No. 21-1316

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JAMES HARPER

Plaintiff-Appellant

v.

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

Defendants-Appellees,

JOHN DOE IRS AGENTS 1-10,

Defendants

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

APPELLEES' PETITION FOR PANEL REHEARING

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GLOSSARY

Abbreviation	Definition
APA	Administrative Procedure Act (5 U.S.C. § 701 *et seq.*)
I.R.C.	Internal Revenue Code (26 U.S.C.)
IRS	Internal Revenue Service
Taxpayer	James Harper, appellant

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On August 18, 2022, this Court issued a published opinion holding that the Anti-Injunction Act, 26 U.S.C. § 7421 ("I.R.C."), is not a jurisdictional bar to appellant James Harper's ("taxpayer") suit challenging the propriety of a "John Doe" third-party summons and seeking an order directing the IRS to expunge financial information allegedly obtained through the summons. Prior to reaching this holding, this Court stated that taxpayer's suit "appears to fit

comfortably within the plain language of th[e] waiver" of sovereign immunity in Section 702 of the Administrative Procedure Act ("APA"), 5 U.S.C., which waives sovereign immunity for suits seeking nonmonetary relief and alleging wrongdoing by a federal agency. (Op. 10.) This Court then vacated the District Court's judgment dismissing this case for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and remanded to the District Court "to consider, in the first instance, whether appellant has stated a claim on which relief can be granted" under Fed. R. Civ. P. 12(b)(6). (Op. 16.)[1]

In this petition for panel rehearing, the Government does not seek rehearing as to this Court's holding regarding the applicability of the Anti-Injunction Act, but solely requests that the Court enlarge the scope of the remand to permit the District Court to consider additional grounds for dismissal for lack of subject-matter jurisdiction under Rule 12(b)(1). As explained below, it is highly questionable whether the APA provides a basis for exercising jurisdiction in this case, and it is unclear from this Court's opinion whether this Court definitively held that the

[1] "Op." refers to this Court's opinion. "Br." refers to taxpayer's opening brief on appeal. "Gov't Br." refers to the Government's appellee brief.

APA provides jurisdiction. Moreover, this Court has previously held, in a case involving different facts, that the APA did *not* provide a basis for challenging an IRS summons. *See Berman v. United States*, 264 F.3d 16, 21 (1st Cir. 2001).

We recognize that the Government did not previously raise alternative jurisdictional arguments in its briefing, in light of the District Court's focus on the Anti-Injunction Act and the uniform practice of courts, prior to *CIC Services LLC v. Internal Revenue Service*, 141 S. Ct. 1582 (2021), to dismiss cases such as this for lack of jurisdiction under the Anti-Injunction Act. *See, e.g., Colangelo v. United States*, 575 F.2d 994, 996 (1st Cir. 1978). (*See* Gov't Br. 27-28, 30-31 (collecting cases)). However, "the district court's subject matter jurisdiction" is "an issue that may be raised at any time." *United States v. Fonseca*, _ F.4th _, 2022 WL 4103074, at *8 (1st Cir. 2022). The Government thus respectfully requests that this Court clarify that the District Court, on remand, may consider additional challenges to its subject-matter jurisdiction.

STATEMENT

In August 2019, the IRS issued a letter to taxpayer informing him that it had information that he held one or more virtual currency accounts and that he may be subject to future civil and criminal enforcement activity if he had not properly reported virtual currency transactions. (Op. 4.) Believing that the IRS unlawfully gained his information through a "John Doe" summons issued to digital currency exchanges Coinbase and/or Abra, taxpayer filed suit against IRS Commissioner Rettig, the IRS, and unnamed IRS agents. (Op. 6-7.) As relevant here, the amended complaint alleged that the IRS and its agents violated the Fourth and Fifth Amendments and the John Doe summons procedures in I.R.C. § 7609(f). Taxpayer sought declaratory and injunctive relief, including an order directing the IRS to expunge the information from its records. (Op. 7.)

