as Harper explains herein, disclosure of individuals' digital currency records exposes them to serious risks, ranging from tracking to home invasions.

Appellees' brief also invites the Court to ignore the principles of contract law our nation inherited from English common law. They argue that tax collectors need not respect contracts under which one party agrees to maintain the confidentiality of digital papers and effects they hold on behalf of the other party. Recent Supreme Court decisions, including *United States v. Jones*, 565 U.S. 400 (2012), reject the notion that property and contractual rights can be dispensed with so easily. There is no IRS exception to the Fourth Amendment, despite Appellees' best efforts to create one.

Appellees' rejection of Harper's statutory and Fifth Amendment rights are equally troubling. Appellees assert they were free to seize his personal records from Coinbase without ever notifying him what they were doing, despite how easily Appellees could have notified Harper of their intentions and provided him an opportunity to object. The Framers adopted the Fifth Amendment, and Congress adopted 26 U.S.C. § 7609(f), to prevent such surreptitious conduct. And even if Appellees were unable to provide Harper with pre-seizure notice of their intended

conduct, they have provided no coherent rationale for denying a post-seizure opportunity to object.

ARGUMENT

I. HARPER HAS STATED A CLAIM UNDER THE FOURTH AMENDMENT

Justice Holmes declared a century ago that: "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe" an agency may "direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime." *FTC v. Am. Tobacco Co*., 264 U.S. 298, 306 (1924). It is difficult to imagine a starker example of an agency-directed fishing expedition than IRS's collection of financial records "regarding 8.9 million transactions and 14,355 [Coinbase] account holders." *See United States v. Coinbase, Inc*., No. 17-CV-01431, 2017 WL 5890052, at *2 (N.D. Cal. Nov. 28, 2017) ("*Coinbase III*").

IRS's primary Fourth Amendment argument expands the third-party doctrine to new arenas, namely: (1) cases involving claims of property-based Fourth Amendment searches, as opposed to being limited to privacy-based claims; (2) cases involving dragnet surveillance targeting thousands of citizens, as opposed to a single suspect or a small group; and (3) cases involving transactions based on "blockchain" technology, which implicate privacy interests in fundamentally different ways from the 1970s-era technology from which the third-party doctrine arose. "In the years

since its adoption, countless scholars [and several Justices] have come to conclude that the 'third-party doctrine is not only wrong, but horribly wrong.'" *Carpenter*, 138 S. Ct. at 2262 (quoting Kerr, *The Case for the Third-Party Doctrine*, 107 Mich. L. Rev. 561, 563 n.5, 564 (2009)); *see also Jones*, 565 U.S. at 417 (Sotomayor, J., concurring) (calling third-party doctrine "ill suited to the digital age"). While this Court cannot overturn the third-party doctrine, it should not expand that doctrine to new contexts.

IRS's alternative argument that compliance with *Powell* ratifies § 7609(f) summonses under the Fourth Amendment also fails. This amounts to a new, statutory Fourth Amendment exemption that enables IRS "fishing expeditions" without individualized suspicion. The Framers adopted the Fourth Amendment precisely to halt such "indiscriminate searches and seizures conducted under the authority of 'general warrants.'" *Payton v. New York*, 445 U.S. 573, 583 (1980).

A. The Third-Party Doctrine Does Not Apply to Property-Based Fourth Amendment Claims

IRS mistakenly relies on the third-party doctrine under *Miller*, 425 U.S. 435, and *Smith v. Maryland*, 442 U.S. 735 (1979), to rebut Harper's property-based Fourth Amendment claim. IRS Br. 33-34. IRS cites no property-based Fourth Amendment case applying that doctrine. The third-party doctrine arose during a period where courts deviated from the Fourth Amendment's property-based approach in favor of asking whether a person has a legitimate expectation of privacy in information that the

government collected. The doctrine's logic is firmly rooted in the diminished expectations of privacy to information voluntarily shared with others and is therefore inapplicable to Harper's property-based claim. *See Florida v. Jardines*, 569 U.S. 1, 11 (2013).

