No. 23-1565

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JAMES HARPER,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

On appeal from the United States District Court for the District of New Hampshire, No. 1:20-cv-00771-JL

BRIEF OF *AMICUS CURIAE* NATIONAL TAXPAYERS UNION FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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October 20, 2023

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *Amicus Curiae* certifies that the National Taxpayers Union Foundation is a nonprofit, tax-exempt organization under Internal Revenue Code §501(c)(3) and is incorporated in the District of Columbia. *Amicus* further states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

s/ Tyler Martinez
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Dated: October 20, 2023

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INTEREST OF *AMICUS CURIAE*

Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, engaging in direct litigation and *amicus curiae* briefs upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce. All parties consented to the filing of this brief.[1]

SUMMARY OF THE ARGUMENT

Overzealous enforcement is a perennial problem for the IRS. Congress provided protections to taxpayers and bystanders alike that give early warning and a chance to contest illegal searches from wayward agents. There is a narrow exception for so-called "John Doe" warrants—really dragnet data scraping of many innocent

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for *Amicus* certifies that counsel for *Amicus* authored the brief in whole, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than *Amicus* contributed money that was intended to fund preparing or submitting the brief.

citizen's private information—in limited circumstances and for a limited number of people. Yet if the decision below stands, the exception will swallow the rule.

The court below held Mr. Harper had no property interests in his financial data, since it was handed over to a third party—that is, his financial institution holding his financial instruments. That holding is in stark contrast to extensive precedent from the Supreme Court and Courts of Appeals holding otherwise. That is because to know where one is spending money is to know a lot about a person: where they eat and shop, what medical bills they pay, and even what ideological or political causes they care about. People treat their finances as private, and it is a cognizable interest for Mr. Harper to assert his financial privacy rights against an IRS dragnet summons.

Since Mr. Harper has a cognizable interest in the privacy of his financial information, then the Fifth Amendment requires he be afforded due process before the government takes it. This case tests whether the IRS met the safeguards of 26 U.S.C. § 7609(f) and under the Due Process Clause. The asserted interest is one of privacy—and once information is disclosed, it cannot be remedied any more than a bell can be unrung. This Court has a chance in this case to clarify that only pre-confiscation process is adequate to protect privacy rights—especially where, as here, the IRS sought the records of *thousands* of accounts.

Finally, the court below asserted that Mr. Harper should have tried to intervene when the financial institutions holding his accounts were summonsed under the John Doe provisions of 26 U.S.C. § 7609(f). His complaint alleged that he tried, but the federal court in California rebuffed his attempts to intervene in the first case. Relegated to bringing some of his legal theories via an *amicus curiae* brief in the California case, the District Court erred in holding Mr. Harper's claims here foreclosed. Engaging as *amicus curiae* is not enough for *res judicata* to attach.

John Doe warrants are dangerous tools that should only be used in limited circumstances against a cognizable limited pool of potential targets. The provision was not designed to allow for thousands of innocent taxpayers' data to be handed over to an IRS agent in the hopes of finding a wayward file or two. Americans have substantial rights in the privacy of their data and should not be presumed to be tax cheats simply for using new technology like cryptocurrency. Mr. Harper should be allowed to bring his claims and assert his statutory and constitutional rights.

ARGUMENT

I. THE DECISION BELOW JEPORDIZES THE PRIVACY RIGHTS OF INNOCENT TAXPAYERS.

Financial records are deeply personal and "financial transactions can reveal much about a person's activities, associations, and beliefs." *Buckley v. Valeo*, 424 U.S. 1, 96 (1976) (*per curiam*) (cleaned up, citation omitted). Nonetheless the

District Court held that Mr. Harper failed to identify any liberty or property interests in his financial records. JA 93-94.[2] This is reversible error, especially on a motion to dismiss where a party has yet to have the opportunity to show either the extent of injury in the violation of privacy or contest the government's need for the records specifically.

