IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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| JAMES HARPER,<br><br>Plaintiff,<br><br>v.<br><br>CHARLES P. RETTIG, in his official capacity as COMMISSIONER INTERNAL REVENUE SERVICE, *et al.*,<br><br>Defendants. | ) | Case No. 1:20-cv-771-JL |

**DEFENDANTS' REPLY IN SUPPORT OF THEIR
RENEWED MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

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Plaintiff's Response (Doc. 32, "Response") to the government's Motion to Dismiss (Doc. 30-1, "Mot. Br.") reveals that he fundamentally disagrees with the statutory John Doe summons procedures through which the IRS obtained records relating to his virtual currency transactions. The IRS acquired those records only after the U.S. District Court for the Northern District of California authorized, and then enforced, a John Doe summons to Coinbase. Plaintiff's claim that the IRS "violated his rights under 26 U.S.C. § 7609(f)" (Response at 6) must be denied, because he has no right of action, nor any colorable argument, to challenge that court's rulings.

Unable to overturn those rulings, Plaintiff seeks to topple the entire statutory scheme by claiming it violates his constitutional rights. But he has no interest in Coinbase's records that is protected by the Fifth Amendment's due process clause or the Fourth Amendment's prohibition on unreasonable searches and seizures. Even if he had a protected interest, Plaintiff would still fail to establish any basis for requiring more John Doe summons procedures, or for concluding that the IRS acted unreasonably in obtaining records through the enforced summons.

## I. Plaintiff's Attack on Prior Court Rulings Authorizing and Enforcing the Coinbase Summons Should Be Dismissed (Count III)

Plaintiff's argument that the Northern District of California erred in finding that the John Doe summons to Coinbase did not meet the requirements of § 7609(f) is both procedurally improper and substantively wrong.

### A. Plaintiff Has No Right to Sue for an Alleged Violation of § 7609(f)

No legal authority supports Plaintiff's position that a taxpayer should be able to sue the IRS—seeking to make it expunge information already obtained through a John Doe summons that a U.S. District Court authorized and enforced—based on an allegation that the District Court's § 7609(f) determination was in error. The statute provides that the § 7609(f) proceeding to authorize issuance of a John Doe summons is "ex parte and shall be made solely on the petition and the supporting affidavits." 26 U.S.C. § 7609(h)(2). "Generally, where an act

provides for an ex parte order, unless the pleadings indicate that the ex parte order was signed by mistake because there were no supporting affidavits or statements to authorize the issuance of such order, then the order is not subject to collateral attack." *United States v. Hamilton*, Civ. A. No. 1:91CV2429RHH, 1992 WL 135579, at *1 (N.D. Ga. Jan. 17, 1992). Thus, "§ 7609(f) does not provide unnamed taxpayers with any opportunity to assert any 'personal defenses'" to a John Doe summons. *Ungaro v. Desert Palace, Inc.*, 732 F. Supp. 1522, 1530 (D. Nev. 1989); *see also In Matter of Tax Liabilities of Does*, M.B.D. No. 84-133, 1984 WL 1109, at *2 (D. Mass. Oct. 2, 1984) ("[A] § 7609(f) determination may not be reopened.").

Nor does the Administrative Procedure Act ("APA") allow the claim. *See* Response at 11-12. The right of review under 5 U.S.C. § 702 is limited to "agency action," and the § 7609(f) determination that Plaintiff disagrees with is not "agency action" but rather the decision of the U.S. District Court for the Northern District of California. That same court proceeding is also an "adequate remedy in a court" that precludes review under 5 U.S.C. § 704. Moreover, § 702(2) adds that "[n]othing herein … confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief," and the IRS third-party summons statute, which allows taxpayers to sue in other contexts, forbids a taxpayer suit with respect to John Doe summonses. *Cf. Neilson v. United States*, 674 F. Supp. 2d 248, 253 (D.D.C. 2009) (dismissing APA claim challenging summonses to financial institutions).