"Fourth Amendment jurisprudence was tied to common-law trespass, until the latter half of the 20th century." *Jones*, 565 U.S. at 405. At that point, the Court "deviated from that exclusive property-based approach" by declaring that the "Fourth Amendment protects people, not places [or things]." *Id.* (citing *Katz v. United States*, 389 U.S. 347, 351 (1967)). Fourth Amendment jurisprudence thereafter asked whether "government officers violate a person's 'reasonable expectation of privacy,'" until the Supreme Court revitalized the property-based approach in *Jones*. *Id.*

Miller and the third-party doctrine are products of the post-*Katz* and pre-*Jones* deviation. *Miller* exclusively "examine[d] the nature of the particular documents sought to be protected to determine whether there is legitimate '*expectation of privacy*' concerning their contents." 425 U.S. at 442 (emphasis added). It withheld Fourth Amendment protection because it "perceive[d] no legitimate 'expectation of privacy' in their contents," which consisted of "only information voluntarily conveyed to the banks and exposed to their employees." *Id.*

The expectation of privacy, however, has nothing to do with Harper's claim that IRS's seizure of his financial records was a seizure of his property. Harper's property interest in financial records that IRS seized is unaffected by his expectation of privacy. *Jardines*, 569 U.S. at 11. Nor does it matter that he voluntarily conveyed information to Coinbase. A companion to the third-party doctrine is the plain-view doctrine, which recognizes that a person has diminished expectation of privacy with respect to movement that he discloses to the public. *See United States v. Knotts*, 460 U.S. 276, 284 (1983). The only distinction is whether one disclosed information to many third parties (plain-view doctrine) or just one (third-party doctrine). The motorist in *Taylor v. City of Saginaw*, 922 F.3d 328, 333-34 (6th Cir. 2019), parked her vehicle in plain view on public streets. The Sixth Circuit nonetheless held that chalking the vehicle's tire was a Fourth Amendment search because the city intruded upon her property. *Id.* That was because the motorist's expectation of privacy with respect to a public parking spot has nothing to do with her ownership of the vehicle with which the city made "intentional physical contact." *Id.* at 333. Similarly, Harper's property interests in his financial information are unaffected by his disclosure of that information to Coinbase.

Harper's property interest in those records is governed by his agreement with Coinbase, which makes clear they are his. IRS grants that Harper had a valid contract,

IRS Br. 31, but denies that the contract protects his property rights in the material he shared with Coinbase. *Id.* at 32 ("Coinbase's privacy policy is not as robust as [Harper] claims."). IRS argues that the contract "warned" Harper that Coinbase "may share his 'personal information'" with government officials if "compelled to do so by court order." *Ibid*. But the issue here is whether IRS properly obtained a court order. If not, then IRS has no right to abrogate Harper's contractual and property rights in his financial records. The contract robustly protected Harper's privacy rights in those records, and the plain meaning of the contractual language is that disclosures to the government were permitted only in response to *valid* legal process.

Appellees note that the contract also permitted disclosure when Coinbase "believe[s] in good faith" that disclosure "is necessary ... to report suspected illegal behavior." *Ibid*. (citing JA41). There is no evidence that Harper had violated the law, and he has not violated the law.[1]

Storing records on Coinbase servers hardly precludes Harper's property interests. Individuals routinely store their property with others under contractual

[1] By seeking to obtain Harper's records without providing him notice or an opportunity to object, IRS creates a dilemma for Coinbase. It cannot determine whether compliance with the summons would breach its contractual obligations because—without Harper's input—it cannot determine whether IRS is complying with his Fourth Amendment rights. That dilemma is eliminated if property owners such as Harper are granted the right to participate in matters that will dispose of their property.

bailment arrangements without forfeiting their property rights. *Carpenter*, 138 S. Ct. at 2268-69 (Gorsuch, J., dissenting). Contrary to Appellees' claim, IRS Br. 35, the *Carpenter* majority did not undermine Justice Gorsuch's bailment position. Rather, to the extent the majority "confirmed the continuing vitality of *Miller* and *Smith*," *id.*, it did so only in the expectation-of-privacy context, recognizing that *Miller* and *Smith* apply only where the government intrusion is limited. *Carpenter*, 138 S. Ct. at 2220. *Carpenter* did not—and could not have—considered whether Mr. Carpenter had a property interest in the cell-site data because he "forfeited perhaps [t]his most promising line of argument." *Id.* at 2272.

A seizure or search occurs whenever the government seizes or searches a person's effects that are stored with a third-party bailee. Just last week, the Ninth Circuit held that the FBI's warrantless seizure of the content of 700 individuals' safety deposit boxes stored at a third-party company was a Fourth Amendment search. *Snitko v. United States*, __ F.4th __, 2024 WL 237732 at *15 (9th Cir. Jan. 23, 2024) (holding that inventory exception did not excuse warrantless searches). Harper's records were likewise stored at Coinbase under a contractual bailment arrangement, and their warrantless seizure by IRS was unconstitutional.