In this case, the IRS demanded a lot of people's financial information, including "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*." Complaint JA 17 ¶ 54 (reproduction of the demand of John Doe summons) (emphasis added); *see also* JA 29 ¶ 133 ("Upon information and belief… [the] IRS ha[s] conducted similar unlawful seizures of intangible property rights in private financial information related to more than 10,000 taxpayers"). Mr. Harper received no notice of this information demand and had no chance, prior to disclosure, to stop it. *See* JA 28 ¶ 127. He therefore brought this action to, *inter alia*, protect this property and liberty rights in his financial records. *See*, *e.g.*, JA 29.

[2] Mr. Harper describes his Fifth Amendment interest as one of property in the records held by Coinbase and others in bailment. *See* Op. Br. at 51. His complaint also asserts property interests in the financial information itself. *See* JA 28 ¶¶129-132. What the records show, however, can touch on Fifth Amendment liberty interests as well because of what the information may reveal about Mr. Harper's life and activity.

This Court has long recognized that, in the tax context, "Congress passed [26 U.S.C.] 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." *United States v. Gertner*, 65 F.3d 963, 971 (1st Cir. 1995) (emphasis added).[3] "This requirement of judicial preapproval is 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 Fine Arts, Inc. v. United States*, 469 U.S. 310, 321 (1985)) (bracket in *Gertner*). "The statutory protections cannot be cavalierly cast aside by either the executive or the judicial branch." *Id*. Mr. Harper's case is about whether the IRS, in demanding so many John Doe summons, satisfied the statutory requirements when it was clear he paid all taxes due. *See* JA 76.

[3] Financial privacy is also presumed throughout federal tax law, which bars officials from releasing private donor information, intentionally or otherwise. The Internal Revenue Code provides for the general confidentiality of tax returns. *See, e.g.*, 26 U.S.C. § 6103 (general confidentially of tax returns). There are also stiff penalties for the unauthorized inspection and/or disclosure of tax return information. *See, e.g.*, 26 U.S.C. §§ 7213(a)(1) (criminal sanctions for disclosure of returns or return information by federal employees); 7213(a)(2) (criminal sanctions for disclosure of returns or return information by state officials); 7216 (criminal sanctions for disclosure of tax return or return information by tax preparers). Congress provided for civil relief too. *See, e.g.*, 26 U.S.C. § 7431 (civil damages for unauthorized inspection or disclosure of returns or return information).

On a motion to dismiss, this Court's *Gertner* decision should be enough for Mr. Harper to bring his case and assert his privacy interests. Nonetheless, the court below cabined privacy interests to only those touching on marriage and procreation, as distinct from financial records privacy. JA 94 n.26. This misses large sections of core privacy interests.

Privacy of financial records helps enable other constitutional rights. Under the First Amendment, all Americans have the right "to pursue their lawful private interests privately and to associate freely with others in so doing." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958) ("*NAACP*"). This "basic constitutional protection[]," *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973), "'lies at the foundation of a free society,'" *Buckley*, 424 U.S. at 25 (quoting *Shelton v. Tucker*, 364 U.S. 479, 486 (1960)). Indeed, just two years ago the Supreme Court reaffirmed that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and there is a "vital relationship between freedom to associate and privacy in one's associations" via financial support. *Americans for Prosperity Found. v. Bonta*, 594 U.S. ___, 141 S. Ct. 2373, 2382 (2021) ("*AFPF*") (citations omitted, brackets in *AFPF*). Consequently, the Supreme Court has long protected the right not only to associate, but to do so privately, free from government surveillance or interference—including broad financial surveillance.

The court below held that there was no "protectable liberty interest in maintaining the privacy of financial records held and created by a third-party financial institution." JA 93. But there is no clear distinction between mere financial records and sussing out someone's affiliations. Indeed, the Civil Rights Era cases on donor privacy were generated by generally applicable business statutes that could be banally described as mere financial records. *NAACP* centered on the state's use of foreign corporation registration statutes as a means of getting the civil rights group's donor list. *NAACP*, 357 U.S. at 451. *Bates v. Little Rock*, 361 U.S. 516, 517 (1960), examined the city's use of business license tax registration. *Shelton*, 364 U.S. at 481, dealt with employment paperwork to be employed as schoolteacher. *AFPF*, 141 S.Ct. at 2379, centered on what should be routine charities registration with the Attorney General of California.

