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; and INTERNAL REVENUE SERVICE,
Defendants-Appellees.
JOHN DOE IRS AGENTS 1-10,
Defendants.

On Appeal from the United States District Court
for the District of New Hampshire
No. 1-20-cv-00771-JD (Hon. Joseph A. DiClerico, Jr.)

APPELLANT'S RESPONSE TO APPELLEES' PETITION FOR PANEL REHEARING

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INTRODUCTION

Appellees Charles Rettig and the Internal Revenue Service (collectively, "IRS") have filed a peculiar petition for panel rehearing. The petition does not challenge the panel's holding that the Anti-Injunction Act (AIA), 26 U.S.C. § 7421, does not bar federal-court jurisdiction over Appellant James Harper's claims. It does not actually seek a rehearing by the panel; it simply urges the panel to issue a statement concerning the scope of the remand to the district court. Nor does the petition actually raise a new challenge to district-court jurisdiction; it simply asks the Court to state that reversing the district court's dismissal for lack of subject matter jurisdiction does not preclude IRS from challenging jurisdiction again.

The petition lacks merit and should be denied. First, as IRS correctly points out, "objections to subject matter jurisdiction may be raised at any time"—even when (as here) the defendant has failed to raise the objection at the outset of litigation. Pet. 7. Because IRS is free to raise its new jurisdictional objection when this case returns to the district court on remand, IRS has failed to show why the Court's further involvement is warranted at this time.

Second, IRS "seeks to have this Court clarify" the following statement in its opinion: "Appellant's suit ... appears to fit comfortably within the plain language of th[e] waiver" of sovereign immunity set out in the Administrative Procedure

Act (APA), 5 U.S.C. § 702. Pet. 7 (quoting Slip op. 10). But IRS does not challenge the accuracy of the Court's statement, nor could it plausibly do so. Appellee Harper's claim indisputably is of the type for which the APA waives the United States' sovereign immunity: Harper seeks injunctive and declaratory relief, and § 702 broadly waives sovereign immunity from such claims against a federal agency or officer. The only issue is whether some *other* federal statute creates an exception to § 702's broad waiver. The Court correctly determined that the Anti-Injunction Act is not such an exception. Nothing in the Court's opinion prevents IRS on remand from asserting the applicability of some other statutory exception to the otherwise-applicable waiver of sovereign immunity.

Third, the new sovereign-immunity defense that IRS says it plans to raise in the district court is insubstantial. IRS asserts that 26 U.S.C. § 7609 "is the exclusive waiver of sovereign immunity relating to challenges to third-party summons." Pet. 10. IRS has misconstrued § 7609. That provision is not a statutory limitation on the APA's waiver of sovereign immunity. Rather, § 7609 establishes procedures whereby IRS may issue a third-party summons and grants some taxpayers the right to object to some summonses under certain circumstances. Whether § 7609 grants Harper a right of action is wholly distinct from whether it constitutes a limitation on the APA's waiver of sovereign

immunity and prevents federal courts from exercising subject matter jurisdiction over Harper's constitutional and statutory claims. IRS points to no language in § 7609 that so much as suggests that the statute creates an exception to the APA's waiver of sovereign immunity.

STATEMENT OF THE CASE

Harper is a New Hampshire resident who has maintained accounts with various digital currency exchanges, including Coinbase, to facilitate his transactions in digital currencies. In 2017, IRS obtained from Coinbase (over Coinbase's objection) a massive amount of data regarding its customers' financial transactions. *See United States v. Coinbase, Inc.*, No. 17-cv-1431-JSC, 2017 WL 5890052 (N.D. Cal. Nov. 28, 2017). Harper was not a party to those proceedings.

In August 2019, IRS sent a letter to Harper stating, "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. ... If you do not accurately report your virtual currency transactions, you may be subject to future civil and criminal enforcement activity." Appx67. The letter provided notice to Harper that IRS had obtained his financial records from Coinbase and/or other digital currency exchanges.

