

APPENDIX

TABLE OF APPENDICES

Appendix A

Opinion, United States Court of Appeals for the First Circuit, *James Harper v. Daniel I. Werfel*, No. 23-1565 (Sept. 24, 2024).....1a

Appendix B

Opinion, United States District Court for the District of New Hampshire, *James Harper v. Charles P. Rettig*, No. 1:20-cv-00771-JL (May 26, 2023)37a

Appendix C

U.S. Constitution, Amendment IV82a

1a

Appendix A

**United States Court of Appeals
For the First Circuit**

No. 23-1565

JAMES HARPER,
Plaintiff, Appellant,

v.

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

Defendants, Appellees.

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

[Hon. Joseph N. Laplante, U.S. District Judge]

Before

Kayatta, Lipez, and Gelpí,
Circuit Judges

Sheng Tao Li, with whom Richard Abbott Samp
and New Civil Liberties Alliance were on brief, for
appellant.

Kathleen E. Lyon, Attorney, Tax Division, Department of Justice, with whom David A. Hubbert, Deputy Assistant Attorney General, Francesca Ugolini, and Jennifer Marie Rubin, Attorneys, were on brief, for appellees.

Rodrigo Seira, Paradigm Operations LP, Omer Tene, Christopher J.C. Herbert, Andrew Kim, Gabe Maldoff, and Goodwin Procter LLP on brief for Paradigm Operations LP, amicus curiae.

Edward M. Wenger, John Cycon, and Holtzman Vogel Baran Torchinsky & Josefiak PLLC on brief for Coin Center, amicus curiae.

J. Abraham Sutherland, Cameron T. Norris, Jeffrey S. Hetzel, and Consovoy McCarthy PLLC on brief for DeFi Education Fund, amicus curiae.

Ryan P. Mulvey, Lee A. Steven, and Americans for Prosperity Foundation on brief for Americans for Prosperity Foundation, amicus curiae.

Tyler Martinez and National Taxpayers Union Foundation on brief for National Taxpayers Union Foundation, amicus curiae.

September 24, 2024

LIPEZ, Circuit Judge. This appeal addresses a so-called "John Doe" summons issued by the Internal Revenue Service ("IRS") to Coinbase, a cryptocurrency exchange, seeking Coinbase's records containing information about numerous Coinbase customers, including appellant James Harper.

Harper contends that the IRS's investigative efforts infringed his privacy and property rights in contravention of the Fourth and Fifth Amendments. Invoking the Administrative Procedure Act ("APA"), he also asserts that the summons did not satisfy statutory requirements for issuing a John Doe summons. See 26 U.S.C. § 7609(f).

The district court dismissed Harper's complaint, concluding, as pertinent to his constitutional claims, that he lacked a reasonable expectation of privacy in his Coinbase account information, and that Coinbase's records were not his property. It further concluded that, in any event, the IRS summons was reasonable, and Harper had received constitutionally adequate process. The court also rejected Harper's statutory challenge, dismissing it as an improper collateral attack on prior district court proceedings enforcing the summons and finding the IRS summons to satisfy the statutory standard.

We agree that Harper lacks a protectable interest under the Fourth or Fifth Amendment, and thus affirm on that basis. Finding that he has not raised a challenge to final agency action, as required to mount an APA claim, we affirm the dismissal of his statutory claim as well.

I.

A. Factual Background

Because we review the dismissal of Harper's complaint, we draw our recitation of the facts from

Harper's well-pleaded allegations, assuming their truth and drawing all reasonable inferences in Harper's favor. See, e.g., Legal Sea Foods, LLC v. Strathmore Ins. Co., 36 F.4th 29, 30, 34 (1st Cir. 2022).

Harper opened a Coinbase account in 2013. Coinbase is a digital currency exchange that facilitates transactions between accountholders. In 2013 and 2014, Harper made several deposits of Bitcoin, a popular digital currency, into his Coinbase account.¹ In 2015, Harper began liquidating his Bitcoin holdings or transferring them from Coinbase to a hardware wallet.² By early 2016, Harper no

¹ Harper primarily received this Bitcoin as income from consulting work. Harper alleges that he properly reported to the IRS all Bitcoin he received and properly reported all capital gains or losses associated with his Bitcoin holdings in the ensuing years. This appeal does not involve any challenge to those assertions.

² A hardware wallet is an offline device, often resembling a USB thumb drive, used to store the "private keys" necessary for a digital currency user to transact digital currency. See Harper v. Rettig, 46 F.4th 1, 3 n.3 (1st Cir. 2022) (quoting Virtual Currency Storage, IRM 5.1.18.20.2 (July 17, 2019)). This "secure offline" version of a virtual currency wallet, "in comparison to a software wallet downloaded to a computer or mobile device, is "immune to computer viruses," does not allow private keys to be transferred in unencrypted fashion, and "is not open source," thus making the device a highly secure alternative for transacting digital currency. Id.

longer had any Bitcoin holdings in his Coinbase account.³

In 2019, Harper received a letter from the IRS informing him that the agency "ha[s] information that you have or had one or more accounts containing virtual currency but may not have properly reported your transactions involving virtual currency." Harper alleges that the IRS's letter refers to information the agency obtained via a "John Doe" summons the agency issued to Coinbase in 2016. A John Doe summons is an ex parte third-party summons issued "where the IRS does not know the identity of the taxpayer[s] under investigation." Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 316 (1985) (emphasis omitted). Such a summons may only issue following a court proceeding in which the IRS establishes that certain statutory criteria have been satisfied,⁴ and the summons must be "narrowly

³ In his amended complaint, Harper also describes Bitcoin transactions made through two other exchanges, Abra and Uphold. His association with these two exchanges is not relevant to the issues in this appeal.

⁴ These factors are:

- (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

tailored to information that pertains to the failure (or potential failure) of the [individuals targeted by the summons] to comply with [the tax code]." 26 U.S.C. § 7609(f).

Initially, the 2016 John Doe summons sought information on all United States Coinbase accountholders who conducted digital currency transactions between 2013 and 2015. See United States v. Coinbase, Inc., No. 17-cv-01431, 2017 WL 5890052, at *1 (N.D. Cal. Nov. 28, 2017). The agency requested several categories of documents, including "complete user profiles, know-your-customer due diligence, documents regarding third-party access, transaction logs, records of payments processed, correspondence between Coinbase and Coinbase users, account or invoice statements, records of payments, and exception records produced by Coinbase's AML system." Id. Coinbase opposed the summons, and the IRS filed a petition to enforce the summons in the United States District Court for the Northern District of California. See generally id.

The agency subsequently and voluntarily narrowed the summons to encompass only users who had engaged in \$20,000 worth of any one type of digital currency transaction (buying, selling, sending, or receiving) in any one calendar year. Id. at *2. As

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

28 U.S.C. § 7609(f).

narrowed, the summons targeted 14,355 Coinbase accounts, seeking the following records: (1) registration information "limited to name, address, tax identification number, date of birth, account opening records, copies of passport or driver's license, all wallet addresses, and all public keys for all accounts/wallets/vaults"; (2) know-your-customer due diligence; (3) "[a]greements or instructions granting a third-party access, control, or transaction approval authority"; (4) account "activity including transaction logs or other records identifying the date, amount, and type of transaction (purchase/sale/exchange)," the names of counterparties to the transaction, and certain Coinbase account information of those counterparties; (5) "[c]orrespondence between Coinbase and the user" or authorized third parties; and (6) "[a]ll periodic statements of account or invoices (or the equivalent)." Id.

Coinbase continued to oppose the narrowed summons.⁵ See id. The court enforced the summons in part, finding the agency was justified, under 26 U.S.C. § 7602(a), which authorizes the IRS to issue summonses to "ascertain[] the correctness of any return, mak[e] a return where none has been made,

⁵ The court allowed a John Doe to intervene in the proceedings, and it also permitted three amici to file briefs opposing the summons. See Coinbase, 2017 WL 5890052, at *1, *3. Harper participated in the filing of one of these briefs, though he did so in a professional capacity and not, so far as the record reveals, based on a belief that his account information was implicated by the summons.

determin[e] the liability of any person for any internal revenue tax or ... collect[] any such liability," in obtaining the following documents: (1) the taxpayer ID number, (2) name, (3) date of birth, (4) address, (5) "records of account activity including transaction logs or other records identifying the date, amount, and type of transaction (purchase/sale/exchange), the post transaction balance, and the names of counterparties to the transaction," and (6) "all periodic statements of account or invoices (or the equivalent)." Coinbase, 2017 WL 5890052, at *8-9.⁶ Neither party appealed the court's enforcement order.

B. Procedural History

After receiving the IRS letter, Harper filed a complaint in the United States District Court for the District of New Hampshire,⁷ alleging violations of the Fourth and Fifth Amendments and seeking a declaration that the John Doe summons did not satisfy the § 7609(f) factors. As the district court put

⁶ As narrowed by the district court, the summons thus excluded several categories of information originally sought by the IRS, including "[r]ecords of Know-Your-Customer diligence," "[a]greements or instructions granting a third-party access, control, or transaction approval authority," and "[c]orrespondence between Coinbase and the user or any third party." *Id.* at *7.

⁷ Harper's amended complaint names as defendants the IRS, the Commissioner of the IRS, and 10 John Doe IRS agents. We refer to these parties collectively as "the IRS."

it, "[a]t its core, Harper's request for declaratory or injunctive relief seeks to compel the IRS to return or destroy the records it received from Coinbase relating to his account." Harper v. Rettig, 675 F. Supp. 3d 190, 199 n.18 (D.N.H. 2023). The district court dismissed the complaint, see Harper v. Rettig ("Harper I"), No. 20-cv-771, 2021 WL 1109254, at *3-5 (D.N.H. Mar. 23, 2021), on the ground that it lacked jurisdiction under the Anti-Injunction Act, which provides 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). We vacated that judgment, however, concluding that Harper's contention that "the IRS acquired [and retained his financial information] in violation of the Constitution and 26 U.S.C § 7609(f)" did not relate to the collection or assessment of a tax. Harper v. Rettig ("Harper II"), 46 F.4th 1, 8 (1st Cir. 2022).

The IRS again moved to dismiss, under Federal Rule of Civil Procedure 12(b)(6), arguing that Harper had failed to state a claim for a variety of reasons. The district court agreed. See Harper ("Harper III"), 675 F. Supp. 3d at 213. In dismissing Harper's Fourth Amendment claim, the court held that Harper lacked a reasonable expectation of privacy in information he voluntarily divulged to Coinbase and that Coinbase's records regarding his account activity were Coinbase's property, not Harper's. Id. at 200-04. The court also held, in the alternative, that the summons was reasonable because it complied with the

requirements for IRS summonses laid out in United States v. Powell, 379 U.S. 48, 57 (1964).⁸ See Harper III, 675 F. Supp. 3d at 203-05. The district court rejected Harper's Fifth Amendment claim on largely similar grounds, holding that because Harper lacked a privacy-based or property interest in his Coinbase account information, he had suffered no deprivation giving rise to due process protection. See id. at 206-07. Alternatively, the court found that Harper had received constitutionally adequate process. See id. at 207-08. Finally, the court dismissed Harper's statutory claim, "assum[ing], without deciding," that he was entitled to judicial review under the APA but

⁸ In Powell, the Court held that, under 26 U.S.C. § 7602, "the [IRS] Commissioner need not meet any standard of probable cause to obtain enforcement of his summons He must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." 379 U.S. at 57-58. As Harper notes, Powell thus concerned only the statutory requirements pertaining to IRS summonses and was not a Fourth Amendment case. The district court observed, however, that several circuits have concluded that satisfaction of the Powell requirements is enough to show that the summons was reasonable under the Fourth Amendment. See Harper III, 675 F. Supp. 3d at 204-05 (collecting examples). We have said the same in dicta. See United States v. Allee, 888 F.2d 208, 213 n.3 (1st Cir. 1989). Because Harper lacked an interest protected by the Fourth Amendment, see infra section II.A, we need not determine whether satisfaction of the Powell factors also, by extension, satisfies the Fourth Amendment reasonableness requirement.

concluding that his effort was an improper collateral attack on the prior order by the Northern District of California enforcing the summons and holding that the summons satisfied the § 7609(f) factors. Id. at 210; see also id. at 209-13. This timely appeal ensued.

