No. 21-1316

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,
&
JOHN DOE IRS AGENTS 1–10,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE, CASE NO. 1:20-CV-00771-JD (HON. JOSEPH A. DICLERICO, JR.)

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

OTHER AUTHORITIES

REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to Local Rule 34.0(a), Appellant respectfully requests that the Court schedule oral argument in this case. This case presents important legal questions about whether the sovereign immunity of the United States bars suits challenging the government's illegal information-gathering practices and whether injunctive or declaratory relief is available in such situations. Oral presentation will aid the Court in seeking clarification from counsel for all parties and in its resolution of the weighty jurisdictional issues.

GLOSSARY

APA	Administrative Procedure Act (Pub. L. 79-404 (1946), codified at 5 U.S.C.)
AIA	Anti-Injunction Act (26 U.S.C. § 7421(a))
DJA	Declaratory Judgment Act (28 U.S.C. §§ 2201–2202)
FRAP	Federal Rules of Appellate Procedure
FRCP	Federal Rules of Civil Procedure
IRS	Internal Revenue Service

INTRODUCTION

The IRS and its officers obtained the private financial information of Mr. James Harper from digital-currency exchanges or from some other source without complying with the constitutional and statutory limitations on its power to gather information.[1] IRS gathered this information despite Mr. Harper's having contracted with the digital-currency exchanges to protect his private records against, among other things, unlawful government seizure.

IRS's actions violated core constitutional protections under the Fourth and Fifth Amendments. Assuming IRS took his information from one or more exchanges, Mr. Harper's contracts recognized that his data is his property, not that of the exchanges, and supplied him with a reasonable expectation of privacy in his personal information. The contracts made clear that he did not voluntarily surrender his Fourth Amendment rights by doing business with them. IRS seized his information without due process. IRS did not provide Mr. Harper with any notice or opportunity to contest its lawless information gathering. That lack of process violates the Fifth Amendment's due-process guarantee. IRS's third-party collection of Mr. Harper's information is also a Fourth Amendment trespass against Mr. Harper because it seized his personal papers without a warrant. IRS also failed to protect Mr. Harper's statutory rights when it obtained his personal papers from third parties.

The district court, basing its opinion on sovereign immunity, the Anti-Injunction Act, the Declaratory Judgment Act, and *Bivens*,[2] concluded that, taking IRS's

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[1] This brief collectively refers to the Appellees as "IRS."

[2] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

constitutional violations as a given, Mr. Harper has no means to challenge IRS's illegal behavior. The court made up a tenuous relationship between IRS's dragnet information-gathering and tax collection to rationalize its decision. That decision is wrong. This action is not an effort to avoid tax liability. Mr. Harper has paid his taxes. Rather, this suit is a challenge to IRS's unlawful data collection under the Fourth and Fifth Amendments, and 26 U.S.C. § 7609(f).

This Court should reverse, conclude that the district court has subject-matter jurisdiction, decide that Mr. Harper has stated a claim on which relief can be granted, and remand the case so that the parties can proceed to discovery.

JURISDICTIONAL STATEMENT

On March 23, 2021, the District of New Hampshire dismissed the case for lack of jurisdiction and for failure to state a claim on which relief can be granted. Appx98–99. Plaintiff James Harper filed a timely notice of appeal, Appx7–8, on April 20, 2021. *See* FRAP 4(a)(1)(B). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

QUESTIONS PRESENTED

1. Does sovereign immunity divest federal courts of subject-matter jurisdiction in suits for specific, nonmonetary relief alleging that the actions of IRS and its officers are unconstitutional or beyond statutory authority?

2. Does the Anti-Injunction Act or the Declaratory Judgment Act limit the subject-matter jurisdiction of federal courts in suits that do not seek to restrain the assessment or collection of taxes?

3. Has Mr. Harper stated a plausible claim that his rights were violated by IRS and its officers under the Fourth and Fifth Amendments, and 26 U.S.C. § 7609(f)?

STATEMENT OF THE CASE

In August of 2019, James Harper, a New Hampshire resident, Appx3, received a letter from IRS. Appx22–23, Appx67–69. The letter stated:

> We have 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. … If you do not accurately report your virtual currency transactions, you may be subject to future civil and criminal enforcement activity.

Appx22, Appx67. In closing, the letter stated, "You do not need to respond to this letter. Note, however, we may send other correspondence about potential enforcement activity in the future." Appx69. The letter was signed by an IRS Program Manager, Bryan Stiernagle. Appx69.

IRS contemporaneously issued a press release, stating, "Taxpayers should take these letters very seriously" and "correct past errors." Appx70. The press release

identified the form letter Mr. Harper received—"6174-A"—as one of three versions of letters it sent to "more than 10,000 taxpayers." Appx24, Appx28, Appx67–69, Appx70.

The IRS letter did not assess taxes against Mr. Harper.[3] IRS did not commence a tax-collection action against Mr. Harper.[4] In this suit, Mr. Harper does not seek a tax refund. Instead, Mr. Harper challenges IRS's gathering of information about his personal finances without a hint of suspicion that he has failed to pay taxes.

IRS obtained Mr. Harper's private financial information from somewhere—Mr. Harper does not know which digital-currency exchange provided the information, and IRS has not disclosed its identity. Yet he does know that IRS did not follow statutory and constitutional limits on information gathering, because the agency did not follow lawful process with respect to *any* party that holds his private information.

Mr. Harper has paid all applicable taxes on his bitcoin income and capital gains for all relevant tax years, accurately disclosing all that the law requires. Appx16–17, Appx22–23. He will continue to declare and pay any capital gains and other applicable taxes for his bitcoin holdings for each tax year in the future. Appx22.

Mr. Harper has owned accounts containing bitcoin or other digital currency with Abra, Coinbase, and Uphold. Appx23. Abra, Coinbase, and Uphold are digital currency exchanges that facilitate transactions in digital currencies such as bitcoin. Appx13, Appx20. Each of these companies has contractually agreed to provide robust privacy

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[3] IRS tax-assessment notices are different. *See, e.g.*, IRS Form CP2566R, https://www.irs.gov/pub/notices/cp2566r_english.pdf.

[4] IRS tax-collection notices are different. *See, e.g.*, Understanding Your CP504 Notice, https://www.irs.gov/individuals/understanding-your-cp504-notice.

protections to Mr. Harper's private financial records. Appx13–22, Appx36–66. Uphold confirmed via a notarized affidavit attached to the amended complaint that it did not provide Mr. Harper's private financial information to IRS. Appx23, Appx72–73. Mr. Harper alleges, therefore, that IRS likely obtained his records from Abra, Coinbase, or both—possibly some other third party. Appx23.

Via the 2019 letter, IRS accuses Mr. Harper of not having "properly reported" his "transactions involving virtual currency." Appx67. IRS must have obtained some information from some third party to accuse Mr. Harper so confidently. Mr. Harper, therefore, filed suit against (1) IRS Commissioner Rettig, in his official capacity, (2) IRS, a federal agency, and (3) John Doe IRS Agents in their personal capacities. Appx11.

In this suit, Mr. Harper challenges IRS's information-gathering practices as violating the Fourth and Fifth Amendments to the United States Constitution, and 26 U.S.C. § 7609(f). Appx25–34. To remedy those violations, Mr. Harper requests declaratory and injunctive relief, including an order expunging Mr. Harper's private financial information from IRS's records if it was obtained in violation of the Constitution or federal statute. Appx25–34. Mr. Harper also requested compensatory damages that would "reasonably and properly compensate him for injuries together with delay damages, interest, costs, and attorneys' fees" to remedy the violations of his Fourth and Fifth Amendment rights, but not for violations of 26 U.S.C. § 7609(f). Appx29, Appx32, Appx34.

The government filed an FRCP 12(b)(1) and 12(b)(6) motion to dismiss. Appx76. Mr. Harper responded to that motion and the government filed a reply. Appx81. No

oral argument was conducted. The district court granted the motion to dismiss as follows:

> Counts I [Fourth Amendment violation] and II [Fifth Amendment violation], to the extent injunctive or declaratory relief is sought from any defendant or money damages are sought from Commissioner Rettig and the IRS, are dismissed for lack of jurisdiction. Counts I and II, to the extent money damages are sought from John Does 1 through 10, are dismissed for failure to state a claim upon which relief can be granted. Count III [26 U.S.C. § 7609(f) violation] is dismissed for lack of jurisdiction.

Appx98. This appeal ensues. Appx7–8.

SUMMARY OF THE ARGUMENT

The district court's FRCP 12(b)(1) dismissal for lack of subject-matter jurisdiction of all three Counts in the amended complaint (to the extent injunctive or declaratory relief is sought) against all defendants is reversible error. Appx98.

Mr. Harper does not challenge the district court's FRCP 12(b)(1) dismissal of Counts I and II to the extent money damages are sought from IRS and its Commissioner. Appx98. Nor does Mr. Harper challenge the district court's FRCP 12(b)(6) dismissal of Counts I and II to the extent money damages are sought from John Doe IRS Agents 1 through 10. Appx98.

Mr. Harper asks this Court to reverse only the district court's FRCP 12(b)(1) dismissal of all Counts for declaratory and injunctive relief against all defendants—IRS, IRS's Commissioner, and John Doe IRS Agents 1 through 10.

The district court labored under the mistaken notion that a waiver of sovereign immunity is necessary. Appx82. No waiver of sovereign immunity is necessary. Even if

it is necessary, 5 U.S.C. § 702 or the *ultra vires* doctrine have eliminated or waived the sovereign-immunity defense in suits for specific, nonmonetary declaratory and injunctive relief. The district court should be reversed on this point. Appx82–84.

The Anti-Injunction Act and the Declaratory Judgment Act do not bar suits like Mr. Harper's that do not seek to restrain the assessment or collection of taxes. Indeed, in a decision handed down after the district court's dismissal here, the Supreme Court explained that where, as here, there is no "tax penalty" at issue, then the case is a "cinch," and "the suit c[an] proceed." *CIC Services, LLC v. IRS*, 141 S. Ct. 1582, 1589 (2021). The district court should also be reversed on this point. Appx85–90.

The procedural posture of this case is notable. In the district court, IRS filed a motion to dismiss, Appx4, presenting several bases for dismissing the case. The district court's decision addressed only IRS's sovereign-immunity, the Anti-Injunction Act, the Declaratory Judgment Act, and *Bivens* defenses. The court did not address the other FRCP 12(b)(6) arguments IRS had presented.

The Court should conclude that the district court has subject-matter jurisdiction, Mr. Harper has stated claims on which relief could be granted, reverse the decision below, and remand for further proceedings consistent with the Court's decision.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews *de novo* the district court's grant of an FRCP 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction because the existence of subject-matter jurisdiction is a question of law. *Grapentine v. Pawtucket Credit Union*, 755 F.3d 29, 31 (1st Cir. 2014). The Court "take[s] as true all well-pleaded facts in the plaintiffs' complaints, scrutinize[s] them in the light most hospitable to the plaintiffs' theory of liability, and draw[s] all reasonable inferences therefrom in the plaintiffs' favor." *Fothergill v. United States*, 566 F.3d 248, 251 (1st Cir. 2009) (cleaned up).

This Court also reviews *de novo* the district court's grant of an FRCP 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *Wilson v. HSBC Mortgage Services, Inc.*, 744 F.3d 1, 7 (1st Cir. 2014). The Court "construe[s] all factual allegations in the light most favorable to the [plaintiff] to determine if there exists a plausible claim upon which relief may be granted." *Id.* "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In such a posture, the Court "may not stray beyond the facts averred in the complaint and its attachments … [and] official public records." *Foisie v. Worcester Polytechnic Institute*, 967 F.3d 27, 34 n.1 (1st Cir. 2020).[5]

[5] The *Bivens* claim for relief was the only issue founded upon FRCP 12(b)(6) that the district court addressed in its decision. Appx98. The standard of review relating to FRCP 12(b)(6) is relevant for the discussion in Part IV below.