The District Court dismissed the case for lack of subject-matter jurisdiction, holding, *inter alia*, that there was no effective waiver of sovereign immunity as to his claims for declaratory and injunctive relief because they were barred by the Anti-Injunction Act. (Op. 7-8.) The District Court did not address the Government's alternative request for

dismissal for failure to state a claim. (Op. 16.) Taxpayer appealed the order dismissing his lawsuit to this Court.

In May 2021, after the District Court issued its order dismissing this case, the Supreme Court held in *CIC Services*, 141 S. Ct. 1582, that the Anti-Injunction Act does not bar a suit seeking to enjoin an IRS Notice requiring third-party information reporting, even though a violation of the reporting requirement may result in a tax penalty. (Op. 11.)

On appeal here, the parties' briefs focused on two issues: (1) whether the Anti-Injunction Act applied to preclude taxpayer's suit (Br. 17-29; Gov't Br. 18-40); and (2) assuming *arguendo* that the District Court had jurisdiction, whether this case should be dismissed for failure to state a claim. (*See* Br. 30-43; Gov't Br. 40-62.)

On August 18, 2022, this Court issued an opinion vacating the District Court's judgment. (Op. 16.) As a threshold matter, this Court stated that taxpayer's suit "appears to fit comfortably within the plain language of th[e] waiver" of sovereign immunity in Section 702 of the APA. (Op. 10.) Noting that the Anti-Injunction Act is an exception to that waiver, this Court, relying on *CIC Services*, then held that the

Anti-Injunction Act did not apply to bar taxpayer's suit. (Op. 10-16.) This Court vacated the District Court's dismissal order and remanded for the District Court "to consider, in the first instance, whether [taxpayer] has stated a claim on which relief can be granted." (Op. 16.)

ARGUMENT

This Court should clarify that, on remand, the District Court is permitted to consider other potential challenges to its subject-matter jurisdiction

Pursuant to Fed. R. App. P. 40(a)(2), a petition for panel rehearing is the appropriate vehicle in which to request revision of an opinion to remedy a "point of law or fact that the petitioner believes the court has overlooked or misapprehended. . . ."

The Government does not seek rehearing regarding this Court's holding that the Anti-Injunction Act does not provide an exception to the waiver of sovereign immunity in Section 702 of the APA as applied to taxpayer's suit. Rather, the Government seeks to have this Court clarify the following statements in its opinion and to make clear that, on remand, the District Court may entertain additional jurisdictional arguments:

- The statement in the opinion that taxpayer's suit "appears to fit comfortably within the plain language of th[e] waiver" in Section 702 of the APA (Op. 10), and
- The statement in its judgment and opinion that the Court is remanding to the District Court "to consider, in the first instance, whether appellant has stated a claim on which relief can be granted" under Fed. R. Civ. P. 12(b)(6). (Judgment; *see also* Op. 16 (same).)

The Government submits that this clarification is appropriate, particularly in light of the principle that objections to subject-matter jurisdiction may be raised at any time. *See Fonseca*, 2022 WL 4103074, at *8. Further consideration of jurisdictional challenges is especially appropriate here, given that when the Government filed its motion to dismiss (prior to *CIC Services*), the Anti-Injunction Act was interpreted broadly as barring lawsuits, such as taxpayer's, that sought to challenge any IRS activities "which are intended to or may culminate in the assessment or collection of taxes." *Colangelo*, 575 F.2d at 996. Because that principle was so well-established prior to *CIC Services*, the Government did not raise other jurisdictional challenges to taxpayer's

lawsuit. However, as explained below, there is serious reason to doubt that Section 702 of the APA provides a jurisdictional basis for this suit, and the District Court should be free to consider this argument, and any other jurisdictional challenges, in the first instance on remand. *See, e.g., Meyer v. United States*, _ F.4th _, 2022 WL 4461966, *6 (11th Cir. 2022) (vacating dismissal under the Anti-Injunction Act and remanding to allow district court to consider other jurisdictional challenges).