Plaintiff does not gain implicit "statutory standing" simply because he claims § 7609(f) protects his interests and he was harmed by a violation. Response at 11-12. The Supreme Court's "statutory standing" doctrine pertains to when a court must "determine the meaning of the congressionally enacted provision creating a cause of action," but here there is no provision creating a cause of action in the first place. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014). Plaintiff's arguments about collateral estoppel are likewise

irrelevant. Before collateral estoppel (or res judicata) can even be invoked, there must be a "different cause of action involving a party to the first case," and here there is none. *See SEC v. Weed*, 315 F. Supp. 3d 667, 673 (D. Mass. 2018). Plaintiff is in an even worse position than the third-party recordkeepers in the cases standing for the "sole forum" rule (Mot. Br. at 24), because at least they were parties to suits authorized by statute (petitions to quash or enforce a summons). His sole citation to the contrary is of doubtful persuasive force, since the judgment was vacated by the Supreme Court. *See* Response at 13 n.8, citing *United States v. Brigham Young Univ.*, 679 F.2d 1345 (10th Cir. 1982), *vacated and remanded*, 459 U.S. 1095 (1983). All final circuit-level decisions are unanimous that a § 7609(f) determination is not subject to later challenge.

**B. Plaintiff's Criticisms of the *Coinbase* Rulings Are Meritless**

Though the Court does not need to consider Plaintiff's substantive arguments regarding the three § 7609(f) factors, which were conclusively determined to have been met by the *Coinbase* court, those arguments too are unsupportable.

With respect to (f)(1) and whether the Coinbase summons relates to an "ascertainable" class, Plaintiff wrongly suggests that the statute's use of "ascertainable" means the class must be "small" and not "large." Response at 8.[1] To "ascertain" means simply "to find out or learn with certainty," and does not connote any size limitation. *See* Merriam-Webster.com Dictionary, "Ascertain," www.merriam-webster.com/dictionary/ascertain (accessed Feb. 23, 2023). Plaintiff does not claim that Coinbase could not find out with certainty who their U.S. customers were. Many courts have approved similarly broad-based John Doe summons classes. *See, e.g., In re Tax Liabilities of Does*, Case No. 20-mc-32, 2021 WL 4556392, at *2 (D. Minn. Sept. 3, 2021)

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[1] The Response misleadingly refers to the summons as encompassing "perhaps millions" of taxpayers. In reality, the narrowed summons enforced by the court concerned fewer than 15,000 taxpayers. *United States v. Coinbase, Inc.*, 2017 WL 5890052, at *2 (N.D. Cal. Nov. 28, 2017).

("United States taxpayers who [from 2013 to 2020] used the services of Panama Offshore Legal Services … to establish, maintain, operate, or control any foreign corporation, company, trust, foundation or other legal entity…."); *In re Tax Liabilities of Does*, No. 1:00-CV-3919, 2000 WL 34538137, at *1 (S.D. Fla. Oct. 30, 2000) ("American Express and MasterCard signatories whose charge, debit, or credit cards were issued by or through, or paid for from funds drawn on, banks in Antigua and Barbuda, the Bahamas, or the Cayman Islands during 1998 and 1999.").

Because there is no ambiguity about the term "ascertainable," the court's "examination of its meaning stops here, and we need not proceed to examine [the] legislative history." *Stauffer v. IRS*, 939 F.3d 1, 7-8 (1st Cir. 2019); *see also Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020) ("Legislative history . . . is meant to clear up ambiguity, not create it."). Nor does a 1975 Congressional Report's reference to a situation that "may be appropriate" for a John Doe summons (Response at 9) suggest Congress intended to deviate from the plain meaning of "ascertainable." Indeed, the Report was citing an example of "where there are unusual (or possibly suspicious) circumstances," not where the class is small. Response at 9.