II. SOVEREIGN IMMUNITY DOES NOT DIVEST FEDERAL COURTS' SUBJECT-MATTER JURISDICTION IN SUITS FOR SPECIFIC, NONMONETARY RELIEF AGAINST IRS AND ITS OFFICERS

The district court dismissed Mr. Harper's claims because it concluded that he "has not demonstrated the applicability of any exception to the United States's sovereign immunity and because the Anti-Injunction Act prohibits the court from granting" injunctive and declaratory relief. Appx90. This ruling was in error because no such waiver of sovereign immunity was necessary for suits brought to enjoin unconstitutional or otherwise *ultra vires* government actions. Of course, even if a waiver *were* necessary, the Administrative Procedure Act constituted the necessary waiver.

A. Sovereign Immunity Does Not Attach in the First Place in Suits Alleging that Officials' Actions Are Unconstitutional or Beyond Statutory Authority

A sovereign-immunity waiver is not necessary in this case. When a suit asks for specific nonmonetary relief "against government officials where the challenged actions of the officials are alleged to be unconstitutional or beyond statutory authority," then "[i]t is well-established that sovereign immunity does not bar [such] suits." *Clark v. Library of Congress*, 750 F.2d 89, 102 (D.C. Cir. 1984). In official-capacity suits alleging officials' actions are unconstitutional or beyond statutory authority, "there is no sovereign immunity to waive—it never attached in the first place." *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1329 (D.C. Cir. 1996); *see also Gros Ventre Tribe v. United States*, 469 F.3d 801, 808 n.8 (9th Cir. 2006) (same). No waiver of sovereign immunity is necessary for lawsuits attacking unconstitutional actions. *Cf. Coeur d'Alene Tribe of Idaho v. Idaho*, 42 F.3d 1244, 1252 n.6 (9th Cir. 1994), *reversed in part on other grounds*, 521 U.S. 261 (1997)

("Although cases against federal officials are no longer necessary because the United States has waived its sovereign immunity to actions to quiet title, 28 U.S.C. § 2409a, the underlying principle remains valid.").

Mr. Harper alleges that IRS's gathering of his information from third parties violates the Fourth and Fifth Amendments and 26 U.S.C. § 7609(f). His official-capacity suit alleging officials' actions "to be unconstitutional or beyond statutory authority," *Clark*, 750 F.2d at 102, is precisely the type of suit in which "there is no sovereign immunity to waive" because "it never attached in the first place." *Reich*, 74 F.3d at 1329.

This *ultra vires* doctrine comes from *Larson*. The Supreme Court has said that sovereign immunity does not attach to federal officials' actions in suits alleging that such actions are unconstitutional or beyond statutory authority. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689–90 (1949). Federal officials can be sued for "specific relief" for *ultra vires* actions because actions that are either unconstitutional or undertaken without statutory authority do not implicate the sovereign immunity of the federal government. *Id.* at 689. There are three reasons, as "set out in [the] complaint," *id.* at 690, for why the officials sued here acted unconstitutionally or without statutory authority: the Fourth Amendment, the Fifth Amendment, and 26 U.S.C. § 7609(f). *Id.* at 690. Mr. Harper "claim[s] an invasion of his recognized legal rights." *Id.* at 693. That is sufficient to conclude that the district court had subject-matter jurisdiction that was not divested by the sovereign-immunity doctrine. *See also Dugan v. Rank*, 372 U.S. 609 (1963) (applying the *ultra vires* doctrine).

In *Pollack v. Hogan*, the plaintiff alleged that the federal officers acted unconstitutionally, and requested injunctive and declaratory relief. 703 F.3d 117, 119

(D.C. Cir. 2012) (*per curiam*). The court concluded that the suit "falls within the *Larson–Dugan* exception." *Id.* at 120. The federal officers had argued that the complainant must also "have a viable" unconstitutionality claim. *Id.* at 120. The court concluded that the *ultra vires* doctrine is not limited in that fashion. *Id.* The government's argument in *Pollack* failed to consider the full context of *Larson*'s explanation that such an argument "confuses the doctrine of sovereign immunity with the requirement that a plaintiff state a cause of action." 337 U.S. at 692–93. *Larson* stated:

> It is a prerequisite to the maintenance of any action for specific relief that the plaintiff *claim* an invasion of his legal rights, either past or threatened. … If he does not, he has not stated a cause of action. This is true whether the conduct complained of is sovereign or individual. In a suit against an agency of the sovereign, *as in any other suit*, it is therefore necessary that the plaintiff claim an invasion of his recognized legal rights. If he does not do so, the suit must fail even if he alleges that the agent acted beyond statutory authority or unconstitutionally.

Id. at 693 (emphasis added).

Here, Mr. Harper has "claimed" an invasion of his legal rights—specifically the constitutional right to secure his papers against unreasonable searches and seizures, the constitutional right to due process of law, and the statutory right to a valid summons. Whether Mr. Harper has these rights, and whether the officials sued have violated any of these rights, goes to the merits of his claim and not to sovereign immunity. *See also Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996) (concluding, under the *ultra vires* doctrine, that no waiver of sovereign immunity is necessary in "suits alleging that an officer's actions were unconstitutional or beyond statutory authority").

Subsequent cases, such as *Clark*, rely on *Larson* to conclude that the 1976 amendment to 5 U.S.C. § 702 endorsed the *ultra vires* doctrine. Sovereign immunity is not a bar to suits challenging federal officials' actions as unconstitutional or beyond statutory authority under either the *ultra vires* doctrine or 5 U.S.C. § 702. The district court, therefore, erred in concluding otherwise.

B. APA Section 702 Eliminates or Waives the Sovereign-Immunity Defense

The second sentence of Section 702 says, "An action in a court of the United States 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 shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." That sentence "eliminated" the sovereign-immunity defense. *Clark*, 750 F.2d at 102. That is, a waiver of sovereign immunity is not necessary for suits seeking nonmonetary relief against a federal agency or officer. This 1976 amendment to APA Section 702 , Pub. L. 94-574, § 1, 90 Stat. 2721 (1976), "eliminated the sovereign immunity defense in virtually all actions for non-monetary relief against a [United States] agency or officer acting in an official capacity." *Clark*, 750 F.2d at 102. *Clark* interpreted the second sentence of APA Section 702 as dictating this conclusion.

Mr. Harper alleges that IRS illegally obtained his private financial records. Appx11. He was informed via the 2019 letter of IRS's unlawful collection of his private information from some unknown-to-him third party. Appx22, Appx67. The letter said that IRS "ha[s] information" about Mr. Harper that it received from somewhere.

Appx67. That letter accused him of not "properly report[ing]" his "transactions involving virtual currency" based on that "information." Appx67. The letter warned him that if he does "not accurately report [his] virtual currency transactions," IRS "may" bring "civil and criminal enforcement" action against him. Appx67. The letter also invited Mr. Harper to "not … respond to this letter." Appx69.

IRS's false accusation of Mr. Harper and its collection of his private records from third parties are complete. Mr. Harper "is entitled to judicial review thereof." 5 U.S.C. § 702. He alleges that he has suffered a "legal wrong because of agency action." *Id.* And he seeks declaratory and injunctive relief to correct that wrong. Appx25–34. His action "seek[s] relief other than money damages and stat[es] 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." 5 U.S.C. § 702. Such suits "shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." *Id.*

Some cases have used the phrase "eliminate the defense of sovereign immunity" interchangeably with "waive[r] of sovereign immunity." *Delano Farms Co. v. California Table Green Com'n*, 655 F.3d 1337, 1345 (Fed. Cir. 2011); *see also Robbins v. BLM*, 438 F.3d 1074, 1081 (10th Cir. 2006) ("[T]he 1976 amendments to the APA to a large extent superseded the restrictions on injunctive relief set forth in *Larson* by inserting into 5 U.S.C. § 702 the language quoted above, waiving sovereign immunity for suits seeking 'relief other than money damages.'") (citing *Clark*); *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525–526 (9th Cir. 1989) ("Congress' plain intent in amending § 702 was to waive sovereign immunity[.]"); *Assiniboine & Sioux Tribes of the Fort Peck*

Indian Reservation v. Board of Oil & Gas Conservation, 792 F.2d 782, 793 (9th Cir. 1986) ("This Court has held that section 702 does waive sovereign immunity in non-statutory review actions for non-monetary relief brought under 28 U.S.C. § 1331."); *Z St. v. Koskinen*, 791 F.3d 24, 32 (D.C. Cir. 2015) ("[S]ection 702 of the [APA] waives sovereign immunity with respect to suits for nonmonetary damages that allege wrongful action by an agency or its officers or employees, and the instant lawsuit [against IRS's Commissioner] fits precisely those criteria."); *Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 57–58 (1st Cir. 2007) ("[APA Section 702] waiver is for *all* equitable actions for specific relief against a Federal agency or officer acting in an official capacity, … and thus applies to any suit whether under the APA or not.") (cleaned up; emphasis in original). Under either formulation, the analysis is the same. Whether "eliminated" or "waived," sovereign immunity does not bar suits for "specific, nonmonetary relief." *Sea-Land Serv., Inc. v. Alaska*, 659 F.2d 243, 244–45 (D.C. Cir. 1981) (R.B. Ginsburg, J., panel opinion). Mr. Harper's is such a suit.

C. Either APA Section 702 or the *Ultra Vires* Doctrine Dispatches the Sovereign-Immunity Bar for APA and Non-APA Cases Alike

Even before Congress amended APA Section 702, plaintiffs could "maintain an action for equitable relief against unconstitutional government conduct, whether or not such conduct constituted 'agency action' in the APA sense." *Presbyterian*, 870 F.2d at 526. And *Clark* relied on Supreme Court cases predating the 1976 amendment to APA Section 702. 750 F.2d at 102 (citing *Dugan*, 372 U.S. at 621–23 (1963); *Malone v. Bowdoin*, 369 U.S. 643, 646–48 (1962); *Larson*, 337 U.S. at 689–91 (1949)).

The APA therefore is not the sole basis for dispatching IRS's sovereign-immunity defense. "[S]overeign immunity does not bar suits for specific relief against government officials where," as here, "the challenged actions of the officials are alleged to be unconstitutional or beyond statutory authority." *Clark*, 750 F.2d at 102. But should the Court deem a waiver of sovereign immunity necessary, the APA contains a general waiver of sovereign immunity for cases involving "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." 5 U.S.C. § 702. *See also Presbyterian*, 870 F.2d at 525–526 ("[P]laintiffs could, even before Congress amended § 702 in 1976, maintain an action for equitable relief against unconstitutional government conduct, whether or not such conduct constituted 'agency action' in the APA sense. … Congress' plain intent in amending § 702 was to waive sovereign immunity for all such suits, thereby eliminating the need to invoke the *Young* fiction."). The rule in this circuit is the same. *Puerto Rico*, 490 F.3d at 57–58 (the Section 702 waiver applies to "any suit whether under the APA or not").

Trudeau v. FTC held that the waiver of immunity in Section 702 "is not limited to APA cases" and applies "regardless of whether the elements of an APA cause of action are satisfied." 456 F.3d 178, 187 (D.C. Cir. 2006). The plaintiff had challenged FTC's issuance of a press release regarding him. *Trudeau* acknowledged that the press release was not "agency action" as defined in the APA, let alone "final agency action." *Id.* at 189. But that was irrelevant, according to the court, because neither of the plaintiff's causes of actions sought judicial review under APA Section 704. In short, "the APA's waiver of sovereign immunity applies to any suit whether under the APA or not." 456 F.3d at 186.

Delano also reached the same conclusion. 655 F.3d at 1345. The 1976 amendment to Section 702, *Delano* explained, "was designed to eliminate the defense of sovereign immunity with respect to any action in a court of the United States seeking relief other than money damages and based on an assertion of unlawful official action by a Federal officer or employee"; it was not "meant to be limited to actions arising under the APA itself or under a statute directed at the review of 'agency action' as that term is defined in the APA." 655 F.3d at 1345 (citations omitted).

Presbyterian concluded: "It would be anom[a]lous—inexplicable in terms of the structure of the APA, and in evident conflict with the plain language and legislative history of the amendment to § 702—to read § 702 as preserving sovereign immunity in claims for equitable relief against government investigations alleged to violate First and Fourth Amendment rights." 870 F.2d at 526.

