No. 21-1316

United States Court of Appeals for the First Circuit

JAMES HARPER,
Plaintiff-Appellant,

v.

CHARLES P. RETTIG,
IN HIS OFFICIAL CAPACITY AS COMMISSIONER
OF THE INTERNAL REVENUE SERVICE,
&
INTERNAL REVENUE SERVICE,
&
JOHN DOE IRS AGENTS 1–10,
Defendants-Appellees.

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

APPELLANT'S REPLY BRIEF

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GLOSSARY

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

REPLY

Constrained by the Supreme Court's intervening decision in *CIC Services, LLC v. IRS*, 141 S. Ct. 1582 (2021), IRS is now stuck relying on sovereign immunity arguments that were long ago rejected by this Court and raising merits arguments never addressed by the district court. These tactics cannot succeed, and this Court should remand for consideration in the first instance of Mr. Harper's substantive arguments.

IRS's jurisdictional arguments fail, as they conflate distinct issues while ignoring binding precedent. The sovereign-immunity defense addresses whether a suit is barred, which is a separate question from whether the relief requested therein is barred. The Anti-Injunction Act and the Declaratory Judgment Act address the latter question. Neither bar exists here. Mr. Harper's suit comfortably surmounts both the sovereign-immunity and the AIA/DJA barriers.

The district court's jurisdictional errors warrant a remand, so that the court can pass on Mr. Harper's substantive claims in the first instance. But even if this Court were to entertain IRS's attempts to gain initial review on this appeal, Mr. Harper has also plausibly pled claims on which relief can be granted: violations of the Fourth and Fifth Amendments to the Constitution, and a violation of statutes relating to IRS's third-party summons practice. This brief refers to the Appellees collectively as IRS.

IRS concedes that this Court's review of all questions on appeal is *de novo*. Resp17. The Court should conclude that the district court has subject-matter jurisdiction, and that Mr. James Harper has stated claims upon which relief can be granted. It should reverse the decision below and remand for further proceedings consistent with the Court's decision.

I. THE SOVEREIGN-IMMUNITY DEFENSE REMAINS UNAVAILABLE TO IRS

Strangely, IRS still insists that this case is barred by sovereign immunity—despite longstanding precedent saying otherwise. IRS erroneously states, Resp22, that Mr. Harper makes a "new argument" or raises a "new theory" on appeal: that sovereign immunity never attached to begin with. But IRS does not argue that the argument is waived, for it is not. The district court addressed this argument. Appx89–90. Appellant simply refutes why IRS's basic claim for dismissal, as endorsed by the district court, is not sustainable under the facts of this case. Precedent explains why the district court erred in concluding that Mr. Harper's suit is barred by sovereign immunity. "It is well-established that sovereign immunity does not bar suits for specific relief against government officials where the challenged actions of the officials are *alleged* to be unconstitutional or beyond statutory authority." *Clark v. Library of Congress*, 750 F.2d 89, 102 (D.C. Cir. 1984) (emphasis added).

Mr. Harper alleged in the complaint that Defendants' actions were unconstitutional or beyond statutory authority. Appx10, Appx25 ("violation of the Fourth Amendment" (capitalization edited)), Appx29 ("violation of the Fifth Amendment" (capitalization edited)), Appx34 ("violation of the limits set out in 26 U.S.C. § 7609(f)"). Sovereign immunity, therefore, does not bar Mr. Harper's suit. *See* OB9–17. IRS's actual argument is not that sovereign immunity bars all such claims, but that the Anti-Injunction Act bars Mr. Harper from obtaining his requested relief; as explained more fully below, that argument is similarly unavailing.

In arguing for sovereign immunity, IRS attacks *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). *Larson*, IRS says, "addressed claims against a

government official, and not an agency." Resp22. Mr. Harper has sued the IRS Commissioner and John Doe IRS Agents 1–10. Appx11. There is nothing in *Larson* that creates a magic-words pleading standard whereby suing government officials as well as the federal agency for which they work defeats federal-court subject-matter jurisdiction to determine whether the sued officials acted unconstitutionally or beyond their statutory authority. Mr. Harper alleges that IRS weaponized the John Doe summons process to surveil Americans just to see if they were up to something. Such allegations are ordinary federal actions alleging the government litigant "acted beyond statutory authority or unconstitutionally." 337 U.S. at 693. They challenge an official's actions that "conflict with the terms of his valid statutory authority." *Id.* at 695.