This lawsuit contends that IRS violated Harper's rights under the Fourth and Fifth Amendments and 26 U.S.C. §§ 7602 and 7609(f) by searching and seizing his financial records without probable cause and without providing him with notice of its actions—thereby depriving him of the ability to raise any objections to the search. Harper alleges that he has paid all federal income tax due on his digital-currency transactions, and IRS has never alleged otherwise. He seeks declaratory and injunctive relief, including an order expunging his private financial information from IRS's records.[1]

The district court granted IRS's motion to dismiss under Fed.R.Civ.P. 12(b)(1) for lack of subject-matter jurisdiction. Appx76-98. The court recognized that the APA, 5 U.S.C. § 702, 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

[1] IRS's seizure of Harper's financial records, and its retention of those records, raise serious security concerns for Harper and his family. Holders of cryptocurrency are uniquely in danger of violent crime should third parties become aware of their holdings and trading activities. Many advanced owners of cryptocurrency maintain their assets on home computers or devices and thus must be on guard against criminal attacks on their households, such as home invasion and kidnaping. Such attacks are disturbingly common. IRS's continued retention of Harper's financial records increases the risk that those records will be accessed by hackers, inviting attacks by criminals who believe, even erroneously, that Harper holds significant crypto assets.

official capacity or under color of legal authority." Appx84. But it also recognized that § 702's waiver of sovereign immunity is subject to limitations created by other statutes, and it held that the limitation created by the Anti-Injunction Act (AIA) barred Harper's claims. Appx85. The AIA states 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 district court believed that Harper's claims sought to "restrain[] the assessment or collection" of income tax and thus were barred by the AIA. Appx86.

This Court vacated the district court's judgment, concluding that the AIA did not deprive the district court of subject matter jurisdiction because its bar is limited to "the acts of assessment [and] collection" of taxes. Slip op. 11 (quoting *CIC Services, LLC v. IRS*, 141 S. Ct. 1582, 1589 (2021)). The Court held that the AIA does "not bar a lawsuit challenging ordinary [income] reporting requirements, even if those requirements '*facilitate* [the] collection of taxes' by identifying taxpayers who owe tax, because reporting requirements are part of the information-gathering phase of tax administration," not the assessment-and-collection phase. *Id.* at 12 (quoting *CIC Services*, 141 S. Ct. at 1589). The Court remanded the case to the district court "to consider, in the first instance, whether appellant has stated a claim on which relief can be granted." *Id.* at 16.

The Court noted that Harper was relying on 5 U.S.C. § 702 for his assertion that the United States waived sovereign immunity from his claim for injunctive and declaratory relief. *Id.* at 9-10. Contrary to IRS's assertion, the Court's discussion of § 702 does not indicate that IRS is foreclosed on remand from challenging subject-matter jurisdiction on grounds unrelated to the AIA. In the sentence cited by IRS, the Court stated, "Appellant's suit, which seeks injunctive and declaratory relief from IRS action taken pursuant to its statutory authority under 26 U.S.C. §§ 7602 and 7609, appears to fit comfortably within the plain language of this [5 U.S.C. § 702] waiver." Slip op. 10. But the Court immediately thereafter observed, "But § 702 also includes two limitations on the United States' waiver of sovereign immunity." *Ibid.* The Court then proceeded to consider (and reject) IRS's argument that the AIA fit within one of those two limitations. *Id.* at 11-14. The Court did not consider other grounds for asserting that this case came within one of the two limitations because IRS did not raise any such arguments.

ARGUMENT

I. THE COURT DID NOT PRECLUDE IRS FROM CONTINUING TO CHALLENGE SUBJECT-MATTER JURISDICTION, A CHALLENGE THAT MAY BE RAISED AT ANY TIME

Appellees are not challenging the Court's decision to vacate the judgment below and remand the case to the district court. Rather, the entire premise of

IRS's rehearing petition is that the Court's opinion might be construed by the district court as foreclosing any further challenge to subject-matter jurisdiction. That premise is faulty. Accordingly, the petition for panel rehearing should be denied; the Court's further involvement is unwarranted at this time.

