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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROGER K. VER,

Defendant.

Case No.: 2:24-cr-00103-MWF

**DEFENDANT ROGER K. VER'S
NOTICE OF MOTION TO DISMISS
COUNTS ONE THROUGH EIGHT
OF THE INDICTMENT**

Judge: Hon. Michael W. Fitzgerald
Hearing Date: February 3, 2025
Time: 1:30 pm
Date Filed: December 3, 2024

DEFENDANT ROGER K. VER'S MOTION TO DISMISS

CASE NO. 2: 24-CR-00103-MWF

**TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF
RECORD:**

PLEASE TAKE NOTICE that, February 3, 2025, or as soon thereafter as the matter may be heard by the Honorable Michael W. Fitzgerald, in the United States District Court for the Central District of California located at 350 W. First Street, Los Angeles, CA 90012, Courtroom 5A, Defendant Roger K. Ver (“Ver”), by and through undersigned counsel, will and hereby do respectfully move this Court to dismiss the indictment with prejudice.

This Motion is made on the grounds that federal district courts have the inherent discretion to allow a foreign defendant not present in the United States to make a special appearance for the limited purpose of moving to dismiss an indictment. This Motion is further made following the conference of counsel pursuant to L.R. 7-3, which took place via email on November 21, November 25, November 26, and December 2, 2024. The government requested a response date of January 6, 2024, and the parties will provide a joint schedule for briefing on the motion.

This motion is based on this notice, the accompanying memorandum of points and authorities, any reply that Ver may make, such other evidence and arguments as may be presented at or prior to the hearing, and all records and files in this action.

[Signature page to follow]

1 Dated: December 3, 2024

Respectfully submitted,

2
3 /s/ Ashwin J. Ram

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I. INTRODUCTION

The government's charges against Roger Ver rely on violations of his rights; misleading, selective quotations of communications presented to the grand jury; and, fundamentally, on the false and anachronistic pretense that U.S. tax rules provided meaningful guidance to those who, like Ver, were among the pioneers in the now-mainstream cryptocurrency economy. Having ambushed Ver's tax counsel and subjected him to interrogation, the government collected reams of data and communications from Ver's attorneys.

Following that collection, Ver and his prior counsel engaged in good-faith discussions *for years* with the Department of Justice in order to understand their theories of Ver's supposed "offenses," and to identify the amount of past-due tax that Ver supposedly owed. In the midst of those conversations, the government secretly indicted Ver while continuing to feign an interest in the conversations that Ver had initiated years before. Remarkably, neither during those conversations nor in the government's secretly returned indictment has the government even attempted to explain the amount of tax that Ver supposedly failed to pay. Unsurprisingly, this broken process resulted in a defective indictment—one that consistently misquotes Ver and his advisors' communications, relies on unconstitutional extensions of the government's taxing power, and ultimately hangs on a semblance of regulatory clarity that never existed.

The indictment against Roger Ver must be dismissed for two reasons. First, the charges in the indictment are unconstitutional. The "exit tax" at issue violates both the Apportionment Clause and the Due Process Clause of the Constitution. Compounding the Due Process violation presented by the exit tax, the charges also rely on provisions of the U.S. tax laws that were, at all relevant times, inscrutably vague as to their application to digital assets of the kind that underlie the charges. Despite years of negotiation and demands, and despite the government's claim to have attributed cryptocurrency holdings to Ver and his companies, the government

1 has never, and the indictment does not, identify the amount of tax that Ver
2 purportedly owed as the result of his expatriation in 2014—one indication among
3 many of the impermissible vagueness that pervaded U.S. tax law as of the time of
4 Ver’s expatriation.

5 Second, the government persists in its charges, and specifically in the selective
6 quotation and incorporation of certain documents, despite the government’s
7 knowledge that the full text of those incorporated documents decimates its claim that
8 Ver acted willfully to violate U.S. tax law, and despite the government’s violation
9 of Ver’s attorney-client privilege. That selective omission, once remedied by
10 reference to the full text of the documents that the government has incorporated into
11 the indictment, creates an irreconcilable contradiction in the government’s
12 allegations that destroy its allegations of required criminal intent. The government’s
13 trampling on Ver’s attorney-client privilege in the course of its investigation,
14 together with the inexplicable decision to persist in prosecuting the indictment
15 despite the government’s awareness of its misleading and incomplete recitation of
16 key facts, reflect a disregard of due process warranting immediate dismissal.