Sovereign immunity does not bar APA and non-APA cases alike if those cases allege unconstitutional government conduct or actions taken without statutory authority. Mr. Harper's is such a case. It alleges that IRS violated Mr. Harper's Fourth and Fifth Amendment rights and 26 U.S.C. § 7609(f).

The district court seemed to recognize that the "APA generally waives the Federal Government's immunity from a suit 'seeking relief other than money damages[.]'" Appx84 (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012)). Nevertheless, the district court dismissed, in part, because of sovereign immunity. Appx89. That conclusion was error. The Court should conclude—under either the *ultra vires* doctrine, or under 5 U.S.C. § 702—that the district

court has subject-matter jurisdiction that is not barred by the sovereign-immunity doctrine.

III. NEITHER THE ANTI-INJUNCTION ACT NOR THE DECLARATORY JUDGMENT ACT LIMITS SUBJECT-MATTER JURISDICTION IN A SUIT THAT DOES NOT SEEK TO RESTRAIN THE ASSESSMENT OR COLLECTION OF TAXES

A. The Anti-Injunction Act Does Not Bar This Suit

IRS argued and the district court concluded that the Anti-Injunction Act, 26 U.S.C. § 7421(a), bars this suit. Appx90. Under 5 U.S.C. § 702's last sentence, which leaves other jurisdictional limitations untouched, the court concluded that the AIA is "another limitation on judicial review." Appx84–85. The district court was wrong to conclude that the AIA limits the district court's subject-matter jurisdiction, however. This Court should reverse the decision below, and remand the case so that it can proceed to the merits.

The district court did not have the benefit of the Supreme Court's recent decision in *CIC Services, LLC v. IRS*, 141 S. Ct. 1582 (May 17, 2021), but that case settles the issue beyond cavil. *See* Appx98–99 (decision and judgment entered on Mar 23, 2021). *CIC* concluded that the Anti-Injunction Act, 26 U.S.C. § 7421(a), does not prohibit a suit "seeking to set aside an information-reporting requirement that is backed by both civil tax penalties and criminal penalties." *Id.* at 1586. This is so because the AIA states in relevant part only that, "[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person."

In *CIC*, a company challenged IRS's Notice 2016-66, which identified certain reportable transactions. *Id.* at 1587; https://www.irs.gov/pub/irs-drop/n-16-66.pdf.

The notice compelled certain persons to give IRS certain information. *Id.* Failure to provide information to the IRS could result in "civil monetary penalties" and "criminal penalties." *Id.* IRS argued that such civil penalties for noncompliance are deemed to be taxes for purposes of the Internal Revenue Code, including the AIA, but the criminal liability is not deemed a tax. *Id.* at 1587–88 (citing 26 U.S.C. §§ 6671(a), 7203).

CIC Services, LLC, a company subject to Notice 2016-66, challenged it and sought declaratory and injunctive relief. *Id.* at 1588. IRS moved to dismiss arguing based on the AIA that the requested relief would prevent IRS from "assessing" taxes. The Court concluded, "A reporting requirement is not a tax; and a suit brought to set aside such a rule is not one to enjoin a tax's assessment or collection. That is so even if the reporting rule will help the IRS bring in future tax revenue." *Id.* at 1588–89.

Because "[i]nformation gathering" is "a phase of tax administration procedure that occurs before assessment or collection," for purposes of the AIA, "it d[oes] not matter" that such information-gathering practices would "facilitate collection of taxes." *Id.* at 1589 (cleaned up). The AIA's limit on injunctions is "not keyed to all activities that may improve [IRS's] ability to assess and collect taxes." *Id.* The AIA is "keyed to the acts of assessment and collection themselves." *Id.* (cleaned up). Therefore, "a suit directed at ordinary reporting duties can go forward, unimpeded by the Anti-Injunction Act." *Id.*

In the course of reaching its conclusion that the AIA did not bar the suit in *CIC*, the Court also noted that other cases that did not have a "downstream tax penalty," were "a cinch," and "[t]he Anti-Injunction Act would not apply and the suit could proceed." *Id.* at 1588. In other words, in cases where the challenge was simply to "set

aside" agency action, not challenge an eventual penalty, the AIA had no *arguable* bearing on the claim. *Id.*

CIC is on all fours with Mr. Harper's suit. Mr. Harper challenges an IRS letter that told him IRS had obtained his private information from some third party. Appx67. Based on that information, IRS accused him of not properly reporting his digital-currency transactions, and stated that if Mr. Harper does not file accurate reports, he "may be subject to civil and criminal enforcement activity." *Id.* IRS did not assess any tax against Mr. Harper, and he does not challenge a tax assessment. IRS did not commence a tax-collection action against Mr. Harper. Mr. Harper does not seek a tax refund. He seeks injunctive and declaratory relief challenging IRS's information-gathering practices as violating Mr. Harper's Fourth and Fifth Amendment rights and 26 U.S.C. § 7609(f). Mr. Harper's suit, brought to set aside IRS's illegal information gathering and false accusation of Mr. Harper, is not a suit brought to enjoin a tax's assessment or collection. That remains so even if IRS views the letter it sent Mr. Harper as one that might "improve [its] ability to assess and collect taxes." 141 S. Ct. at 1589.

In evaluating the AIA defense, this Court should focus on "the relief the suit requests," *i.e.*, "the face of the taxpayer's complaint." 141 S. Ct. at 1589. *CIC* looked to "the claims brought and injuries alleged" "to determine the suit's object," "most especially, … the relief requested." *Id.* at 1589–90. In *CIC*, the complaint described the relief requested as "setting aside IRS Notice 2016-66, enjoining the enforcement of Notice 2016-66 as an unlawful IRS rule, and declaring that Notice 2016-66 is unlawful." *Id.* at 1590.

Again, *CIC* resolves this aspect of the case in Mr. Harper's favor. Mr. Harper seeks "declaratory and injunctive relief [against Defendants], including an order expunging Mr. Harper's private financial information from IRS's records." Appx29, Appx32, Appx34. According to *CIC*, such relief cannot be viewed "as blocking the downstream tax penalty that may sanction the Notice's breach." 141 S. Ct. at 1590. Just like the notice at issue in *CIC*, the IRS letter that forms the basis of this suit "levies no tax." *Id.* at 1591. The letter Mr. Harper received is "several steps removed" from any tax Mr. Harper owes. *Id.* First, Mr. Harper would have to "withhold required information about" his cryptocurrency transactions—information that he has not withheld and will continue to disclose. *Id.* Then, IRS "must determine … that a violation" of tax laws "has in fact occurred." *Id.* IRS must then make the "entirely discretionary" "decision to impose a tax penalty." *Id.* "[O]nly if all of those things occur does tax liability attach." *Id. CIC* concluded that this "threefold contingency matters in assessing whether the [AIA] applies." *Id.*

Having already paid all relevant taxes, Mr. Harper "stands nowhere near the cusp of tax liability: Between the upstream [letter] and the downstream tax, the river runs long." *Id.* In *CIC*, as here, it is "hard to characterize this suit's purpose as enjoining a tax." *Id.* Therefore, this case should be a "cinch." *Id.* at 1588.

Overpaying taxes and then bringing a refund suit is not a substitute for Mr. Harper's suit. Mr. Harper does not claim that he is owed a refund; he only claims that IRS collected his private records from third parties by disregarding his constitutional and statutory rights. Meanwhile, Mr. Harper has disclosed all his digital-currency transactions and paid applicable taxes, and he will continue to do so for all future tax

years. Appx22. IRS does not claim otherwise. In short, Mr. Harper's suit is not one that seeks "to foreclose tax liability"; it seeks to challenge IRS's illegal information-gathering practices that violate Mr. Harper's constitutional and statutory rights. 141 S. Ct. at 1593.

Given *CIC*'s plain statement as to the scope of the AIA, the district court erred in concluding that the AIA bars Mr. Harper's claims "because they implicate provisions of the Internal Revenue Code and would restrain the assessment or collection of a tax." Appx86. While the court below recognized that Mr. Harper's suit "challenges the validity of nontax activity," it concluded that "the effect of Harper's requested declaratory and injunctive relief would be to prevent the IRS from assessing Harper's or others' taxes using the information it has obtained through the John Doe third-party process." Appx86. The court's assumption is incorrect because IRS's assessment or collection of taxes is several steps removed from the information-gathering practice sought to be enjoined and declared illegal here.

IRS itself is unsure whether IRS currently has the authority to gather information about cryptocurrency transactions. IRS has sought but not yet obtained Congress's permission to collect routine cryptocurrency transaction information. Carla Mozée, *IRS Chief Asks Congress for More Authority to Regulate the Crypto Industry* (Jun 8, 2021), https://bit.ly/3yqqrna (visited July 9, 2021). IRS, by its own recent actions before Congress, first would have to obtain authority to regulate digital-currency transactions. Depending on the precise wording of the statute Congress enacts, IRS then might have to issue notice-and-comment regulations requiring third-party disclosure of digital-currency transactions. None of these things has happened.

It suffices for the AIA analysis here that there is no such regime in place currently. Mr. Harper accurately self-reported and disclosed his digital-currency transactions and capital gains, and he paid applicable taxes. IRS has never said that his reporting or payment of taxes is inaccurate. Instead, IRS informed Mr. Harper in 2019 that it had obtained some information from some third party; based on that (inaccurate) information, IRS wrongly accused Mr. Harper of not properly reporting his digital-currency transactions. Appx67 ("you … may not have properly reported your transactions involving virtual currency"). This suit is therefore far removed from "the assessment or collection of any tax." 26 U.S.C. § 7421(a). If IRS possesses potentially incriminating information against Mr. Harper that it obtained from third parties, the AIA does not bar a suit in which he seeks a declaration whether IRS obtained such information without violating his right to secure his papers from unreasonable searches and seizures or without denying him the due process of law or without disregarding statutory requirements outlined in 26 U.S.C. § 7609(f).

After *CIC*, it is no longer sufficient (if it ever was) for IRS to claim that the information it possesses "may culminate in the assessment or collection of taxes." Appx87. By that logic, all information that comes into IRS's possession—whether obtained by following proper procedures or otherwise—could culminate in the assessment or collection of taxes. But the Fourth and Fifth Amendments to the Constitution do not contain an IRS exception. Congress has specifically laid out in 26 U.S.C. § 7609(f) that where, as here, IRS issues a summons that "does not identify the person with respect to whose liability the summons is issued," IRS must affirmatively establish that (1) "the summons relates to the investigation of a particular person," (2)

"there is a reasonable basis for believing that such person … may fail or may have failed to comply with any provision of any internal revenue law," and (3) "the information sought to be obtained from the examination of the records … and the identity of the person or persons with respect to whose liability the summons is issued … is not readily available from other sources." *Id.* Congress further prohibited IRS from issuing "any summons … unless the information sought to be obtained is narrowly tailored to information that pertains to the failure (or potential failure) of the person … referred to in paragraph (2) to comply with one or more provisions of the internal revenue law which have been identified for purposes of such paragraph." *Id.*

IRS did not seek any information from Mr. Harper—had it done so, there is no indication that Mr. Harper's cooperation would have been deficient in any way. Mr. Harper never received any notice of a third-party summons from IRS pursuant to 26 U.S.C. § 7609(a). Appx31, Appx33. He had no notice and no opportunity to challenge the seizure of his property. Appx31. IRS's decision to seek any information at all from third parties therefore has dubious footing. There is no "reasonable basis for believing" that Mr. Harper "failed to comply with any provision of the internal revenue law." 26 U.S.C. § 7609(f). There is no indication that the information IRS now has was "not readily available from other sources." *Id.* Nor has IRS shown whether the information it sought and has now obtained is "narrowly tailored to information that pertains to" Mr. Harper's "failure (or potential failure) … to comply with" tax laws. Nor is it clear whether IRS identified any specific "provisions of the internal revenue law" that Mr. Harper failed or potentially failed to comply with before obtaining his information from third parties. *Id.* The letter Mr. Harper received from IRS did not

present any particularized suspicion that Mr. Harper violated any specific internal revenue laws; it did not mention any validly obtained judicial warrant or subpoena as the method by which IRS obtained Mr. Harper's records. The letter contains none of the information that a tax-collection or a refund-denial letter contains. In short, the causal chain between information currently in IRS's possession and a tax-assessment or tax-refund action is so attenuated that Mr. Harper's suit cannot be viewed as one barred by the AIA. The IRS letter sent to thousands of taxpayers including Mr. Harper saying that IRS has some "information" that gives it reason to think that the recipients "may" have violated tax reporting requirements, Appx67, has all the hallmarks of a dragnet operation and a fishing expedition, which are antithetical to a judicially approved subpoena based on particularized suspicion.