II.

We review de novo the district court's dismissal of all three of Harper's claims. See Legal Sea Foods, 36 F.4th at 34.

A. Fourth Amendment

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A "search," as conceived in the context of the Fourth Amendment, can take two forms: it may be an intrusion upon a person's reasonable expectations of privacy, see, e.g., Katz v. United States, 389 U.S. 347, 351 (1967), or it may involve a "physical[] intru[sion] on a constitutionally protected area," Carpenter v. United States, 585 U.S. 296, 304 (2018) (quoting United States v. Jones, 565 U.S. 400, 405, 406 n.3 (2012)). Harper relies upon both theories in support of his Fourth Amendment claim: he had a reasonable expectation of privacy in his Coinbase account

information, and his account records were his personal property, which he had transferred to Coinbase as a "bailment." We address each contention in turn.

1. Reasonable Expectation of Privacy

Under a privacy-based theory, "the application of the Fourth Amendment depends on whether the person invoking its protection can claim a justifiable, a reasonable, or a legitimate expectation of privacy that has been invaded by government action." Smith v. Maryland, 442 U.S. 735, 740 (1979) (internal quotation marks omitted) (collecting cases). This "reasonable-expectation-of-privacy" inquiry contains subjective and objective elements: "the individual [must] 'exhibit[] an actual (subjective) expectation of privacy,'" id. (quoting Katz, 389 U.S. at 361 (Harlan, J., concurring)), and "the individual's expectation, viewed objectively, [must be] 'justifiable' under the circumstances," id. (quoting Katz, 389 U.S. at 353). Because Harper's complaint makes clear that he expected his Coinbase account information to remain confidential, his privacy-based theory turns on whether his expectation of privacy was justified under controlling law.

The Supreme Court "consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Id. at 743-44 (collecting cases). This principle holds true "even if the information is revealed on the

assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." Id. at 744 (quoting United States v. Miller, 425 U.S. 435, 443 (1976)). Of particular relevance here, the Court held in Miller that an individual has no legitimate expectation of privacy in "information kept in bank records," as these documents, "including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." 425 U.S. at 442; see also id. at 444 (restating its conclusion that "no Fourth Amendment interests of the depositor are implicated here").

We agree with the IRS (and the district court) that the account information obtained by the agency in this case falls squarely within this "third party doctrine" line of precedent. See, e.g., United States v. Gratkowski, 964 F.3d 307, 312 (5th Cir. 2020) (holding, under Miller and Smith, that a Coinbase user lacks a reasonable expectation of privacy in Coinbase account information). All the information revealed to the IRS pursuant to the enforced summons -- personal identifiers such as taxpayer identification number, name, and address; records of account activity such as transaction logs; and statements -- is directly analogous to the bank records at issue in Miller -- checks, deposit slips, and financial statements. See id.; see also Miller, 425 U.S. at 444 (comparing the subpoena in that case to a third-party IRS summons targeting a financial institution's

depositors and stating, in dicta, that "an [IRS] summons directed to a third-party bank does not violate the Fourth Amendment rights of a depositor under investigation"); Donaldson v. United States, 400 U.S. 517, 522 (1971) (similar); S.E.C. v. Jerry T. O'Brien, Inc., 467 U.S. 735, 743 (1984) (relying on the third-party doctrine to reject a Fourth Amendment challenge to third-party subpoena of financial records). In fact, Coinbase's terms of service expressly warn accountholders of the possibility of disclosure to law enforcement.

Revealingly, Harper's first line of attack against application of the third-party doctrine here is to invoke sentiment by academics and individual Supreme Court justices that the "doctrine is not only wrong, but horribly wrong." Carpenter, 585 U.S. at 388 (Gorsuch, J., dissenting) (quoting Orin Kerr, The Case for the Third-Party Doctrine, 107 Mich. L. Rev. 561, 563 n.5, 564 (2009)); see also Jones, 565 U.S. at 417 (Sotomayor, J., concurring) ("[The third-party doctrine] is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."). But, of course, we are bound to faithfully apply Supreme Court precedent notwithstanding the concerns of scholars and some justices.

Harper's arguments against "extending" the third-party doctrine to digital currency exchanges are no more convincing. Harper relies primarily on Carpenter, in which the Supreme Court held that an

individual has a reasonable expectation of privacy in cell-site location information ("CSLI"), which is a time-stamped record of a cell phone user's approximate location generated each time the cell phone connects to the wireless network. See 585 U.S. at 300-01, 315-16. Those records typically are created several times every minute, whether or not the cell phone user is even actively using the phone. See id. at 300-01. The CSLI in Carpenter has little in common, however, with Harper's Coinbase account information. An individual's CSLI amounts to a "detailed chronicle of a person's physical presence compiled every day, every moment, over several years," "implicat[ing] privacy concerns far beyond those considered in Smith and Miller." Id. at 315. By contrast, the information contained in financial records like those at issue here, even several years' worth of them, does not paint nearly so detailed a portrait of an individual's daily activity. While such records may capture some intimate information, the same is true of traditional bank records, and yet the Miller Court had no trouble concluding that a subpoena of such records does not impermissibly intrude upon "intimate areas of an individual's personal affairs." 425 U.S. at 444 n.6 (quoting Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 78 (1974) (Powell, J., concurring)).

Additionally, the Carpenter Court noted that CSLI "is not truly 'shared' as one normally understands the term." Carpenter, 585 U.S. at 315. Carrying a cell phone is "indispensable to

participation in modern society," and "a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up." Id. Plainly, participating in a digital currency exchange is not "indispensable," id., certainly no more so than having a traditional bank account. And transactions on Coinbase occur only when a user opts into that activity, unlike a cellphone automatically pinging a cell site, even while passively sitting in the user's pocket. See Gratkowski, 964 F.3d at 312 (similarly distinguishing Coinbase records from CSLI because "Coinbase records are limited" and "transacting Bitcoin through Coinbase . . . requires an 'affirmative act on [the] part of the user'" (quoting Carpenter, 585 U.S. at 315)).

Harper also cites United States v. Warshak, 631 F.3d 266, 287-88 (6th Cir. 2010), in which the Sixth Circuit held that individuals have a legitimate expectation of privacy in the contents of their emails, notwithstanding the third-party doctrine. In that case, federal agents obtained a criminal defendant's emails via a subpoena served on his internet service provider, which stored the email content in the process of delivering messages sent by or to the defendant, not unlike a mail carrier delivering a letter. Id. The court distinguished Miller because as an "intermediary" of emails, rather than the "intended recipient," the internet service provider holding those emails did not "put th[at] information to use 'in the ordinary course of business'" in the same manner that a financial institution generates and

uses its records regarding account activity as a core component of its business model. Id. at 287-88 (quoting Miller, 425 U.S. at 442). Here, by contrast, the IRS summonsed business records much like those in Miller, generated by Coinbase in its "ordinary course of business" as a financial institution and consisting of information "voluntarily conveyed to [Coinbase]." Miller, 425 U.S. at 442; see also id. at 440 (noting that the account information at issue "pertain[ed] to transactions to which the bank was itself a party" (quoting Cal. Bankers Ass'n, 416 U.S. at 52)).

Finally, we disagree with Harper's contention that Miller is distinguishable because "[c]ryptocurrency transactions are confidential by nature" thanks to the anonymity of the blockchain, a pseudonymized public ledger of all Bitcoin transactions.⁹ We do not doubt that because digital

⁹ Several amici elaborate on this concern. As they explain, transactions are registered on the blockchain for all to see, using a pseudonymous "wallet address," derived from a "public key," associated with each party to the transaction. If a person's identity becomes associated with an address or public key, thus piercing the veil of anonymity, anyone aware of that information can easily ascertain all transactions the person has made using that address -- or track future transactions. Though the IRS disputed at oral argument that any wallet addresses or public keys were included in the information the IRS obtained, we agree with Harper and his amici that exposure of this information was a reasonably likely consequence of the IRS summons, either directly or by analyzing the transaction data that was included. Ultimately, however, our agreement with

currency transactions are recorded on a public ledger, exposure of a person's identity opens a potentially wide window into that person's financial activity contained on that ledger. But that possibility does not alter our conclusion that the information at risk of exposure -- all concerning financial transactions -- is, fundamentally, much more analogous to the financial information at issue in Miller than to the uniquely comprehensive, locational data at issue in Carpenter.

Indeed, we fail to see how the decision to transmit financial information to the public -- even pseudonymously -- makes the expectation of privacy more reasonable than doing so privately, given the heightened consequences of exposure that Harper identifies. In other words, even if Harper chose to transact Bitcoin because he felt the technology would protect his privacy more than traditional banking (and his complaint does not allege as much), that choice would only inform, subjectively speaking, whether “he [sought] to preserve [something] as private,” Katz, 389 U.S. at 351, not whether his expectation of privacy was objectively legitimate. The fact remains that Harper voluntarily divulged information about his Bitcoin transactions to Coinbase. Indeed, Harper could have bypassed a digital currency exchange like Coinbase and conducted his Bitcoin transactions through decentralized, peer-to-peer transactions, which

Harper on this point makes no difference in our conclusion that he lacked a reasonable expectation of privacy.

“maintain [the] high level of privacy” associated with the blockchain but require specialized software and greater technical proficiency. Gratkowski, 964 F.3d at 312-13. Instead, Harper evidently chose “to sacrifice some privacy” in return for use of an intermediary, a more convenient method of transacting Bitcoin that “requires [less] technical expertise.” Id.¹⁰

Because Harper lacked a reasonable expectation of privacy in his Coinbase account information, we

¹⁰ Harper also argues that Miller and Gratkowski are distinguishable because they involved subpoenas concerning one person, whereas here the IRS’s summons concerned numerous Coinbase accounts. But in support of that argument, Harper relies primarily on a pre-Miller case from the Third Circuit that merely states, as a general principle, that the government may not engage in “fishing expedition[s],” United States v. Dauphin Deposit Tr. Co., 385 F.2d 129, 131 (3d Cir. 1967), a protection rooted in the Fourth Amendment’s reasonableness requirement and thus irrelevant to the reasonable-expectation-of-privacy inquiry as it pertains to whether Harper, as an individual, reasonably expected his information to remain private. Harper correctly notes in his reply brief that in United States v. Knotts, 460 U.S. 276, 284 (1983), the Supreme Court reserved the question of whether the third-party doctrine applies to “dragnet type law enforcement practices.” But the Court never suggested in that case (or in the forty years since) that an individual’s expectation of privacy is somehow stronger in cases involving multiple targets, notwithstanding that individual’s decision to turn over that information to third parties. Simply put, thus, neither Knotts nor Dauphin provides any reason to disregard our straightforward application of Miller to conclude that Harper lacked a reasonable expectation of privacy in information he voluntarily turned over to Coinbase.

reject his privacy-based theory for his claim of a Fourth Amendment violation.

2. Property

Harper also argues, in effect, that his Coinbase account records, though in Coinbase's possession, were his "private papers," and thus the IRS's inspection of this information was akin to an intrusion on his personal property, giving rise to Fourth Amendment protections. Harper's novel theory relies heavily on Justice Gorsuch's solo dissenting opinion in Carpenter. See 585 U.S. at 397-406. Though Justice Gorsuch did not agree with the majority that the defendant had a reasonable expectation of privacy in his CSLI notwithstanding the third-party doctrine, Justice Gorsuch argued that he might have had a property interest in his CSLI that could serve as the basis for his Fourth Amendment claim. Id. at 405-06; see also id. at 397-404 (discussing why a property-based approach, rather than a reasonable-expectation-of-privacy standard, is, in Justice Gorsuch's view, a preferable method for resolving Fourth Amendment claims).