17 II. BACKGROUND

18 Roger Ver was among the bitcoin (“BTC”) pioneers. BTC launched in 2009,
19 and in 2011, Ver and companies affiliated with him began acquiring and promoting
20 its use as an alternative form of currency. While today BTC has increased in value
21 and popularity, at that time the mainstream perception of BTC was as a technology
22 with an uncertain future and little, if any, long-term value. Ver and a relatively small
23 group of peers, however, viewed BTC as a promising medium of exchange—a
24 currency—that would inevitably gain in acceptance and, therefore, utility. Having
25 acquired BTC as part of his personal wealth and his companies’ corporate treasuries,
26 and having grappled with accounting for those holdings under principles of unclear
27 application in the digital asset space, Ver was also among the first people to face the
28 vagaries of taxes related to BTC.

Ver’s approach in the face of that lack of clarity was, then as now, to insist on compliance, good-faith collaboration, and staying within the bounds of U.S. tax law—a difficult task at the time, and one that the government recasts in hindsight as an attempt at evasion (notwithstanding the government’s inability to articulate the correct accounting and tax treatment owed to BTC holdings at the times relevant to this indictment). At a time when tens of thousands of BTC owners did not disclose *any* of their BTC holdings or try to pay taxes on those holdings,¹ Ver hired a team of experts including multiple law firms and an experienced appraiser. Ver did this because he “ha[d] no idea what the IRS w[ould] be demanding of [him],” was “very concerned about the proper way to handle [his and his companies’] bitcoin holdings,” and “want[ed] to make sure that [his] exit tax payments [we]re as clean as possible,” “with no room” for future dispute with the IRS. *See* Ex. 1 (quoted, in part, in Ind. ¶ 27.c).²

¹ *See* IRS Press Release, *IRS Has Begun Sending Letters to Virtual Currency Owners Advising Them to Pay Back Taxes, File Amended Returns* (July 26, 2019). In 2019, the IRS began sending letters to taxpayers who had not reported their BTC or other virtual currency transactions during the 2013-2017 period (suggesting amnesty for the pre-2013 period during which most of Ver’s BTC accrued). The letters provided the taxpayers with the opportunity to correct past mistakes including “incorrectly calculating your income, gain, or loss” in virtual currency by submitting an amended return. Although Ver actually made a good-faith attempt to report his virtual currency transactions, he was not afforded the same due process afforded to every other taxpayer. Instead, Ver was prosecuted.

² As discussed in more detail below, the indictment relies on selective quotations, selective omissions, and the presentation of information divorced from context. The government’s presentation of that document, and its continued persistence in its prosecution, raise significant due process issues warranting dismissal. Because the indictment incorporates these documents by quotation or reference, we include them here to provide the Court with greater context.

1 **A. Ver’s Decision to Expatriate and Reliance on Respected Counsel**

2 In 2006, Ver left the United States and moved to Japan, where his future wife
3 had been born and where the two would live in the coming years. In the subsequent
4 years, he rarely returned to the United States and began considering expatriation.

5 Bitcoin launched in 2009. In 2011, Ver and his companies began acquiring
6 and promoting the use of BTC as an alternative form of currency. While we know
7 today that BTC substantially increased in value over time, at that time, the
8 mainstream perception was that the nascent cryptocurrency was speculative and held
9 an uncertain future. Importantly, and as discussed in more detail below, there were
10 no rules, no guidance, and no best practices for BTC accounting or tax treatment in
11 these early days. The IRS had not yet released guidance, and experts had not
12 coalesced around any particular practices.³ In light of this absence of formal
13 guidance, and Ver’s inexperience with accounting- and tax-related practices, he
14 relied heavily on the professionals he retained to assist him in all accounting- and
15 tax-related matters, including the proper accounting and tax treatment of BTC held
16 by Ver and his companies.