IRS's assertion that "physical intrusions onto [Harper's] property … did not occur" as part of such seizure is false. IRS Br. 47. That Harper's records are digital

rather than paper does not mean they lack physical substance. Electronic records stored at Coinbase consist of configurations of physical matter—*i.e.*, electrons— over which Harper had a property interest. *Riley v. California*, 573 U.S. 373 (2014) (search of cell phone digital data is subject to Fourth Amendment constraints). IRS's seizure of those records is no less a physical intrusion than, for instance, tire chalking. *See Taylor*, 922 F.3d at 333. To conclude otherwise would extinguish Fourth Amendment protection over digital documents, communications, photographs, videos, etc., that Americans routinely store at third-party companies under bailment arrangements.

B. The Third-Party Doctrine Does Not Apply to IRS's Dragnet Surveillance

Appellees stretch the third-party doctrine to the breaking point, arguing that Harper lacks any privacy interest in financial records voluntarily conveyed to Coinbase. IRS Br. 19-20. Were the doctrine so broad, telephone calls would be subject to warrantless surveillance. But *Katz*, the parent of the "reasonable expectation" doctrine, held that a person has a privacy interest in phone conversations even though the contents are obviously shared with the person on other end, 389 U.S. at 351, and third-party "telephone companies had a right to monitor calls." *United States v. Warshack*, 631 F.3d 266, 286 (6th Cir. 2010). Neither *Smith* nor *Miller* disturbed *Katz*'s holding that warrantless wiretapping of private phone calls was unconstitutional.

Carpenter, 138 S. Ct. 2206, confirmed that the third-party doctrine depends on the limited nature and scope of the information collected. The doctrine has no place where the government obtains broad and intrusive information that "provides an intimate window into a person's life," *id.* at 2217, nor where it engages in dragnet surveillance "against everyone," *id.* at 2018; *see also id.* at 2019 ("[S]hifts in digital technology … made possible the tracking of not only Carpenter's location but also everyone else's, not for a short period but for years and years.").

In *Smith*, the government collected from a telephone company the "numbers" that a single defendant dialed from his landline for a single day. 442 U.S. at 737. In holding that Mr. Smith lacked a privacy interest, the Court emphasized that the information revealed neither "any communication between the caller and the recipient of the call, their identities, nor whether the call was even completed." *Id.* at 741. Since *Smith*, technological advances have resulted in modern call logs containing far more details. Hence, the Supreme Court had no trouble concluding that *Smith* did not apply to modern call logs because any such inquiry would be far broader and more intrusive. *Riley*, 573 U.S. at 400; *see also Carpenter*, 138 S. Ct. at 2219 (explaining that "telephone call logs [in *Smith*] reveal little" compared to cell-site data).

The financial records collected in *Miller* were likewise extremely limited. The government obtained only "two financial statements," "three monthly statements,"

plus "checks and deposit slips" from a single bank customer whom it suspected of fraud. *Miller*, 425 U.S. at 438. By contrast, IRS here obtained electronic transaction information over a three-year period "regarding 8.9 million transactions and 14,355 account holders." *Coinbase III*, 2017 WL 5890052, at *2.

IRS tellingly cites no case in which the third-party doctrine was applied to uphold "dragnet type law enforcement practices." *Knotts*, 460 U.S. at 284. Even as it articulated the plain-view doctrine, the Supreme Court in *Knott* explicitly cautioned against applying it to permit "dragnet" as opposed to targeted surveillance. *Id.* at 284. *Carpenter* confirmed that the plain-view doctrine does not authorize surveillance techniques that could be deployed "against everyone." 138 S. Ct. at 2218. The prohibition against dragnet surveillance applies with equal force to the third-party doctrine, which operates under the same voluntary-disclosure rationale as the plain-view doctrine.

Courts have never interpreted the Fourth Amendment to authorize agencies to "direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime." *Am. Tobacco Co.*, 264 U.S. at 306. Yet, that is precisely what IRS did by collecting records detailing millions of cryptocurrency transactions from thousands of Coinbase customers without individualized suspicion. This Court should

not be the first to expand the third-party doctrine to authorize mass, suspicionless surveillance.