Relying on Justice Gorsuch's supposition, Harper argues that he has a property interest in his Coinbase account records. Yet, despite Justice Gorsuch's recognition that any such interest needs to be anchored in law, Harper makes no effort in his opening brief to explain the legal source of the interest

he asserts.¹¹ See Carpenter, 585 U.S. at 405-06 (Gorsuch, J., dissenting) (concluding, based on an analysis of 47 U.S.C. § 477, that “customers have substantial legal interests in [CSLI], including at least some right to include, exclude, and control its use,” that “might even rise to the level of a property right,” but adding that the defendant “offered no analysis ... of what rights state law might provide him”); see also Cahoon v. Shelton, 647 F.3d 18, 28 (1st Cir. 2011) (“A court tasked with determining whether a constitutionally protected property interest exists must look to ‘existing rules or understandings that stem from an independent source such as state law.’” (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972))). Harper simply asserts that the property interest exists because these records are his “papers,” but his facile reliance on that word from the text of the Fourth Amendment is inadequate, as “[p]roperty interests ... are not created by the

¹¹ At oral argument, Harper's counsel did point to references in Coinbase's terms of service to “information about your transactions,” “your personal information,” and “your account information,” arguing that these phrases reflect a contractual understanding that the information belonged to Harper. Putting aside that arguments made for the first time at oral argument are waived, see, e.g., Guardado v. United States, 76 F.4th 17, 23 n.4 (1st Cir. 2023), we perceive an obvious difference between a reference to “your information,” meaning information about Harper, some of which was provided by him but some of which Coinbase collected in the course of his account activity, and the actual records generated and held by Coinbase based on that information.

Constitution.” Roth, 408 U.S. at 577; see also Cahoon, 647 F.3d at 29 (“A party’s unilateral expectation, in itself, cannot create a constitutionally protected property interest.”).

Harper’s failure to elaborate on the nature of his purported property right is especially significant because his property-based claim faces significant headwind in Supreme Court precedent. In Miller, the Court remarked that, with no ability to assert ownership or possession, the respondent could not claim the financial records as his own “private papers.” 425 U.S. at 440. They were “[i]nstead . . . the business records of the banks,” as “all of the records [which must be retained under the Bank Secrecy Act] pertain[ed] to transactions to which the bank was itself a party.” Id. (quoting Ca. Bankers Ass’n, 416 U.S. 21, 52 (1974)); cf. Donaldson, 400 U.S. at 523 (stating that a taxpayer had “no proprietary interest of any kind” in records “owned by [a] third person, which are in [the third person’s] hands, and which relate to the third person’s business transactions with the taxpayer”). The same logic applies here.

Thus, while Harper asserts that Coinbase is merely a “bailee” of his financial records,¹² his allegations tell a different story. Most of the records

¹² As Justice Gorsuch explained in his Carpenter dissent, “[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.’” 585 U.S. at 399 (emphasis removed) (quoting Black’s Law Dictionary 169 (10th ed. 2014)).

included in the summons, as ultimately enforced, appear to be documents generated by Coinbase, such as records of transactions that Coinbase facilitated and periodic account statements. Other information obtained -- taxpayer ID number, name, birthdate, address -- appears to simply be basic biographical information necessary to open a Coinbase account. Given the Miller Court's rejection of such financial records as an individual's "private papers" rather than the property of the financial institution, we see no basis to conclude that the IRS intruded upon Harper's protected property rights.

None of the cases Harper cites compels a different result. The decisions in Warshak, 631 F.3d at 287, and United States v. Ackerman, 831 F.3d 1292, 1304 (10th Cir. 2016), both concerning emails, analyzed the Fourth Amendment question under the reasonable-expectation-of-privacy standard, not under a property-based approach. And in Carpenter v. United States, 484 U.S. 19, 26-27 (1987);¹³ Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001-04 (1984); and Boyd v. United States, 116 U.S. 616, 638 (1886), all cases recognizing a property interest in business records or personal papers, it was clear, unlike here, that the asserted property belonged to the party claiming the

¹³ Not to be confused with the 2018 Carpenter v. United States cited extensively in our reasonable-expectation-of-privacy analysis.

interest.¹⁴ Similarly, Jones, 565 U.S. at 404 n.2, 405-11, and Ex Parte Jackson, 96 U.S. 727, 723 (1878), both involved property bailments, whereas here, as explained, Coinbase was not in possession of Harper's property. The summonsed records were its own.

Accordingly, we agree with the district court that Harper lacked a constitutionally protected property interest in Coinbase's records related to his account.

In sum, Harper had neither a reasonable expectation of privacy in the Coinbase account information nor a cognizable property interest in Coinbase's records. Because Harper's Fourth Amendment Claim fails at this threshold, we need not assess whether the summons was reasonable under Fourth Amendment principles.

B. Fifth Amendment

Harper next argues that the IRS violated his Fifth Amendment right to procedural due process when it used the summons to obtain his Coinbase account records without providing him notice or an opportunity to be heard. See U.S. Const. amend. V ("No person shall ... be deprived of life, liberty, or

¹⁴ Boyd, for instance, concerned the "compulsory production of [the defendant's] private papers," namely, the defendant's personally held records of invoices concerning the importation of several cases of glass. 116 U.S. at 622.

property, without due process of law.”); Aponte-Rosario v. Acevedo-Vilá, 617 F.3d 1, 9 (1st Cir. 2010) (“[T]he essential requirements of procedural due process include adequate notice and an opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” (quoting Amsden v. Moran, 904 F.2d 748, 753 (1st Cir.1990))).¹⁵ To establish an entitlement to these procedural protections, Harper must first show that the IRS deprived him of an interest protected by the Due Process Clause, namely, his property or his liberty. See Roe v. Lynch, 997 F.3d 80, 85 (1st Cir. 2021). While Harper argues that the summons deprived him of his property right in his Coinbase account records, he acknowledges that his purported property interest is no different from the one we rejected in connection with his Fourth Amendment claim. We thus limit our discussion to Harper's theory that the IRS deprived him of a protected Fifth Amendment liberty interest in the privacy of his financial information.

In sourcing his claimed right to privacy, Harper relies principally on Whalen v. Roe, 429 U.S. 589, 598-

¹⁵ While many of the precedents we discuss concern the Due Process Clause of the Fourteenth Amendment, “the language and policies of the Due Process Clauses of the Fifth and Fourteenth Amendments are essentially the same,” and thus “due process cases decided under the Fourteenth Amendment provide guidance in due process cases arising under the Fifth Amendment.” United States v. Neto, 659 F.3d 194, 201 n.7 (1st Cir. 2011) (quoting United States v. Bohn, 281 F. App'x 430, 434 n.4 (6th Cir. 2008)).

604 (1977), in which the Supreme Court recognized that the Due Process Clause's protection of liberty includes "avoiding disclosure of personal matters," including, to some degree, "disclosures to representatives of the State." *Id.* at 599, 602. Despite that recognition, the Supreme Court upheld a state statute requiring physicians to disclose to the government the identities of patients to whom they prescribed certain controlled substances, explaining, as most relevant here, that such disclosure was not "meaningfully distinguishable" from other "disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies [that] are often an essential part of modern medical practice" and was thus not "an impermissible invasion of privacy." *Id.* at 602. Harper also cites Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977), in which the Supreme Court recognized that the president has a "legitimate expectation of privacy" in "matters of personal life unrelated to any [official] acts," although the Court once again rejected the underlying due process claim, finding that privacy interest outweighed by the public interest in archiving the official records with which that private information was intermingled. *Id.* at 457- 58, 465. We have likewise recognized a due process "right of confidentiality," though we have cautioned that such a right does not "extend[] beyond prohibiting profligate disclosure of medical, financial, and other intimately personal data." Vega-Rodriguez v. P.R. Tel. Co., 110 F.3d 174, 183 (1st Cir. 1997). Thus, in

that case, we rejected a due process challenge to a state agency's video surveillance of its employees in the workplace, reasoning that “[a]ny data disclosed ... ha[d] been revealed knowingly by the [employees] to all observers (including the video cameras),” and therefore “cannot be characterized accurately as ‘personal’ or ‘confidential.’” Id. at 183.

Harper is correct that these cases establish that the substantive component of the Due Process Clause protects a limited liberty interest in the confidentiality of certain intimate information. And we can assume, without deciding, that Harper also is correct that this protectable privacy interest may encompass certain sensitive financial information. Even with that assumption, however, Harper’s claim that the IRS deprived him of such a liberty interest nonetheless fails because -- as we already have concluded -- he lacked any reasonable expectation of privacy in the circumstances here. See supra Section II.A.1. In other words, because Harper could not reasonably expect Coinbase, faced with an IRS summons, to withhold the type of financial information he chose to submit to the company (or the related Coinbase records), Harper lacks a cognizable due process interest in the confidentiality of those records.¹⁶

¹⁶ The district court held that Harper’s assertion of a protected liberty interest failed because there is no liberty interest in the privacy of financial information generated and held by a third-party financial institution like Coinbase. See Harper III, 675 F.

While Harper argues that our reasonable-expectation-of-privacy analysis is inapplicable to the due process context, that assertion is belied by precedent. In Whalen, for example, the Supreme Court found no privacy violation because the information sought by the state was already routinely disclosed to other parties. See 429 U.S. at 878. Similarly, in Nixon, 433 U.S. at 465, the Supreme Court analyzed the president's privacy interest through the prism of his “legitimate expectation of privacy.” And in Payne v. Taslimi, 998 F.3d 648, 657 (4th Cir. 2021), and Walls v. City of Petersburg, 895 F.2d 188, 192 (4th Cir. 1990), which concern the disclosure of financial data, and upon which Harper also relies, the first step of the Fourth Circuit’s due process inquiry was to determine whether there was a reasonable expectation of privacy. Accordingly,

Supp. 3d at 206. Our holding is more limited. Starting with the assumption that the Due Process Clause protects some kinds of personal financial information, we conclude only that Harper lacks a Fifth Amendment privacy interest in the specific financial information he voluntarily gave to Coinbase. We do not consider whether individuals would have a due process liberty interest in the same type of information in different circumstances, or whether other types of personal financial information would be protected by the Fifth Amendment even when voluntarily transferred to a third-party financial institution. Because Harper fails to assert a cognizable liberty interest even with the benefit of our assumption that financial records may give rise to such an interest, we choose to affirm the district court's dismissal of his Fifth Amendment claim without further examining the extent to which the Due Process Clause protects the confidentiality of personal financial information.

having already concluded that Harper lacked any reasonable expectation of privacy in his Coinbase account information, we cannot say that Harper has been “deprived” of a constitutionally protected privacy interest by the disclosure of that information to the IRS.¹⁷

We note, moreover, that the disclosure of Coinbase’s transaction logs and account statements to the IRS for investigative purposes, pursuant to a twice-narrowed summons and a judicial enforcement order, would hardly seem to count as “profligate,” as we have said it must be to implicate a protected liberty interest in the confidentiality of information. Vega-Rodriguez, 110 F.3d at 182. For this reason as well, we think that Harper has clearly failed to show

¹⁷ To be sure, Whalen discussed two constitutionally protected forms of confidentiality: nondisclosure to the government and nondisclosure to the public resulting from the government’s acquisition of personal information. See 429 U.S. at 591, 600-01 (evaluating a state statute requiring a centralized record of the names and addresses of individuals prescribed certain controlled substances). For the reasons explained above, we think that nondisclosure to the government is sufficiently analogous to privacy as conceptualized in the Fourth Amendment context that our reasonable-expectation-of-privacy analysis compels the rejection of Harper’s due process claim. Aside from a passing reference to IRS data breaches in his reply brief, Harper makes no argument about public disclosure. Any such argument about the due process right against public disclosure is thus waived, see, e.g., United States v. Gordon, 954 F.3d 315, 323 n.1 (1st Cir. 2020), and we therefore need not consider whether our analysis regarding Harper’s lack of a reasonable expectation of privacy would compel the same result in the context of public disclosure.

that the IRS deprived him of any protected liberty interest in the nondisclosure of intimate information.