As an initial matter, Harper notes that a party is never foreclosed from challenging subject-matter jurisdiction; such challenges are never deemed to have been waived. *See, e.g., Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) (stating that a litigant "generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance"). Indeed, a federal court may not address the merits of a dispute unless it satisfies itself that subject-matter jurisdiction exists, regardless whether any party has raised the issue. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101-02 (1998). IRS expressly recognizes its right to challenge the courts' subject-matter jurisdiction "at any time"—even when (as here) it has failed to raise the objection at the outset of litigation. Pet. 7. Because IRS is free to raise new objections to subject-matter jurisdiction when the case returns to district court, a rehearing simply to establish that right is unwarranted.

Nor does language in the Court's opinion call into question IRS's right to raise new objections to subject-matter jurisdiction. IRS asserts (Pet. 7-8) that the

Court "overlooked" or "misapprehended" the IRS's right to assert new objections to subject-matter jurisdiction—*i.e.*, objections other than the AIA objection rejected by the Court. As noted above, IRS bases that assertion on the following sentence in the opinion: "Appellant's suit, which seeks injunctive and declaratory relief from IRS action taken pursuant to its statutory authority appears to fit comfortably within the plain language of this [5 U.S.C. § 702] waiver." Slip op. 10. But that statement is a noncontroversial, accurate statement of the law. Section 702 broadly waives the United States's sovereign immunity from suits that do not seek monetary relief:

> 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 be denied on the ground that it is against the United States or that the United States is a necessary party.

Because Harper is not seeking recovery of monetary damages but instead seeks injunctive and declaratory relief based on claims that federal officials acting in their official capacity violated his constitutional and statutory rights, the Court's "fit comfortably" statement is entirely accurate. Indeed, IRS does not assert otherwise, nor does it point to any "point of law or fact that [it] believes the court

has overlooked or misapprehended," Fed.R.App.P. 40(a)(2), a prerequisite to the grant of any petition for panel rehearing.[2]

IRS states that it nonetheless fears that the district court might interpret the quoted sentence as precluding the IRS from raising any further objections to subject-matter jurisdiction. But that fear is groundless in light of what the Court wrote immediately after acknowledging that Harper's claim "fit comfortably" within § 702's broad waiver of sovereign immunity. The Court said: "But § 702 also includes two limitations on the United States' waiver of sovereign immunity." Slip op. 10. It then vacated the district court's judgment only after determining that the AIA did not implicate those limitations. Slip op. 11-14. In other words, the quoted sentence was not intended as the final word on subject-matter jurisdiction; the Court recognized that even though Harper's claims appeared to "fit comfortably" within § 702's broad waiver of the United States's sovereign

[2] The rehearing petition also points to a second statement in the Court's opinion and judgment: its statement that the case is remanded to the district court "to consider, in the first instance, whether appellant has stated a claim on which relief can be granted." Pet. 7 (quoting Slip op. 16). That statement does not suggest that the district court is precluded from examining subject-matter jurisdiction. The Court included the statement in conjunction with its rejection of IRS's request that it address IRS's Rule 12(b)(6) motion. Following its usual practice, the Court said that the district court should be the first to address the motion; that statement includes no suggestion that the district court is barred from addressing other issues.

immunity, a final waiver ruling would require an examination of whether either of § 702's two limitations on waiver apply. The Court determined that the AIA does not impose any limitation on the federal courts' subject-matter jurisdiction over Harper's claims; it did not address whether any other statute might impose such a limitation.

II. SECTION 7609 DOES NOT BAR SUBJECT-MATTER JURISDICTION OVER HARPER'S CLAIMS

IRS asserts that panel rehearing is particularly warranted because "it is highly questionable whether the APA provides a basis for exercising jurisdiction in this case." Pet. 2. It asserts that a different federal statute, 26 U.S.C. § 7609, eliminates the subject-matter jurisdiction otherwise granted by the APA to the federal courts over Harper's claims. Pet. 9-14. IRS's newly minted § 7609 sovereign-immunity defense is insubstantial.

The APA, 5 U.S.C. § 702, identifies two limitations on the its waiver of sovereign immunity. Section 7609 implicates neither of those limitations.

A. Section 7609 Is Not a 'Limitation[] on Judicial Review'

The first of the APA's two limitations on its waiver of sovereign immunity states: "Nothing herein . . . 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." 5 U.S.C. § 702(1). This first limitation has no plausible application to Harper's claims; indeed, IRS's rehearing petition does not cite this limitation.