17 In 2012, Ver retained attorneys at a highly regarded, tax-focused law firm
18 (referred to in the indictment as “Law Firm 1”) to advise and assist him with his
19 formal expatriation. To ensure a lawful and final exit from the United States, Ver
20 wanted to ensure that his expatriation taxes were done correctly, and Law Firm 1,
21 which advertised itself as being comprised of experts on tax expatriation law, was
22 hired for that purpose. As he did previously with his accounting professionals, Ver
23 relied heavily on Law Firm 1 to properly advise him on his expatriation taxes. Ver
24 repeatedly told his advisors that he knew that he would be audited, and he wanted
25

26 _____
27 ³ The IRS’s first guidance on the tax treatment of cryptocurrency, IRS guidance
28 2014-21, was released on March 25, 2014, three weeks after Ver expatriated.

1 “to make sure that [his] exit tax payments are as clean as possible, with no room to
2 have trouble from the IRS in the future.” *See* Ex. 1 (quoted, in part, in Ind. ¶ 27.c).

3 **B. Ver’s Good Faith Efforts in the Face of Uncertain Tax Laws**

4 The core issue facing Ver and his advisors was how to value his and his
5 affiliated entities’ BTC holdings. As Ver’s advisors explained, expatriating citizens
6 are required to “pretend [they] sell everything on the day before [they] terminate
7 [their] citizenship, [March 2, 2014], at fair market value.” Ex. 2 (cited in Ind. ¶ 27.a).
8 If that value surpasses a statutory threshold, the unrealized gains from this one-day
9 hypothetical sale are subject to tax.

10 Calculating the hypothetical, unrealized gains from the hypothetical sale of
11 Ver’s BTC holdings as of March 2, 2014 presented an unanswerable question. With
12 the markets that exist in November 2024, the sudden sale of tens of thousands of
13 BTC would cause the price of BTC to tumble, but it would be *possible*. On March
14 2, 2014, however, such a sale was likely *impossible* as a technological matter and
15 catastrophic as a matter of market value. At the time, BTC was a thinly-traded
16 market with a limited number of active traders. The *only* large marketplace for BTC
17 (a forum called “Mt. Gox”) collapsed in early 2014, declaring bankruptcy and going
18 offline in February 2014. By March 2, 2014, any attempt to sell a large block of BTC
19 would have collapsed the market. The value of Ver’s BTC would be the amount that
20 could have been sold before that market collapse, but that was impossible to
21 calculate or precisely predict.

22 Ver’s advisors confirmed that it was necessary to consider the lack of
23 sustained demand for BTC and discount any valuation accordingly. While the
24 indictment claims that Lawyer 1 “told defendant Ver that they were legally required
25 to use the \$800 per bitcoin [spot price] value,” that is *not* Lawyer 1’s advice in the
26 cited document. Instead, the cited document shows that Lawyer 1 erroneously
27 believed Ver could sell all of the BTC “within a small interval of time and not
28

1 depress the market”—a scenario that would justify applying the spot price. Ex. 3
2 (quoted, selectively, in Ind. ¶ 27.e.vi). Once Lawyer 1 understood that liquidating
3 Ver’s BTC would have “crash[ed] the price,” he conducted additional research.
4 Based on his research, Lawyer 1 concluded that people who owned property that
5 could not be sold “without depressing the market,” could “take this effect into
6 consideration and discount the shares.” *See* Ex. 4. Instead of using the \$800 price,
7 Lawyer 1 advised Ver that he could get an appraisal that rejected the spot price
8 method in favor of a more accurate simulation of what Ver’s property would be
9 worth on the open market. *See* Ex. 5 (“I emphasize that you are allowed to do this
10 because of the size of the BTC holding: For small BTC holdings [which would not
11 move the market], you have to use exchange rates.”). That is exactly what Ver did.