With regard to (f)(2), Plaintiff alleges only that IRS lacked a "reasonable basis for believing that Mr. Harper failed to comply with any provision of any internal revenue law" (Am. Compl. ¶ 144, ECF No. 3); he does not allege that IRS lacked such reasonable basis for the "group or class of persons" identified in the summons, and that is the standard. The widespread tax underreporting of cryptocurrency transactions was documented in the *Coinbase* litigation. *See United States v. Coinbase, Inc.*, 2017 WL 5890052, at *4 (N.D. Cal. Nov. 28, 2017) (citing "discrepancy" between transactions taking place and transactions reported to IRS).

Third, the Complaint alleges nothing about (f)(3) as applied to the Coinbase summons. In his Response, Plaintiff raises a novel argument that § 7609(f)(3) limits summonses to seeking only the identity of taxpayers. Response at 9-11. The language of the statute itself flatly

contradicts this interpretation. Section 7609(f)(3) requires that "*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." (Emphases added.) This contemplates that the "identity" of John Doe class members will be provided in addition to "the information sought" about those class members.[2] Contrary to Plaintiff's revisionist history (Response at 16), seeking identities and information in one John Doe summons is consistent with IRS practice over the years, as courts have authorized John Doe summonses seeking information beyond taxpayer identities in many cases. *E.g.*, *In re John Does*, Case 2:10-mc-00130 (N.D. Cal.) (summons for names of property transferors, as well as dates, parcel numbers, counties, and values of transfers); *In re Tax Liabilities of John Doe*, Case 1:03-cv-22793 (S.D. Fla.) (summons for identities of customers, as well as agreements, correspondence, workpapers, statements, and financial records).

Plaintiff's alternative suggestion is that the IRS, after obtaining only identities through a John Doe summons, should issue a second summons that names the taxpayers and seeks their records from either the same third-party recordkeeper or the taxpayers themselves. Response at 9. This suggestion is unavailing because information sought in the hypothetical second round is not "readily available from other sources." A second summons to Coinbase would be to the same source, not "other sources," and information is not "readily available" if the IRS must serve

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[2] Plaintiff's assertion (Response at 10) that the 2019 amendment to § 7609(f) (which is not applicable to the Coinbase summons in any event) supports his view is wrong too. The new language says "the information sought" in the summons must be "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)[.]" Identities alone do not "pertain" to a potential tax violation, and it makes no sense to require IRS to "narrowly tailor" a request for identities either.

numerous summonses on individual taxpayers. No legal authority supports Plaintiff's proposed two-step approach; indeed, the text of the statute is directly at odds with his proposal.[3]

## II. Plaintiff's Constitutional Claims (Counts I and II) Should Be Dismissed

Despite Plaintiff's insistence in his reply that he is entitled to prior notice and an opportunity to object before IRS can obtain Coinbase's records concerning his cryptocurrency transactions, he cites no law showing he has an interest that is protected by the Fourth or Fifth Amendment. Even if he did, the John Doe summons process passes constitutional muster.

### A. None of Plaintiff's Asserted Interests Are Constitutionally Protected

Plaintiff does not have a Fourth or Fifth Amendment interest in Coinbase's records. He claims a "property-based" right (Response at 21-22), but as the Supreme Court explained in a seminal IRS summons-enforcement case concerning financial records, "[t]he material sought … consists only of [the third party's] routine business records in which the taxpayer has no proprietary interest of any kind." *Donaldson v. United States*, 400 U.S. 517, 530 (1971).

Plaintiff's attempt to manufacture a protected privacy interest in third-party financial records also fails in light of the inescapable ruling in *United States v. Miller*, 425 U.S. 435, 442-43 (1976), that there is no "legitimate expectation of privacy" in information voluntarily conveyed to third parties. *See* Mot. Br. at 15-18. Plaintiff suggests *Miller* "should be overruled" (Response at 23), but it is a Supreme Court precedent that this Court must follow. His proposal that this Court "distinguish *Miller*" (*id.*) would eviscerate that case's holding and be tantamount to overruling it. His criticism that *Miller* is "antiquated" (*id*. at 22-23) further ignores that five years ago the Supreme Court confirmed *Miller*'s continued force, saying it would not "disturb the application" of *Miller* outside the narrow context of cell phone data that tracks individuals'