Reinforcing this conclusion is the fact that Harper's privacy interest in cryptocurrency transactions using "blockchain" technology is fundamentally different from bank records in *Miller*. The Supreme Court has warned that "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *Kyllo v. United States*, 533 U.S. 27, 33–34 (2001). Cryptocurrency transactions use "blockchain" technology whereby each transaction is posted onto a public ledger. The details of transactions, including the identities of parties, are private because individuals use unique pseudonymous addresses. By obtaining "transaction logs" from Harper and other Coinbase customers, IRS learns their pseudonymous addresses and thus can gather information about *all* their cryptocurrency transactions, including those that do not fall within the summons's three-year period and do not go through Coinbase. In one fell swoop, IRS effectively collected all cryptocurrency transactions linked to Coinbase transactions, past and future, for Harper and over 14,000 others.

IRS's claim that "information regarding these transactions is precisely the sort of commercial information that does not implicate privacy interests," IRS Br. 25, is wrong. "Financial transactions can reveal much about a person's activities,

associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy." *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 78–79 (1974) (Powell, J. concurring). While the limited bank records in *Miller* may not have crossed this threshold, IRS's sweeping collection of now-and-forever electronic transaction history opens wide an "intimate window into a person life." *Carpenter*, 138 S. Ct. at 2217. A detailed history of digital transactions could reveal a person's "familial, political, professional, religious, and sexual associations," *ibid*., as well as "alcohol, drug, and gambling addictions," and "symptoms of disease." *Riley*, 573 U.S. at 396. Warrantless and suspicionless collection of such information thus falls outside of *Miller*'s third-party doctrine.

C. *Powell* Factors Do Not Authorize Sweeping Collection of Millions of Transaction Records

Appellees endorse the district court's reliance on *United States v. Powell*, 379 U.S. 48 (1964), to waive Fourth Amendment requirements as to IRS. IRS Br. 37-38. *See* JA89-90 ("The *Powell* requirements, while not an 'exception' to the warrant requirement, *exempt* the IRS from making any probable cause showing that would otherwise be required to support a warrant.")

Powell did not address or even mention the Fourth Amendment. *Powell* addressed only statutory interpretation issues. *Id.* at 57-58; *see id.* at 59-60 (Douglas, J., dissenting). The Court granted *certiorari* in *Powell* to address a circuit split as to

IRS's statutory summons authority. Of the decisions cited as evidence of a split, *id.* at 51 n.8, none addressed whether IRS summonses were subject to Fourth Amendment limitations.

No statute can define reasonableness under the Fourth Amendment, and 26 U.S.C. § 7602 ("Examination of Books and Witnesses") does not purport to do so. Much less did it make reasonable a "fishing expedition in private papers" of thousands of taxpayers without individual suspicion. *Am. Tobacco*, 264 U.S. at 306.

II. HARPER HAS STATED A CLAIM FOR VIOLATION OF 26 U.S.C. § 7609(f)

"Congress passed section 7609(f) specifically to protect the civil rights, *including the privacy rights*, of taxpayers subjected to the IRS's aggressive use of third-party summonses." *United States v. Gertner*, 65 F.3d 963, 971 (1st Cir. 1995) (emphasis added); *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 317 (1985). The Complaint alleges that IRS engaged in precisely the sort of overreach that Congress sought to guard against. Yet, as interpreted by Appellees, § 7609(f) is toothless, granting John Doe taxpayers no right to object to IRS's seizure of their financial records—a right granted to virtually all other taxpayers.

A. The Administrative Procedure Act Creates an Express Right of Action to Enforce § 7609(f)

The Administrative Procedure Act (APA) provides aggrieved individuals a right of action to review any "final agency action for which there is no other adequate

remedy in a court." 5 U.S.C. § 704. Conceding that Harper has "no other adequate remedy in a court" for the alleged violation of his rights under 26 U.S.C. § 7609(f), Appellees nonetheless contest Harper's right to proceed under § 704, based on several unpersuasive arguments.

First, IRS's contention that its challenged conduct was neither "agency action" nor "final," IRS Br. 53-54, is inconsistent with the statutory definitions of those terms. The APA broadly defines "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Harper challenges IRS's issuance of a summons to Coinbase, enforcement of the summons, and its seizure and search of his records. Those actions constitute "order[s]" of the IRS (as well as their "equivalent[s]") under commonly understood definitions of those words.