12 Law Firm 1 instructed Ver to assign the BTC in the wallets that he and his
13 companies controlled into (1) BTC Ver believed to be owned by his companies, and
14 (2) BTC Ver believed to be owned by himself personally—excluding BTC in those
15 wallets that were owned by others. Ver followed expert advice with respect to each
16 of these categories. In reality, all of the BTC were maintained in a group of wallets
17 without a coin-by-coin designation of ownership, basis, or other data that might be
18 kept for a capital asset (as opposed to a currency). Ver repeatedly informed his
19 advisors that he could not unscramble the egg to figure out which BTC “belonged”
20 to which entity, as opposed to the amount of money used to acquire BTC for or
21 through a given company. *See, e.g.,* Ex. 6 (referenced in Ind. ¶ 27.e.iv) (“There is
22 also a lot of uncertainty about which bitcoin belongs to myself vs MemoryDealers.”).
23 In a display of good faith, Ver volunteered to take the most conservative (and
24 personally expensive) approach: assign it all to himself personally, requiring
25 payment of both transfer taxes and exit taxes. *See, e.g., id.* (“For tax purposes, I
26 suspect we should assign just about all of it to myself?”); Ex. 7(quoted in Ind. ¶
27 27.e.vii). However, Ver’s idea was rejected in favor of allocating BTC among
28 companies and conducting corporate appraisals—a task now painted as criminal

1 notwithstanding the complete lack of regulatory clarity for crypto accounting and
2 reporting, and notwithstanding his professionals' advice.

3 The BTC owned by Ver's companies—MemoryDealers U.S. and Agilestar—
4 were included as assets of those companies and incorporated into the appraisal of
5 those companies conducted by Appraiser 2. Ver's accountants provided Appraiser 2
6 with "the companies' financial records," which listed BTC purchases in the ordinary
7 course, and Appraiser 2 used those financial records, tax returns, other documents,
8 and his expertise to prepare valuations that included BTC valued at approximately
9 \$1.4 million, making the combined value of the two businesses approximately \$6.6
10 million. Ind. ¶ 27.x. Appraiser 2 rejected any valuation of Ver's companies based on
11 the spot price of their assets and instead appraised them using a complex analysis
12 that he explained in a lengthy report. Although the indictment claims that Ver's May
13 4, 2016 Initial and Annual Expatriation Statement (Form 8854) for tax year 2014
14 "underreported the fair market values of MemoryDealers and Agilestar," Ind. ¶ 27.g,
15 none of the lawyers who reviewed the appraiser's report objected or warned Ver that
16 the valuation was too low. As discussed in more detail below, this approach to
17 accounting and reporting BTC was perfectly reasonable given the lack of statutory
18 clarity around the tax treatment of digital assets that persists to this day.

19 Based on Lawyer 1's advice to obtain an appraisal of BTC that accounted for
20 the effect of selling those BTC all at once, Ver approached Appraiser 2 to appraise
21 BTC that were not assigned to his U.S. companies. Ind. ¶ 27.e.xviii (quoting Ex. 8).
22 He emphasized that this would require appraising the value of BTC "in an illiquid
23 market," because that is what existed in early 2014. Ind. ¶ 27.e.xviii (quoting Ex. 8).
24 As they discussed, "[t]he market at that time was very very thin, and any substantial
25 sale of bitcoins would easily crash the price," and any valuation would depend in
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1 part on “trading volume volatility.” Ex. 8 (quoted in Ind. ¶ 27.e.xxiii). Appraiser 2
2 therefore began preparing a valuation of the BTC in question.⁴