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[3] Plaintiff advocates for the same two-step approach in support of his Fifth Amendment argument (Response at 16), where it is equally unavailing for reasons discussed below.

physical movements. *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018). Plaintiff tries to shoehorn his case into the *Carpenter* framework by claiming records of bitcoin sales are somehow equally "intimate" to tracking someone's physical movements (Response at 23-24), but there is nothing in *Carpenter*'s text to support this far-fetched assertion. *See also United States v. Gratkowski*, 964 F.3d 307, 311 (5th Cir. 2020) (distinguishing *Carpenter* on basis that "information on Bitcoin's blockchain is far more analogous to the bank records in *Miller*").[4]

Plaintiff also fails to cite any authority establishing his claimed "liberty interest" in "maintaining the privacy of his financial records" held by third parties. Response at 14. Plaintiff's lengthy list of "liberty" interests identified by the Supreme Court and recited by the First Circuit (Response at 14 n.1) ignores the First Circuit's holding that there was no Fifth Amendment due process claim because the "asserted interest comes within none of those protected areas." *Perrier-Bilbo v. United States*, 954 F.3d 413, 434 (1st Cir. 2020). The records at issue here fall under none of the listed categories either.

Plaintiff relies on *Ramie v. City of Hedwig Village* (Response at 15), but that case held that "the Constitution is violated only by invasions of privacy involving the most intimate aspects of human affairs," 765 F.2d 490, 492 (5th Cir. 1985)—a description inapplicable to financial records held by Coinbase.[5] He also mentions two Fourth Circuit cases (Response at 15,

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[4] Plaintiff calls *Gratkowski* "thinly reasoned" (Response at 23), but he overlooks that multiple district courts have agreed that taxpayers have no protected privacy interest in bitcoin transaction records held by digital currency exchanges. *See Zietzke v. United States*, 426 F. Supp. 3d 758 (W.D. Wash. 2019); *Zietzke v. United States*, No. 19-CV-03761, 2020 WL 264394 (N.D. Cal. Jan. 17, 2020), *report and recommendation adopted*, 2020 WL 6585882 (N.D. Cal. Nov. 10, 2020). There are no cases of any kind taking Plaintiff's position.

[5] The First Circuit has not held there is any right of confidentiality beyond certain autonomy interests "limited to decisions arising in the personal sphere," and has noted that "[e]ven if the right of confidentiality has a range broader than that associated with the right to autonomy," it does not "extend[] beyond prohibiting profligate disclosure," which plainly did not occur here. *See Vega–Rodriguez v. Puerto Rico Telephone Co.*, 110 F.3d 174, 183 (1st Cir.1997).

citing *Payne v. Taslimi*, 998 F.3d 648 (4th Cir. 2021), and *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990)), but those cases involved disclosures originally requested by government, not requests for information already disclosed to others. *Payne* reaffirmed that "information is protected only where there is a 'reasonable expectation of privacy' in it." 998 F.3d at 656 (quoting *Walls*, 895 F.2d at 193). The *Walls* case—an outlier of questionable continuing validity, *see Payne*, 998 F.3d at 657—does not help Plaintiff for another reason: the court found there was no constitutional violation in light of the government's "compelling interest." 895 F.2d at 194.