Finally, though neither the district court nor the IRS relied on this body of law, we must note that Harper's privacy-based reliance on the protections of procedural due process to challenge the IRS's summons appears to suffer from an even more fundamental problem. In SEC v. Jerry T. O'Brien, the Supreme Court stated that "the Due Process Clause of the Fifth Amendment ... is [not] offended when a federal administrative agency, without notifying a person under investigation, uses its subpoena power to gather evidence adverse to him." 467 U.S. at 742. The Court thus rejected the argument that the targets of an SEC investigation had a due process right to notice and opportunity to oppose a subpoena of third parties pursuant to that investigation. Id.; see also Hannah v. Larche, 363 U.S. 420, 442 (1960) (holding that procedural due process rights do not apply "when governmental action does not partake of an adjudication, as for example, when a general factfinding investigation is being conducted"); Aponte v. Calderón, 284 F.3d 184, 193 (1st Cir. 2002) ("[I]nvestigations conducted by administrative agencies, even when they may lead to criminal prosecutions, do not trigger due process rights.").

This precedent confirms our view that Harper's reliance on his due process right to privacy cannot succeed. Here, just as in Jerry T. O'Brien, the IRS's summons of Coinbase's records was quintessential

fact-finding that did not involve any sort of adjudication of Harper's rights or liabilities. Accordingly, Harper lacked any procedural due process right to be notified of the IRS's investigative efforts or to oppose its summons issued to a third party. To be sure, the Supreme Court did not directly consider the protected liberty interest of keeping certain sensitive information confidential. But we discern little difference between Harper's assertion of a right to keep his Coinbase account information private from an IRS summons and the purported right at issue in Jerry T. O'Brien. Indeed, by holding that the Due Process Clause offers no protection from an agency "using its subpoena power to gather evidence adverse to [a person]," 467 U.S. at 742, the Jerry T. O'Brien Court seemed to implicitly recognize that the possibility of an investigation surfacing private information is not enough to entitle an individual to procedural due process protections. Simply put, Harper's effort to keep his Coinbase account information out of the hands of the IRS appears to be no different from the unsuccessful effort in Jerry T. O'Brien to stymie an investigation that likewise implicated potentially sensitive financial information but gave rise to no procedural due process protections.

In sum, the procedural protections of the Due Process Clause are not implicated by the IRS's

summons.¹⁸ Because Harper's Fifth Amendment claim fails at this threshold step, we need not consider whether he received constitutionally adequate process.

C. Statutory Factors

Finally, Harper seeks a declaratory judgment that the IRS's summons was not issued in compliance with the factors set out in 26 U.S.C. § 7609(f) for a John Doe summons. Harper advances this claim under the APA. The IRS argued in the district court that the summons was not agency action, as required to mount an APA challenge. The district court declined to reach this question, however, "assuming, without deciding," that the summons was challengeable under the APA before rejecting it on other grounds. Harper III, 675 F. Supp. 3d at 210. On appeal, the IRS renews its contention that the APA does not authorize the relief Harper seeks. See United States v. Roman, 942 F.3d 43, 50 (1st Cir. 2019) ("We may affirm 'on any basis apparent in the record.'").¹⁹

¹⁸ We note that our discussion here does not speak comprehensively to the rights of the recipient of a subpoena or summons or to the right of a defendant in a criminal case to challenge the basis for issuing such an order.

¹⁹ Harper asserts that the IRS has not raised a finality challenge, as it argued in the district court only that the summons was not "agency action," without analyzing whether it was "final." The IRS counters that, by arguing that the summons was not agency action at all, it was, necessarily, also contending that the

The APA provides for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. To be considered "final," the agency action must satisfy two conditions. First, it "must mark the 'consummation' of the agency's decisionmaking process." Bennett v. Spear, 520 U.S. 154, 178 (1997) (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948)). Second, "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" Id. (quoting Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatl., 400 U.S. 62, 71 (1970)). Our analysis focuses on the first requirement.

The IRS's summons of Coinbase's records is a preliminary investigative step, far upstream of any potential tax enforcement actions against Coinbase accountholders like Harper or any broader agency action regarding the reporting of digital asset transactions. Cf. United States v. Bisceglia, 420 U.S. 141, 146 (1975) (stating that "[t]he purpose of [the IRS's summons power] is not to accuse, but to inquire" and that "such investigations . . . are essential to our self-reporting system"); Harper II, 46 F.4th at 8 (stating that the scope of the IRS's summoning authority described under 26 U.S.C. § 7602 "clearly

summons was not final agency action. We agree with the IRS that the question of whether the APA authorizes judicial review of the IRS summons, as final agency action, is properly before us.

fall[s] within the category of information gathering"). The summons was thus not the "consummation" of the agency's decisionmaking process," but, rather, was "of a merely tentative or interlocutory nature." Bennett, 520 U.S. at 178. Several of our sister circuits have likewise concluded that investigatory measures are not final agency action. See, e.g., Am. Civil Liberties Union v. Nat'l Sec. Agency, 493 F.3d 644, 679 n.37 (6th Cir. 2007) (concluding that surveillance activities are not final agency action); Univ. of Med. & Dentistry of N.J. v. Corrigan, 347 F.3d 57, 69 (3d Cir. 2003) ("The decision to investigate is normally seen as a preliminary step -- non-final by definition -- leading toward the possibility of a 'final action' in the form of an enforcement or other action."); Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n, 324 F.3d 726, 731 (D.C. Cir. 2003) ("The agency's conduct thus far amounts to an investigation [This] agency activit[y] do[es] not constitute final agency action within the meaning of the APA."); Ass'n of Am. Med. Colls. v. United States, 217 F.3d 770, 780-81 (9th Cir. 2000) ("An investigation, even one conducted with an eye to enforcement, is quintessentially non-final as a form of agency action."); Jobs, Training & Servs., Inc. v. E. Tex. Council of Gov'ts, 50 F.3d 1318, 1324 (5th Cir. 1995) ("[A]n agency's initiation of an investigation does not constitute final agency action." (quoting Veldhoen v. U.S. Coast Guard, 35 F.3d 222, 225 (5th Cir. 1994))); cf. FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 241-42 (1980) (holding that the

issuance of an administrative complaint is not final agency action).

Nor are we aware of any judicial decision holding that an agency's issuance of a summons or similar investigatory instrument is final agency action reviewable under the APA. The lone case Harper cites is Sackett v. EPA, 566 U.S. 120, 126 (2012), in which the Supreme Court held that an EPA compliance order which required the petitioners, among other things, to "give the EPA access to their property and to 'records and documentation related to the conditions at the [s]ite,'" was final agency action. Id. Putting aside that this order also imposed a "legal obligation to 'restore' their property according to an Agency-approved Restoration Work Plan," id., the analysis in Sackett pertained to the second finality requirement: that the agency action determine rights and obligations. See Bennett, 520 U.S. at 178. Our analysis, however, pertains to the first requirement: that the action mark "the 'consummation' of the agency's decisionmaking process." Id. (quoting Bennett, 520 U.S. at 178). For the reasons we describe, a summons issued as part of a broader investigation is not such a consummation.

Mindful that early "[j]udicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise," Standard Oil, 449 U.S. at 242, it strikes us as premature at this point to wade into the IRS's investigation of potential widespread misreporting of

income from digital asset transactions. See also id. at 243 (cautioning against premature judicial review as "a means of turning prosecutor into defendant before adjudication concludes"); Univ. of Med. & Dentistry of N.J., 347 F.3d at 69 ("In the ordinary course, an investigation is the beginning of a process that may or may not lead to an ultimate enforcement action."). We thus affirm the district court's dismissal of Harper's statutory claim without needing to address the requirements of § 7609(f).

III.

Having rejected all three of Harper's lines of attack, we affirm the district court's dismissal of Harper's complaint for the reasons explained herein.

So ordered.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE
James Harper

v.

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

Civil No. 1:20-cv-00771-JL
Opinion No. 2023 DNH 066P

MEMORANDUM ORDER

This case concerns the constitutionality of the Internal Revenue Service’s utilization of its “John Doe” summons procedure to obtain a taxpayer’s account information from Coinbase, a virtual currency exchange. Following the issuance and enforcement of such a summons, the IRS collected account information and records from Coinbase. Some of the records it collected belonged to Plaintiff James Harper, who bought and sold bitcoin through Coinbase. Through this lawsuit, Harper seeks an injunction requiring the IRS to expunge, destroy, or return his Coinbase records and an order declaring the statute that authorized the issuance of the John Doe summons, 26 U.S.C. § 7609(f), unconstitutional.

Harper alleges that the IRS’s actions constituted a seizure and search that violated the Fourth Amendment of the United States Constitution as well as his procedural due process rights under the Fifth

Amendment. He further claims that the IRS violated § 7609(f) in obtaining his records. The IRS moves to dismiss for failure to state a claim upon which relief can be granted.

This court has jurisdiction over Harper's claims under 28 U.S.C. § 1331 because the claims present federal questions. After considering the parties' submissions and hearing oral argument, the court grants the motion. Harper does not have protectable Fourth or Fifth Amendment interests in the records produced by Coinbase in response to the John Doe summons. Even assuming that he did, the IRS's actions satisfied the Fourth Amendment's reasonableness requirement and provided him constitutionally adequate process under the Due Process Clause. As for Harper's statutory claim, the statute at issue does not expressly or impliedly provide taxpayers with a private right to sue the IRS for purported statutory violations. Also, a different court has already determined that the IRS satisfied the statutory requirements for a John Doe summons, and that determination is not subject to a later collateral attack. Finally, even if the court's decision was subject to collateral attack, Harper's complaint fails to state a claim that the IRS did not satisfy the elements of § 7609(f).

I. Applicable legal standard

To defeat a Rule 12(b)(6) motion, Harper must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Martinez v. Petrenko, 792 F.3d 173, 179 (1st Cir. 2015). This standard “demands that a party do more than suggest in conclusory terms the existence of questions of fact about the elements of a claim.” A.G. ex rel. Maddox v. Elsevier, Inc., 732 F.3d 77, 81 (1st Cir. 2013). In ruling on such a motion, the court accepts as true all well-pleaded facts set forth in the complaint and draws all reasonable inferences in Harper’s favor. See Martino v. Forward Air, Inc., 609 F.3d 1, 2 (1st Cir. 2010). The court may also consider judicially noticed documents, information attached to or incorporated into the complaint, matters of public record, and documents introduced by Harper in his objection to the motion to dismiss or concessions in that objection, without converting the Rule 12(b)(6) motion into a motion for summary judgment. See Lyman v. Baker, 954 F.3d 351, 360 (1st Cir. 2020).

II. Background

Factual background. The court draws the relevant factual background from Harper’s First Amended Complaint,¹ documents attached to that

¹ Doc. no. 3.

complaint, and other matters of public record. In 2013, Harper opened an account with “Coinbase,” an entity that “facilitates transactions in virtual currencies such as bitcoin.”² 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.”³ Coinbase warned its users, however, that it “may share [their] personal information with . . . [l]aw enforcement, government officials, or other third parties when: [w]e are compelled to do so by a subpoena, court order or similar legal procedure[.]”⁴

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 that he declared all “appropriate income from bitcoin payments,” including capital gains tax.⁵ Harper further alleges that he paid “appropriate capital gains on any bitcoin income for tax years 2015 and 2016.”⁶ Harper began liquidating his holdings in the Coinbase account in

² Id. at ¶ 18.

³ Id. at ¶ 25

⁴ Id. at ¶ 28

⁵ Id. ¶¶ 30-33; see also id. ¶¶ 75, 99, 123, 140 (alleging that he “has accurately reported his virtual currency transactions for all applicable tax years”).

