No. 24-922

In the Supreme Court of the United States

JAMES HARPER, PETITIONER

v.

MICHAEL FAULKENDER, ACTING COMMISSIONER OF INTERNAL REVENUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner has a protected Fourth Amendment interest in financial records created and maintained by a third-party virtual-currency exchange respecting his account and financial transactions at the exchange.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.N.H.):

Harper v. *Commissioner*, No. 20-cv-771 (May 30, 2023)

United States Court of Appeals (1st Cir.):

Harper v. *Rettig*, No. 21-1316 (Aug. 18, 2022)

Harper v. *Werfel*, No. 23-1565 (Sept. 24, 2024)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and regulation:

Constitution, statutes, and regulation—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 118 F.4th 100. The order of the district court (Pet. App. 37a-81a) is reported at 675 F. Supp. 3d 190.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 2024. On December 5, 2024, Justice Jackson extended the time within which to file a petition for a writ of certiorari to and including February 21, 2025, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

* Acting Commissioner Faulkender is substituted for his predecessor in office pursuant to Rule 35.3 of the Rules of this Court.

STATEMENT

1. The Internal Revenue Statute (IRS) has "considerable power to go after unpaid taxes." *Polselli* v. *IRS*, 598 U.S. 432, 434 (2023). Those powers serve as "a crucial backstop in a tax system based on self-reporting," ensuring that "'dishonest persons'" are not able to "'escape taxation, thus shifting heavier burdens to honest taxpayers.'" *United States* v. *Clarke*, 573 U.S. 248, 254 (2014) (quoting *United States* v. *Bisceglia*, 420 U.S. 141, 146 (1975)) (brackets omitted).

The IRS's investigative powers include the "broad latitude to issue summonses." *Polselli*, 598 U.S. at 434 (quoting *Clarke*, 573 U.S. at 250). The IRS may "examine any books, papers, records, or other data which may be relevant" to a tax inquiry and demand the production of the same. 26 U.S.C. 7602(a)(1) and (2). When a summons goes to a third party, such as a bank, the IRS must provide notice to "any person * * * identified in the summons." 26 U.S.C. 7609(a)(1). A person receiving notice may seek to intervene in enforcement proceedings or move to quash the summons in federal court. 26 U.S.C. 7609(b)(2)(A) and (h).

Where "the IRS does not know the identity of the taxpayer under investigation, advance notice to that taxpayer is, of course, not possible." *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 316-317 (1985) (emphasis omitted). Instead, the IRS must obtain authorization from a district court to issue a "John Doe" summons. 26 U.S.C. 7609(f) and (h). To do so, the IRS must establish that (1) "the summons relates to the investigation of a particular person or ascertainable group," (2) "a reasonable basis" exists to believe that the person or group may have violated the tax laws, and (3) the in-

formation sought and the subject's identity are "not readily available from other sources." 26 U.S.C. 7609(f).[1]

If a person fails to comply with a summons (including a John Doe summons), the IRS may seek judicial enforcement. 26 U.S.C. 7402(b), 7604(a). Probable cause is not required. *United States* v. *Powell*, 379 U.S. 48, 57 (1964). Instead, "the IRS need only demonstrate good faith in issuing the summons." *Clarke*, 573 U.S. at 250 (internal quotation marks omitted). Thus, a court will assess whether the investigation has "a legitimate purpose, [whether] the inquiry may be relevant to the purpose, [whether] the information sought is not already within the [IRS's] possession," and whether the Internal Revenue Code's "administrative steps" have been followed. *Ibid.* (quoting *Powell*, 379 U.S. at 57-58) (third set of brackets in original).

2. This case arises from an IRS investigation into the systematic underreporting of capital gains on virtual currencies, such as bitcoin.

a. Virtual currencies that can be converted into traditional currency are property for tax purposes. I.R.S. Notice 2014-21, 2014-16 I.R.B. 938, 2014 WL 1224474 (Apr. 14, 2014), modified on other grounds, I.R.S. Notice 2023-34, 2023-19 I.R.B. 837, 2023 WL 3185105 (May 8, 2023) (reproduced at C.A. App. 153-158). The sale of bitcoin can therefore produce a taxable capital gain or a loss. *Ibid.*

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[1] After the summons in this case was enforced, Congress amended Section 7609(f) to require that a John Doe summons be "narrowly tailored to information" about a particular person or ascertainable group's tax non-compliance. Taxpayer First Act, Pub. L. No. 116-25, § 1204(a), 133 Stat. 981, 988. That amendment does not apply here.