The district court erred in concluding otherwise. Appx87. The district court assumed that an injunction "expunging" the records IRS has in its possession would "preemptively stop assessment or collection of [Mr. Harper's] taxes" and that his allegation that he has "paid all taxes that were due is an unsupported conclusory statement." Appx88. The district court was simply wrong in characterizing Mr. Harper's undisputed statement as "unsupported" or "conclusory." Appx88. Throughout this suit, IRS has *not* said that Mr. Harper owes any taxes. No party disputes that Mr. Harper has paid all taxes. IRS has not accused Mr. Harper of tax delinquency, and Mr. Harper has not sought a tax refund. The injunctive and declaratory relief Mr. Harper seeks has no connection to the assessment or collection of taxes. If the records IRS claims it possesses were illegally collected, a declaration to that effect and an injunction requiring

IRS to expunge those records would not prevent IRS from lawfully obtaining Mr. Harper's information through legal channels and from legitimate sources.

The district court suggests that Mr. Harper could have "intervene[d] and challenge[d] enforcement of the [Coinbase] summons," and that "additional processes are available." Appx89–90 (citing *United States v. Coinbase*, No. 17-cv-1431, 2017 WL 3035164 (N.D. Cal. July 18, 2017); 26 U.S.C. §§ 6213 (tax-assessment notice), 7422 (tax-refund suit)). The AIA does not turn on whether other remedies are available. The Act, by its plain terms, states only that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a). The Act does not say that a declaratory-and-injunctive-relief suit may proceed only if no other relief is obtainable via other channels. It is also odd to suggest that the AIA bars this suit because IRS's information-gathering practices can potentially be challenged in a tax-assessment or tax-refund suit when the individual discretionary acts that are necessary to build up to such a fact pattern are simply absent here. Also, Mr. Harper cannot even bring such a suit if IRS never does anything with the information it has illegally seized. To challenge IRS's illegal information-gathering Mr. Harper must "bring an action in just this form, framing [the] requested relief in just this way." *CIC*, 141 S. Ct. at 1592. Put differently, a long chain of potentialities leading up to some other hypothetical suit that can be brought does not show why *this* suit is barred by the AIA. Furthermore, that misreading of the AIA would leave taxpayers whose records have been seized in violation of the Constitution or federal law without relief if the IRS never uses those records. Yet federal courts should be particularly concerned to protect the papers of innocent taxpayers.

B. The Declaratory Judgment Act Does Not Bar This Suit

In the court below, IRS argued that both the AIA and the DJA, 28 U.S.C. §§ 2201–2202, divested the court's subject-matter jurisdiction. The district court concluded that the DJA "includes a similar carve out for declaratory judgments 'with respect to Federal taxes.'" Appx87. However, that conclusion is also wrong for the same reasons as is its conclusion that the AIA bars jurisdiction. The DJA states, in relevant part:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under [26 U.S.C. § 7428 (declaratory judgments relating to status and classification of organizations under section 501(c)(3))], … any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

28 U.S.C. § 2201(a).

The legislative history behind DJA's tax exception and its relationship to the AIA have led numerous courts of appeals, including this Court, to conclude that the scope of DJA's tax exception should be read coextensively with the AIA. *See McCarthy v. Marshall*, 723 F.2d 1034, 1038 (1st Cir. 1983); *Cohen v. United States*, 650 F.3d 717, 730–31 (D.C. Cir. 2011) (DJA's tax exception is "coterminous" or "coextensive" with the AIA's prohibition); *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 583 (4th Cir. 1996) ("the two statutory texts are, in underlying intent and practical effect, coextensive"); *Wyoming Trucking Ass'n v. Bentsen*, 82 F.3d 930, 933 (10th Cir. 1996) (same); *Ecclesiastical Order of*

the ISM of Am., Inc. v. IRS, 725 F.2d 398, 404–05 (6th Cir. 1984) (same); *Perlowin v. Sasse*, 711 F.2d 910, 911 (9th Cir. 1983) (same); *Tomlinson v. Smith*, 128 F.2d 808, 811 (7th Cir. 1942) (same).

To decide whether a lawsuit is barred by either the AIA or the DJA, this Court asks whether "the primary purpose of th[e] action is to prevent [IRS] from assessing and collecting income taxes and to restore advance assurance of tax advantages under the Internal Revenue Code." *McCarthy*, 723 F.2d at 1038. A court should also ask whether the exercise of jurisdiction over the case would "obstruct the collection of revenue" or "alter Appellants' future tax liabilities" or "shift the risk of insolvency." *Cohen*, 650 F.3d at 725. If IRS would still be able to collect and assess taxes, then the suit should not be barred. *Id.* Indeed, even a suit that "merely inhibit[s]" the collection of taxes, is not barred. *Z St.*, 791 F.3d at 31.

Even before the Supreme Court's recent watershed *CIC* decision, federal courts had emphasized that although "IRS envisions a world in which no challenge to its actions is ever outside the closed loop of its taxing authority," AIA's prohibition does not sweep broadly: "[a]ssessment is not synonymous with the entire plan of taxation, but rather with the trigger for levy and collection efforts, and the 'collection' is the actual imposition of a tax against a plaintiff." *Cohen*, 650 F.3d at 726 (cleaned up). It is not surprising that courts "allowed constitutional claims against the IRS to go forward in the face of the AIA" and refused to "rea[d] the AIA to reach all disputes tangentially related to taxes." *Id.* at 726–27. The key question is whether the action is fundamentally a "tax collection claim," which courts determine based upon "a careful inquiry into the

remedy sought, the statutory basis for that remedy, and any implication the remedy may have on assessment and collection." *Id.* at 727.

Congress framed the AIA as a barricade to jurisdiction, and the DJA as an entryway. But courts of appeals view the DJA analysis to be coterminous and coextensive with the AIA analysis (including this Court, under *McCarthy*, 723 F.2d at 1038). Now is not the occasion to read the two statutes separately. After the Supreme Court's decision in *CIC*, this Court should conclude that because the AIA does not bar Mr. Harper's suit, the DJA does not bar it either.

Mr. Harper has already paid all applicable taxes. Mr. Harper challenges IRS's unlawful collection of his private information through its abuse of subpoenas related to his use of digital currencies. Appx22. Mr. Harper has fully complied with all his tax obligations. Appx16. Fundamentally, this suit cannot seek to prevent the assessment and collection of income taxes as those actions are uncontested and "long-since completed." *Cohen*, 650 F.3d at 726. "This suit does not seek to restrain the assessment or collection of any tax. The IRS previously assessed and collected the excise tax at issue. The money is in the U.S. treasury; the legal right to it has been previously determined. … Hearing [this suit]—whatever its merit—will not obstruct the collection of revenue … alter … future tax liabilities … or shift the risk of insolvency." *Id.* at 725. Notably, IRS has not audited Mr. Harper, nor has it assessed any additional tax liability against Mr. Harper based on its illegally obtained information. Nor can it if it were to rely solely on that illegally obtained information.

Further, neither the DJA nor the AIA bars this suit because of the remedy Mr. Harper seeks. This suit is not about the amount of money Mr. Harper or anyone

else owes the IRS. Tax liability has no role whatsoever here. Rather, the lawsuit targets IRS's illegal collection of private data. Appx25–34. Mr. Harper does not seek a refund or a recalculation of his tax liability. He seeks injunctive and declaratory relief for the constitutional and statutory violations of his protected privacy interests. Appx25–34 (prayer for relief). This is not a "tax collection claim"; it is a constitutional challenge to unlawful actions that IRS took. The nature of the suit would not change had those actions been taken by any other federal agency or officer. Mr. Harper's suit thus cannot be barred by either the AIA or the DJA. *Cohen*, 650 F.3d at 727.

Mr. Harper does not seek a system-wide injunction. Mr. Harper does not seek injunctive relief requiring IRS to expunge from its records information about potentially thousands of taxpayers. Instead, Mr. Harper seeks injunctive relief as to *his* private information, and expungement of *his* private information that IRS obtained illegally. Appx25–34 (prayer for relief). Perhaps other similarly situated persons might seek similar relief; perhaps not. Presumably, declaratory relief from this court will deter IRS from unlawful information-gathering in the future as well. This suit is merely about IRS's violation of Mr. Harper's rights and has nothing at all to say about his tax liability.

The Court should conclude that the district court has subject-matter jurisdiction because neither the AIA nor the DJA bars this suit, reverse the decision below, and remand so that the parties can proceed to discovery.

IV. MR. HARPER HAS PLAUSIBLY PLED THAT IRS VIOLATED HIS CONSTITUTIONAL AND STATUTORY RIGHTS

IRS had argued below that all counts should be dismissed under FRCP 12(b)(6) because they fail to state a claim on which relief could be granted. The district court did not reach IRS's arguments regarding the merits of Mr. Harper's claims that IRS violated his constitutional and statutory rights.

The Court should decide that Mr. Harper has plausibly alleged that his rights were violated under the Fourth and Fifth Amendments, and 26 U.S.C. § 7609(f), and remand the case so that parties can proceed to discovery. IRS did not defend its actions as having been authorized by statute—it simply said that IRS's violations do not matter under the third-party doctrine. But the third-party doctrine does not give IRS a free pass. IRS frustrated Mr. Harper's reasonable expectations of privacy founded in contractual agreements with digital-currency exchanges, and IRS has trespassed by seizing Mr. Harper's private information without any lawful process.

A. IRS Acquired Mr. Harper's Information Without a Lawful Subpoena

IRS did not argue below that it complied with 26 U.S.C. § 7609(f). Appx32–34. This may have been because IRS appears not to have complied with the requirements set out in 26 U.S.C. § 7609(f), as the third-party subpoena it issued to obtain Mr. Harper's records (assuming that is how IRS obtained his records) was not supported by a reasonable basis to suspect he had violated the tax laws. Appx32–34. IRS probably obtained Mr. Harper's private information either from an unlawful John Doe subpoena issued to Coinbase or without any subpoena issued to Abra or a comparable exchange. Appx33–34.

IRS has statutory authority to issue a John Doe subpoena only "where the IRS *does not know* the identity of the taxpayer under investigation." *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 317 (1985) (interpreting 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 Cit. 1995). Section 7609(f) authorizes IRS to issue John Doe summonses for financial records only if the Secretary establishes 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 or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and (3) the information sought to be obtained from the examination of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources."

As pled in the Complaint, IRS obtained Mr. Harper's information either from Abra without any subpoena at all, which would violate 26 U.S.C. § 7609(f), or from Coinbase based on a legally inadequate subpoena. Appx33–34. The Coinbase subpoena fails at least the second prong of Section 7609(f). The magistrate who approved the Coinbase subpoena, a decision not binding on this Court, decided that the subpoena was minimally relevant under the lesser standard applicable to Section 7602. The information sought related to "14,335 Coinbase account holders" and a single IRS agent had attested that "only 800 to 900 tax-payers reported gains related to bitcoin in each of the relevant years." *Coinbase*, 2017 WL 5890052, at *4 (Scott Corley, U.S.M.J.). The magistrate judge concluded that the users who had a series of transactions that

aggregated to "at least $20,000 worth of bitcoin in a given year" may have been more likely to not have properly filed their taxes. *Id.*

This information hardly shows a reasonable basis for believing that all bitcoin users—or Mr. Harper particularly—had violated the tax laws. Transfers of cryptocurrency away from an exchange do not imply a sale or other taxable event, as many cryptocurrency users move their holdings to privately held wallets. Even if one assumes that most Coinbase users largely failed to report transactions related to bitcoin, it does not follow that they or Mr. Harper likely failed to comply with the tax laws. One must receive gains to report them, and the class also includes people who merely engaged in aggregate transactions—even if they only held small amounts of bitcoin for short periods of time and never realized any gain.