⁶ Id. at ¶ 37.

2015. By 2016, Harper no longer held any bitcoin in the Coinbase account.⁷

In 2016, the IRS petitioned ex parte under 26 U.S.C. §§ 7609(f) and 7609(h)(2) in the United States District Court for the Northern District of California for leave to serve a “John Doe” summons on Coinbase.⁸ “A ‘John Doe’ summons is, in essence, a direction to a third party to surrender information concerning taxpayers whose identity is currently unknown to the IRS.” Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 313, n.4 (1985) (quoting In re Tax Liabilities of John Does, 671 F.2d 977, 978 (6th Cir. 1982)). As further detailed below, under § 7609(f), the IRS may only serve a John Doe summons after a court proceeding in which the IRS establishes that: (1)

⁷ Id. at ¶ 36. From 2016 to the date of his complaint (August 2020), Harper and his wife also “liquidated bitcoin through” the virtual currency exchanges “Abra” and “Uphold.” Id. at ¶ 56.

⁸ 2016 Petition (doc. on. 30-3). The court can consider the Coinbase summons petition and other court documents relating to the enforcement of that summons when deciding this motion, without converting it to motion for summary judgment. See Fritz v. Brown, No. 06-cv-469-PB, 2007 WL 2585083, at *1 (D.N.H. Aug. 29, 2007) (Barbadoro, J.) (Items “susceptible to judicial notice” include “matters of public record such as documents from prior court proceedings.”); Giragosian v. Ryan, 547 F.3d 59, 66 (1st Cir. 2008) (“A court may consider matters of public record in resolving a Rule 12(b)(6) motion to dismiss.”). Through the petition, the IRS was trying “to determine the correct federal income tax liabilities for taxable years 2013-2015 of United States taxpayers who have conducted transactions in a ‘convertible virtual currency’” on Coinbase. Id.

the summons relates to the investigation of a particular person or ascertainable group of persons; (2) there is a reasonable basis for believing that such 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, and the identity of the subject persons, is not readily available from other sources. See § 7609(f)(1)-(3).

Based on a review of the petition and supporting documents, the court granted the petition, determining that the John Doe summons to Coinbase:

relat[ed] to the investigation of an ascertainable group or class of persons, that there [wa]s a reasonable basis for believing that such group or class of persons has failed or may have failed to comply with any provision of any internal revenue laws, and that the information sought to be obtained from the examination of the records or testimony (and the identities of the persons with respect to whose liability the summons is issued) [wer]e not readily available from other sources.⁹

The IRS served the summons on Coinbase, which did not comply.

⁹ Order Granting Petition (doc. no. 30-5) at 1-2.

The IRS then filed a separate summons-enforcement petition against Coinbase in March 2017.¹⁰ Coinbase opposed the petition, and at least one John Doe successfully intervened as well.¹¹ Other third parties filed amicus briefs opposing the summons, including Harper, who signed an amicus brief filed by the Competitive Enterprise Institute.¹² During the enforcement proceeding, the IRS agreed to narrow the scope of its summons.¹³ Ultimately, after oral argument, the court granted the petition in part and denied it in part and ordered Coinbase to comply with a narrowed version of the summons. See United States v. Coinbase, Inc., No. 3:17-cv-01431, 2017 WL 5890052, at *1 (N.D. Cal. Nov. 28, 2017) (finding that the narrowed IRS summons “serves the IRS’s legitimate purpose of investigating Coinbase account holders who may not have paid federal taxes on their virtual currency profits”). The narrowed summons sought documents and various categories of information from Coinbase “accounts with at least the equivalent of \$20,000 in any one transaction type

¹⁰ 2017 Petition (doc. no. 30-6). The same judge who oversaw the 2016 summons petition – Judge Jacqueline Scott Corley – presided over the 2017 summons-enforcement action.

¹¹ Motions to Intervene (doc. no. 30-8); see also doc. no. 3 at ¶¶ 41, 48.

¹² Competitive Enterprise Institute Amicus Brief (doc. no. 30-10); see also doc. no. 3 at ¶ 51.

¹³ Notice of Narrowed Summons (doc. no. 30-7); see also doc. no. 3 at ¶ 41.

(buy, sell, send, or receive) in any one year during the 2013 to 2015 period.” Id. at *8-*9.¹⁴

Coinbase produced account holder documents and information to the IRS in response to the narrowed summons, including information about Harper’s Coinbase account from 2013 to 2015. Following its receipt of Harper’s Coinbase account information, the IRS sent Harper a letter in 2019 entitled “Reporting Virtual Currency Transactions.”¹⁵ As relevant here, the IRS 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

¹⁴ See also doc. no. 3 at ¶ 54. No party appealed the summons issuance or summons enforcement orders. Id. at ¶ 55.

¹⁵ Doc. no. 3 at ¶ 67; see also doc. 3-6 at 1. Harper also alleges, upon information and belief, that IRS agents “issued an informal demand” to Abra and Coinbase for his financial records with those entities. He believes that Abra or Coinbase complied with that informal demand, further prompting the 2019 letter. See id. at ¶ 76. The IRS has subsequently stated in sworn interrogatory answers that it sent the 2019 letter to Harper based only on its review of documents and information produced by Coinbase in response to the narrowed John Doe summons, and not based on receipt of documents or information from Abra, Coinbase, or Uphold in response to an informal IRS demand. See IRS Interrogatory Answers (doc. no. 30-11) at 5. The court does not rely on these interrogatory answers for purposes of resolving the pending motion to dismiss. It simply notes – and the parties agree – that Harper’s claims now only relate to the judicially issued and enforced Coinbase summons.

involving virtual currency, which include cryptocurrency and non-crypto virtual currencies.¹⁶

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.”¹⁷

Procedural history. Harper filed suit in August 2020 against the IRS, its then Commissioner in his official capacity, and ten “John Doe” IRS agents. Harper’s complaint contains three counts: (1) violation of the Fourth Amendment; (2) violation of the Fifth Amendment; and (3) declaratory judgment/violation of 26 U.S.C. § 7609(f). As relief for the alleged Constitutional violations in Counts 1 and 2, Harper seeks money damages from the defendants, as well as injunctive and declaratory relief. Specifically, Harper requests an order: (i) declaring § 7602, et seq., unconstitutional as applied to him under the Fourth and Fifth Amendments; (ii) requiring the IRS to expunge Harper’s financial records; and (iii) 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 3, Harper requests a declaratory judgment that the IRS is violating § 7609(f) and, like

¹⁶ Doc. no 3 at ¶ 68; see also doc. 3-6 at 1.

¹⁷ Doc. no. 3 at ¶ 69; see also doc. 3-6 at 1.

Counts 1 and 2, requiring the IRS to expunge¹⁸ his financial records and prohibiting the IRS and John Does 1 through 10 from seizing similar financial records through § 7609(f) in the future.

The IRS initially moved to dismiss the complaint for lack of subject-matter jurisdiction and failure to state a claim upon which relief could be granted. The court (DiClerico, J.) granted the motion and dismissed (for varying reasons) all of Harper’s claims for damages and declaratory and injunctive relief.¹⁹ Harper appealed the dismissal of his injunctive and declaratory relief claims, but not his damages claim. A First Circuit Court of Appeals panel reversed, finding that the Anti-Injunction Act “does not bar [Harper’s] suit and the district court’s judgment of dismissal under Federal Rule of Civil Procedure 12(b)(1) must be vacated.” Harper v. Rettig, 46 F.4th 1, 9 (1st Cir. 2022). On remand, the case was assigned to the undersigned judge after Judge DiClerico passed away in April 2022. The parties agree that only Harper’s claims for declaratory and injunctive relief remain.

¹⁸ At its core, Harper’s request for declaratory or injunctive relief seeks to compel the IRS to return or destroy the records it received from Coinbase relating to his account.

¹⁹ See Order (doc. no. 17) (DiClerico, J.).

III. Analysis

Harper first contends that the IRS's acquisition of his Coinbase records through a John Doe summons was an unreasonable seizure and search of his private papers (in which he held both property and privacy interests) that violated the Fourth Amendment. He next contends that because he possesses both property and liberty interests in his Coinbase records, the Due Process Clause of the Fifth Amendment afforded him notice and an opportunity to be heard before the IRS attempted to deprive him of those interests. Finally, Harper argues that § 7609(f) is unconstitutional as applied to him, and even if not unconstitutional, the IRS violated the statute by failing to satisfy several prerequisites for issuance of a John Doe summons. The court addresses the IRS's challenges to each claim in turn, beginning with the Fourth Amendment claim.

A. Fourth Amendment claim

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” and provides that “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.” U.S. Const. Amend. IV. The IRS raises two primary challenges to Harper's Fourth Amendment claim. It

first argues that Harper had no protectable Fourth Amendment interest in the Coinbase records. It also argues that even if the IRS's acquisition of the Coinbase records constituted a Fourth Amendment search or seizure, its actions were reasonable and probable cause is not required to issue a John Doe summons. The court agrees with the IRS on both points.

1. Protectable Fourth Amendment interest

Courts have utilized a property-based or “common-law trespass” approach as well as a privacy-based approach to determining whether Fourth Amendment interests are implicated. Carpenter v. United States, 138 S. Ct. 2206, 2213 (2018) (citations omitted). For example, “[w]hen ‘the Government obtains information by physically intruding’ on persons, houses, papers, or effects, ‘a ‘search’ within the original meaning of the Fourth Amendment’ has ‘undoubtedly occurred.’” Florida v. Jardines, 569 U.S. 1, 5 (2013) (quoting United States v. Jones, 565 U.S. 400, 406, n.3 (2012)). In addition, a “Fourth Amendment search [also] occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.” Kyllo v. United States, 533 U.S. 27, 33 (2001). Whether Harper’s complaint states a claim for violating the Fourth Amendment therefore first turns on whether he has a protectable privacy or property interest in the Coinbase records.

Privacy interest. The Supreme Court of the United States has long held that “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.” Smith v. Maryland, 442 U.S. 735, 743-44 (1979). Smith involved information conveyed to a telephone company, but courts have applied the third-party doctrine in other contexts, most notably to bank records and customer information held by financial institutions. See United States v. Miller, 425 U.S. 435, 440, 444 (1976) (finding a depositor had “no Fourth Amendment interests” in a bank’s records of his accounts or transactions). In Miller – a case involving subpoenas to banks for investigating tax evasion by bank customers – the Court found that the customer’s canceled checks, deposit slips, and monthly statements were “not confidential communications but negotiable instruments to be used in commercial transactions” and contained information “exposed to [bank] employees in the ordinary course of business.” Id. at 442. Thus, the customer had “take[n] the risk, in revealing his affairs to another, that the information [would] be conveyed by that person to the Government.” Id. at 443.

In Carpenter, the Court declined to apply the third-party doctrine to “cell-site location information” maintained by wireless telephone carriers. Prosecutors obtained court orders under the Stored Communications Act to collect the CSLI relating to several robbery suspects from wireless providers. The

question before the Court was whether the CSLI was entitled to Fourth Amendment protection and if so, whether the government unlawfully searched the data without a warrant supported by probable cause. The Supreme Court answered both questions in the affirmative.

The Court reasoned that, like GPS information, but unlike “telephone numbers and bank records,” the “time-stamped [CSLI] data provides an intimate window into a person’s life, revealing not only his particular movements, but also his ‘familial, political, professional, religious, and sexual associations.’” Id. (quoting Jones, 565 U.S. at 415 (Sotomayor, J., concurring)). Thus, the Court held that “an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI.” Id. at 2217.

Harper asks this court to find, as in Carpenter, that account information held by a virtual currency exchange provides an intimate window into a person’s life and is thus protected under the Fourth Amendment. The court declines to do so. Harper’s “Coinbase records are more akin to the bank records in Miller than the CSLI in Carpenter.” United States v. Gratkowski, 964 F.3d 307, 312 (5th Cir. 2020). As the Fifth Circuit Court of Appeals aptly put it,

Coinbase is a financial institution, a virtual currency exchange, that provides Bitcoin users with a method for transferring Bitcoin. The main

difference between Coinbase and traditional banks, which were at issue in Miller, is that Coinbase deals with virtual currency while traditional banks deal with physical currency. But both are subject to the Bank Secrecy Act as regulated financial institutions. Both keep records of customer identities and currency transactions.