After *Larson* (1949), there was no question that an injunction operates against the United States in suits alleging unconstitutional or *ultra vires* officer activity. Those allegations permeate Mr. Harper's complaint. *See, e.g.*, Appx10, Appx25, Appx29, Appx34. To be doubly sure, Congress amended the APA in 1976 to specifically allow suits for injunctive relief to be brought against the United States. *See* 2 Charles H. Koch, Jr., *Administrative Law & Practice* 211 (1985) (stating that 5 U.S.C. § 702 was amended in response to "overwhelming academic and judicial criticism"). IRS's ill-founded protest (Resp12, Resp15) that Mr. Harper's suit could be viewed as functionally against the United States is not supportable under settled precedent. *See* OB12–17. Sovereign immunity bars neither Mr. Harper's suit nor the relief he seeks.

The 1976 amendment to Section 702 "eliminated the sovereign immunity defense in virtually all actions for non-monetary relief against a U.S. agency or officer acting in an official capacity." *Clark v. Library of Congress*, 750 F.2d 89, 102 (D.C. Cir.

1984). IRS admits, Resp25, as it must, that the law in this Circuit is not to the contrary: *See Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 57–58 (1st Cir. 2007) (concluding that APA Section 702's rejection of sovereign immunity applies to "*all* equitable actions for specific relief against a Federal agency or officer acting in an official capacity, … and thus applies to any suit whether under the APA or not" (emphasis in original)); *compare* Pub. L. 89-554, 80 Stat. 392 (1966) (enacting 5 U.S.C. § 702) *with* Pub. L. 94-574, 90 Stat. 2721 (1976) (amending 5 U.S.C. § 702). In fact, IRS cites *no* case to the contrary. Resp25–26 (citing cases). Sovereign immunity remains a defense unavailable to Defendants here, thanks to APA Section 702. Mr. Harper's suit against IRS and its officers should be allowed to proceed to trial in the district court.

IRS says that Mr. Harper has the burden of demonstrating waiver of sovereign immunity. Resp18. Section 702 does just that. At most, IRS's argument rests on semantics: who has the burden to prove waiver. But the waiver question is one of statutory construction—the meaning of APA Section 702—not a factual one. And as Mr. Harper's opening brief explained, that section has already been interpreted to either "waive" or "eliminate" the sovereign-immunity defense. OB12–14. His suit against IRS and its officers should be allowed to proceed.

II. NEITHER THE ANTI-INJUNCTION ACT NOR THE DECLARATORY JUDGMENT ACT BARS THE RELIEF MR. HARPER SEEKS

Although sovereign immunity does not bar this suit, IRS raises an additional question: whether the relief requested is barred by the AIA or the DJA. Resp19. The Supreme Court's recent decision in *CIC Services, LLC v.* IRS, 141 S. Ct. 1582 (2021), provides a ready answer: neither the AIA nor the DJA bars suits like Mr. Harper's. Nor do they bar the relief requested therein.

A. The Supreme Court's Recent *CIC* Decision Controls

All parties agree (OB26–28, Resp20) that the AIA and DJA are to be read coextensively. But IRS is flatly wrong in stating that the AIA "preserve[s] the Government's sovereign immunity." Resp27. Sovereign immunity is a bar to some types of suits; the AIA, 26 U.S.C. § 7421(a), is a bar to some forms of requested relief. To evaluate the AIA argument, what matters is "the relief the suit requests." *CIC Services,* 141 S. Ct. at 1589. IRS "agree[d] on that interpretation" of the AIA in *CIC* and agrees in this Court. *Id.*; Resp28.

IRS cites (Resp24, Resp26–28) some old lower-court decisions to cobble together an argument that the AIA bars Mr. Harper's requested relief. However, according to *CIC*, this Court must look to "the face of [Mr. Harper's] complaint," "the claims brought," the "injuries alleged," and "the relief requested," *i.e.*, "the thing sought to be enjoined." *Id.* at 1589–90.

Under that decision's plain interpretation of the AIA, the relief Mr. Harper seeks is not barred by the AIA. In all three counts, Mr. Harper seeks declaratory and injunctive relief, including an order expunging Mr. Harper's private financial

information that IRS has illegally obtained. Appx29, Appx32, Appx34. Mr. Harper will continue to supply IRS information that will enable it to calculate and assess taxes; indeed, he has appropriately disclosed capital gains and filed all requisite tax returns for all relevant tax years, and IRS does not claim otherwise. Mr. Harper "stands nowhere near the cusp of tax liability," and IRS does not state otherwise. *CIC*, 141 S. Ct. at 1591. Between the relief Mr. Harper seeks and the "downstream" tax assessment or collection, "the river runs long." *Id.*

The AIA states that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a). Mr. Harper does not seek to "restrain" tax assessment or collection; he does not contest his obligation to pay taxes on his digital-currency transactions. His objection is the improper method employed by IRS to obtain his personal financial information.