IRS's subpoena for Coinbase records was unlawful. The Coinbase subpoena may not have been how IRS got Mr. Harper's data; IRS neither confirms nor denies. Mr. Harper was given no notice of either the Coinbase or any other subpoena IRS used to seize Mr. Harper's private papers. Mr. Harper has stated a plausible claim for declaratory and injunctive relief in Count III that is sufficient to overcome an FRCP 12(b)(6) motion. Appx32–34.

B. IRS Violated the Fourth Amendment

IRS argued below that Mr. Harper did not have an expectation of privacy in his financial information and therefore that no unreasonable search in violation of the Fourth Amendment occurred. Mr. Harper has stated a claim that IRS violated his Fourth Amendment rights in two ways: an unreasonable search, and a trespassory search and seizure. IRS's possible defense based on the third-party doctrine does not

overcome Mr. Harper's reasonable expectation of privacy in his private information and his property interest in that information. IRS's warrantless search and seizure, therefore, intruded on Mr. Harper's Fourth Amendment rights.

1. The Fourth Amendment Restrains the Types of Searches IRS Conducts

The Fourth Amendment protects "the right of the people to be secure in their … papers … against unreasonable searches and seizures." The Fourth Amendment is violated when (1) the government trespasses upon a person's property, or (2) intrudes against a person's reasonable expectation of privacy. *United States v. Jones*, 565 U.S. 400, 405–06 (2012). Either test suffices. Even if there is no reasonable expectation of privacy, a trespass akin to one understood at the founding constitutes a search. *Id.* at 405, 406, 411.

There is a strong preference for warrants before government agents may intrude on a person's papers. "[T]he founders understood the seizure of papers to be an outrageous abuse distinct from general warrants." Donald A. Dripps, *"Dearest Property": Digital Evidence and the History of Private "Papers" as Special Objects of Search and Seizure*, 103 J. Crim. L. & Criminology 49, 52 (2013). "If one goes back to the early Republic … it is difficult to find any federal executive body that could bind subjects to appear, testify, or produce records." Philip Hamburger, *Is Administrative Law Unlawful?* 221 (2014). "[P]rivately owned papers were peculiarly protected: They were not subject even to general disclosure requirements, it being only government-owned records that were open to inspection." *Id.*

Congress initially gave the Treasury Secretary the authority in all revenue actions "other than criminal" the power to serve an investigative demand on a defendant. An Act to Amend the Customs-Revenue Laws and to Repeal Moieties, ch. 391 § 5, 18 Stat. 187 (1874). *Boyd v. United States*, 116 U.S. 616, 638 (1886) concluded that subpoenas issued under the statute were "unconstitutional and void" under the Fourth Amendment because they are akin to general warrants. *Boyd* relied on *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765). 116 U.S. at 626.

In *Entick*, Lord Camden wrote:

> Papers are the owner's goods and chattels; they are his dearest property, and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and erried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect.

Boyd, 116 U.S. at 627–28 (quoting *Entick*, 19 How. St. Tr. at 1029). The "principles laid down" in *Entick* "affect the very essence of constitutional liberty and security." *Id.* at 630. The Court equated "a compulsory production of a man's private papers" with "[b]reaking into a house and opening boxes and drawers." *Id.* at 622, 630. Both constitute "the invasion of his indefeasible right of personal security, personal liberty, and private property." *Id.* at 630.

Jones also relied heavily on *Entick*, "a case we have described as a 'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of

constitutional law' with regard to search and seizure" to determine the proper contours of what constituted a trespass at common law. 565 U.S. at 405 (citations omitted).

Carpenter v. United States, 138 S. Ct. 2206 (2018) concluded that the Fourth Amendment requires a warrant based on probable cause for seizure of sensitive personal information from third parties. In *Carpenter*, federal investigators subpoenaed wireless carriers' cell-site location information records without a warrant. *Id.* at 2212. The Court concluded, the government "must generally obtain a warrant supported by probable cause before acquiring such records." *Id.* at 2221. *Carpenter* clarified that the Court had "never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy." *Id.* at 2221. If the government subpoenas "records held by a third party," it must first obtain a warrant "where the suspect has a legitimate privacy interest" in the records. *Id.* at 2222.

Justice Gorsuch offered "another way" to resolve the case, surpassing the much-derided reasonable-expectation-of-privacy test in favor of a test more rooted in constitutional text and the common law. *Id.* at 2267–68 (Gorsuch, J., dissenting). Justice Gorsuch would have treated the records as a "bailment." *Id.* "A bailment is the delivery of personal property by one person (the *bailor*) to another (the *bailee*) who holds the property for a certain purpose. … A bailee normally owes a legal duty to keep the item safe, according to the terms of the parties' contract if they have one. … A bailee who uses the item in a different way than he's supposed to, or against the bailor's instructions, is liable for conversion." *Id.* at 2268–69. This approach would accord with the common law approach to subpoenas. *Id.* at 2271. Citing *Ex Parte Jackson*, 96 U.S. 727, 723 (1878), which "held that sealed letters placed in the mail are 'as fully guarded

from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles,'" Justice Gorsuch said: "no one thinks the government can evade *Jackson*'s prohibition on opening sealed letters without a warrant simply by issuing a subpoena to a postmaster for 'all letters sent by John Smith' or, worse, 'all letters sent by John Smith concerning a particular transaction.'" 138 S. Ct. at 2269, 2271. The relevant question is: "What other kinds of records are sufficiently similar to letters in the mail that the same rule should apply?" *Id.* at 2271.

Mr. Harper did not voluntarily convey his information to government eyes. He contracted with Coinbase and Abra, *inter alia*, to ensure that they would *not* share his personal information without a lawful directive from the government. Appx36–66. In the court below, IRS parried by citing *United States v. Miller*, 425 U.S. 435, 439 (1976). In *Miller*, treasury agents obtained facially invalid grand-jury subpoenas for Miller's bank records and obtained account information from a financial institution. The subpoenaed documents did not "fall within a protected zone of privacy" because they were not Miller's "private papers" but were "business records of the banks." *Id.* at 440. *Carpenter* declined to extend *Miller*, diminished it, saying that the "third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. But the fact of diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." 138 S. Ct. at 2219. The voluntary-exposure rationale of *Miller* does not justify intrusions when the intrusion was so pervasive that "in no meaningful sense" did the "user voluntarily assume the risk of turning over" the data. *Id.* at 2220.

Mr. Harper had very different expectations. He contracted with the relevant platforms to protect his personal information. Coinbase promised so. Appx14–15. As did Abra, Appx20–21, and Uphold, Appx21–22. Uphold has now categorically said it did not give IRS Mr. Harper's information. Appx23. Mr. Harper could not have expected any of his information would be disclosed to the government contrary to these agreements. The voluntary-exposure rationale does not apply.

Carpenter recognizes that the third-party doctrine no longer applies "for records in which the suspect has a reasonable expectation of privacy." 138 S. Ct. at 2221. The contracts are strong evidence that Mr. Harper expected his personal information to be kept private except for limited and defined intrusions, which demonstrate his reasonable expectation of privacy.

2. Mr. Harper Has a Reasonable Expectation of Privacy in His Records

A search occurs when the government infringes upon "an expectation of privacy that society is prepared to consider reasonable." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). There are two distinct inquiries under this standard: "has the [target of the investigation] manifested a subjective expectation of privacy in the object of the challenged search?" "[I]s society willing to recognize that expectation as reasonable?" *California v. Ciraolo*, 476 U.S. 207, 211 (1986).

On the first question, Mr. Harper *did* expect his information to remain private according to the contracts he entered into with cryptocurrency exchanges (Abra, Coinbase, and Uphold). He had a subjective expectation of privacy that his information would only be shared according to the terms of the agreements.

Mr. Harper's expectation was also reasonable. Personal papers are a person's "dearest property," and even private financial records have been jealously protected since well before the Bill of Rights was written. *See Boyd*, 116 U.S. at 627–28. In 1791, the concept of administrative subpoenas was so foreign to the Republic that even a statute requiring distillers to keep records of "their production of spirits" on books supplied to them for that purpose by "treasury officers" were "privately owned records or papers" that were "peculiarly protected." Hamburger, *supra*, at 224–25. Mr. Harper's personal financial information is at least as "dear" as a distiller's production records.

Mr. Harper's personal information, which included identifying information, detailed transaction information, and payment and routing information, is akin to personal papers. An agency "is less free to subpoena *personal* financial information" than "*corporate* financial information" in reliance on "the Fourth Amendment's protection of the privacy interest that inheres in personal papers." *Resolution Tr. Corp. v. Thornton*, 41 F.3d 1539, 1544–45 (D.C. Cir. 1994).

Courts look to contractual agreements or policies to ascertain whether a person has a reasonable expectation of privacy. *See, e.g.*, *United States v. Dorais*, 241 F.3d 1124, 1130 (9th Cir. 2001) (hotel's checkout procedures granted person reasonable expectation of privacy in a room); *United States v. Boruff*, 909 F.2d 111, 117 (5th Cir. 1990) (an individual not listed as a driver on a rental agreement did not have a legitimate expectation of privacy in a car). A limited right of access to information given in a privacy policy does not defeat the general expectation of privacy in email. A protective privacy policy (like the ones Mr. Harper entered into with Coinbase, Abra, and Uphold)

is relevant to the Fourth Amendment inquiry. *United States v. Warshak*, 631 F.3d 266, 287 (6th Cir. 2010).

Mr. Harper contracted with all three platforms to protect his personal information, and all three agreed to safeguard his information from government intrusion unless lawfully compelled to disclose it. Appx14–16, Appx20–22. Uphold even insisted on a warrant or a specific type of subpoena in an active criminal investigation. Appx21–22. These common contractual provisions show that society recognizes a reasonable expectation of privacy here.

IRS violated Mr. Harper's reasonable privacy expectations. IRS did not use lawful process to obtain Mr. Harper's information from Coinbase, Abra, or other sources. Without a lawful warrant, the search and seizure were unlawful. *Carpenter*, 138 S. Ct. at 2221.

3. IRS Violated the Fourth Amendment by Trespassing on Mr. Harper's Private Property

New Hampshire, where Mr. Harper resides, has long held that a bailee may not "delive[r] the [bailor's] goods to others" because the "goods still remained the property of the [bailor]." *Sargent v. Gile*, 8 N.H. 325, 328–29 (1836). Both "tangible and intangible property" can be the subject of a bailment. *Liddle v. Salem Sch. Dist. No. 600*, 619 N.E.2d 530, 531 (Ill. App. 1993). Many courts recognize that one may wrongly convert intangible property. *Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003) (collecting cases). The Supreme Court has said, "The *Katz* reasonable-expectations test has been *added* to, not *substituted for*, the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence

by physically intruding on constitutionally protected areas." *Florida v. Jardines*, 569 U.S. 1, 11 (2013).

IRS converted Mr. Harper's personal information. As per the contracts, Mr. Harper was a bailor and expected that the exchanges he contracted with at personal expense would not violate the terms of their agreement with him and hand over his information to the government except by lawful process. But the process was not lawful because, having come about either through a disclosure by Abra with no process, the improper Coinbase subpoena, or a third irregular way, IRS's acquisition of Mr. Harper's information did not pass muster under the Fourth Amendment warrant requirement. Appx26–28. Coinbase's agreement not to divulge his information without being "compelled" to do so implies that it was lawfully compelled to act, and, as pled and not challenged by IRS, the Coinbase subpoena was not a lawful demand for information. Appx26. IRS, of course, never subpoenaed Abra, as far as it is known, so disclosure of information to IRS would have violated Abra's agreement with Mr. Harper. Appx27.

If the search were a trespass, then it required a warrant. *Jones*, 565 U.S. at 405. IRS never got a warrant, so the search was unlawful.

In sum, Mr. Harper has stated a plausible claim for declaratory and injunctive relief under the Fourth Amendment that is sufficient to defeat an FRCP 12(b)(6) motion to dismiss. Appx25–29.