Id. (citations omitted). The Carpenter Court was concerned about the surveillance aspect of CSLI; the data provided “a detailed chronicle of a person’s physical presence compiled every day, every moment, over several years,” which “implicate[d] privacy concerns far beyond those considered in Smith and Miller.” 138 S. Ct. at 2220. Coinbase and other virtual currency exchange records do not reveal similarly intimate details about a user’s life. The records instead provide information that a person uses a particular exchange and “information about a person’s virtual currency transactions.” Gratkowski, 964 F.3d at 312. Thus, both qualitatively and quantitatively, Harper’s virtual currency exchange account information is closely analogous to the bank records in Miller.²⁰

²⁰ Harper does not explain what intimate life details his Coinbase records reveal. Even if the records incidentally showed his occasional location information (and Harper does not argue that they did), Carpenter would not require this court to recognize a privacy interest in the records. See Carpenter, 138

The CSLI in Carpenter also lacked the voluntary disclosure quality of bank records and other information normally subject to the third-party doctrine. “[T]ransacting [b]itcoin through Coinbase or other virtual currency exchange institutions requires an ‘affirmative act on the part of the user.’” Gratkowski, 964 F.3d at 312 (quoting Carpenter, 138 S. Ct. at 2220). Indeed, to open a bank account – or a Coinbase account – a user must provide his personal information to the third party. And to use the bank’s or Coinbase’s services, a user must provide additional information to the third party. In the case of CSLI, however, the location information was “not truly ‘shared’ as one normally understands the term.” Carpenter, 138 S. Ct. at 2220. Instead, the wireless carrier collected it (perhaps without the user even realizing it) as soon as the user turned his phone on. Id. By electing to buy, sell, and store virtual currency through Coinbase, and providing personal information to Coinbase to utilize its “technical expertise,” users like Harper “sacrifice some privacy” and thus lack a protectable “privacy interest in the records of [their] [b]itcoin transactions on Coinbase” or other virtual currency exchanges. Id. at 312-13.²¹

S. Ct. at 2220 (“Nor do we address other business records that might incidentally reveal location information.”).

²¹ The nature of bitcoin and other virtual currencies allows individuals to buy, sell, or transfer the bitcoin directly to others without third party intervention. Harper chose to use a government-regulated, third party to execute these types of transactions.

Harper’s “contract” with Coinbase does not compel a different result. The Supreme Court “has held repeatedly that the Fourth Amendment does not prohibit” the government from obtaining information revealed to third parties, “even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.” Miller, 425 U.S. at 443 (citing cases). And Coinbase warned Harper in its privacy policy that it may share his personal information with “[l]aw enforcement, government officials, or other third parties” when “compelled to do so by subpoena, court order or similar legal procedure,” further reducing any privacy interest he may have held in the records.²²

Moreover, no court has adopted Harper’s broad reading of Carpenter in the context of virtual currency exchange records. Several courts have rejected it. See, e.g., Gratkowski, 964 F.3d at 311-12 (holding that Coinbase user had no reasonable expectation of privacy in Coinbase records of his bitcoin transactions and in information held in the bitcoin blockchain); Zietzke v. United States, 426 F. Supp. 3d 758, 768-69 (W.D. Wash. 2019) (“Because Bitstamp’s records do not implicate the privacy concerns at issue in Carpenter, Petitioner lacks a legitimate expectation of privacy in those records. Consequently, the IRS’s request for those records does not infringe upon Petitioner’s Fourth Amendment

²² Doc. no. 3 at ¶ 28.

rights.”); Zietzke v. United States, No. 19-cv-03761, 2020 WL 264394, at *13 (N.D. Cal. Jan. 17, 2020), report and recommendation adopted, 2020 WL 6585882 (N.D. Cal. Nov. 10, 2020) (“Carpenter is not applicable here because Carpenter’s holding is narrowly limited to facts different from this case, because location data is not at issue here, and because it is undisputed that Petitioner voluntarily exposed the requested data to Coinbase.”).

Of course, the court cannot grant Harper’s request that it overrule Miller. See Obj. at 23. Miller and the third-party doctrine remain good law even after Carpenter, and this court is bound to apply them. Carpenter, 138 S. Ct. at 2220 (finding that the Court’s holding did “not disturb the application of Smith and Miller” and noting that “the third-party doctrine [still] applies to telephone numbers and bank records”).

Property interest. Citing Boyd v. United States, 116 U.S. 616 (1886), Harper also argues that he has a property interest in the Coinbase records because those records constitute his personal or “private papers.” The court is not persuaded. In Miller, the Court distinguished Boyd and found that a bank customer could “assert neither ownership nor possession” of his account records. 425 U.S. at 440. The “documents subpoenaed” were not the customer’s “private papers,” but instead were “the business records of the banks.” Id. Similarly, in Donaldson v. United States, the Court found that a taxpayer had

“no proprietary interest of any kind” in his former employer’s “routine business records.” 400 U.S. 517, 531 (1971).²³ As discussed above, the records the IRS obtained from Coinbase are analogous to a customer’s account records with a bank. Thus, Miller’s holding that a bank customer has neither a property interest nor a reasonable expectation of privacy in the bank’s records for his account applies with equal force to Harper’s Coinbase account records.

While the initial summons to Coinbase sought copies of third-party agreements, passports and drivers’ licenses, bitcoin (or other virtual currency) wallet addresses, public keys for all accounts/wallets/vaults, and correspondence between Coinbase and users and third parties with access to the accounts, the court-enforced summons was far narrower. The court ultimately ordered Coinbase to produce, for a limited group of account holders, the following information to the IRS: (1) the taxpayer ID number; (2) name; (3) birth date; (4) address; (5) “records of account activity including transaction logs or other records identifying the date, amount, and type of transaction (purchase/sale/exchange), the post transaction balance, and the names of counterparties to the transaction”; and (6) all periodic statements of account or invoices or equivalent documents. Coinbase, 2017 WL 5890052, at *8-9.

²³ Donaldson, which addressed a taxpayer’s right to intervene in a third-party IRS summons proceeding, led to Congress’ passage of § 7609(b).

From a property rights perspective, this information is “no different from the many other kinds of business records the Government has a lawful right to obtain by compulsory process,” because the account holder does “not own, possess, control, or use the records.” Carpenter, 138 S. Ct. at 2224 (Kennedy, J., dissenting); see also id. at 2235 (“By obtaining the [CSLI], the Government did not search Carpenter’s property. He did not create the records, he does not maintain them, he cannot control them, and he cannot destroy them.”) (Thomas, J., dissenting). While Harper may have had a proprietary interest in the bitcoin itself, the IRS did not seek to dispossess him of that property. Thus, the IRS did not seize or search anything over which Harper could assert ownership or control.²⁴ The court

²⁴ Harper quotes from Justice Gorsuch’s solo dissent in Carpenter to bolster his criticism of Miller and the third-party doctrine. Doc. no. 32 at 19. He also relies on that dissent to advance a “bailment” theory of property rights to support his argument that he holds a property interest in the Coinbase records. Under this theory, if one entrusts his papers and effects to a third party, that third party “owes a legal duty to keep the item safe.” Carpenter, 138 S. Ct. at 2268 (Gorsuch, J., dissenting). If the third party “uses the item in a different way than he’s supposed to, or against the bailor’s instructions,” the third party is “liable for conversion.” Id. at 2269. One of the problems with this theory as applied to Harper’s Coinbase records (beyond the fact that it comes from a non-controlling dissenting opinion), is that it starts with the premise that a person has given his “papers and effects” to a third party. Here, however, as the court has already found, Harper’s Coinbase account information is not considered his papers and effects for

concludes that Harper did not have a protectable Fourth Amendment interest in the account records and information produced by Coinbase in response to the IRS summons.

2. Reasonableness

The IRS also argues that, even if the Coinbase summons implicated Harper's Fourth Amendment rights, its seizure and search of the records were reasonable and thus did not violate the Fourth Amendment. "The fundamental inquiry under the Fourth Amendment is whether a particular search or search procedure is 'reasonable' in the circumstances." McCabe v. Life-Line Ambulance Serv., Inc., 77 F.3d 540, 544 (1st Cir. 1996) (quoting Cady v. Dombrowski, 413 U.S. 433, 439-40 (1973)). "Reasonableness," in turn, depends on "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." Id. at 546-47 (quoting O'Connor v. Ortega, 480 U.S. 709, 719 (1987)). A warrantless search is normally "reasonable only if it falls within a specific exception to the warrant requirement." Carpenter, 138 S. Ct. at 2221.

purposes of the Fourth Amendment. The bailment theory might work if the IRS attempted to seize Harper's bitcoin, which he entrusted to Coinbase to secure, without a warrant. But that did not occur.

The IRS does not claim that its third-party summons procedure is an exception to the warrant requirement per se. Instead, it argues that so long as it complies with the requirements of United States v. Powell in obtaining and enforcing the summons, the Fourth Amendment reasonableness standard is met. In other words, the Powell requirements, while not an “exception” to the warrant requirement, exempt the IRS from making any probable cause showing that would otherwise be required to support a warrant. See United States v. Powell, 379 U.S. 48, 57 (1964) (holding that “the Commissioner need not meet any standard of probable cause to obtain enforcement of his summons”); see also Presley v. United States, 895 F.3d 1284, 1293 (11th Cir. 2018) (recognizing that a “basic distinction between administrative summonses of business records and actual searches of things in which citizens hold a reasonable expectation of privacy means a separate Fourth Amendment standard applies to each circumstance”) (quoting Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 204 (1946)).

The case law supports the IRS’s argument. For example, in United States v. Allee, the First Circuit Court of Appeals found – albeit in dicta – that the “Fourth Amendment is not violated as long as the IRS has complied with the requirements of United States v. Powell.” 888 F.2d 208, 213 n.3 (1st Cir. 1989); see also Standing Akimbo, LLC v. United States, 955 F.3d 1146, 1166 (10th Cir. 2020) (“The IRS has met

the Powell factors establishing the Fourth Amendment reasonableness of the Standing Akimbo summons. The Taxpayers have failed to rebut this showing, so the IRS does not need probable cause.”); Presley, 895 F.3d at 1293 (“In other words, when it comes to the IRS’s issuance of a summons, compliance with the Powell factors satisfies the Fourth Amendment’s reasonableness requirement.”); United States v. Silkman, 543 F.2d 1218, 1220 (8th Cir. 1976) (“The summons in question is not a general warrant prohibited by the Fourth Amendment, but instead only seeks those records needed to establish his tax liabilities for 1973 and 1974. It has long been settled that the enforcement of a validly drawn Internal Revenue summons does not violate the Fourth Amendment.”) (citations omitted); Harris v. U.S.I.R.S., 758 F.2d 456, 457 (9th Cir. 1985) (“Such summonses issued to a third party recordkeeper do not violate the Fourth Amendment.”).

Powell resolved a circuit split “on the standards the [IRS] must meet to obtain judicial enforcement of its” summonses under § 7602 and § 7604. 379 U.S. at 50-51. Thus, the Powell requirements and the statute itself provide, to the extent required, the necessary Fourth Amendment protections to taxpayers subject to IRS summons proceedings. As the Supreme Court recognized, § 7601 gives the IRS “a broad mandate to investigate and audit persons who may be liable for taxes” and § 7602 “provides the power to examine any books, papers, records, or other data which may be

relevant . . . (and to summon) any person having possession . . . of books of account . . . relevant or material to such inquiry.” United States v. Bisceglia, 420 U.S. 141, 145-46 (1975) (quotations omitted). The IRS’s statutory investigative authority is, “[o]f necessity,” “not limited to situations in which there is probable cause, in the traditional sense, to believe that a violation of the tax laws exists.” Id. at 146. To ensure that the IRS does not abuse this power, however, “[s]ubstantial protection is afforded by the provision that an Internal Revenue Service summons can be enforced only by the courts.” Id. (citing 26 U.S.C. § 7604(b)). In the context of John Doe summonses, the § 7609(f) similarly protects taxpayer rights through the “requirement of judicial preapproval,” which “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, 971 (1st Cir. 1995) (quoting Tiffany, 469 U.S. at 321). “What § 7609(f) does is to provide 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.