Nor can Appellees plausibly contend that their action was not "final." Agency action is "final" if it "mark[s] the consummation of the agency's decisionmaking process, … it must not be of a merely tentative or interlocutory nature," and if it is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citations omitted). Appellees' conduct in this case easily meets that standard. There was nothing tentative about IRS's decisions to issue a summons and seek enforcement; it

carried through on those decisions. IRS sought and received judicial assistance to force Coinbase to disclose Harper's private papers, and "legal consequences" flowed from those actions. *See, e.g., Sackett v. EPA*, 566 U.S. 120, 126 (2012) (EPA engaged in "final agency action" when it ordered property owners to disclose "records and documentation related to the conditions" of their property).

Second, Appellees assert that Harper lacks "statutory standing" to assert his APA claim. IRS Br. 51. Statutory standing is a question of statutory interpretation: does the plaintiff fall within the class of plaintiffs who have been conferred a right of action by the applicable statute (here § 704, and by extension, § 7609(f))? *Lexmark, Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). Harper falls within that class; indeed, John Doe taxpayers such as Harper are the precise group whose interests Congress intended to benefit when it adopted § 7609(f). *Gertner*, 65 F.3d at 971.

Third, Appellees argue that the *ex parte* proceedings before the magistrate judge definitively determined the propriety of the Coinbase summons and that "the order permitting the IRS to issue the initial summons is not subject to later collateral attack." IRS Br. 52 (citing district court decision at JA101-03). Appellees concede that Harper was not a party to those *ex parte* proceedings. And Appellees make no response to

Harper's showing (Opening Br. 37-40) that he cannot be barred from challenging a judicial ruling issued in a proceeding in which he had no opportunity to participate.

Finally, Appellees argue that "Section 7609 *impliedly* forbids any claim under the APA that the IRS violated Section 7609(f)." IRS Br. 54 (emphasis added). They point to no language in § 7609(f) to support that proposition or to rebut the "strong presumption that Congress intends judicial review of administrative action." *Smith v. Berryhill*, 139 S. Ct. 1765, 1776 (2019). Appellees rely on 26 U.S.C. § 7609(h)(2), which sets out the procedures to be followed during the hearing mandated by § 7609(f). Section 7609(h)(2) states that the court conducting the hearing shall make the § 7609(f) determinations "*ex parte*" and "solely on the petition and supporting affidavits." But nothing in § 7609 suggests that whether IRS has complied with § 7609(f)'s procedural requirements is subject to no further review.

B. The Complaint Adequately Alleges IRS's Non-Compliance with § 7609(f)'s Three Requirements

Harper has adequately alleged that IRS failed to satisfy any of the three prerequisites that it must satisfy before issuing a John Doe summons. Appellees' disagreements with those factual allegations are not properly resolved in connection with a Rule 12(b)(6) motion to dismiss.

1. IRS Failed to Identify an "Ascertainable" Group

Section 7609(f)(1) prohibits IRS from issuing a John Doe summons unless IRS establishes that the summons relates to an investigation of "a particular person or ascertainable group or class of persons."

The parties agree that the term "ascertainable" "means 'something that can be determined with certainty.'" IRS Br. 56 (quoting JA104). The adjective "ascertainable" modifies the words "group or class"; the statute thus focuses on discrete groups or classes—ones whose membership "can be determined with certainty." In the context of a statute administering tax law enforcement, this reading directs IRS to seek out information about discrete groups involved in tax avoidance schemes. The provision indicates that a John Doe summons should seek information making the group's membership certain or nearly so, a sensible cabin on tax investigations.

IRS rejects that straightforward construction and instead rewrites the language as though it reads "group or class of persons the characteristics of whom are specific and well-defined." IRS Br. 57. IRS urges an interpretation in which *the group's* membership is not necessarily ascertainable, but one can assess from person to person whether each is in or out of the group. This is not an aid to sensible law enforcement, because it allows essentially any characteristic to make a group ascertainable. "All

humans" qualify as an "ascertainable group" because IRS can distinguish humans from animals, even though it cannot identify all group members.

IRS's Coinbase summons did not identify an "ascertainable" group, *i.e.*,a group whose members could be determined with certainty. The group described by IRS's *ex parte* petition consisted of all "United States taxpayers who, at any time during the years ended December 31, 2013, through December 31, 2015, conducted transactions in a convertible virtual currency." JA113, 125. There is no realistic means by which IRS could identify all members of that massive group, because it includes millions not using Coinbase, including many who do not use cryptocurrency exchanges at all.