These cases on financial privacy protect not only political dissent, *e.g.*, *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), but also simple privacy in investments. For instance, the Eleventh Circuit has ruled that a city violated the First Amendment when it sought to "require[] corporate applicants for adult business licenses to disclose the names of 'principal stockholders'" privately to a regulatory agency, and invalidated the ordinance when the agency was unable to demonstrate a sufficient need for that information. *Lady J. Lingerie v. City of Jacksonville*, 176 F.3d 1358, 1366 (11th Cir. 1999) (citation omitted).

Furthermore, this Court, like many others, has had to examine the scope of privacy interests in financial information for public employees. For example, in *O'Brien v. DiGrazia*, 544 F.2d 543, 545 (1st Cir. 1973), the Boston Police Commissioner suspected some of his officers of involvement in organized crime. He therefore demanded that the patrolmen fill out a financial questionnaire "listing all sources of income in 1972 for themselves and their spouses, all significant assets held by them and any members of their households, and, for the years 1966 through 1971, a general estimate of their expenditures and copies of their state and federal income tax returns." *Id*. Officers who refused to supply the information were suspended, and asserted a right to privacy based on the Fourth, Fifth, Seventh, and Fourteenth Amendments. *See id*. Assuming, without deciding, that there was such a privacy interest, this Court ultimately held that the governmental interests in an honest police force outweighed the privacy interest for those specific officers. *See id*. at 546.

Similarly, in *Plante v. Gonzalez*, 575 F.2d 1119, 1121 (5th Cir. 1978), members of the Florida Legislature challenged a state constitutional amendment requiring extensive financial and tax return disclosures from elected officials. This was the result of "[p]olitical scandals [that] rocked Florida in the seventies." *Id*. at 1122; *see also id*. at 1122 n.3 (detailing scandals). The Fifth Circuit recognized the right to financial privacy: "Ranged against these important interests are the senators'

interests in financial privacy. *Their interest is substantial*." *Id*. at 1135 (emphasis added). The Fifth Circuit further held that "[f]inancial privacy is a matter of serious concern, deserving strong protection." *Id*. at 1136.

The challengers there were "not ordinary citizens, but state senators," and while that did "not strip them of all constitutional protection" from disclosure of their finances, it did "put some limits on the privacy they may reasonably expect." *Id*. at 1135. Thus the "public interests supporting public disclosure for these elected officials are even stronger" in that instance. *Id*. at 1136. A year later, the same Circuit recognized privacy interests in financial data for federal judges, but the jurists lost because they were public servants, similar to the senators in *Plante*. *Duplantier v. United States*, 606 F.2d 654, 670 (5th Cir. 1979) ("Like the state senators in Plante, judges are not ordinary citizens but are rather people who have chosen to accept public office.") (quotation marks removed).

The key difference between public employees—Boston's police officers, Florida's state senators, and federal judges—and Mr. Harper is that the latter is a private citizen. Transparency is for government actors to keep them accountable. Privacy rights for private citizens is to keep the government from snooping—and is a substantial right protected by multiple constitutional provisions. Statutory law also protects taxpayer privacy interests. The lower court's dismissal of these viable constitutional and statutory claims is error.

II. THE FIFTH AMENDMENT PROTECTS TAXPAYERS' ABILITY TO CHALLENGE DRAGNET SUBPOENAS.

Mr. Harper has a cognizable interest in the privacy of his financial information, and the Fifth Amendment requires he be afforded due process before the government commandeers it. U.S. Const. amend. V (providing that "[n]o person shall…be deprived of life, liberty, or property, without due process of law"). The Supreme Court has long "held that some form of hearing is required before an individual is finally deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (collecting cases). Privacy is unlike other property interests in that, once disclosed, the harm cannot be undone. Due process *before* disclosure is the only way to protect privacy.