In support of his claim that Congress waived sovereign immunity as to his claims for injunctive and declaratory relief, taxpayer cited Section 702 of the APA, which generally waives sovereign immunity for suits seeking nonmonetary relief for alleged wrongdoing by a federal agency. Section 702, however, also disclaims any "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702(2). *See also* 5 U.S.C. § 701(a)(1) (provisions of APA do not apply where "statutes preclude judicial review"). This exception "prevents plaintiffs from exploiting the APA's waiver to evade limitations on suit contained in other statutes." *Match-E-Be-Nash-She-Wish Band of Pottawatomi*

Indians v. Patchak, 567 U.S. 209, 215 (2012); *see Block v. North Dakota ex. Rel. Board of University and School Lands*, 461 U.S. 273, 285 (1983) (stating that a "detailed statute pre-empts more general remedies" such as those in the APA and "[i]t would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading"). As explained below, I.R.C. § 7609, which governs the issuance and enforcement of third-party summonses, impliedly forbids the relief taxpayer seeks here.

This Court found that taxpayer's suit challenges the IRS's "allegedly unlawful acquisition and retention" of his financial information, which taxpayer alleged was obtained through a John Doe summons issued to Coinbase (or Abra) in violation of the Fourth and Fifth Amendments and the procedures in I.R.C. § 7609. (Op. 16; *see also* Op. 7.) Although taxpayer's suit seeks relief in the form of the expungement of that information—relief which this Court held was not precluded by the Anti-Injunction Act—the crux of his complaint is that the John Doe summons issued to Coinbase (or Abra) was invalid, notwithstanding the enforcement of the summons by the District Court for the Northern District of California. *See United States v. Coinbase,*

Inc., No. 17-cv-1431-JSC, 2017 WL 5890052, at *1 (N.D. Cal. Nov. 28, 2017).

Section 7609 is the exclusive waiver of sovereign immunity relating to challenges to third-party summonses. Indeed, before Congress enacted Section 7609, the Supreme Court held that (1) a taxpayer does not have a right to intervene in a proceeding to enforce a third-party summons where his property interests or privilege matters are not implicated, *see Donaldson v. United States*, 400 U.S. 517, 531 (1971) (also rejecting taxpayer's argument that he had a right protected by the Fourth Amendment against summonsing documents held by third party), and that (2) the IRS has authority under I.R.C. §§ 7601 and 7602 to issue a John Doe summons to a third party to obtain information about an unidentified taxpayer with potential tax liability, *see United States v. Bisceglia*, 420 U.S. 141, 148-51 (1975).

The Supreme Court later recognized that Congress's enactment of Section 7609 "was clearly a response to these decisions" because of its concern that "the standards enunciated in *Donaldson* and *Bisceglia* might unreasonably infringe on the civil rights of taxpayers, including the right to privacy." *Tiffany Fine Arts, Inc. v. United States*, 469 U.S.

310, 315, 316 (1985) (quotation and citation omitted). In Section 7609, Congress provided that, with certain exceptions set forth in § 7609(c), any person entitled to notice of a third-party summons under § 7609(a) may petition to quash the summons or intervene in a proceeding to enforce such summons. I.R.C. § 7609(b). "In the case of a John Doe summons, where the IRS *does not know* the identity of the taxpayer under investigation, advance notice to that taxpayer is, of course, not possible." *Tiffany Fine Arts*, 469 U.S. at 316-17 (emphasis in original). Congress provided that in such cases, the IRS cannot issue the third-party summons until showing that it has satisfied requirements set forth in § 7609(f) in an *ex parte* proceeding in district court, and that a determination that the Government has satisfied § 7609(f) is to be made "solely on the [Government's] petition and supporting affidavits." I.R.C. § 7609(h)(2).