According to IRS, the moment a taxpayer questions IRS's actions or a specific provision of the Internal Revenue Code, the AIA bars relief. Resp28. But *CIC* is instead in line with the prior understanding of the AIA. It simply clarifies some of the confusion in the lower courts. The Supreme Court clarified that the AIA analysis turns on how closely linked the requested relief is to tax collection or assessment. *CIC*, 141 S. Ct. at 1591 ("Even the Government concedes that when there is 'too attenuated a chain of connection' between an upstream duty and a 'downstream tax,' a court should not view a suit challenging the duty as aiming to 'restrain the assessment or collection of a tax.'").

The Supreme Court's *CIC* decision controls. Suits like Mr. Harper's that challenge IRS's unconstitutional and illegal information-gathering practices are far removed from the collection or assessment suits in which injunctive relief is barred by

the AIA. IRS states that "the August 2019 letter did not need to determine that [Mr. Harper] owed additional tax or seek to collect a tax." Resp30. That admission suffices to demonstrate that Mr. Harper's suit is far removed from the AIA's focus: suits designed to "restrain the assessment or collection of any tax."

Mr. Harper's tax returns disclosing and paying tax on his digital-currency holdings were already in IRS's possession for tax years 2016 through 2019. Appx22. Assuming IRS's newfound taxpayer-under-investigation theory is correct, 26 U.S.C. § 7602(c)(1) provides that IRS and its officers should "not contact any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer." IRS did not contact Mr. Harper about *his* tax liability. IRS did not notify Mr. Harper before issuing a third-party summons to Coinbase that it intended to contact "persons other than the taxpayer." 26 U.S.C. § 7602(c)(1)(A). IRS did not bother to issue any *pre-summons* notice to Mr. Harper as required by statute. *Id.* Instead, IRS purportedly obtained information from Coinbase or some other source, and then sent a *post-summons* and *post-data-acquisition* notice to Mr. Harper. Appx22. Mr. Harper challenges these actions as an unlawful intrusion into his privacy, and the search and seizure of his property in violation of the Fourth and Fifth Amendments. He also challenges IRS's actions as violating the relevant statutes. The declaratory and injunctive relief Mr. Harper seeks is far removed from tax assessment or collection, because (1) Mr. Harper "will continue to declare and pay capital gains and other applicable taxes for his bitcoin holdings, if any, for tax year 2020, and for each tax year in the future," Appx22, and (2) IRS has at its disposal a constitutionally adequate procedure to investigate taxpayers that requires it to provide a *pre-summons* notice to the taxpayer that

IRS is going to seek information from third parties. In other words, the relief Mr. Harper seeks, if granted, will require IRS to follow a constitutionally adequate and statutorily authorized procedure to obtain Mr. Harper's information from third parties. The AIA does not bar such relief. *CIC* so dictates.

IRS instead argues that *CIC* "does not undermine the correctness of the District Court's conclusion that the AIA bars [Mr. Harper's] lawsuit." Resp32. But IRS does not explain why or how. IRS mischaracterizes this suit. It says Mr. Harper does not want IRS "to possess information bearing on his tax liability." Resp33. Not so. Mr. Harper wants IRS to comply with the Constitution and federal statutes when invading his privacy and property. IRS tries to argue that Mr. Harper's suit is "distinguishable" from two D.C. Circuit cases finding that the AIA did not apply. Resp34–35 (citing *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011); *Z St. v. Koskinen*, 791 F.3d 24 (D.C. Cir. 2015)). But it does not explain why or how. Because IRS has not briefed those arguments, they are considered waived. *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."). Regardless, as described in Mr. Harper's opening brief, those decisions had long since concluded that the AIA does not bar suits that "merely inhibit" the incidental collection of tax revenue, which accurately predicted the outcome in *CIC*. *See* OB39–40.

B. Declaratory and Injunctive Relief Are the Only Available Remedies

IRS tries to push this case into the AIA-exceptions territory, Resp35–39, without adequately stating why the AIA bars relief in the first place. The Court should reject IRS's invitation to make it so.

The first of two "exceptions," Resp35—"attempted tax collection may be enjoined" "if it is clear that under no circumstances could the Government ultimately prevail," *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962)—does not apply here. IRS is not attempting tax collection of any sort against Mr. Harper.