Coinbase is a virtual-currency exchange where customers can buy or sell bitcoin. Pet. App. 4a. Like a traditional bank, Coinbase is regulated as a financial institution under the Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1114. *United States* v. *Gratkowski*, 964 F.3d 307, 312 (5th Cir. 2020); see 31 U.S.C. 5312(a)(2)(R) (defining any business engaged "in the transmission of * * * value that substitutes for currency" as a financial institution covered by the Bank Secrecy Act).

In 2016, the IRS began investigating the "reporting gap" between Coinbase's asserted number of customers and the number of Americans reporting bitcoin gains or losses between 2013 and 2015. *United States* v. *Coinbase, Inc.*, No. 17-cv-1431, 2017 WL 5890052, at *4 (N.D. Cal. Nov. 28, 2017) (citation omitted). By 2017, Coinbase was America's largest bitcoin exchange, with 5.9 million reported customers exchanging $6 billion in bitcoin annually. *Id.* at *2. Yet in 2013 through 2015, only 800 to 900 Americans reported bitcoin sales to the IRS on electronic tax forms. *Ibid.*

To identify taxpayers who may have failed to report bitcoin transactions, the IRS filed a petition in the United States District Court for the Northern District of California to serve a John Doe summons on Coinbase. *Coinbase*, 2017 WL 5890052, at *1. The initial summons sought nine categories of documents for U.S. users who conducted virtual-currency transactions between 2013 and 2015. *Ibid.* An IRS revenue agent attested to serious compliance concerns associated with virtual currencies. C.A. App. 142-147. The district court granted permission to serve the summons. *Coinbase*, 2017 WL 5890052, at *1.

Coinbase refused to comply, and the IRS petitioned for judicial enforcement. *Coinbase*, 2017 WL 5890052,

at *1. After discussions with Coinbase about its record-keeping and its user base, the IRS narrowed the summons to six categories of information about the 14,355 accountholders who had more than $20,000 of virtual-currency transactions in one year. *Id.* at *2-*3, *5.

Coinbase continued to oppose the summons. Pet. App. 43a. One John Doe intervened in the proceedings, and petitioner James Harper signed an amicus brief supporting Coinbase's opposition. *Id.* at 46a. After a hearing, the district court granted the narrowed summons in part. *Coinbase*, 2017 WL 5890052, at *6-*7. Applying this Court's decision in *Powell*, 379 U.S. at 57, the district court determined that the IRS's request for basic account information and transaction records furthered the IRS's "legitimate investigative purpose." *Coinbase*, 2017 WL 5890052, at *5, *7. But the court rejected the IRS's other requests as "not necessary * * * at this stage." *Id.* at *7. Coinbase did not appeal, and it complied with the summons. Pet. App. 44a & n.14.

b. During the years covered by the summons, petitioner used Coinbase to buy and sell bitcoin. Pet. App. 4a. By his math, those transactions totaled $3500 a month or $42,000 annually in 2014. First Am. Compl. (Compl.) ¶ 32. By 2016, petitioner had transferred his bitcoin to a "hardware wallet," a physical device used to store virtual currencies offline without the need for an intermediary like Coinbase. See Pet. App. 4a n.2, 52a n.21.

Coinbase's June 2013 user agreement informed petitioner that his bitcoin transactions occurred directly with Coinbase. Compl. Ex. 1, at 2. And Coinbase's November 2014 privacy policy warned petitioner that Coinbase stored various forms of personal information about customers which could be shared with service provid-

ers, financial institutions, potential acquisition partners, and, relevant here, "[l]aw enforcement, government officials, or other third parties." Compl. Ex. 2, at 3, 5. The policy said that Coinbase would make that last category of disclosure when compelled by a court order or when Coinbase "believe[d] in good faith that the disclosure of personal information [wa]s necessary * * * to report suspected illegal activity." *Id.* at 5.

In August 2019, the IRS informed petitioner by letter that it "ha[d] information that you have or had one or more accounts containing virtual currency but may not have properly reported your transactions involving virtual currency." Pet. App. 5a; see Compl. Ex. 6. The letter advised petitioner that virtual-currency sales must generally be reported to the IRS and encouraged him to submit an amended return if needed. Compl. Ex. 6.

3. In August 2020, petitioner filed this suit in the United States District Court for the District of New Hampshire challenging the IRS's receipt and possession of Coinbase records about him. Pet. App. 45a. His amended complaint asserted that the IRS violated the Fourth Amendment, the Due Process Clause of the Fifth Amendment, and the John Doe summons procedures in 26 U.S.C. 7609(f). Pet. App. 45a-46a. Petitioner requested declaratory and injunctive relief requiring the IRS to delete the Coinbase records and refrain from obtaining financial records from virtual-currency exchanges in the future. *Ibid.* Petitioner also asserted an implied damages remedy against individual IRS agents under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Compl. ¶¶ 112, 135.