C. IRS Violated Mr. Harper's Fifth Amendment Rights

Mr. Harper is entitled under the Fifth Amendment's Due Process Clause to a notice and an opportunity to protect his private information from unreasonable searches and seizures. It is a Fifth Amendment due-process violation if a person is

deprived of the right to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). IRS deprived Mr. Harper of due-process rights. IRS misapplied the applicable statutes, 26 U.S.C. § 7602 *et seq.*, which constitutes a due-process violation. Because it misapplied the statutes that require IRS to afford a defined process to the owners of records, IRS violated the Due Process Clause when it failed to adhere to the set process for obtaining and then keeping Mr. Harper's private papers.

Through 26 U.S.C. § 7609(f), Congress attempted to approximate the requirements of the Due Process Clause: a notice and an opportunity to contest at a meaningful time in a meaningful manner. But the statutory violation is distinct from the Fifth Amendment violation. In other words, if there were no 26 U.S.C. § 7609(f), Mr. Harper would still have this notice-and-opportunity due-process right. IRS violated the Fifth Amendment's Due Process Clause by seizing Mr. Harper's intangible property from Abra, Coinbase, or some other source, without first providing him notice and an opportunity to challenge the seizure of his property. Appx31.

It is not sufficient to say that Mr. Harper could have sought intervention in the Coinbase matter in the Northern District of California. "In the case of a John Doe summons, the Doe has no right to intervene in the hearing on the summons's issuance required by [26 U.S.C.] § 7609(f) … and the Doe has no right to file a motion to quash the summons once it has been issued." *United States v. Ritchie*, 15 F.3d 592, 597 (6th Cir. 1994). The IRS third-party summons procedure is an *ex parte* process. Mr. Harper did

not receive any notice of a third-party summons from IRS pursuant to 26 U.S.C. § 7609(a).[6]

A straightforward *Mathews* three-factor analysis demonstrates the plausibility of Mr. Harper's Fifth Amendment claim. *Mathews* lays out three factors to ascertain whether the procedures used by government actors comport with the Due Process Clause: "private interest[s] that will be affected by the official action," "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," "the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." 424 U.S. at 335.

Mr. Harper has a recognized privacy interest in his private information. *See Lepelletier v. FDIC*, 164 F.3d 37, 49 (D.C. Cir. 1999). He also has a recognized property interest in his private papers. *Boyd*, 116 U.S. at 627–28. The risk of erroneously depriving him of his privacy and property interests is especially high because IRS did not even follow statutory procedures to provide Mr. Harper of notice and an opportunity to contest IRS's third-party subpoenas *before* it intruded upon his protected interests. Additional or substitute procedural safeguards are readily available: IRS could give Mr. Harper constitutionally adequate notice and opportunity to contest; IRS could follow 26 U.S.C. § 7609(f). Meanwhile, past violations can be readily corrected by expunging Mr. Harper's records in IRS's possession that it obtained through illegal channels. As to the third factor, the government has no interest in violating the

[6] Mr. Harper filed an *amicus* brief opposing IRS in the Coinbase case. Appx19.

Constitution or federal statutes. IRS's interest should be aligned with Mr. Harper's: obtain private records in compliance with the Fourth and Fifth Amendments, and 26 U.S.C. § 7609(f).

Mr. Harper has plausibly pled a claim for declaratory and injunctive relief in Count II that is sufficient to defeat an FRCP 12(b)(6) motion. Appx29–32.

CONCLUSION

The Court should conclude that the district court has subject-matter jurisdiction, and that Mr. Harper has stated a claim upon which relief can be granted. Consequently, the Court should reverse the decision below and remand for further proceedings consistent with the Court's decision.

Respectfully submitted on July 9, 2021, by:

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CERTIFICATE OF COMPLIANCE

This document complies with the 13,000-word limit established by FRAP 32(a)(7) because it contains **11,886** words. This document complies with the typeface and typestyle requirements of FRAP 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced serif typeface, Garamond, and set at 14-point or larger.

Dated: July 9, 2021

/s/ Aditya Dynar
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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2021, I electronically filed the foregoing document, along with the Appendix and Addendum, with the United States Court of Appeals for the First Circuit using the CM/ECF system. Counsel for all parties are registered users of the CM/ECF system. They will be served by the CM/ECF system:

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Dated: July 9, 2021

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No. 21-1316

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,
&
JOHN DOE IRS AGENTS 1–10,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE, CASE NO. 1:20-CV-00771-JD (HON. JOSEPH A. DICLERICO, JR.)

ADDENDUM TO APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

James Harper

v.

Charles P. Rettig, in his official capacity as Commissioner of the Internal Revenue Service, et al.

Civil No. 20-cv-771-JD
Opinion No. 2021 DNH 056

O R D E R

James Harper brought this civil rights suit against Commissioner Charles Rettig, the IRS, and various unknown officers of the IRS (John Does 1 through 10) (collectively, "the government"). Harper alleges that the government violated the Fourth Amendment, Fifth Amendment, and 26 U.S.C. § 7609(f) by obtaining records of his financial transactions from third parties. The government moves to dismiss (doc. no. 12) Harper's suit for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). Harper objects.

Standard of Review

When resolving a challenge to the court's subject-matter jurisdiction under Rule 12(b)(1) or determining whether a claim

upon which relief can be granted has been stated under Rule 12(b)(6), the court construes the allegations in the complaint liberally, treats all well-pleaded facts as true, and resolves inferences in the plaintiff's favor. Jalbert v. U.S. Securities & Exchange Comm'n, 945 F.3d 587, 590-91 (1st Cir. 2019); Hamann v. Carpenter, 937 F.3d 86, 88 (1st Cir. 2019). The court, however, disregards conclusory allegations that simply parrot the applicable legal standard. Manning v. Boston Med. Ctr. Corp., 725 F.3d 34, 43 (1st Cir. 2013).

When addressing subject-matter jurisdiction, in addition to the complaint, the court may consider other evidence submitted by the parties without objection. Hajdusek v. United States, 895 F.3d 146, 148 (1st Cir. 2018). The plaintiff, as the party invoking federal jurisdiction, bears the burden of showing that subject matter jurisdiction exists when challenged. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).

Background

In 2013, Harper opened an account with "Coinbase," an entity that "facilitates transactions in virtual currencies such as bitcoin." Doc. 3 ¶ 18. Coinbase provided terms of agreement alongside its account, stating, in relevant part, that "Coinbase takes reasonable precautions, as described herein, to protect

your personal information from loss, misuse, unauthorized access, disclosure, alteration, and destruction." Id. ¶ 25.

In 2013 and 2014, Harper deposited bitcoin into his Coinbase account. Harper primarily received the bitcoin as income from consulting work. Harper alleges that he declared the transactions on his 2013 and 2014 tax returns and states that he declared all "appropriate income from bitcoin payments," including capital gains tax. Id. ¶¶ 30-33. Harper states that he also paid "appropriate capital gains on any bitcoin income for tax years 2015 and 2016." Id. ¶ 37. In 2015, Harper liquidated his holdings in the Coinbase account and by 2016 Harper no longer held any bitcoin in the Coinbase account. Harper also held bitcoin in accounts with "Abra" and "Uphold". Harper and his wife liquidated those accounts from 2016 through the date of the Amended Complaint (August 2020).

In 2016, the IRS sought to enforce an ex parte third-party "John Doe" administrative summons under 26 U.S.C. §§ 7602,[1]

[1] Section 7602 generally authorizes the IRS to issue administrative summonses "[f]or 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 the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability . . . ."

7609(f),[2] and 7609(h)(2) against Coinbase in the Northern District of California. Coinbase opposed enforcement of the summons. Ultimately, the court ordered Coinbase to comply with a narrowed version of the summons. United States v. Coinbase, Inc., 2017 WL 5890052, at *1 (N.D. Cal. Nov. 28, 2017) (finding that the narrowed IRS summons "serves the IRS's legitimate

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[2] Section 7609(f) details special prerequisites the IRS must satisfy before enforcing an ex parte "John Doe" third-party summons. It says:

> Any summons described in subsection (c)(1) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes 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 or class of persons may fail or may have failed to comply with any provision of any internal revenue law, 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.
>
> The Secretary shall not issue any summons described in the preceding sentence unless the information sought to be obtained is narrowly tailored to information that pertains to the failure (or potential failure) of the person or group or class of persons referred to in paragraph (2) to comply with one or more provisions of the internal revenue law which have been identified for purposes of such paragraph.

purpose of investigating Coinbase account holders who may not have paid federal taxes on their virtual currency profits").

In 2019, the IRS sent Harper a letter entitled "Reporting Virtual Currency Transactions." Doc. 3 ¶ 67; see also doc. 3-6 at 1. As relevant, the IRS's letter told Harper the following:

> We have 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.

Doc. 3 ¶ 68; see also doc. 3-6 at 1. The IRS stated that if Harper had failed to properly report his "virtual currency transactions" then he "may be subject to future civil and criminal enforcement activity." Doc. 3 ¶ 69; see also doc. 3-6 at 1. Additionally, upon Harper's "information and belief," John Does 1 through 10 "issued an informal demand" to Abra and Coinbase for Harper's financial records. Harper believes that Abra or Coinbase complied with that demand.

Harper's Amended Complaint contains three counts: (I) violation of the Fourth Amendment; (II) violation of the Fifth Amendment; and (III) declaratory judgment/violation of 26 U.S.C. § 7609(f). As relief for the alleged violations of law stated in Counts I and II, Harper requests money damages from the defendants, as well as injunctive and declaratory relief. Specifically, Harper requests an order declaring § 7602, et

seq., unconstitutional as applied to him under the Fourth and Fifth Amendments, requiring the IRS to expunge Harper's financial records, and prohibiting the IRS and John Does 1 through 10 from seizing financial records from "virtual currency exchanges" under § 7602, et seq., in the future.

In Count III, Harper requests a declaratory judgment that the IRS is violating § 7609(f) and, like Counts I and II, requiring the IRS to expunge his financial records and prohibiting the IRS and John Does 1 through 10 from seizing similar financial records through § 7609(f) in the future. Commissioner Rettig is sued in his official capacity, while John Does 1 through 10 are sued in their personal capacities.

Discussion

The government moves to dismiss Harper's suit for lack of jurisdiction and for failure to state a claim upon which relief can be granted. Harper objects to dismissal. The government filed a reply.

A. Jurisdiction (Sovereign Immunity)

The government argues that, while Harper's suit is nominally against Commissioner Rettig and unidentified "John Doe" IRS officers, the suit is, in function, a suit against the

United States, so that the United States's sovereign immunity bars the suit. Harper does not contest that his claims against the IRS and Commissioner Rettig are functionally against the United States, but he argues that the Administrative Procedure Act ("APA") waives sovereign immunity to the extent he requests declaratory or injunctive relief. Harper also suggests that Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), provides an exception to the United States's sovereign immunity for claims for money damages. In its reply, the government argues that the APA does not waive the United States's sovereign immunity because, 1) another statute – the Anti-Injunction Act, 26 U.S.C. § 7421 – precludes judicial review; 2) the APA does not waive sovereign immunity if another statute that grants consent to suit expressly or implicitly forbids the relief sought; and 3) the agency action complained of by Harper has another adequate court remedy.

"It is elementary that the United States, as sovereign, 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 the suit." United States v. Mitchell, 445 U.S. 535, 538 (1980) (alterations and quotation marks omitted). The burden is on Harper to establish that a waiver of

sovereign immunity is applicable here. In re Rivera Torres, 432 F.3d 20, 23 (1st Cir. 2005).

1. Counts I and II (Relief in Form of Money Damages)

In Counts I and II, in part, Harper appears to request money damages from the IRS and Commissioner Rettig, who was sued only in his official capacity. Contrary to Harper's apparent contention in his objection to the motion to dismiss, Bivens does not provide an exception to sovereign immunity for suits against the United States or official-capacity defendants for money damages. Tapia-Tapia v. Potter, 322 F.3d 742, 746 (1st Cir. 2003) ("[T]he government's sovereign immunity does not vanish simply because government officials may be personally liable for unconstitutional acts."). Harper asserts no other basis for his argument that the United States has waived its sovereign immunity for his claims for money damages brought against the IRS or Commissioner Rettig. Therefore, Counts I and II are dismissed to the extent Harper seeks money damages from the IRS or Commissioner Rettig. See id.