Section 7609 does not impose any limitations on federal courts' subject-matter jurisdiction. Rather, § 7609 establishes procedures whereby IRS may issue a third-party summons and grants some taxpayers the right to object to the summons under certain circumstances.

As the Supreme Court has explained, Congress adopted § 7609 in 1976 to *increase* the rights of taxpayers who objected to IRS efforts to obtain their financial records from third parties, not to bar the courthouse doors to taxpayers who previously were entitled under the APA to invoke federal-court jurisdiction over their claims. *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 315-317 (1985). Congress was concerned that prior case law permitted IRS to use a third-party summons in a manner that "might 'unreasonably infringe on the civil rights of taxpayers, including the right to privacy.' … Section 7609 stems from this concern." *Id.* at 316 (quoting S. Rep. No. 94-938, at 368 (1976); H.R. Rep. No. 94-658, at 306 (1975)).

Harper has asserted claims under the Fourth and Fifth Amendments to the U.S. Constitution as well as 26 U.S.C. §§ 7602 and 7609(f). Whether he has

stated a claim under §§ 7602 and 7609(f) upon which relief can be granted is not at issue in this rehearing petition. The rehearing petition is limited to IRS's claim that § 7609 limits the APA's waiver of sovereign immunity and thereby bars subject-matter jurisdiction over *all three* of Harper's claims—not simply his § 7609(f) claim. In the absence of any evidence in either the statutory text or legislative history that § 7609 imposes "limitations on [otherwise available] judicial review," the first of § 702's two limitations on sovereign-immunity waiver is inapplicable to Harper's claims.

B. The APA's Second Limitation on Sovereign-Immunity Waiver Is Inapplicable to this Case

The second of the APA's two limitations on its waiver of sovereign immunity states, "Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." This second limitation, the one on which the rehearing petition exclusively relies, is inapplicable on its face.

IRS has treated Harper throughout these proceedings as a "John Doe" taxpayer, seeking to keep him in that category to diminish his rights. Rather than obtaining Harper's identity from Coinbase and then issuing a summons to which Harper would have been able to object, IRS obtained a "John Doe" summons

directing Coinbase to produce the financial records it held for its clients—all of whom were unknown to IRS simply because IRS did not request their names and other identifying information before demanding production of records.

IRS argues that § 7609(f) (which governs "John Doe" summonses) "forbids the relief" Harper seeks because (IRS asserts) it does not authorize "John Doe" taxpayers to sue to enforce compliance with third-party summons procedures. And because the relief sought by Harper allegedly is "forbid[den]," IRS asserts that § 7609 implicates the second of the APA's two limitations and strips federal courts of the jurisdiction they otherwise would possess to hear Harper's claims.

Section 7609(f)'s silence does not "forbid" relief to John Doe taxpayers. Even if it did, IRS's argument is too clever by half. The APA's second limitation on sovereign-immunity waiver, 5 U.S.C. § 702(2), applies *only* if the "other statute" relied on by the federal government "grants consent to suit." But IRS's jurisdictional argument is premised on its claim that § 7609(f) does *not* grant Harper a right of action. Under those circumstances, the APA's second limitation is inapplicable on its face.

The Supreme Court's decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 567 U.S. 209 (2012), demonstrates why § 702's second limitation cannot apply here. *Match-E* involved a challenge to a decision by the

Secretary of Interior to take land (the site of a proposed Indian casino) into trust on behalf of an Indian tribe. Invoking § 702's second limitation, the United States argued that the federal courts lacked subject-matter jurisdiction over the challenge, which was filed by an adjacent landowner. The United States noted that the Quiet Title Act (QTA) "authorizes (and so waives the Government's sovereign immunity from) … a quiet title suit"—a type of suit in which the plaintiff argues that his title to the real property in question is superior to the "'right, title, or interest' the United States claims," 567 U.S. at 215 (quoting 28 U.S.C. § 2409a(d)). It further noted that the QTA contains an exception—it "does not apply to trust or restricted Indian lands," *ibid.* (quoting 28 U.S.C. § 2409a(a)). Based on that exception, the United States argued that § 702's second limitation applies: "[T]he QTA exception retains the United States' full immunity from suits seeking to challenge its title to or impair its legal interest in Indian trust lands." *Id.* at 215-16 (citations omitted).