The IRS moved to dismiss. The district court dismissed petitioner's damages claims, holding that *Bivens*

does not extend to the tax-collection context. D. Ct. Doc. 17, at 17-21 (Mar. 23, 2021). And the district court dismissed petitioner's claims for declaratory and injunctive relief, *id.* at 11-15, concluding that they are barred by the Anti-Injunction Act, 26 U.S.C. 7421.

The First Circuit reversed as to the claims for declaratory and injunctive relief, holding that the Anti-Injunction Act does not apply to petitioner's suit. 46 F.4th 1, 5. The court remanded for the district court to determine whether petitioner has stated a claim for relief. *Id.* at 9.

On remand, the district court granted the IRS's renewed motion to dismiss. Pet. App. 37a-81a. The court held that petitioner has failed to state a Fourth Amendment claim because he had neither a reasonable expectation of privacy nor a property interest in the Coinbase records. *Id.* at 47a-57a. In the alternative, the court held that, even if the Coinbase summons implicated petitioner's Fourth Amendment rights, the summons was reasonable because it complied with the statutory requirements for IRS summonses. *Id.* at 57a-61a.

The district court also dismissed petitioner's Fifth Amendment claim, holding that he lacks any liberty interest in the Coinbase records and, in any event, that the statutory summons procedures provide adequate process. Pet. App. 61a-67a. The court rejected petitioner's statutory claim because the summons complied with 26 U.S.C 7609(f). Pet. App. 67a-80a.

4. The court of appeals affirmed. Pet. App. 1a-36a. As relevant here, the court held that the Coinbase records regarding petitioner fall "squarely within" the third-party doctrine set forth in *United States* v. *Miller*, 425 U.S. 435 (1976), and *Smith* v. *Maryland*, 442 U.S. 735 (1979). Pet. App. 13a. Under that doctrine, an indi-

vidual has no reasonable expectation of privacy in information he voluntarily turns over to third parties. *Id.* at 12a-13a. The court found this case "directly analogous" to *Miller*, where this Court held that accountholders lack any "legitimate expectation of privacy in 'information kept in bank records.'" *Id.* at 13a (quoting *Miller*, 425 U.S. at 442). The court of appeals also found that, because all bitcoin transactions are recorded on a public (albeit pseudonymous) ledger, petitioner did not have a *more* reasonable expectation of privacy in bitcoin transactions than the interest in the bank records that this Court rejected in *Miller*. *Id.* at 18a.

The court of appeals explained that *Carpenter* v. *United States*, 585 U.S. 296 (2018), does not require a different result. Pet. App. 14a-15a. In *Carpenter*, this Court declined to extend the third-party doctrine to the "unique" context of cell-site-location information, which provides a comprehensive record of every cell-phone user's location. 585 U.S. at 300-301, 315-316. The court of appeals held that such "'detailed,'" "intimate" information, which any participant "'in modern society'" cannot avoid sharing, has "little in common" with virtual-currency trading records. Pet. App. 15a-16a (quoting *Carpenter*, 585 U.S. at 315).

The court of appeals also rejected petitioner's "novel theory," based on Justice Gorsuch's dissenting opinion in *Carpenter*, 585 U.S. at 405-406, that the Coinbase records are his personal property. Pet. App. 20a-22a. As the court of appeals explained, "any such interest needs to be anchored in law." *Id.* at 20a. But petitioner "ma[de] no effort in his opening brief to explain the legal source of [his] interest." *Ibid.* While petitioner at oral argument attempted to ground his asserted property right in Coinbase's privacy policy, that argument

was both "waived" and an "obvious" misreading of the policy's terms. *Id.* at 21a n.11.

ARGUMENT

Petitioner asks (Pet. 21-34) this Court to modify or overrule the third-party doctrine, at least as applied to non-"targeted" investigations or to virtual-currency records. To the extent petitioner made those arguments below, the court of appeals correctly rejected them as both foreclosed by this Court's precedent and meritless. Pet. App. 11a-24a. That decision does not conflict with the decision of any court of appeals. And this case would be an unsuitable vehicle to address petitioner's arguments given the underdeveloped record and the district court's alternative holding (*id.* at 57a-61a) that any search was reasonable. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly held that the IRS summons to obtain Coinbase's records about petitioner did not violate his Fourth Amendment rights.

a. The Fourth Amendment's prohibition on unreasonable searches was originally understood to be "tied to common-law trespass." *United States* v. *Jones*, 565 U.S. 400, 405 (2012). Since this Court's decision in *Katz* v. *United States*, 389 U.S. 347 (1967), however, the Court has held that a Fourth Amendment search may also "occur[] when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo* v. *United States*, 533 U.S. 27, 33 (2001).