2. Count I, II, and III (Relief in Form of Injunctions & Declaratory Judgments)

Harper also requests that the court declare § 7602, et seq., unconstitutional as applied to him and order Commissioner

Rettig, the IRS, and John Does 1 through 10 to expunge any financial records they obtained about Harper's cryptocurrency transactions via § 7602, et seq., and enjoin John Does 1 through 10 from violating the Fourth Amendment, Fifth Amendment, and § 7609(f) in the future. In its motion to dismiss, the government contends that these requests for relief are barred by the United States's sovereign immunity and the Anti-Injunction Act. Harper objects, arguing that the APA waives the United States's sovereign immunity and that the Anti-Injunction Act does not prohibit the injunctive and declaratory relief he seeks in this case.

"The APA generally waives the Federal Government's immunity from a suit '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.'" Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 215 (2012) (quoting 5 U.S.C. § 702). That waiver, however, contains two exceptions: (1) if another limitation on judicial review requires the court to deny relief; or (2) "if any other statute that grants consent to suit expressly or impliedly forbids the relief" sought by the plaintiff. 5 U.S.C. § 702.

The Anti-Injunction Act provides such a limitation on judicial review, as it states, in relevant part, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person[.]" 26 U.S.C. § 7421(a);[3] see also Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 543 (2012) ("This statute protects the Government's ability to collect a consistent stream of revenue, by barring litigation to enjoin or otherwise obstruct the collection of taxes. Because of the Anti-Injunction Act, taxes can ordinarily be challenged only after they are paid, by suing for a refund."); Fostvedt v. United States, 978 F.2d 1201, 1203-04 (10th Cir. 1992) ("Contrary to Petitioner's assertions, § 702 of the APA does not override the limitations of the Anti-Injunction Act and the Declaratory Judgment Act."). If a claim "called in question a specific provision of the Internal Revenue Code, or to a ruling or regulation issued under the Code, the claim would clearly come under the general bars to jurisdiction and declaratory relief . . . ." McCarthy v. Marshall, 723 F.2d

[3] Harper does not argue that any of the enumerated statutory exceptions to the Anti-Injunction Act apply here. See 26 U.S.C. § 7421(a) (stating that the act applies "[e]xcept as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6232(c), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436"). Rather, he contends that the Anti-Injunction Act does not apply considering the circumstances of his claims.

1034, 1037 (1st Cir. 1983). "Conversely, if jurisdiction were otherwise established and the controversy concerned essentially nontax matters, there would be no question of dismissing the case merely because a decision on the merits might have some collateral tax repercussions." Id.

The Anti-Injunction Act applies to Harper's claims for declaratory and injunctive relief because they implicate provisions of the Internal Revenue Code and would restrain the assessment or collection of a tax. See id. Although Harper's suit ostensibly challenges the validity of nontax activity – the IRS's enforcement of a John Doe third-party summons – the effect of Harper's requested declaratory and injunctive relief would be to prevent the IRS from assessing Harper's or others' taxes using the information it has obtained through the John Doe third-party process. Consequently, his suit, to the extent it seeks injunctive and declaratory relief, is barred by the Anti-Injunction Act. See Bob Jones Univ. v. Simon, 416 U.S. 725, 738 (1974) (rejecting argument that suit was not intended to restrain the assessment or collection of any tax because the "complaint and supporting documents" revealed the plaintiff's concern about how the challenged IRS action would affect its future federal tax liability); Gulden v. United States, 287 F. Appx. 813, 816 (11th Cir. 2008) ("[T]he Anti-Injunction Act bars

not only suits that directly seek to restrain the assessment or collection of taxes, but also suits that seek to restrain IRS activities 'which are intended to or may culminate in the assessment or collection of taxes.'"); Dickens v. United States, 671 F.2d 969, 971 (6th Cir. 1982) ("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 [Anti-Injunction Act]."). Therefore, the Anti-Injunction Act bars consideration of Harper's claims for injunctive and declaratory relief. See McCarthy, 723 F.2d at 1037; Breton v. I.R.S., 2013 WL 1788536, at *2 (D.N.H. Apr. 10, 2013) (finding that Anti-Injunction Act prohibited court from enjoining administrative tax levy when plaintiff argued the levy violated the Fourth and Fifth Amendments); see also Fostvedt, 978 F.2d at 1203-04 ("Although disguised as a procedural challenge, the essence of Petitioner's action is an attempt to delay and/or prevent the IRS from assessing and collecting the income tax . . . . Actions in the nature of Petitioner's suit are prohibited by the Anti-Injunction Act . . . .").[4]

[4] The federal declaratory judgment statute, 28 U.S.C. § 2201(a), includes a similar carve out for declaratory judgments "with respect to Federal taxes." Similar to the Anti-Injunction Act, that exception prevents Count III of Harper's complaint, which requests a declaratory judgment "with respect to Federal taxes," from moving forward. See 28 U.S.C. § 2201(a); Thompson/Center Arms Co. v. Baker, 686 F. Supp. 38,

In an attempt to evade that conclusion, Harper argues that, because he alleged in the Amended Complaint that he has paid all taxes that were due, his request for injunctive relief expunging his financial records is not an attempt to preemptively stop assessment or collection of his taxes and therefore does not fall within the Anti-Injunction Act's scope. Harper, however, also alleged in his Amended Complaint that the IRS sent him a letter informing him that it had information – information that Harper wants the court to direct the IRS to expunge – that he may have additional tax liability. Therefore, Harper's allegation that he paid all taxes that were due is an unsupported conclusory statement and not well pled. See A.G. ex rel. Maddox v. Elsevier, Inc., 732 F.3d 77, 80 (1st Cir. 2013) (observing that a conclusory statement "presented as an ipse dixit" and "unadorned by any factual assertions that might lend it plausibility" need not be taken as true at the motion to dismiss stage).

Moreover, in enforcing the IRS's summons on Coinbase that resulted in the IRS's acquisition of Harper's financial records, the court found that "the IRS's purpose is related to tax

41 (D.N.H. 1988) ("[A] finding that the plaintiff's claim is barred by the Anti-Injunction Act necessitates a finding that the claim is similarly barred by the Declaratory Judgment Act.").

compliance, not research" and that the summons "serves the legitimate investigative purpose of enforcing the tax laws against those who profit from trading in virtual currency." Coinbase, 2017 WL 5890052, at *6, *8. Therefore, Harper's argument that his proposed injunction and declaratory judgment are not aimed at restraining the assessment or collection of taxes is incorrect. See McCarthy, 723 F.2d at 1037; Dickens, 671 F.2d at 971.

Harper also argues that, because he has no other remedy for the IRS's constitutional or statutory violations, the Anti-Injunction Act does not bar his suit even if it otherwise would apply. See South Carolina v. Regan, 465 U.S. 367, 378 (1984) ("In sum, the [Anti-Injunction] Act's purpose and the circumstances of its enactment indicate that Congress did not intend the Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy."). Harper, however, had an alternative remedy to contest the third-party summons at issue in this case: A taxpayer who is a target of a John Doe third-party summons under § 7609(f) "may intervene and challenge enforcement of the summons." United States v. Ritchie, 15 F.3d 592, 597 (6th Cir. 1994); cf. United States v. Coinbase, 2017 WL 3035164 (N.D. Cal. July 18, 2017) (pertaining to the summons challenged by Harper in this case and granting

motion by John Doe to intervene as of right and permissively). Furthermore, if the IRS determines that Harper does have additional tax liability, additional processes are available to challenge the IRS's actions. See 26 U.S.C. §§ 6213, 7422. Therefore, Harper has failed to demonstrate that he lacks an adequate remedy for the violations he claims in this suit.

Because Harper has not demonstrated the applicability of any exception to the United States's sovereign immunity and because the Anti-Injunction Act prohibits the court from granting any of the injunctive and declaratory relief sought by Harper in this suit, Counts I and II, to the extent Harper seeks injunctive or declaratory relief against any defendant or money damages from Commissioner Rettig or the IRS, are dismissed for lack of jurisdiction. Count III of the Amended Complaint is dismissed in its entirety for lack of jurisdiction.

B. Personal Capacity Claims / Bivens

Harper's remaining unaddressed claims are Counts I and II, to the extent he seeks money damages from John Does 1 through 10 in their individual capacities. The government moves to dismiss Harper's claims against the John Does in their individual capacities on the ground that Harper seeks recognition of Bivens claims in new contexts. The government contends that "the

existence of the Internal Revenue Code, and its comprehensive scheme governing taxpayer remedies" is a special factor that prohibits extending Bivens to the new context here, such that Harper's claims do not state a claim upon which relief can be granted. Doc. 12-1 at 17. Harper objects, contending that his claims in Count I (Fourth Amendment violation) and Count II (procedural due process violation) are not applications of Bivens in a new context. Harper adds that, even if Counts I and II do apply Bivens in a new context, Bivens should be extended to this new context.

A claim seeking money damages from federal officers in their individual capacities for alleged constitutional violations is cognizable only if it fits within the existing contexts in which the Supreme Court has applied Bivens or if there are no special factors that counsel against extending Bivens to a new context. Ziglar v. Abbasi, --- U.S. ---, 137 S. Ct. 1843, 1857-59 (2017). A court examining a claim seeking a damages remedy under Bivens must first determine whether the claim applies Bivens in a new context. Id. at 1859. "If the case is different in a meaningful way from previous Bivens cases decided by [the Supreme Court], then the context is new." Id. at 1859-60. "A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at

issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous Bivens cases did not consider." Id. at 1859-60. Moreover, "[a] claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized." Hernandez v. Mesa, 140 S. Ct. 735, 743 (2020).

If the claim is in a new context, the court must then consider whether any "special factors counsel[] hesitation" in extending Bivens "in the absence of affirmative action by Congress." Abbasi, 137 S. Ct. at 1857. Only if there are no such special factors may the court conclude that Bivens provides a remedy for constitutional violations alleged by the plaintiff. See id.

1. Applicability of Bivens to Count I (Fourth Amendment)

The government argues that Harper's Fourth Amendment claim is dissimilar to Bivens. Harper responds that his claim in Count I under the Fourth Amendment is not different in a

meaningful way from Bivens itself, which also involved a Fourth Amendment claim.

Harper's claim here, however, applies Bivens in a "new context." Harper's lawsuit is a broad challenge "largely aimed at official IRS conduct and policy," while Bivens, in contrast, was a narrowly-focused suit that challenged the acts of a few individual officers. Doc. 14 at 6; Bivens, 403 U.S. at 389 ("The agents manacled petitioner in front of his wife and children, and threatened to arrest the entire family. They searched the apartment from stem to stern. Thereafter, petitioner was taken to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip search."). Additionally, the John Doe defendants here are alleged to have violated the Fourth Amendment because they obtained without a warrant Harper's electronically-stored financial records from a third party that Harper believes was contractually obligated to withhold those records. By contrast, the Fourth Amendment claim in Bivens was based on federal agents' unlawful entrance and ransacking of a home, their threats to its occupants, and the strip search of the petitioner. 403 U.S. at 389. These contextual differences are sufficient to differentiate Harper's case from Bivens under Abbasi. See Attkisson v. Holder, 925 F.3d 606, 621 (4th Cir.

2019) ("The plaintiffs' Fourth Amendment Bivens claim . . . differs meaningfully from the claim raised in Bivens in numerous ways that are material under Abbasi . . . . [A] claim based on unlawful electronic surveillance presents wildly different facts and a vastly different statutory framework from a warrantless search and arrest.").

The existence of the Internal Revenue Code, which contains a statutory remedial scheme covering the alleged wrongful conduct here, as well as the inherent ability of a taxpayer who is a target of a John Doe third-party summons to intervene in an enforcement proceeding, is a "special factor" that counsels against extending Bivens into the new context. See, e.g., Harvey v. U.S. Postal Serv., 52 F.3d 309, at *1 (1st Cir. Apr. 25, 1995) (per curiam) (declining to extend Bivens because a "comprehensive scheme" provides an "exclusive remedy" for wrongful personnel practices by the federal government); McMillen v. U.S. Dep't of Treasury, 960 F.2d 187, 190-91 (1st Cir. 1991) (per curiam) (observing that while the Internal Revenue Code is not "perfectly comprehensive," Congress has determined that it provides "adequate remedial mechanisms for constitutional violations that may occur in the" enforcement of tax laws). For those reasons alone, the court declines to find that Bivens extends to the new context asserted by Harper here.