The Court rejected the federal government's sovereign-immunity claim and permitted the adjacent landowner's APA suit to continue. *Id.* at 224. The Court noted that the plaintiff did not assert any claim to the property in question, only that the federal government lacked statutory authority to take title to the land. *Id.* at 212, 216. It concluded that in the absence of a claim to title, the plaintiff lacked a cause of action under the QTA, and thus the APA's second limitation on

sovereign-immunity waiver was inapplicable because the QTA's exception for Indian lands did not come into play in the absence of a QTA cause of action. (Recall that the second limitation, 5 U.S.C. § 702(2), does not apply unless the "other statute" relied on by the federal government "grants consent to suit.") While conceding that plaintiffs should not be permitted to evade the QTA's Indian-land exception by restyling their QTA claims as APA claims, the Court concluded that the adjacent landowner was not attempting any such evasion because he had not stated a claim actionable under the QTA. *Id.* at 223 & n.6.

So too here. IRS contends that § 7609 does not grant a right of action to "John Doe" taxpayers such as Harper. If IRS is correct, then *Match-E* teaches that the APA's second limitation on sovereign-immunity waiver is inapplicable here. If the IRS is *incorrect*, then IRS's second-limitation argument dissolves entirely—IRS's sovereign-immunity argument is premised on its assertion that Harper is not entitled to statutory relief because he lacks a § 7609 right of action. Either way, IRS lacks a valid basis for asserting sovereign immunity under 5 U.S.C. § 702(2).[3]

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[3] Although *dicta* in *Match-E* might suggest otherwise, 5 U.S.C. § 702(2) actually has nothing whatsoever to say about sovereign immunity and subject-matter jurisdiction. In contrast to § 702(1) (which directly references "other limitations on judicial review"), § 702(2) speaks only of other statutes that "forbid[] the relief which is sought." In other words, while § 702(2) may in some

Citing *Berman v. United States*, 264 F.3d 16 (1st Cir. 2001), IRS asserts, "this Court has previously recognized that Section 7609 provides the exclusive means for challenging a third-party summons" and that the statute "expressly or impliedly bars relief under Section 702(2) of the APA." Pet. 12-13. IRS has misconstrued *Berman,* which limits its discussion of 5 U.S.C. § 702 to only four sentences in a lengthy opinion. 264 F.3d at 21. *Berman* involved a taxpayer who (all parties agreed) possessed a statutory right under § 7609(b) to file a motion to quash an IRS administrative summons—but who failed to meet the § 7609(b)(2)(A) deadline for filing the motion. Because the federal government had consented to a judicial challenge to the summons by the taxpayer but the taxpayer had forfeited his opportunity for relief by missing the filing deadline, the Court held that the second limitation on APA sovereign-immunity waiver was implicated. *Ibid.*

IRS is flat-out wrong in asserting that *Berman* "recognized that Section 7609 provides the exclusive means for challenging a third-party summons." Pet. 12. *Berman* said nothing about "John Doe" summonses, nor did it discuss federal-court jurisdiction to hear constitutional claims filed by "John Doe" taxpayers.

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circumstances limit the relief a court might otherwise be authorized to grant, it imposes no limitations on a federal court's jurisdiction over a claim.

In sum, IRS's newly minted § 7609 sovereign-immunity defense lacks merit and provides no support for its rehearing petition.

CONCLUSION

The Court should deny the petition for panel rehearing.

Respectfully submitted,

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October 28, 2022

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CERTIFICATE OF COMPLIANCE

I am an attorney for Appellant James Harper. Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief is in 14-point, proportionately spaced Times New Roman type. According to the word processing system used to prepare this brief (WordPerfect X8), the word count of the brief is 3,722, not including the Rule 26.1 disclosure statement, table of contents, table of authorities, signature block, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

Dated: October 28, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 2022, I electronically filed Appellants' Response to the Petition for Panel Rehearing with the Clerk of the Court for the U.S. Court of Appeals for the First Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
Richard A. Samp