IRS whistle-stops a second exception, Resp36—the AIA does not apply "to actions brought by aggrieved parties for whom [Congress] has not provided an alternative remedy," *South Carolina v. Regan*, 465 U.S. 367, 378 (1984). It does so to suggest that "two sets of alternative remedies [are] potentially available to [Mr. Harper]": (1) intervention in the *Coinbase* summons case, Resp37–38, and (2) defense in a tax-collection action, or a tax-refund action, Resp38–39. According to IRS, therefore, Mr. Harper must either time-travel back to intervene in the *Coinbase* case, or time-travel forward to a hypothetical tax-collection or tax-refund action. Neither is a remedy. Neither can be characterized even as a "potentially available" remedy. Resp37. IRS does not contest Mr. Harper's allegation that he has complied with the tax laws, so there is no reason to believe that there will ever be a tax-collection proceeding in which Mr. Harper could raise his claims.

IRS's information-gathering practices can potentially be challenged in a tax-assessment or tax-refund suit. But the individual official acts necessary to build up to such a fact pattern are simply absent here. This is not a tax-collection action. IRS is not proceeding against Mr. Harper for underpaying taxes. This is not a tax-refund suit. Mr. Harper is not suing IRS because he overpaid taxes. Relief available in such suits is inapposite to the facts and the legal challenge presented here. Mr. Harper must "bring an action in just this form, framing [the] requested relief in just this way." *CIC*, 141 S.

Ct. at 1592. Under the factual circumstances present here Congress has provided no alternative relief. Declaratory and injunctive relief is the only relief Mr. Harper can seek.

IRS also simply ignores that Mr. Harper could not have legally challenged the *Coinbase* subpoena. As argued in his opening brief, the subpoena process was *ex parte*—there was no possible way for Mr. Harper to even receive notice of any subpoena related to him. *See* OB41–42. Moreover, even if he *had* somehow guessed correctly, he was statutorily barred from challenging the subpoena. *See id.* (citing *United States v. Ritchie*, 15 F.3d 592, 597 (6th Cir. 1994)).

Congress has *not* provided any alternative remedy (other than declaratory and injunctive relief) by which Mr. Harper could obtain a judgment asking IRS to comply with the Constitution and federal statutes when it sets out to gather his private financial information from third parties. The conclusion is inescapable: neither the AIA nor the DJA bars the relief Mr. Harper seeks against IRS.

III. MR. HARPER'S PLAUSIBLY PLED CONSTITUTIONAL AND STATUTORY VIOLATION ALLEGATIONS AGAINST IRS SURVIVE THE MOTION TO DISMISS

The district court did not address the merits arguments. It dismissed the complaint on the sole ground that the AIA deprives it of jurisdiction over Mr. Harper's claims for declaratory and injunctive relief. Under these circumstances, IRS's request that this Court affirm the judgment below (failure to state a claim) is untenable. Even if IRS were correct that the complaint fails to state a claim, Mr. Harper would be entitled to vacatur and a remand to provide him with an opportunity to file an amended complaint to cure any factual deficiencies. It is appropriate for this Court to reverse the district court on subject-matter jurisdiction and remand to allow Mr. Harper to amend the complaint, if needed.

Mr. Harper truthfully alleged that he has disclosed capital gains from digital-currency holdings for applicable tax years and paid capital-gains tax on the gains. Appx16, Appx17, Appx22. The district court, however, concluded that those statements were "not well pled." Appx88. Mr. Harper's tax returns are already in IRS's possession. Attaching those tax forms to the complaint is unnecessary. But Mr. Harper can readily supply to the district court whatever additional factual allegations are necessary to render plausible his claim that he fully disclosed and paid taxes on digital-currency transactions. Under these circumstances, dismissal for failure to state a claim is inappropriate and reversible error. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). If, as Mr. Harper claims, IRS has no reasonable basis for suspecting that he has not fully complied with all tax laws, then its summons of his personal financial records was unwarranted. It has failed to comply with 26 U.S.C. § 7609(f)'s "narrowly tailored" requirement.

IRS attempts to recast the *Twombly–Iqbal* plausibility standard into a likelihood-of-success standard. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). This Court has said the following:

> Nor may a court attempt to forecast a plaintiff's likelihood of success on the merits; a well-pleaded complaint may proceed even if a recovery is very remote or unlikely. … When a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder. The relevant inquiry focuses on the reasonableness of the inference of liability that the plaintiff is asking the court to draw from the facts alleged in the complaint.