3 That valuation process was short-circuited when Ver’s lawyers learned that
4 the BTC not accounted for in the valuation of Ver’s U.S. companies were, in fact,
5 owned for tax purposes by MemoryDealers Japan, an affiliate of MemoryDealers
6 U.S. owned by Ver’s romantic partner, a Japanese citizen and resident. Ver’s lawyers
7 contemplated the potential entity ownership of Ver’s BTC before consulting with
8 Ver regarding that potential approach. *See* Ex. 10 (cited in Ind. ¶ 27.e.xxvii) (noting
9 that Lawyer 1 would look into “the exactness of [Ver’s] holdings whether personal
10 or entity”). As one attorney later explained, the lawyers concluded that the BTC were
11 owned by MemoryDealers Japan because they were traded using MemoryDealers
12 Japan’s bank account, and Roger’s partner was the sole shareholder of
13 MemoryDealers Japan. *See* Ex. 11 (cited in Ind. ¶ 27.e.xxviii). That attorney
14 explained that although the funds originated from Ver, Ver “made one or more gifts
15 of BTC to [his] partner,” which “were subject to US gift tax” but not exit tax, and
16 any subsequent trades were executed within Ver’s role as an agent of
17 MemoryDealers. *Id.* Ver’s lawyers agreed to consider “whether we can still take this
18 position” in light of Ver’s personal understanding that the coins had been his. *Id.*
19 The lawyers—not Ver—determined that Ver’s actions legally “gave the BTC wallet
20 to [his partner],” and that they would “report[] [it] as a gift.” Ex. 12. After
21 discussions with counsel, Ver thereafter filed a tax return memorializing what his
22 counsel told him had occurred under the rules of the tax code: his provision of the
23 wallet’s passcode and use of MemoryDealers Japan’s account to trade constituted a
24 gift of the resulting BTC to the owner of MemoryDealers Japan. Ind. ¶ 27.e.xxix.

25
26
27 ⁴ Ver estimated that he “h[e]ld personally” 25,000 BTC after excluding the value
28 of BTC that he may have held custodially for others. Ex. 9 (quoted in Ind. ¶ 27.e.xxvi).

1 Because Ver's lawyers advised him that he did not need to pay taxes on
2 MemoryDealers Japan's property and advised him that the BTC Ver considered
3 personal were in fact MemoryDealers Japan's property, those BTC were not listed
4 on the May 4, 2016 U.S. Nonresident Alien Tax Return (Form 1040NR) for tax year
5 2014. Ind. ¶ 27.f.

6 **1) Professional Advice in 2017**

7 The government's charges involving Ver's filing of his 2017 taxes are
8 similarly unfounded, as the government now knows. The indictment's 2017
9 allegations are directly contrary to the real-time advice provided to Ver by his legal
10 and accounting professionals. The government has alleged that Ver intentionally
11 failed to report capital gains that accrued when MemoryDealers U.S. and Agilestar
12 shut down in 2017 and their assets were transferred to Ver. Whereas the 2014
13 allegations attack Ver for not recording sufficient BTC as his personal property, the
14 2017 allegations attack him for not recording the same BTC as corporate property
15 subject to taxation upon transfer.

16 Regardless of this contradiction, the indictment's 2017 allegations are fatally
17 flawed and are based on facts that the government now knows to be false. In 2016,
18 Ver was again advised by Law Firm 1, which explained to Ver that gains on the sale
19 of MemoryDealers U.S. and Agilestar would not be subject to federal tax because,
20 in general, capital gains are not taxable to non-residents like Ver, who had by then
21 expatriated.⁵ With this backdrop, two events occurred in 2017. First, in June 2017,
22 Ver was in the process of winding down his U.S. businesses, and asked Employee 1
23 to close out the MemoryDealers books, which at that time reported less than \$10,000
24 in assets. Second, later that year, Ver sold some of his BTC. Accurately or
25 inaccurately, Ver believed based upon discussions with counsel that he would not
26

27 _____
28 ⁵ See Ex. 13.

1 owe capital gains taxes upon the sale of his BTC assets following expatriation
2 because his U.S. tax obligations on pre-expatriation assets had concluded upon his
3 payment of expatriation taxes.