In support of their position, Appellees cite four district court decisions. IRS Br. 57-58. All are inapposite; none addresses the definition of "ascertainable group." Two of the decisions determined that IRS had identified an "ascertainable group," but both involved groups far smaller than the one at issue here.

The legislative history of § 7609(f) supports Harper's construction of "ascertainable group." *See* Opening Br. 42-43. IRS fails to respond to this argument, including this statement in the House Report on the legislation that enacted § 7609(f):

> [T]he committee does not intend that the John Doe summons is to be available for purposes of enabling the Service to engage in a possible "fishing expedition." For this reason, the committee intends that when the Service does seek court authorization to serve John Doe summons, it will have specific facts concerning a *specific situation* to present to the court.

H.R. Rep. 94-658, 1975 WL 12389 (Leg. Hist.), at *311 (1975) (emphasis added). Congress's use of the phrase "specific situation"—singular rather than plural—indicates its intent that each § 7609(f) summons should investigate taxpayers united by their potential involvement in a common scheme. In contrast, the Coinbase summons's identification of a multi-million-member group can aptly be labeled a "fishing expedition."

2. IRS Did Not Show that the Group It Identified Has Failed to Pay Its Taxes

Section 7609(f)(2) prohibits IRS from issuing a John Doe summons unless IRS can show that "there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law." The district court refused to credit Harper's allegations that IRS failed to make that showing.

IRS defends the district court's unquestioning acceptance of the material included in its petition, asserting that "the IRS's petition and supporting documentation in the *ex parte* proceeding was sufficient as a matter of law to establish a reasonable basis for believing that the John Doe class 'may fail or may have failed to comply' with the tax laws." IRS Br. 60 (quoting JA106). While wrong, that response does not answer Harper's argument. The district court should not have accepted factual allegations IRS made in separate proceedings. In its petition, IRS

alleged at most a weak relationship between bitcoin use and tax evasion. Opening Br. 45 (citing JA145-46).

Even if one were to accept the accuracy of the petition's factual allegations, those allegations did not suffice "as a matter of law" to satisfy § 7609(f)(2). IRS does not meet its statutory burden simply by showing that a handful of members of the group it identifies may have failed to pay their taxes. If that were the standard, § 7609(f)(2) would impose no restrictions whatsoever; within *any* group consisting of millions of taxpayers, there will always be a number of tax cheats. To have meaning, the subsection must require IRS to show that, by virtue of membership, most or all of those in a group or class "may have failed to comply" with the tax laws, such as participants in a tax shelter designed to create fictitious losses. The characteristics that placed them in the class must be the indicia of tax non-compliance. IRS did not respond to that argument.

3. The Information IRS Sought from Coinbase Was Readily Available from Other Sources

Section 7609(f)(3) effectively prohibits IRS from issuing a John Doe summons that simultaneously seeks both identity information and taxpayer records, if the taxpayers themselves are a ready source of the records.[2] IRS failed to satisfy the "not

[2] Section 7609(f)(3) requires IRS to establish that "the information sought to be obtained from the examination of the records or testimony (and the identity of the

readily available from other sources" requirement because it could have requested from Harper the financial records it sought from Coinbase. Indeed, in the years following § 7609(f)(3)'s adoption, IRS generally used John Doe summonses solely to identify taxpayers, not to obtain their documents from a third party.[3]

IRS asserts that the readily-available finding must be "made at the time the IRS seeks the *ex parte* determination in the district court." IRS Br. 63. That assertion is correct but irrelevant. The question is not whether the taxpayer's identity is *known* when the petition is filed but whether it is "readily available." The taxpayer's identity is "readily available" if it can easily be obtained from a third party. It was. Demanding contact information for customers was the procedure IRS routinely followed until recently. Once it obtained Harper's contact information, IRS would have had no further need for the John Doe summons process because Harper would no longer be a John Doe taxpayer.

---

person or persons with respect to whose liability the summons is issued) is not readily available from other sources."

[3] Appellees point to three cases from the 1980s in which IRS sought both the identities of John Doe taxpayers and those taxpayers' records. IRS Br. 63. But they do not contest our larger point: John Doe summonses that sought not only the identity of taxpayers but also their records were the exception during that period. Opening Br. 48.