The Fourth Amendment permits the government to obtain business records through a subpoena, without either a warrant or a showing of probable cause. See *Oklahoma Press Publ'g Co.* v. *Walling*, 327 U.S. 186, 194-195 (1946); see also *United States* v. *Miller*, 425 U.S. 435, 445-446 (1976). In its decisions in *Miller* and *Smith*

v. *Maryland*, 442 U.S. 735 (1979), this Court further concluded that the government's acquisition of a business's records does not constitute a Fourth Amendment "search" of an individual customer even when the records reflect information pertaining to that customer.

In *Miller*, the government had obtained by subpoena records regarding a suspected tax evader from his banks, including copies of his checks, deposit slips, financial statements, and other records. 425 U.S. at 436-438. The Court held that the government's acquisition of those records was not an "intrusion into any area in which [the defendant] had a protected Fourth Amendment interest." *Id.* at 440. The Court explained that the defendant could "assert neither ownership nor possession" of the documents, which were the "business records of the banks." *Ibid.*

The Court in *Miller* also rejected the defendant's asserted "reasonable expectation of privacy" in such records. 425 U.S. at 442. As the Court explained, it had "held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose." *Id.* at 443. Because the records "contain[ed] only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business," the defendant had "take[n] the risk, in revealing his affairs to another, that the information w[ould] be conveyed by that person to the Government." *Id.* at 442-443.

In *Smith*, the Court applied the same principles to a telephone company's records of numbers dialed from the defendant's phone. 442 U.S. at 737. The defendant had "voluntarily conveyed numerical information to the

telephone company and 'exposed' that information to its equipment in the ordinary course of business," thereby "assum[ing] the risk that the company would reveal to police the numbers he dialed." *Id.* at 744.

In *Carpenter* v. *United States*, 585 U.S. 296 (2018), this Court recognized a "narrow" exception to those principles for cell-phone-location records providing "a comprehensive chronicle of the user's past movements," *id.* at 300, 316. The Court explained that its decision did "not disturb the application of *Smith* and *Miller*." *Id.* at 316. Instead, it "decline[d] to extend *Smith* and *Miller*" in light of the "unique nature of cell phone location records," which would enable "near perfect surveillance" of every cell-phone user. *Id.* at 309, 312, 315-316.

b. The court of appeals correctly held that the principles in *Miller*, *Smith*, and *Carpenter* resolve this case against petitioner. Pet. App. 12a-24a.

At the outset, petitioner lacks any reasonable expectation of privacy in Coinbase's records about his account. The IRS obtained Coinbase-created documents recording petitioner's transactions and account history as well as "basic biographical information" like his name, birthdate, social security number, and address. Pet. App. 23a.

Those records are materially indistinguishable from the bank records in *Miller*, which included "financial statements," "monthly statements," and "all" other records for a three-month period at two banks. 425 U.S. at 437-438. Just as in *Miller*, the government sought "the business records of" a financial institution, including records of "'transactions to which the [institution] was itself a party.'" *Id.* at 440-441 (citation omitted). And just as in *Miller*, at least some of those records are required to be kept by the Bank Secrecy Act. *Ibid.*; see

31 C.F.R. 1010.410(e) (recordkeeping requirements for "[n]onbank financial institutions"). Petitioner lacks "any legitimate expectation of privacy" in such "financial statements," which "contain only information [that he] voluntarily conveyed to [Coinbase] and exposed to [its] employees in the ordinary course of business." *Miller*, 425 U.S. at 442. Indeed, Coinbase's privacy policy gave petitioner specific notice of "the possibility of disclosure to law enforcement." Pet. App. 14a; see pp. 5-6, *supra*. Petitioner therefore "assumed the risk" of disclosure. *Smith*, 442 U.S. at 744.

Carpenter does not alter that result, as petitioner appears to recognize. In his own words: *Carpenter* "did not place * * * guardrails on the third-party doctrine" and instead turned on "'the unique nature of cell phone location records.'" Pet. 30 (quoting *Carpenter*, 585 U.S. at 309). The uniquely intimate and unavoidable trail of cell-phone-location data in *Carpenter* has "little in common" with the basic financial information here. Pet. App. 15a.