Section 7609's notice provisions, which define who can challenge a third-party summons, "not only guide the IRS procedurally but also define the scope of the United States' sovereign immunity." *Polselli v. U.S. Dep't of Treasury*, 23 F.4th 616, 622 (6th Cir. 2022), *cert. pet. docketed*, S. Ct. No. 21-1599 (June 28, 2022). In Section 7609, Congress

carefully delineated the limits of the waiver of sovereign immunity for challenging third-party summonses and chose not to provide persons (like taxpayer) who are not named in a summons with a procedure for challenging the summons. Instead, Congress chose to entrust the district courts with protecting the interests of third parties, such as taxpayer, whose information may be covered by a John Doe summons, by requiring that the *ex parte* procedures in § 7609(f) be satisfied before the summons may issue. I.R.C. § 7609(h). The Supreme Court has approvingly found that § 7609(f) "provide[s] some guarantee that the information that the IRS seeks through a summons is relevant to a legitimate investigation, albeit that of an unknown taxpayer." *Tiffany*, 469 U.S. at 321. And this Court has found that judicial preapproval under § 7609(f) "permits the district court to act as a surrogate for the unnamed taxpayer and to exert a restraining influence on the IRS." *United States v. Gertner*, 65 F.3d 963, 972 (1st Cir. 1995) (cleaned up).

This Court has previously recognized that Section 7609 provides the exclusive means for challenging a third-party summons. In *Berman,* 264 F.3d at 21, this Court held that the APA did not provide a basis for bringing an out-of-time challenge to a third-party summons

because I.R.C. § 7609(b)(2)(A), which permits any person entitled to notice of a third-party summons to file a petition to quash within 20 days after notice is given, "is such an other statute" that expressly or impliedly bars relief under Section 702(2) of the APA. Other courts have similarly held that the APA does not provide a basis for challenging IRS third-party summonses because Section 7609 limits the waiver of sovereign immunity for such challenges. *See, e.g.*, *Haber v. United States*, 2015 WL 3797308, at *3, 4 (S.D.N.Y. 2015) (APA does not confer jurisdiction where Congress exempted the IRS from the requirements of notice and judicial review of summonses issued in aid of collection under § 7609(c)(2)(D)) (unpub.), *aff'd on other grounds*, 823 F.3d 746, 751 (2d Cir. 2016) (finding no jurisdiction under terms of Section 7609); *Neilson v. United States*, 674 F. Supp. 2d 248, 253 (D.D.C. 2009) (holding that injunctive relief was not available under the APA because Section 7609 "constitutes the United States's limited consent to a lawsuit challenging its legal authority to issue the summons. . . . This provision alone impliedly forbids seeking relief instead under the APA"); *see also Justin v. United States*, 607 F. Supp. 2d 73, 75 (D.D.C. 2009) (Section 7609 is an "other statute" that

"expressly or impliedly forbids the relief" under Section 702(2) of APA); *Trowbridge v. Internal Revenue Service*, 2013 WL 6002205, at *3-4 (S.D. Tex. 2013) (unpub.) (same).

" '[W]hen Congress has dealt in particularity with a claim and [has] intended a specified remedy'—including its exceptions—to be exclusive, that is the end of the matter; the APA does not undo the judgment." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 567 U.S. at 216 (quoting *Block*, 461 U.S. at 286, n.22)). Accordingly, and consistent with the above caselaw, the Government seeks to preserve its ability to argue that taxpayer cannot use the APA as an end-run around the carefully defined limits on the waiver of sovereign immunity in Section 7609.

* * *

As the above example illustrates, the District Court's jurisdiction over this case is highly questionable, even apart from the Anti-Injunction Act. While this Court observed that taxpayer's suit "appears to fit comfortably" within Section 702 of the APA (Op. 10), it is unclear whether that statement was a definitive holding regarding APA jurisdiction in this case, and this Court did not have the benefit of full

briefing on other reasons why the APA may not apply here. We therefore request that this Court grant this petition for panel rehearing for the limited purpose of clarifying that, on remand, the District Court is not limited to considering Rule 12(b)(6) arguments, but is also permitted to consider alternative grounds for dismissal for lack of subject-matter jurisdiction.

CONCLUSION

The Court should clarify that the District Court on remand is permitted to consider not only whether taxpayer has stated a claim under Rule 12(b)(6), but also alternative grounds for dismissal for lack of subject-matter jurisdiction.

Respectfully submitted,

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