IRS also asserts that the statute "unambiguously indicates that the IRS may use a John Doe summons to seek both the identity of a taxpayer and information pertaining to him from a third party." IRS Br. 61. IRS misreads the statute. It says nothing about the scope of the information IRS is entitled to seek. Rather, § 7609(f)(3) imposes two conditions IRS must satisfy before it may issue a John Doe summons. It must show: (1) examination of the taxpayer's records "is not readily available from other sources" *and* (2) the taxpayer's identity is similarly unavailable. Nothing in that language suggests IRS can skip over the identification step and proceed directly to the seizure of the taxpayer's records when, as here, IRS could readily have obtained identification information.[4]

Finally, IRS objects (IRS Br. 64) to Harper's request (Opening Br. 50) that, if necessary, he be permitted on remand to amend his § 7609(f) claims. IRS misunderstands that request. Harper is not requesting an opportunity to craft new arguments regarding his § 7609(f) claims not already set out in his district-court and appellate briefs. Rather, Harper's request (also made in district court) is raised in an abundance of caution, in the event the Court concludes that the factual allegations in

[4] Congress agrees with our understanding of the statute. When Congress amended § 7609(f) in 2019 (in response to concerns that IRS was continuing to abuse the John Doe summons process), the accompanying House Report stated, "IRS is able to issue a summons (referred to as a 'John Doe' summons) *to learn the identity* of the taxpayer." H.R. 116-39(I), 2019 WL 1649873 at *41 (2019) (emphasis added).

the Amended Complaint do not include the same level of detail contained in later filings. IRS does not dispute that Harper timely requested leave to amend in the district court.

III. HARPER HAS STATED A CLAIM UNDER THE FIFTH AMENDMENT FOR VIOLATION OF HIS PROCEDURAL DUE PROCESS RIGHTS

The Amended Complaint alleges that IRS deprived Harper of liberty and property interests in his financial records without notice and an opportunity to challenge the deprivation. The district court did not dispute the lack of notice and did not point to any opportunity available to Harper to contest IRS's summons for his financial records.

IRS argues that Harper cannot state a due process claim because he possesses neither a property nor a liberty interest in the financial records it seized from Coinbase. IRS Br. 44. But as IRS concedes, the Court has explicitly held that the Due Process Clause of the Fifth Amendment creates a liberty interest in "the confidentiality of personal matters." *Id.* (citing *Vega-Rodriguez v. Puerto Rico Tel. Co.*, 110 F.3d 174, 182-183 (1st Cir. 1997)).[5] IRS asserts that Harper does not own the financial records maintained by Coinbase and that he does not have "a reasonable expectation of privacy in financial information he did not own or possess." *Id.* at 44-

[5] As explained in Part I of this brief, Harper also possesses a property interest in the seized records.

45. But two leading Supreme Court decisions recognize a liberty interest "in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). In both cases, the individuals asserting privacy rights did not possess the records whose disclosure they sought to prevent. The Fourth Circuit has similarly recognized that procedural due process rights can extend to avoiding disclosure of personal matters (including financial matters) even when those matters are known to third parties. *Payne v. Taslimi*, 998 F.3d 648, 657 (4th Cir. 2021).

IRS argues that the liberty interest in avoiding disclosure of personal matters does not extend to financial records. IRS Br. 45-46. But this Court has explicitly recognized that Fifth Amendment privacy rights extend to at least some "personal data," including "financial" data. *Vega-Rodriguez*, 110 F.3d at 183.[6]

IRS argues alternatively that Harper was afforded all the procedural rights to which he was entitled. IRS Br. 46-49. But as IRS concedes, "the fundamental

[6] IRS misleadingly cites *Vega-Rodriguez* for the proposition that the procedural due process right to privacy "does not 'extend beyond prohibiting profligate disclosure.'" IRS Br. 45 (quoting *Vegas-Rodriguez*, 110 F.3d at 183). That citation conveniently omits the end of the quoted sentence; the sentence states that other courts have not extended Fifth Amendment rights "beyond prohibiting profligate disclosure of medical, financial, and other intimately personal data." 110 F.3d at 183. The complete sentence makes clear that: (1) financial information is a type of "intimately personal data"; and (2) individuals have a liberty interest in preventing the disclosure of at least some personal financial information.

requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id*. at 46 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Harper has had *no* formal opportunity to be heard. IRS responds that it complied with § 7609(f)'s requirements before issuing the Coinbase summons, but it is uncontested that Harper received no notification of IRS's § 7609(f) petition and had no opportunity to participate in that *ex parte* proceeding.