Moreover, the IRS's summons to Coinbase did not trespass upon any protected property interest in petitioner's papers. As the court of appeals explained, petitioner failed "to explain the legal source of the [property] interest he asserts" and instead relied on the "facile" claim that Coinbase's records are his "'papers.'" Pet. App. 20a-21a (citation omitted). While petitioner attempted at oral argument to ground his asserted property interest in Coinbase's privacy policy, that policy simply described Coinbase as collecting "'your information,' meaning information *about* [petitioner]." *Id.* at 21a n.11 (citation omitted). Nothing in the policy established any property right of petitioner in Coinbase's records.

Petitioner's property theory is foreclosed by *Miller*. Just as in *Miller*, petitioner "can assert neither ownership nor possession" of documents that are, at bottom, "the business records of [Coinbase]." 425 U.S. at 440. Petitioner lacks any property interest in records "generated by Coinbase in its 'ordinary course of business' as a financial institution." Pet. App. 17a (quoting *Miller*, 425 U.S. at 442). This case involves records of "transactions to which [Coinbase] was itself a party" which belong to Coinbase, not to petitioner. *Miller*, 425 U.S. at 441; see Compl. ¶¶ 29, 32, 34; *id.* Ex. 1, at 2.

Regardless, even if petitioner had some property interest in Coinbase's records, the IRS's acquisition of those records via a valid, judicially enforced summons would not trespass on any such interest. As Coinbase's privacy policy made clear, his personal information could be disclosed to law enforcement. See pp. 5-6, *supra*. The IRS's acquisition of Coinbase's records is therefore consistent with any conceivable property rights that petitioner might have in those records.

c. Petitioner makes little effort to square his Fourth Amendment claim with current doctrine. Without briefing stare decisis, he calls (Pet. 2, 12-13, 19-21, 27, 30) this Court's precedent "incoherent," "outdated," and "wrongly conceived" and urges the Court to "[r]evisit," "update," "[r]eform," or "realign" that precedent or "overturn" or "overrul[e]" cases out right.

Petitioner's two attempts to distinguish current doctrine are unpersuasive. First, petitioner calls the judicially approved summons here a "dragnet" search (Pet. 2, 9, 11-12, 22, 29, 32) or a "fishing expedition" (Pet. 31) and asks this Court to "cabin the third-party doctrine to * * * targeted investigations." Pet. 27 (capitalization omitted). But petitioner does not define "targeted" or

explain how any such limitation would work in practice. Petitioner notes (Pet. 28, 31) that the facts of *Miller* and *Smith* involved information about a single individual over the course of a day or months, rather than the three years of information the IRS obtained here. But this Court said nothing in *Miller* or *Smith* to suggest that its analysis turned on those facts. Petitioner appears to recognize as much, faulting *Carpenter* for failing to "provide meaningful limitations or guidance regarding the third-party doctrine." Pet. 19 (capitalization omitted).

Petitioner also points (Pet. 28-30) to *United States* v. *Knotts*, 460 U.S. 276 (1983), which approved the use of a beeper to track a moving car but noted that "different constitutional principles" might apply to "dragnet-type law enforcement practices," *id.* at 284. But later cases do not endorse such principles, and petitioner does not articulate what they might be.

While petitioner emphasizes (Pet. 3, 11, 31) the number of taxpayers covered by the summons that included Coinbase records pertaining to him, that fact has no bearing on whether petitioner's asserted expectation of privacy was reasonable. Pet. App. 19a n.10. Instead, as the court of appeals explained, the scope or motivation for the summons goes to whether any search satisfied the Fourth Amendment's reasonableness requirement, not whether a search occurred in the first place. *Ibid.*

In any event, the district court correctly concluded that the summons was reasonable because it sought information relevant to suspected tax evasion by high-dollar Coinbase customers. See pp. 22-23, *infra*. Petitioner's arguments about the scope of the summons were aired before the court considering the IRS's petition to enforce the summons, which carefully tailored

the summons to the IRS's legitimate investigative purpose. *United States* v. *Coinbase, Inc.*, No. 17-cv-1431, 2017 WL 5890052, at *6-*8 (N.D. Cal. Nov. 28, 2017). The IRS operates in tax years and logically sought information for the three years when it suspected underreporting given the massive disparity between Coinbase's asserted seven-figure customer base and the reporting of virtual-currency income by fewer than 1000 taxpayers. See p. 4, *supra*.