Judge Corley has already found that the IRS satisfied both § 7609(f) and the Powell requirements in obtaining and enforcing the John Doe Coinbase summons. See doc. no. 30-5; Coinbase, 2017 WL 5890052, at *7. This court will not disturb those findings. Accordingly, even if the court found that

Harper had a protectable Fourth Amendment interest in his account records (a finding which the court does not make), the IRS's compliance with § 7609(f) and Powell satisfies the Fourth Amendment's reasonableness requirement. The IRS's motion to dismiss Harper's Fourth Amendment claim is granted.

B. Fifth Amendment Procedural Due Process claim

“Procedural due process guarantees that ‘before a significant deprivation of liberty or property takes place at the state’s hands, the affected individual must be forewarned and afforded an opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” Perrier-Bilbo v. United States, 954 F.3d 413, 433 (1st Cir. 2020) (quoting González-Droz v. González-Colón, 660 F.3d 1, 13 (1st Cir. 2011)); see also Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”). “To state a valid procedural due process claim, [Harper] must (1) identify a protected liberty or property interest[;] and (2) allege that the defendants . . . deprived [him] of that interest without constitutionally adequate process.” Air Sunshine, Inc. v. Carl, 663 F.3d 27, 34 (1st Cir. 2011) (cleaned up).

The IRS argues that Harper has failed to identify a protected liberty or property interest. It further argues that even if he had a protected liberty or property interest in the Coinbase records, the IRS used constitutionally adequate process to deprive him of those interests. The court agrees with the IRS.

1. Identifiable property or liberty interest

For the reasons discussed above, Harper does not have a property interest in the records and information produced by Coinbase in response to the IRS's summons. See supra, § III, A., 1; see also Miller, 425 U.S. at 440; Donaldson, 400 U.S. at 531; United States v. Schutterle, 586 F.2d 1201, 1204-05 (8th Cir. 1978) (“Absent a protectible liberty or property interest, the protections of procedural due process do not attach. The Schutterles clearly have no property interest in the business records of the bank.”).

Harper nevertheless argues that he has a “liberty interest in maintaining the privacy of his financial records”²⁵ that is protectable under the Fifth Amendment. This argument falters for several reasons. First, it mischaracterizes the interest at stake. The financial records belong to Coinbase, not Harper. Second, it finds no support in precedent. No court has recognized a protectable liberty interest in maintaining the privacy of financial records held and

²⁵ Doc. no. 32 at 14.

created by a third-party financial institution. Third, “privacy” in the context of liberty interests relates to the “most personal and deep-rooted expectations of privacy,” and not necessarily account records maintained by regulated financial institutions. Payne v. Taslimi, 998 F.3d 648, 658 (4th Cir. 2021).

“The constitutional right to privacy does extend to . . . ‘the individual interest in avoiding disclosure of personal matters.’” Walls v. City of Petersburg, 895 F.2d 188, 192 (4th Cir. 1990) (citing Whalen v. Roe, 429 U.S. 589, 599-600 (1977)).²⁶ But that “right to privacy” protects “only information with respect to which the individual has a reasonable expectation of privacy.” Id. at 193. As discussed above, Harper did not have a reasonable expectation of privacy in

²⁶ Courts, including the First Circuit Court of Appeals, “look to the Supreme Court’s interpretation of ‘liberty’ in the Fourteenth Amendment for guidance” in determining whether a protectable liberty interest exists for procedural due process purposes. Perrier-Bilbo, 954 F.3d at 434. Liberty in the Fourteenth Amendment context refers to two types of interests: “one is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.” Whalen, 429 U.S. at 599–600. Personal matters include matters relating to marriage, Loving v. Virginia, 388 U.S. 1 (1967); procreation, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942); contraception, Eisenstadt v. Baird, 405 U.S. 438 (1972); family relationships, Prince v. Massachusetts, 321 U.S. 158 (1944); and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510 (1925). One’s interest in avoiding disclosure of account records maintained by third party financial institutions does not fit within these categories of “personal matters.”

Coinbase's records of his account and accordingly does not have a protectable liberty interest for purposes of the Due Process Clause of the Fifth Amendment.

2. Deprivation of interest without constitutionally adequate process

Even if Harper held a liberty or property interest in the Coinbase records, the summons procedure utilized here adequately protected those interests. “No rigid taxonomy exists for evaluating the adequacy of state procedures in a given case; rather, ‘due process is flexible and calls for such procedural protections as the particular situation demands.’” Gonzalez-Droz v. Gonzalez-Colon, 660 F.3d 1, 13 (1st Cir. 2011) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). “In order to determine both when a pre-deprivation hearing is compulsory and what process is due, an inquiring court must balance a myriad of factors, including the private and public interests involved, the risk of an erroneous deprivation inherent in the procedures employed by the state, and the likely benefit that might accrue from additional procedural protections.” Id. (citing Mathews, 424 U.S. at 335).

Harper contends that he received neither notice nor an opportunity to be heard at a meaningful time and manner before being deprived of his alleged interests in the Coinbase records. The court disagrees. “[D]ue process does not invariably require

a hearing before the state can interfere with a protected property interest.” Gonzalez-Droz, 660 F.3d at 14. Instead, “some form of hearing” must be provided “before an individual is finally deprived of [the] interest.” Mathews, 424 U.S. at 333 (emphasis supplied). But while the opportunity to be heard before the seizure is usually expected, “this is not always feasible.” Herwins v. City of Revere, 163 F.3d 15, 18 (1st Cir. 1998). Here, because the IRS does not know the identity of John Doe summons recipients prior to obtaining a court order issuing the summons and the process for obtaining the summons is necessarily ex parte, providing notice to Harper would not have been feasible.

Moreover, the reviewing court provides the necessary protection to the unnamed taxpayer by requiring the IRS to satisfy the requirements of § 7609(f) and obtain a court order before serving the summons. See Gertner, 65 F.3d at 971 (the district court “act[s] as a surrogate for the unnamed taxpayer . . . to ‘exert[] a restraining influence on the IRS’”); United States v. Samuels, Kramer and Co., 712 F.2d 1342, 1346 (9th Cir. 1983) (“Section 7609’s criteria thus constitute a procedural safeguard which Congress created to provide extra protection to unknown target taxpayers to whom the IRS cannot give notice.”).

Further, meaningful opportunities to contest the summons arise after its issuance. For example, once the summons issued here, Coinbase refused to comply

and made the IRS satisfy additional procedural hurdles in an enforcement proceeding. See Bisceglia, 420 U.S. at 146 (“[s]ubstantial protection is afforded” to taxpayers when “a summons can be enforced only by the courts”). Harper participated in the enforcement proceeding through the amicus brief he filed. And he could have moved to intervene in the enforcement proceeding to obtain party status, and thus attain an even more meaningful opportunity to be heard. He did not do so.

Lastly, the IRS’s interests in swift receipt and enforcement of investigative summonses, as well as its interest in rooting out citizens who do not pay their obligated share of taxes, outweigh any benefit that might accrue from additional procedural protections.

Harper acknowledges that the IRS John Doe summons procedure is necessarily ex parte and it would have been impossible to provide him notice prior to issuing the original summons. He argues instead that the IRS should have followed a different procedure. Specifically, Harper asserts that the IRS should have first sought a John Doe summons to Coinbase for account holder names only. Presuming it obtained his name from this summons, Harper then expected the IRS to send summonses to the individual account holders with notice, providing them an opportunity to contest the summons. Harper believes that the IRS could have utilized this optional procedure to get the information it wanted but simultaneously preserve his due process rights.

Whether to utilize Harper's proposed procedure is discretionary for the IRS, and "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion." Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005). Due process therefore does not compel the IRS to undertake the purely optional procedure of Harper's choice.

C. Statutory claim

In Count 3, Harper seeks a declaratory judgment that the IRS violated 26 U.S.C. § 7609(f) in obtaining his account information from Coinbase and an injunction requiring the IRS to expunge his records. The IRS lodges several grounds for dismissal. First, it argues that Harper lacks standing to bring a claim for violation of § 7609(f) because the statute contains no private right to sue. Second, it contends that even if Harper had standing, a different court has already determined that the IRS satisfied the statute in obtaining the Coinbase records and that determination is not subject to collateral attack. Third, it asserts that even if the prior orders were subject to a later collateral challenge, the IRS fully met its obligations under the statute. Harper contests each argument and further asserts that he has standing to challenge the IRS's actions under the

Administrative Procedure Act.²⁷ The court agrees with the IRS.

1. Standing

Harper concedes that the text of § 7609(f) confers no private right on a taxpayer to sue the IRS for damages and injunctive relief arising out of an alleged violation of the statute. He instead contends that because he is within the “zone of interests” that the statute is intended to protect, he has an implicit right to sue under § 7609(f). He also argues that the APA allows him to challenge the IRS’s alleged compliance with § 7609(f). Neither argument persuades the court.

Implied right of action. Harper cites Vander Luitgaren v. Sun Life Assur. Co. of Canada, 765 F.3d 59 (1st Cir. 2014) and Lexmark Int’l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014) as supporting his “zone of interests” theory of statutory

²⁷ Harper’s counsel argued in passing at oral argument that because the IRS did not initially move to dismiss his statutory claim under Rule 12(b)(6), that portion of its current motion is foreclosed by Rule 12(g). Harper’s counsel later seemed to concede that the First Circuit Court of Appeals’ opinion and remand order allows this court to consider any Rule 12(b)(6) arguments on remand, regardless of whether the IRS raised them initially. To be clear, the Court of Appeals’ mandate to this court is to “consider, in the first instance, whether [Harper] has stated a claim on which relief can be granted.” Harper, 46 F.4th at 9. That includes consideration of the IRS’s arguments for dismissal of Harper’s statutory claim.

standing. The statutes at issue in those cases, however, contained express authorization for some person or group of persons to sue. See, e.g., Vander Luitgaren, 765 F.3d at 62 (The statutory standing inquiry “turns on whether the appellant “falls within the class of plaintiffs whom Congress has authorized to sue under.”) (emphasis added); Lexmark Int’l, 572 U.S. at 127 (“Whether a plaintiff comes within [a statute’s] ‘zone of interests’ is an issue that requires [courts] to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.”) (emphasis added). The question in those cases was whether those groups included the plaintiffs. Section 7609(f) contains no express private right of action, so those cases are therefore inapposite to Harper’s theory of statutory standing.

Harper nonetheless seeks to expand the concept of statutory standing to confer a private right of action on anyone the statute is arguably designed to protect, even when (as here) the statute is devoid of a legislatively conferred cause of action. Neither Lexmark nor Vander Luitgaren compel this result. Harper has not cited, and the court’s research has not uncovered, any decision where a court allowed a taxpayer to bring a separate, later claim (in a different court) for violation of § 7609(f) after the reviewing court had already allowed, issued, and enforced the summons.

Harper also does not cite cases or develop arguments under the more conventional implied right of action rubric. Under that doctrine, courts have “held that ‘[t]he question whether Congress . . . intended to create a private right of action [is] definitively answered in the negative’ where [as here] a ‘statute by its terms grants no private rights to any identifiable class.’” Gonzaga Univ. v. Doe, 536 U.S. 273, 283-84 (2002) (quoting Touche Ross & Co. v. Redington, 442 U.S. 560, 576 (1979)). “[F]or a statute to create such private rights, its text must be ‘phrased in terms of the persons benefitted.’” Id. at 284 (quoting Cannon v. University of Chicago, 441 U.S. 677, 692, n.13 (1979)).