Ocasio-Hernandez v. Forturo-Burset, 640 F.3d 1, 12–13 (1st Cir. 2011) (cleaned up). IRS does not dispute that Mr. Harper's complaint contains sufficient nonconclusory factual allegations to support a reasonable inference that the complained-of conduct occurred. *Iqbal*, 556 U.S. at 678. The complaint alleges that IRS's August 2019 letter informs him that IRS somehow obtained some of Mr. Harper's private financial information from someone other than Mr. Harper. Appx22–23, Appx67–69. Mr. Harper challenges IRS's collection of his private information from third parties as unconstitutional under the Fourth and Fifth Amendments, and illegal under the relevant statutes. The factual allegations are plausibly pled and therefore sufficient to survive a motion to dismiss for failure to state a claim.

IRS had two constitutionally and statutorily permissible ways to go about gathering Mr. Harper's private financial information. First, because Mr. Harper voluntarily disclosed digital-currency assets and paid tax on them to IRS, IRS could

have employed existing enforcement tools to ask Mr. Harper himself for further information. Doing so would have afforded Mr. Harper an opportunity to object to any information requests barred by statute or the United States Constitution.

Second, even if it were somehow imperative for IRS to go initially to the digital-currency exchanges like Coinbase for information about Mr. Harper, IRS could have invoked 26 U.S.C. § 7609 to ask the digital-currency exchange to provide the name and contact information for all of the exchange's customers. Once it discovered that Mr. Harper was a customer of the exchange, IRS could have asked him for relevant information in the first instance. This two-step process would have satisfied both the constitutional and statutory limits on IRS's information-gathering authority. But IRS did not follow such a "narrowly tailored" procedure, in violation of the requirements of 26 U.S.C. § 7609(f) and the Due Process Clause. The "inference of liability … draw[n] from the facts alleged in the complaint" is, therefore, plain and sufficient to survive a motion to dismiss. *Ocasio-Hernandez*, 640 F.3d at 13.

As IRS admits (Resp43 n.6), Congress amended 26 U.S.C. § 7609(f) in July 2019 to add the "narrowly tailored" language. Asking Mr. Harper directly, or the two-step subpoena process outlined above, would have complied with the statutory narrow-tailoring requirement.

Section 7609 contemplates "John Doe" summonses, but only when the summons relates to "a particular person or ascertainable group or class of persons." "Ascertainable group or class of persons" refers to a relatively small, ascertainable group (for example, the partners in a partnership). It does not refer to large groups with little in common except that they all do business with a third party (for example, Coinbase).

Section 7609(f)'s class of persons contemplates situations where IRS issues a third-party summons, say, to a limited partnership for the name and contact information of its partners so that it can ask those partners for information relating to their potential failure to comply with tax law. It does not contemplate a class as large as all depositors of the Bank of America, or all customers of Coinbase, or all owners of cryptocurrency. Such summonses are not "narrowly tailored to information that pertains to the failure (or potential failure) of the person or group or class of persons" who "may fail or may have failed to comply with any provision of any internal revenue law." 26 U.S.C. § 7609(f). IRS thus failed both the "narrow tailoring" and "ascertainable group or class of persons" provisions of 26 U.S.C. § 7609(f). As a direct result of its end-run around the statute, IRS sent Mr. Harper the August 2019 accusatory letter that informed him of the *fait accompli* search and seizure of his private information from a third party without notice and an opportunity to contest, and invited him to do nothing.

Mr. Harper alleges that he received no advance notice of IRS's decision to seize his financial records and thus was afforded no opportunity to contest the seizure. IRS's August 2019 letter failed to offer him even a post-seizure opportunity to contest IRS's actions. IRS had ample opportunity to notify Mr. Harper before seizing his records yet failed to utilize that opportunity. These allegations suffice to state a claim for violation of his due process rights and Fourth Amendment rights. Mr. Harper has therefore stated claims for relief that survive a motion to dismiss.

CONCLUSION

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

Respectfully submitted on October 5, 2021, by:

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CERTIFICATE OF COMPLIANCE

This document complies with the 6,500-word limit established by FRAP 32(a)(7) because it contains **3,936** words. This document complies with the typeface and typestyle requirements of FRAP 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced serif typeface, Garamond, and set at 14-point or larger.

Dated: October 5, 2021

/s/ Aditya Dynar
ADITYA DYNAR
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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2021, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit using the CM/ECF system. Counsel for all parties are registered users of the CM/ECF system. They will be served by the CM/ECF system:

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Dated: October 5, 2021

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