Second, petitioner seeks (Pet. 10, 32-34) a carveout for virtual-currency records from the third-party doctrine given their purportedly "unique" nature. Petitioner contends that virtual-currency records permit "future-looking surveillance" because all transactions are published on a public ledger using pseudonyms. Pet. 32, 34 (emphasis omitted). While the IRS did not obtain petitioner's pseudonym, petitioner asserts (Pet. 7-8, 32-33), and the court of appeals agreed (Pet. App. 17a n.9), that the IRS could determine his pseudonym from the Coinbase records.

Petitioner does not ground that virtual-currency-specific exception in this Court's precedent or history. If anything, privacy expectations should be weaker at virtual-currency exchanges than at traditional banks like the ones in *Miller*. As the court of appeals observed, petitioner's "decision to transmit financial information to the public—even pseudonymously"—does not "make[] the expectation of privacy *more* reasonable than doing so privately." Pet. App. 18a; accord *United States* v. *Gratkowski*, 964 F.3d 307, 312 (5th Cir. 2020).

Moreover, participation in a virtual-currency exchange is hardly "indispensable to participation in modern society." Pet. App. 15a-16a (quoting *Carpenter*, 585 U.S. at 315). Virtual-currency exchanges are not even

indispensable for trading bitcoin; individuals can buy and sell bitcoin directly using technologies like the hardware wallet that petitioner later adopted. See *id.* at 4a n.2, 52a n.21. Petitioner's decision to enjoy the convenience of "a government-regulated, third party to execute these types of transactions" came with obvious privacy tradeoffs. *Id.* at 52a n.21; see *id.* at 18a-19a.

d. Petitioner principally contends (Pet. 22-27) that this Court should overrule *Miller* and *Smith* and treat Coinbase's privacy policy as a "contractually granted property interest" providing "Fourth Amendment protection."

Petitioner faults (Pet. 3) the decision below for supposedly refusing "to recognize contractual terms as a basis for Fourth Amendment protection." But the court of appeals made no such categorical holding. Instead, the court held that petitioner "waived" reliance on Coinbase's privacy policy by failing to develop the point until oral argument. Pet. App. 21a n.11. Yet the court proceeded to analyze the cited provision and concluded that it had not created a property right. *Ibid.* Those case-specific determinations about petitioner's issue preservation and his reading of the Coinbase privacy policy plainly do not warrant this Court's review.

In disputing the waiver finding, petitioner points to one passage in his opening brief below contending that "[t]he routine use of the possessive pronoun 'your' when service providers, including Coinbase, refer to customers' information illustrates the common understanding that the information is the customers' and protectable by them under the Fourth Amendment." Pet. 25 n.5 (quoting Pet. C.A. Br. 27). But the quoted passage had described service providers' "routine" practices in order to illustrate the purported "common understand-

ings around third-party storage of data" even if petitioner "does *not* enjoy a full measure of property rights in his information through contract." Pet. C.A. Br. 26-27 (emphasis added). Petitioner's brief identified no provision of the privacy policy actually creating a property right. See *id.* at 18-24. Instead, the thrust of petitioner's brief was that all "[p]ersonal financial records" are by definition "'papers' and 'effects' protected by the Fourth Amendment." *Id.* at 18 (citation omitted); accord *id.* at 20-21, 25.

At minimum, petitioner's property-based theory remains seriously underdeveloped. Petitioner "cites no property law in his briefs to this Court, and he does not explain how he has a property right in the compan[y's] records under the law of any jurisdiction at any point in American history." *Carpenter*, 585 U.S. at 353 (Thomas, J., dissenting). Apart from one citation to California contract law (Pet. 26), the petition leaves entirely unclear what body of law, in petitioner's view, creates his asserted property right.

That omission is a problem because any property-based theory must be "anchored in law." Pet. App. 20a. Petitioner cites (Pet. 2, 10-11, 15, 19, 21-24, 30) Justice Gorsuch's dissenting opinion in *Carpenter* ten times for its tentative endorsement of a property-based rethinking of the third-party doctrine. But Justice Gorsuch ultimately declined to concur in the judgment because the petitioner in *Carpenter* failed to "invoke the law of property or any analogies to the common law" and "offered no analysis, for example, of what rights state law might provide him." 585 U.S. at 406. Those same defects exist here.

In any event, petitioner's contract-based theory lacks merit. Petitioner attempts (Pet. 11) to dismiss *Miller*

as "a case that never addressed property interests or contract rights." Accord Pet. 21. But *Miller* explained that the defendant could "assert neither ownership nor possession" over what were ultimately "the business records of the banks." 425 U.S. at 440. That holding should be dispositive here.