### B. Existing John Doe Summons Procedures Sufficiently Protect Plaintiff's Rights

Even if Plaintiff had Fourth or Fifth Amendment rights with respect to the Coinbase records, his claims would still be subject to dismissal because existing John Doe procedures satisfy constitutional requirements. *See* Mot. Br. at 21-23. As recounted in our opening brief, Congress enacted § 7609(f) to protect the rights of unnamed taxpayers in John Doe summons cases. The IRS properly obtained § 7609(f) authorization here. Plaintiff also cannot overcome the well-established proposition, from a landmark Supreme Court case approving a John Doe summons, that "[s]ubstantial protection is afforded" when a "summons can be enforced only by the courts." *United States v. Bisceglia*, 420 U.S. 141, 146 (1975). Prior to receiving any Coinbase records, the government obtained a separate court order enforcing the John Doe summons, and that came only after litigating a case in which Plaintiff participated as amicus.[6] That summons-

[6] Plaintiff's complaints that he was denied an "opportunity to be heard" (*e.g.*, Response at 15) ring hollow on the facts of this case, where he signed a brief raising a host of objections to the John Doe summons prior to any enforcement. He simply disagrees with the California judge's decision that partially enforced the summons in spite of his objections. He also disparages the "non-Article III magistrate judge" who entered the enforcement order (Response at 13), forgetting that all parties consented to her jurisdiction and that none appealed her ruling.

enforcement order is dispositive of Plaintiff's Fourth Amendment claim. *See United States v. Allee*, 888 F.2d 208, 213 n.3 (1st Cir. 1989).

Plaintiff unconvincingly tries to distinguish *Allee* on the basis that it "concerned a single taxpayer who had not filed tax returns for over a decade" (Response at 25 n.16), but the First Circuit's pronouncement that "[t]he Fourth Amendment is not violated as long as the IRS has complied with the requirements of *United States v. Powell*," and thus obtained a summons-enforcement order, was not limited to the facts of the *Allee* case. Indeed, courts consistently reject Fourth Amendment challenges concerning records obtained from third parties pursuant to an IRS summons, *United States v. Galloway*, No. 1:14-cr-00114, 2017 WL 735730, at *5 (E.D. Cal. Feb. 24, 2017) (collecting cases), and a summons-enforcement order establishes Fourth Amendment reasonableness, *Standing Akimbo, LLC v. IRS*, 955 F.3d 1146, 1166 (10th Cir. 2020). Plaintiff resists this outcome by insisting that "*Powell* is a statutory interpretation case that made no mention of the Fourth Amendment" and that courts nationwide have been misapplying *Powell* for the last six decades (Response at 24), but this can be summarily rejected based on the Supreme Court's statement in *Powell* that an IRS summons "need not meet any standard of probable cause." 379 U.S. at 57.

The IRS also does not violate procedural due process simply because there is no "opportunity to be heard" before taxpayer information is relayed to the IRS. Section 7609 notably permits the IRS to issue other types of summonses without notice to the taxpayer whose liability is implicated, such as summonses "issued in aid of the collection" of the taxpayer's tax liabilities or during certain criminal investigations. 26 U.S.C. § 7609(c)(2)(D) & (E). In seeking a ruling that would invalidate these and potentially other government investigative tools, Plaintiff wrongly discounts the need for "speedy issuance of summonses" (Response at 13) and the government's substantial interest in enforcing compliance with the internal revenue laws. *See*

*Bisceglia*, 420 U.S. at 149 (government "has a legitimate interest in large or unusual financial transactions"). That is why "[s]ummons enforcement proceedings should be summary in nature and discovery should be limited." *United States v. Stuart*, 489 U.S. 353, 369 (1989). Plaintiff also incorrectly assumes the government must provide an "explanation" for why his desired process is not "unduly burdensome" (Response at 16), ignoring that "administrative burdens" are reason to deny his constitutional claim. *See Mathews v. Eldridge*, 424 U.S. 319, 347-48 (1976). Regardless, the government owes no explanation for why it should be allowed to follow well-established statutory procedures that are constitutionally valid.

## III. Conclusion

The Court should grant the United States' renewed motion to dismiss.

Respectfully submitted,

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Certificate of Service

I certify that on February 28, 2023, I electronically filed the foregoing DEFENDANTS' REPLY IN SUPPORT OF THEIR RENEWED MOTION TO DISMISS via the Court's CM/ECF system and thereby served the following attorneys for plaintiff who are registered to receive ECF notices for this case:

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