This case tests whether the IRS met the safeguards of 26 U.S.C. § 7609(f), especially in light of a taxpayer who claims he diligently reported and paid the taxes due on his cryptocurrency transactions. *See* JA 76. In response, the government says it applied the statutory framework—but the contention is whether the framework was followed *and* whether it was enough to protect the constitutional privacy rights of Mr. Harper. In this Circuit, simply having a procedure is not enough, because "[p]erfunctory gestures will not suffice. At bedrock, '[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.'" *In re Nineteen Appeals Arising Out of San Juan Dupont Plaza*

Hotel Fire Litig., 982 F.2d 603, 611 (1st Cir. 1992) (quoting *Matthews*, 424 U.S. at 333) (first bracket supplied).

If allowed to go to trial, this case will test if Mr. Harper had an opportunity at a meaningful time and manner to object to the IRS dragnet of thousands of taxpayers' data, especially as applied to his track record of paying taxes on his cryptocurrency portfolio. "A fundamental purpose of the due process clause is to allow the aggrieved party the opportunity to present his case and have its merits fairly judged," but Mr. Harper "was not given such an opportunity" when the District Court dismissed his claims under Federal Rule of Civil Procedure 12(b). *Pollock v. Baxter Manor Nursing Home*, 716 F.2d 545, 546–47 (8th Cir. 1983).

The lower court reasoned that "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," JA 95, it failed to account in its reasoning that the IRS asked for *thousands* of account holder information—almost everyone who used Coinbase. *See* JA 76 n.8 ("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.") (quotation marks removed). The problem was the IRS's own making: it could not reasonably identify Mr. Harper because it was seeking the records of everyone who used a popular

platform. This stretches the idea of "ascertainable group of persons" in 26 U.S.C. § 7609(f) beyond limit. Mr. Harper therefore brings a colorable claim that use of Section 7609(f) was improper.

Due process reflects the "fundamental and deeply held values central to the framers' concept of government." Richard B. Saphire, *Specifying Due Process Values: Toward A More Responsive Approach to Procedural Protection*, 127 U. Pa. L. Rev. 111 (1978). It is not just the outcome, but "the processes of interaction themselves are always important in their own right." *Id*. at 124. Whether it's *habeas corpus*, a disability determination by the Social Security Administration, or the search of bank records without a warrant, the Constitution provides that there must be some sort of method to get before a neutral arbiter. In the context of the privacy of one's financial records, that process must be done before disclosure. This is an important bulwark against government overreach. But if the decision below stands, the bulwark is made of paper, for the government can demand data from *thousands* of taxpayers at once in the hopes of finding a few who may not have paid what was due and no one can later object to the depravation of privacy.

III. *RES JUDICATA* SHOULD NOT BE APPLIED TO THOSE WHO PARTICIPATE AS *AMICUS CURIAE*.

At the end of its analysis of Mr. Harper's Fifth Amendment claims, the District Court held that Mr. Harper had "meaningful opportunities to contest the

summons." JA 96. This is based on Mr. Harper's participation as *amicus curiae* in the case of Coinbase's initial refusal to comply with the IRS summonses before the United States District Court for the Northern District of California. *See* JA 96; *see also* JA 76–78 (describing prior case). But such a rule will unnecessarily hamper those seeking to preserve their constitutional rights when threatened in multiple judicial fora.

The Supreme Court recognizes that "[c]laim preclusion, like issue preclusion, is an *affirmative defense*." *Taylor v. Sturgell*, 553 U.S. 880, 907 (2008) (emphasis added). It is therefore "incumbent on the defendant to plead and prove such a defense." *Id*. (collecting cases and treatises on the topic). And such a defense will typically come only after "targeted interrogatories or deposition questions," *id*., which is long after the motion to dismiss stage of litigation. This Court often requires specific briefing on "the question of how the doctrine of non-mutual offensive collateral estoppel should be fairly applied" in the circumstances of the case. *Acevedo-Garcia v. Monroig*, 351 F.3d 547, 577 (1st Cir. 2003). The government does not get a free pass on having to bear the burden of the affirmative defense.