Setting aside precedent, petitioner also attempts (Pet. 2, 16, 21, 23) to embrace the Fourth Amendment's "original meaning." But "the Fourth Amendment, as originally understood, did not apply to the compulsory production of documents at all." *Carpenter*, 585 U.S. at 368 (Alito, J., dissenting). And it is "not obvious" that business records even qualify as "papers" within the "original meaning" of the Fourth Amendment. *Id.* at 352 n.8 (Thomas, J., dissenting).

Regardless, Coinbase's privacy policy does not purport to create a property right. Petitioner assumes that the privacy policy is a legally binding contract. But the privacy policy—which is distinct from the "user agreement," Compl. Ex. 1—does not purport to create legally enforceable rights. Instead, the policy offers "to let you know what information we collect when you visit our site, why we collect it and how it is used." Compl. Ex. 2, at 1. For its part, the user agreement—which is styled as "a contract between you and Coinbase"—merely invites users to "[p]lease review our Privacy Policy." Compl. Ex. 1, at 1. Coinbase's own amicus brief in this Court notably fails to suggest that the privacy policy is a binding contract which Coinbase could be sued for violating.

Petitioner also misreads the policy. Petitioner cites (Pet. 22) his complaint's assertion (Compl. ¶ 89) that the privacy policy creates a property right. But that "legal conclusion couched as a factual allegation" need not be

accepted at the motion-to-dismiss stage. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Petitioner asserts (Pet. 24) that the policy "explicitly grants him ownership of his records." But he points to no terms that do so, explicitly or otherwise. The only language he cites (Pet. 25 & n.5) is the policy's use of "your" to describe his personal and account information. As the court of appeals explained, that pronoun was an "obvious" reference to "information *about* [petitioner]"; it did not create a property right. Pet. App. 21a n.11. The bank in *Miller* could have equally described the bank-created and owned statements as "your account statements" without giving Miller a property right in those statements.

Petitioner further asserts (Pet. 25 n.6) that the policy "grants him the 'right to exclude'" without citing any provision of the policy. Petitioner may be referring to Coinbase's pledge not to "use your personal information for purposes other than those purposes we have disclosed to you, without your permission." Compl. Ex. 2, at 4. But one of those disclosed purposes is to comply with a "court order." *Id.* at 5. Even if the privacy policy is a contract, and even if that contract creates a property right, that right would not exclude court-ordered government access. Petitioner counters (Pet. 24) that Coinbase could only disclose his data pursuant to "a *valid* subpoena or order"—a qualification missing from the policy itself. Regardless, the summons *was* valid, as the district court enforcing the summons held. *Coinbase*, 2017 WL 5890052, at *8.

2. The decision below does not conflict with any decision by another court of appeals, and petitioner does not argue otherwise. The only other court of appeals to address the question has held that the customers of a

virtual-currency exchange lack a Fourth Amendment privacy interest in the exchange's records. *Gratkowski*, 964 F.3d at 311-313. Multiple district courts have reached the same conclusion. *Zietzke* v. *United States*, 426 F. Supp. 3d 758 (W.D. Wash. 2019); *Zietzke* v. *United States*, No. 19-cv-3761, 2020 WL 264394 (N.D. Cal. Jan. 17, 2020), report and recommendation adopted, 2020 WL 6585882 (N.D. Cal. Nov. 10, 2020). Multiple district courts have similarly rejected any Fourth Amendment privacy interest in virtual-currency transactions recorded on a public ledger. *United States* v. *Patel*, No. 23-cr-166, 2024 WL 1932871, at *5 (D.D.C. May 1, 2024); *In re Search of Multiple Email Accounts*, 585 F. Supp. 3d 1, 18 (D.D.C. 2022). That uniformity in applying settled Fourth Amendment principles to new technology underscores the lack of need for this Court's intervention.

3. In addition to petitioner's issue-preservation problems, see pp. 16-17, *supra*, this case is an unsuitable vehicle to consider whether virtual-currency accountholders have a Fourth Amendment interest in information about their accounts because the record is underdeveloped and the question presented is not outcome determinative.

a. This case arises in a highly artificial posture that would impede intelligent resolution of the question presented. This Court's cases involving the application of the Fourth Amendment to new technologies have arisen almost exclusively from motions to suppress in criminal cases. *E.g.*, *Carpenter*, 585 U.S. at 302; *Riley* v. *California*, 573 U.S. 373, 379 (2014); *Jones*, 565 U.S. at 403; *Kyllo*, 533 U.S. at 30; *Knotts*, 460 U.S. at 279; *Katz*, 389 U.S. at 348-349. That posture generally provides this Court with a clearer record of the technology and infor-

mation at issue and its consequences for the defendant's case.