Congress phrased § 7609(f) not in terms of the persons benefitted, but with an eye towards proper enforcement by the IRS. Section 7609(f) is thus “regulatory in nature —and private rights of action should rarely be implied where a statute’s core function is to furnish directives to a federal agency.” Bonano v. E. Caribbean Airline Corp., 365 F.3d 81, 85 (1st Cir. 2004). And “even where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent ‘to create not just a private right but also a private remedy.’” Id. (quoting Alexander v. Sandoval, 532 U.S. 275, 286 (2001)) (emphases in original). Section 7609(f) creates neither a right nor a remedy for a taxpayer.

Harper is correct that courts have recognized that “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.” Gertner, 65 F.3d at 971. But the mechanism for protecting those taxpayer rights is not a right to sue or a separate remedy, but the “requirement of judicial preapproval.” Id. at 972. Not only is judicial preapproval an “important component of the statutory scheme,” it “permits the district court to act as a surrogate for the unnamed taxpayer and to ‘exert[] a restraining influence on the IRS.’” Id. (quoting Tiffany, 469 U.S. at 321). “What § 7609(f) does is to provide 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. What it does not do is impliedly afford taxpayers the right to sue the IRS for allegedly violating the statute after a different court has already found otherwise. Harper’s complaint thus fails to state a claim for violation of § 7609(f) because the statute provides him no private right to sue.

APA. Harper also argues that he can challenge the IRS’s compliance with the statute under the APA because the IRS’s act of pursuing the summons is a “final agency action.” 5 U.S.C. § 704 (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review” under the APA). The

IRS responds that Harper is not challenging agency action, but rather the district court's decisions in the Coinbase summons matters. It further argues that the Coinbase summons proceedings were an "adequate remedy in court," precluding review under the APA. 5 U.S.C. § 704. And it contends that review is prohibited under the APA because § 7609(f) "impliedly forbids the relief which is sought." 5 U.S.C. § 702(2). The IRS's arguments have superficial appeal, but because the court assumes, without deciding, that Harper has standing to challenge the IRS's compliance with § 7609(f) in this lawsuit (and, as discussed below, finds for the IRS on the merits), it need not decide the APA question.²⁸

2. Collateral challenge to prior orders

Assuming arguendo that Harper has an implied right of action under § 7609(f) or a right to assert a claim for alleged violations of § 7609(f) under the APA, he has failed to show that prior district court orders issuing and enforcing John Doe summonses are subject to subsequent collateral challenges in a different district court. Harper asserts that Judge Corley's rulings in the Coinbase summons cases have no preclusive effect on this suit. He further asserts that he was not required to challenge those rulings in

²⁸ Harper's complaint does not cite or otherwise rely on the APA.

the same court that issued and enforced the summons.

The IRS counters that it is not raising a collateral estoppel argument. It simply contends, correctly, that unappealed § 7609(f) determinations are not subject to later challenges as a matter of procedure. See, e.g., United States v. Allee, 888 F.2d 208, 211 (1st Cir. 1989) (“When, as in this case, an enforcement order is unappealed from, a contempt proceeding (as well as any subsequent appeal from a finding of contempt), begins with acceptance of the validity of the prior enforcement order. The earlier order may not be impeached, avoided or attacked in the later proceedings and no relief can be sought against its command.”) (emphasis added); Tax Liabilities of: John Does, All Unknown Emps. of Boundary Waters Rest. v. United States, 866 F.2d 1015, 1018 (8th Cir. 1989) (“Applying that holding to the present case, the district court’s determination that the summons relates to the investigation of a particular ascertainable group of persons, 26 U.S.C. § 7609(f)(1), was not open to collateral attack[.]”); accord Samuels, Kramer & Co., 712 F.2d at 1346 (“But the three factual determinations that a district court must make under section 7609(f) before issuing its ex parte authorization of a John Doe summons may not be challenged. There is, therefore, no reason why these

factual determinations should be subject to de novo review at an enforcement hearing.”).²⁹

Judgment entered in the Coinbase summons matters, and neither Harper nor any party, intervenor, or amici appealed the court’s orders, moved for relief from judgment, or moved to re-open those matters. As a result, Harper has no additional procedural avenue to argue that Judge Corley’s findings under § 7609(f) and Powell were incorrect. Allee, 888 F.2d at 212 (“Challenges to the issuance of the IRS summons and to the validity of the order enforcing that summons can, and must, be raised by timely appeal from the date of issuance of the enforcement order.”). The IRS’s motion to dismiss Count 3 of Harper’s complaint is accordingly granted for this reason as well.

²⁹ The one decision cited by Harper in support of his argument that ex parte § 7609(f) determinations are subject to later collateral challenges – United States v. Brigham Young University – is readily distinguishable because there, the Tenth Circuit Court of Appeals merely held that a summons recipient could challenge a § 7609(f) determination in a later enforcement proceeding relating to the same summons. 679 F.2d 1345, 1348 (10th Cir. 1982). Here, however, Harper seeks to challenge Judge Corley’s § 7609(f) determination in an entirely separate proceeding, well after resolution of an enforcement proceeding. Moreover, the Supreme Court vacated the Tenth Circuit Court of Appeals’ decision. See Brigham Young Univ. v. United States, 459 U.S. 1095 (1983).

3. Merits

Even if Harper had a private right of action to assert a violation of § 7609(f) and this court could review – notwithstanding Judge Corley’s prior orders – whether the IRS satisfied the requirements of § 7609(f), the court finds that Harper has failed to state a claim that the IRS violated the statute. In an action seeking the issuance of a John Doe summons, the IRS must establish 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.

§ 7609(f). Harper contends that the IRS failed to establish that its summons to Coinbase related to the investigation of an “ascertainable group or class or persons” and that the information sought was “not readily available from other sources[.]” §§ 7609(f)(1),

(f)(3).³⁰ He also argues that because he has “accurately reported his virtual currency transactions for all applicable tax years,”³¹ the IRS failed to establish that it had a reasonable basis for believing the group of persons “may fail or may have failed to comply with any provision of any internal revenue law.” § 7609(f)(2). None of Harper’s arguments has merit.³²

Ascertainable group of persons. Harper asserts that the Coinbase summons fails to identify an “ascertainable group or class of persons” because “ascertainable group” means a small, similarly situated group, not a group of the size covered by the subject summons. He cites no case law supporting that reading of the statute. Instead, he relies only on the statute’s legislative history, which purportedly cites smaller groups of persons such as “corporate shareholders” as examples of an ascertainable group. The court agrees with the IRS that the plain and ordinary meaning of “ascertainable” is well understood from the text of the statute as referring to something that can be determined with certainty.³³

³⁰ Doc. no. 32 at 8-9.

³¹ Doc. no. 3 at ¶ 140

³² See doc. no. 30-5. The IRS supported its ex parte petition for leave to serve a John Doe summons on Coinbase with a detailed memorandum of law and a declaration from an IRS Senior Revenue Agent. Id.

³³ See IRS Reply (doc. no. 34) (quoting Merriam Webster Dictionary, “Ascertain”, available at <https://www.merriam-webster.com/dictionary/ascertainable>).

Nothing in the language of the statute imposes a size limitation on the class or group, and reference to the legislative history is therefore unnecessary. See Stauffer v. IRS, 939 F.3d 1, 8 (1st Cir. 2019) (“Because the term ‘authorized’ is unambiguous within its statutory context, our examination of its meaning stops here, and we need not proceed to examine § 6511(h)(2)(B)’s legislative history.”); see also Greebel v. FTP Software, Inc., 194 F.3d 185, 192 (1st Cir. 1999) (“The words of the statute are the first guide to any interpretation of the meaning of the statute . . . if the meaning is plain.”).

In addition, courts have approved summonses to broad groups of John Does and found such groups “ascertainable.” See, e.g., In re Tax Liabilities of Does, Case No. 20-mc-32, 2021 WL 4556392, at *2 (D. Minn. Sept. 3, 2021) (group of taxpayers who used a company’s services over a seven year period); 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”).³⁴ By contrast, no court has limited the meaning of “ascertainable” to a small, similarly situated group of people, as Harper requests. The Coinbase summons, as both originally requested and in its narrowed form, relates to the

³⁴ See also doc. 30-4 at 11-13 (citing cases).

investigation of an ascertainable group or class of persons and therefore satisfies § 7609(f)(1).

Reasonable basis. Harper argues that the IRS could not satisfy § 7609(f)(2) when it sought issuance of the Coinbase summons because he allegedly “reported [all of] his virtual currency transactions for all applicable tax years.”³⁵ This ignores the fact that the IRS sought a summons for records of a group of unidentified people that it believed had violated or would violate the internal revenue laws. The statute does not require the IRS to show that each person in the ascertainable group violated the law. If it suspects that members of the group “may” have violated the law and the information sought may reasonably suggest that the correct tax liability may not have been reported, § 7609(f)(2) is satisfied. The IRS’s petition and supporting documentation established that taxpayers utilizing Coinbase may have failed to report – or under-reported – income and other information required under the internal revenue laws. In fact, the IRS alleged that not only did it have suspicion that the John Doe class included taxpayers who were not complying with the law, but it knew that members of the class violated the tax laws in the past, all of which was sufficient to satisfy § 7609(f)(2).³⁶

³⁵ Doc. no. 3 at ¶ 140.

³⁶ See doc. no. 30-4 at 13-14.

Availability from other sources. Harper lastly argues that the summons fails to satisfy the third statutory requirement regarding the unavailability of the records from other sources. Under his reading of the statute, John Doe summonses must be limited to taxpayer identities only, so the IRS should have limited the initial John Doe summons to Coinbase to customer identities. No court has adopted Harper's reading of § 7609(f)(3). In making this argument, he ignores the text of the statute and again purportedly relies on its legislative history and purpose. The statutory language – "(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" – flatly contradicts Harper's interpretation as requiring summonses only for identifying taxpayers. By its plain terms, the statute provides that both the information sought and the subject's identity must not be readily available from other sources. The court cannot ignore this text and adopt Harper's policy-based construction.

Moreover, the statute does not require the IRS to adopt Harper's two-step approach of first seeking a John Doe summons for taxpayer identifying information only and then later summoning the taxpayer directly, with notice, for their account information. That such an entirely optional procedure may be available to the IRS does not suggest that the

information obtained from the Coinbase summons was available from other sources. Harper has failed to state a claim that the IRS did not satisfy the requirements of § 7609(f)(3).

The IRS made the required showing under § 7609(f) and followed the required procedures. As the First Circuit Court of Appeals has recognized, “under section 7609(f) form is substance.” Gertner, 65 F.3d at 972 (emphasis in original). The IRS’s motion to dismiss Count 3 of Harper’s complaint is granted for this additional reason.

IV. Conclusion

As the Supreme Court recently reaffirmed, “[t]o pursue unpaid taxes and the people who owe them, ‘Congress has granted the Service broad latitude to issue summonses.’” Polselli v. Internal Revenue Serv., No. 21-1599, 2023 WL 3511532, at *2 (U.S. May 18, 2023). The IRS’s actions at issue in this case fall squarely within that broad latitude, and Harper is not entitled to protection or relief beyond the existing Congressionally and judicially imposed “safeguards” and checks on the IRS’s powers. Id. For the reasons set forth above, the defendants’ motion to dismiss³⁷ is GRANTED. The clerk shall enter judgment accordingly and close the case.

³⁷ Doc. no. 30.

81a

SO ORDERED.

/s/ Joseph N. Laplante

Dated: May 26, 2023

cc: Richard Samp, Esq.
Jared Joseph Bedrick, Esq.
Edward J. Murphy, Esq.
Thomas P. Cole, Esq.
Ryan D. Galisewski, Esq.

Appendix C

U.S. Constitution, Amendment 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.