IRS contends that Harper had an opportunity to be heard by intervening in IRS's action to enforce the Coinbase summons but failed to do so. IRS Br. 50. But Harper had no notice that IRS was seeking disclosure of his financial records.[7] Though interested in the issue, he knew of no reason to seek intervention. Harper did not learn that his financial records were likely among those disclosed by Coinbase until August 2019 (2½ years later), when he received a threatening letter from IRS. Moreover, IRS has consistently asserted, including in the Coinbase enforcement action, that John Doe taxpayers are not permitted to intervene. In light of that

[7] Harper learned of the enforcement action through press accounts. Interested in the policy issues, Harper's conversations with others led him to believe that the summons did not encompass his records, focusing only on Coinbase customers who (unlike Harper) had engaged in large bitcoin transactions. Opening Br. 9. Harper also relied on Coinbase's public statement that it would notify affected users before handing over information. *Ibid.* Harper received no such notification.

assertion, IRS cannot argue that Harper's decision not to seek to intervene constituted abandonment of his Fifth Amendment rights.

IRS asserts the Due Process Clause doesn't "invariably" require that an individual receive a pre-deprivation hearing, that sometimes a post-deprivation hearing suffices. IRS Br. 48. But even *after* seizing Harper's financial records, IRS has not offered Harper a hearing. IRS's suggested "potential post-deprivation process[es]" are unrealistic. It suggests that Harper be relegated to raising a challenge "before assessment in Tax Court" or "after assessment and payment in a refund suit." *Id.* at 51. Those alleged remedial procedures will never materialize: Harper has paid all his taxes, and IRS has never suggested that it will seek assessment of additional tax.

In determining the process an individual must be afforded before being deprived of a liberty or property interest, courts should undertake an "analysis of the governmental and private interests that are affected." *Eldridge*, 424 U.S. at 334. IRS does not claim that providing Harper a hearing on his privacy claim would interfere with its ability to enforce the tax laws. In sharp contrast, Harper alleges that IRS's continued possession of his financial records both severely intrudes on his privacy rights and raises serious security concerns for him and his family.

Holders of cryptocurrency are uniquely in danger of violent crimes should third parties become aware of their holdings and trading activities. Many cryptocurrency owners maintain their assets on home computers and thus must be on guard against criminal attacks on their households, such as home invasion and kidnapping. Such attacks are disturbingly common. IRS's continued retention of Harper's financial records increases the risk that those records will be accessed by hackers, inviting attacks by criminals who believe, even erroneously, that Harper holds significant crypto assets.

IRS has a disturbing history of data breaches. In 2021 a news organization published reports on the income of wealthy taxpayers based on tax data stolen from IRS files. *See* ProPublica, *The Secret IRS Files: Trove of Never-Before-Seen Records Reveal How Wealthiest Avoid Income Tax* (June 8, 2021). The General Accounting Office recently reported that IRS inadvertently posted confidential taxpayer data on its website in August 2022 and then, after removing the data, discovered that it had been reposted in December 2022. GAO, *Security of Taxpayer Information: IRS Needs to Address Critical Safeguard Weaknesses* (Aug. 2023) at 2. GAO has repeatedly concluded that IRS has "continuing information system control deficiencies." *Ibid*. These substantial security concerns justify Harper's insistence that he be granted a

hearing on his claim that IRS's possession of his financial records infringes his liberty and property interests.

CONCLUSION

The Court should reverse the district court's grant of Appellees' motion to dismiss and remand the case to district court.

Respectfully submitted,

/s/ Richard A. Samp
Richard A. Samp
First Circuit Bar No. 19778
Sheng Li
NEW CIVIL LIBERTIES ALLIANCE
1225 19th Street NW, Suite 450
Washington, DC 20036
202-869-5210
rich.samp@ncla.legal
sheng.li@ncla.legal

January 31, 2024

CERTIFICATE OF COMPLIANCE

I am an attorney for Appellant James Harper. Pursuant to Fed.R.App.P. 32(a)(7), I hereby certify that the foregoing brief of Appellant is in 14-point, proportionately spaced Times New Roman type. According to the word processing system used to prepare this brief (Microsoft Word), the word count of the brief is 6,498, not including the table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

January 31, 2024

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2024, I electronically filed the foregoing document with the U.S. Court of Appeals for the First Circuit, using the CM/ECF system. Counsel for all parties are registered users of the CM/ECF system and service will be accomplished via the appellate CM/ECF system.

/s/ Richard A. Samp
Richard A. Samp