But here, petitioner has brought a civil lawsuit against the IRS asserting an implied right of action under the Constitution for declaratory and injunctive relief. That unusual posture creates lacunae that would impede this Court's review, in addition to the gaps in petitioner's property-based theory. See pp. 16-19, *supra*. To start, what information the IRS ultimately obtained about petitioner was not before the district court on the motion to dismiss. Pet. App. 44a n.15. At the time of his complaint, petitioner was not even sure from which virtual-currency exchanges the IRS had obtained his account records. *Ibid.* Moreover, petitioner bases (Pet. 24) his asserted property interest on his asserted "contract with Coinbase." But his complaint attaches only a June 2013 user agreement and a November 2014 privacy policy, Compl. Exs. 1-2, leaving unclear whether the policies might have changed in material ways during the years at issue. And petitioner proposes (Pet. 12, 32-34) special Fourth Amendment treatment for "cryptocurrency transactions" given the nature of "Blockchain technology." But that technology is not elucidated in the record, leaving the technological contours that shape petitioner's theory unexplained.

The posture of the case would also curtail the practical consequences of a ruling in petitioner's favor. Petitioner has not appealed the dismissal of his *Bivens* claims, leaving only his request for a declaration and injunction barring the IRS from requesting information from virtual-currency exchanges going forward and ordering the IRS to delete any information about him. Pet. App. 46a. But petitioner plainly lacks Article III standing to seek relief against hypothetical future IRS

conduct that he can only speculate will affect him. See *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 410-411 (2013). And given petitioner's allegation that he has paid all taxes owed in the years that were being investigated, Pet. App. 40a, it is unclear what harm he suffers from the IRS's ongoing possession of information about his transactions.[2] Even if data possession alone establishes Article III injury, the practical stakes of an order directing the IRS to delete decade-old financial information are slim.

b. Nor would answering the question presented be outcome determinative. Even if this Court were to hold that the IRS summons amounted to a "search," the district court correctly concluded in the alternative that any search was reasonable. Pet. App. 57a-61a.

To comply with the Fourth Amendment, an administrative subpoena for corporate records need not be supported by probable cause. *Oklahoma Press*, 327 U.S. at 209. Instead, a subpoena is reasonable if the requested documents are "relevant" and "adequate, but not excessive," for an investigation "authorized by Congress, * * * for a purpose Congress can order." *Ibid.*

That standard was satisfied here because—as the district court in the original enforcement proceeding found and the district court below reaffirmed—the summons served a legitimate investigative purpose as required by *Unitd States* v. *Powell*, 379 U.S. 48, 57-58 (1964). Pet. App. 60a-61a; *Coinbase*, 2017 WL 5890052, at *7. Every court of appeals to address the question has concluded that an IRS summons that satisfies *Powell*'s statutory standard necessarily "satisfies the Fourth Amendment's reasonableness requirement."

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[2] Contrary to petitioner's assertion (Pet. 7), the IRS has never conceded that petitioner fully paid his taxes for 2013 through 2015.

Presley v. *United States*, 895 F.3d 1284, 1293 (11th Cir. 2018), cert. denied, 586 U.S. 1248 (2019).[3] The First Circuit has said the same in dicta. Pet. App. 10a n.8 (discussing *United States* v. *Allee*, 888 F.2d 208, 213 n.3 (1st Cir. 1989) (per curiam)). Accordingly, even were this Court to conclude that petitioner has protectible Fourth Amendment interests in Coinbase's records, petitioner's Fourth Amendment claim would fail.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2025

[3] Accord *Standing Akimbo, LLC* v. *United States*, 955 F.3d 1146, 1166 (10th Cir. 2020), cert. denied, 141 S. Ct. 2236 (2021); *Cypress Funds, Inc.* v. *United States*, 234 F.3d 1267, 2000 WL 1597833, at *4 (6th Cir. 2000) (Tbl.); *United States* v. *Abrahams*, 905 F.2d 1276, 1282 (9th Cir. 1990), overruled on other grounds by *United States* v. *Jose*, 131 F.3d 1325, 1329 (9th Cir. 1997); *Stites* v. *IRS*, 793 F.2d 618, 620-621 (5th Cir. 1986); *United States* v. *First Nat'l Bank of Mitchell*, 691 F.2d 386, 388 (8th Cir. 1982) (per curiam).