Nonetheless, the court below erroneously held, without analysis of the Rules of Civil Procedure or applicable case law, that Mr. Harper "could have moved to intervene in the enforcement proceeding to obtain party status." JA 96. But the complaint alleges he tried but was denied. *See* JA 16 ¶ 50 (discussing attempt to

intervene); *cf. Martino v. Forward Air, Inc.*, 609 F.3d 1, 2 (1st Cir. 2010) ("We accept as true all well-pleaded facts in the complaint and make all reasonable inferences in plaintiff's favor."); JA 75 (district court citing same case). That left Mr. Harper only the chance to file as *amicus curiae* to try to protect his rights.

Quite simply, engaging as *amicus curiae* is not enough for *res judicata* to attach. That is because courts, including this Court, "will not address an issue raised by an amicus that was not seasonably raised by a party to the case." *Dalombo Fontes v. Gonzales*, 498 F.3d 1, 2 (1st Cir. 2007); *see also Am. Fed'n of Gov't Employees, Local 3936, AFL-CIO v. Fed. Labor Relations Auth.*, 239 F.3d 66, 69 n.1 (1st Cir. 2001) (holding "issues… raised for the first time on appeal by an amicus," are not to be considered); *Christopher M. ex rel. Laveta McA. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1293 (5th Cir. 1991) ("Absent exceptional circumstances, an issue waived by [an] appellant cannot be raised by [an] amicus curiae."). That is because it is "[a]n amicus is not a party." *Kerr v. Hickenlooper*, 824 F.3d 1207, 1216 (10th Cir. 2016).

The Rules of Appellate Procedure in this Court bear this out. An *amicus*, other than the United States government, must seek the *consent* of the parties to even participate—or be subject to the Court's discretion on a motion to leave to file. *Compare* FRAP 29(a)(2) with FRAP 29(a)(3) (requirements for motion). *Amicus* filers get no reply brief. FRAP 29(a)(7). And absent pressing circumstances, *amicus*

rarely get oral argument time. FRAP 29(a)(8). If this Court continues to be "delighted to hear additional arguments from able amici that will help the court toward right answers," *Massachusetts Food Association v. Massachusetts Alcoholic Beverages Control Commisson*, 197 F.3d 560, 567 (1st Cir. 1999), then it should be wary of approving such a loaded threat as *res judicata* for those who try to supply such answers on emerging topics. Status as *amicus* is too tenuous to hold Mr. Harper to the decisions of a court case he tried to intervene in, but was denied.

Without correction via a decision of this Court, Mr. Harper and thousands of others are at the whim of IRS agents using a powerful tool to gather vast amounts of private data. Mr. Harper brings important claims of financial data privacy which should only be set aside by meaningful pre-disclosure proceedings where the government proves its need. That Mr. Harper tried to bring this to the attention of another court on the other side of the continent does not preclude him from doing so here when Coinbase and others failed to press the issue.

CONCLUSION

The judgment of the district court should be reversed, and Mr. Harper's constitutional and statutory claims remanded for trial on the merits.

Respectfully submitted,

s/ Tyler Martinez

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Dated: October 20, 2023

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rules Appellate Procedure 32(a)(7)(B) and 29(a)(5) because it contains 3,650 words, excluding the parts of the brief exempted by Federal Rule Appellate Procedure 32(f). I further certify that the attached brief complies with the typeface and typestyle requirements of Federal Rules Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

s/ Tyler Martinez
Tyler Martinez (First Cir. No. 1209439)

Dated: November 6, 2023

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing using the court's CM/ECF system which will automatically generate and send by email a Notice of Docket Activity to registered attorneys currently participating in this case, constituting service on those attorneys.

s/ Tyler Martinez
Tyler Martinez (First Cir. No. 1209439)

Dated: November 6, 2023

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