Additionally, Harper's suit, as discussed above, implicates the federal government's power to assess and collect taxes. That is also a "special factor" that counsels against extending the Bivens remedy to this context. Cf. Cameron v. I.R.S., 773 F.2d 126, 129 (7th Cir. 1985) ("Congress has given taxpayers all sorts of rights against an overzealous officialdom, including, most fundamentally, the right to sue the government for a refund if forced to overpay taxes, and it would make the collection of taxes chaotic if a taxpayer could bypass the remedies provided by Congress simply by bringing a damage[s] action against Treasury employees. It is hard enough to collect taxes as it is; additional obstructions are not needed."). As discussed above, Congress specifically exempted suits that implicate its taxing power from the Declaratory Judgment Act and, through the Anti-Injunction Act, affirmatively prohibited injunctions that restrain that power. Considering Congress's limitations on injunctive and declaratory relief in tax suits like the one brought by Harper, as well as the statutory remedial scheme that includes processes to challenge the conduct complained of by Harper in this suit, the court declines to imply a money damages remedy under Bivens.

For the foregoing reasons, the court dismisses Count I to the extent Harper seeks money damages from the John Doe defendants named in their individual capacities.

2. Applicability of Bivens to Count II (Procedural Due Process)

As with Count I, the government argues that Count II, which raises a claim for violation of Harper's due process rights under the Fifth Amendment, extends Bivens to a new context and that special factors counsel against expansion. Harper responds that, in Davis v. Passman, 442 U.S. 228 (1979), the Supreme Court recognized a Bivens remedy for Fifth Amendment violations such that his Fifth Amendment claim in Count II does not apply Bivens in a new context.

The circumstances of Harper's Fifth Amendment procedural due process claim are distinguishable from the Fifth Amendment claim in Davis. In Davis, "the Court held that the Due Process Clause of the Fifth Amendment permitted a damages action where a staffer sued a Member of Congress for cashiering her because of her gender." Gonzalez v. Velez, 864 F.3d 45, 53 (1st Cir. 2017). By contrast, here, Harper asserts that unidentified government agents deprived him of a property right that he held in his financial records or the privacy thereof by seizing those records without providing him sufficient notice and an

opportunity to challenge the seizure. The equal-protection type claim made in Davis was unlike the procedural due process claim made by Harper here. See Air Sunshine, Inc. v. Carl, 663 F.3d 27, 33-34 (1st Cir. 2011) ("While the Supreme Court has extended Bivens to the Due Process Clause, it has only done so in the context of '[t]he equal protection component' of that clause.") (quoting Davis, 442 U.S. at 235). Therefore, Davis does not suffice to bring Harper's claim within an existing context in which a Bivens action has been recognized.[5]

For the same reasons as discussed above as to Count I, the court finds that special factors counsel against extending the Bivens remedy. Specifically, the existence of a remedial scheme under the Internal Revenue Code for violations of the law and Congress's hesitancy to allow injunctions or declaratory judgments that would interfere with the collection of taxes counsel against implying a money damages remedy under the same circumstances. Therefore, the court dismisses Count II of

[5] Harper also cites Abdelfattah v. U.S. Dep't of Homeland Sec., 787 F.3d 524, 533-34 (D.C. Cir. 2015), in support of his argument his claim does not extend Bivens into a new context. Abdelfattah is not relevant to this issue, however, because it rejected the plaintiff's damages claim under Bivens, while allowing a claim for a declaratory relief requiring the Department of Homeland Security to expunge certain information it had collected. See id. The court addressed Harper's claims for declaratory and injunctive relief above in Part A.

Harper's complaint to the extent it raises a claim for money damages against the John Doe defendants named in their individual capacities.

Conclusion

For the foregoing reasons, the government's motion to dismiss (doc. no. 12) is granted. Counts I and II, to the extent injunctive or declaratory relief is sought from any defendant or money damages are sought from Commissioner Rettig and the IRS, are dismissed for lack of jurisdiction. Counts I and II, to the extent money damages are sought from John Does 1 through 10, are dismissed for failure to state a claim upon which relief can be granted. Count III is dismissed for lack of jurisdiction.

Because all claims in this case have been dismissed, the Clerk of Court is directed to close the case.

SO ORDERED.

Joseph A. DiClerico, Jr.
United States District Judge

March 23, 2021

cc: Counsel of Record

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

James Harper

v.

Case No. 20-cv-771-JD

Internal Revenue Service,
Commissioner, et al.

JUDGMENT

In accordance with the Order by District Judge Joseph A. DiClerico, Jr., dated March 23, 2021, judgment is hereby entered.

By the Court:

/s/ Daniel J. Lynch
Daniel J. Lynch
Clerk of Court

Date: March 23, 2021

cc: Counsel of Record

U.S. Const. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

An action in a court of the United States 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 shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance.

Nothing 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.

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26 U.S.C. § 7421. Prohibition of suits to restrain assessment or collection

(a) Tax.—
Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6232(c), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

(b) Liability of transferee or fiduciary.—
No suit shall be maintained in any court for the purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of—

(1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a fiduciary under section 3713(b) of title 31, United States Code, in respect of any such tax.

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26 U.S.C. § 7609. Special procedures for third-party summonses

(a) Notice.—

(1) In general.—If any summons to which this section applies requires the giving of testimony on or relating to, the production of any portion of records made or kept on or relating to, or the production of any computer software source code (as defined in 7612(d)(2)) with respect to, any person (other than the person summoned) who is identified in the summons, then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain an explanation of the right under subsection (b)(2) to bring a proceeding to quash the summons.

(2) Sufficiency of notice.—Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603 (relating to service of summons) upon the person entitled to notice, or is mailed by certified or registered mail to the last known address of such person, or, in the absence of a last known address, is left with the person summoned. If such notice is mailed, it shall be sufficient if mailed to the last known address of the person entitled to notice or, in the case of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, to the last known address of the fiduciary of such person, even if such person or fiduciary is then deceased, under a legal disability, or no longer in existence.

(3) Nature of summons.—Any summons to which this subsection applies (and any summons in aid of collection described in subsection (c)(2)(D)) shall identify the taxpayer to whom the summons relates or the other person to whom the records pertain and shall provide such other information as will enable the person summoned to locate the records required under the summons.

(b) Right to intervene; right to proceeding to quash.—

(1) Intervention.—Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

(2) Proceeding to quash.—

(A) In general.—Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to begin a proceeding to quash such summons not later than the 20th day after the day such notice is given in the manner provided in subsection (a)(2). In any such proceeding, the Secretary may seek to compel compliance with the summons.

(B) Requirement of notice to person summoned and to Secretary.—If any person begins a proceeding under subparagraph (A) with respect to any summons, not later than the close of the 20-day period referred to in subparagraph (A) such person shall mail by registered or certified mail a copy of the petition to the person summoned and to such office as the Secretary may direct in the notice referred to in subsection (a)(1).

(C) Intervention; etc.—Notwithstanding any other law or rule of law, the person summoned shall have the right to intervene in any proceeding under subparagraph (A). Such person shall be bound by the decision in such proceeding (whether or not the person intervenes in such proceeding).

(c) Summons to which section applies.--

(1) In general.—Except as provided in paragraph (2), this section shall apply to any summons issued under paragraph (2) of section 7602(a) or under section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7612.

(2) Exceptions.—This section shall not apply to any summons—

(A) served on the person with respect to whose liability the summons is issued, or any officer or employee of such person;

(B) issued to determine whether or not records of the business transactions or affairs of an identified person have been made or kept;

(C) issued solely to determine the identity of any person having a numbered account (or similar arrangement) with a bank or other institution described in section 7603(b)(2)(A);

(D) issued in aid of the collection of—

(i) an assessment made or judgment rendered against the person with respect to whose liability the summons is issued; or
(ii) the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (i); or

(E)

(i) issued by a criminal investigator of the Internal Revenue Service in connection with the investigation of an offense connected with the administration or enforcement of the internal revenue laws; and
(ii) served on any person who is not a third-party recordkeeper (as defined in section 7603(b)).

(3) John Doe and certain other summonses.—Subsection (a) shall not apply to any summons described in subsection (f) or (g).

(4) Records.—For purposes of this section, the term "records" includes books, papers, and other data.

(d) Restriction on examination of records.—No examination of any records required to be produced under a summons as to which notice is required under subsection (a) may be made—

(1) before the close of the 23rd day after the day notice with respect to the summons is given in the manner provided in subsection (a)(2), or

(2) where a proceeding under subsection (b)(2)(A) was begun within the 20-day period referred to in such subsection and the requirements of subsection (b)(2)(B) have been met, except in accordance with an order of the court having jurisdiction of such proceeding or with the consent of the person beginning the proceeding to quash.

(e) Suspension of statute of limitations.—

(1) Subsection (b) action.—If any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations under section 6501 (relating to the assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall

be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

(2) Suspension after 6 months of service of summons.—In the absence of the resolution of the summoned party's response to the summons, the running of any period of limitations under section 6501 or under section 6531 with respect to any person with respect to whose liability the summons is issued (other than a person taking action as provided in subsection (b)) shall be suspended for the period—

(A) beginning on the date which is 6 months after the service of such summons, and

(B) ending with the final resolution of such response.

(f) Additional requirement in the case of a John Doe summons.—Any summons described in subsection (c)(1) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes 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 or class of persons may fail or may have failed to comply with any provision of any internal revenue law, 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.

The Secretary shall not issue any summons described in the preceding sentence unless the information sought to be obtained is narrowly tailored to information that pertains to the failure (or potential failure) of the person or group or class of persons referred to in paragraph (2) to comply with one or more provisions of the internal revenue law which have been identified for purposes of such paragraph.

(g) Special exception for certain summonses.—A summons is described in this subsection if, upon petition by the Secretary, the court determines, on the basis of the facts and circumstances alleged, that there is reasonable cause to believe the giving of

notice may lead to attempts to conceal, destroy, or alter records relevant to the examination, to prevent the communication of information from other persons through intimidation, bribery, or collusion, or to flee to avoid prosecution, testifying, or production of records.

(h) Jurisdiction of district court; etc.—

(1) Jurisdiction.—The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceeding brought under subsection (b)(2), (f), or (g). An order denying the petition shall be deemed a final order which may be appealed.

(2) Special rule for proceedings under subsections (f) and (g).—The determinations required to be made under subsections (f) and (g) shall be made ex parte and shall be made solely on the petition and supporting affidavits.

(i) Duty of summoned party.—

(1) Recordkeeper must assemble records and be prepared to produce records.—On receipt of a summons to which this section applies for the production of records, the summoned party shall proceed to assemble the records requested, or such portion thereof as the Secretary may prescribe, and shall be prepared to produce the records pursuant to the summons on the day on which the records are to be examined.

(2) Secretary may give summoned party certificate.—The Secretary may issue a certificate to the summoned party that the period prescribed for beginning a proceeding to quash a summons has expired and that no such proceeding began within such period, or that the taxpayer consents to the examination.

(3) Protection for summoned party who discloses.—Any summoned party, or agent or employee thereof, making a disclosure of records or testimony pursuant to this section in good faith reliance on the certificate of the Secretary or an order of a court requiring production of records or the giving of such testimony shall not be liable to any customer or other person for such disclosure.

(4) Notice of suspension of statute of limitations in the case of a John Doe summons.—In the case of a summons described in subsection (f) with respect to which any period of limitations has been suspended under subsection (e)(2),

the summoned party shall provide notice of such suspension to any person described in subsection (f).

(j) Use of summons not required.—Nothing in this section shall be construed to limit the Secretary's ability to obtain information, other than by summons, through formal or informal procedures authorized by sections 7601 and 7602.

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28 U.S.C. § 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(9) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

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28 U.S.C. § 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

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