4 In 2018, in preparation for Ver's 2017 taxes, Return Preparer 1 asked Ver to
5 confirm that he had not received any distributions or other payments from
6 MemoryDealers or Agilestar.⁶ In light of the fact that Employee 1 had not issued
7 Ver a 1099-DIV for 2017, and Ver's belief that he did not need to pay taxes upon
8 the sale of his pre-existing BTC assets post-expatriation, he confirmed that no
9 distributions had been made in 2017. Nonetheless, in the same email, in response to
10 Return Preparer 1's request that he confirm that he had "no cryptocurrency
11 transactions on U.S. exchanges in 2017," Ver corrected Return Preparer 1's mistaken
12 understanding and explained that that he had made "substantial trades" on U.S.-
13 based crypto currency exchanges, and asked Law Firm 1 what needed to be done
14 about those trades. Two weeks later, Return Preparer 1 responded to Ver's question
15 on whether he owed U.S. taxes on his 2017 BTC trades. Return Preparer 1 advised
16 Ver that his trades on the U.S. exchanges were not taxable to him because Ver was
17 a nonresident, and U.S. sales of intangible personal property are sourced to the
18 residence of the seller. *See* Ex. 14. Return Preparer 1 also advised Ver it would not
19 need any further detail about those transactions. *See id.*

20 The context for Ver's 2017 filing was previously reflected in privileged
21 communications, which have previously been provided to the government and, now,
22 to the Court. Despite a prior disclosure of this evidence that fatally undermines the
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27 ⁶ *See* Ex. 14. (cited in Ind. ¶ 27.i.vii.)
28

1 government's claim of intentional misconduct, the government has persisted in
2 prosecuting Ver for conduct it now knows, definitively, not to have been criminal.⁷

3 **2) The Government Violates Attorney-Client Privilege and Its**
4 **Own Policies**

5 Ver first learned of the Department's investigation in December 2017, after
6 Special Agents with the IRS Criminal Investigation Division appeared at the law
7 office of Ver's tax counsel and conducted an unannounced interview of one of Ver's
8 attorneys. When another of Ver's attorneys intervened and ended the interview, the
9 Special Agents served the law firm and two of its employees with grand jury
10 subpoenas. Department policy requires significant scrutiny by Department
11 supervisors and safeguards against abuse prior to the questioning of a subject's
12 attorney or the service of compelled process on an attorney. Justice Manual § 9-
13 13.410. An unannounced interrogation by on-duty, armed, federal agents
14 immediately prior to the service of compelled process strongly suggests that this
15 investigative step fell outside of Department policy or supervisory approval.
16 Unsurprisingly, this "technique" has resulted in the collection of privileged material
17 that remains subject to litigation.⁸

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20 ⁷ Through this limited waiver of Ver's privilege regarding his 2017 filing, Ver does
21 not, and does not intend, to waive privilege as to other confidential
22 communications.

23 ⁸ Should Ver be required to appear, he intends to move to dismiss based on the use
24 and derivative use of information coerced through the agents' unlawful interview
25 of Ver's lawyer. Because such a motion will likely require an evidentiary hearing
26 at which Ver would have a right to be present, such a motion must be delayed until
27 after the Spanish courts rule on the government's extradition request. By citing to
28 the documents that the government has already used to seek its indictment, Ver
does not waive or forgo any such motion or the underlying privilege related to the
legal advice Ver received in connection with the process of expatriating and filing
his 2014 tax returns.

1 **3) The Indictment and Ver’s Arrest in Spain**

2 Although Ver had long engaged the government in discussions regarding a
3 civil resolution of this matter, the government has *never* been able to articulate the
4 taxes purportedly owed by Ver. Instead of continuing those discussions in good faith,
5 but while Ver’s prior counsel remained under the impression that discussions were
6 ongoing, on February 15, 2024, the government announced that Ver had been
7 charged in an eight-count indictment. Ver was in Spain at that time—he had never
8 fled from criminal charges; he was and is in no sense a “fugitive.”

9 Compounding the many problems in this case, and particularly the
10 government’s continued insistence on prosecution despite its awareness that the
11 indictment is grounded in significant part on selective summary and quotation of
12 otherwise exculpatory communications, the government has enlisted the Spanish
13 courts in pursuit of his extradition. After arguing (unsuccessfully) for his detention
14 in Spain, the government—again, having been informed expressly of the errors in
15 their indictment—transmitted that document through the U.S. and Spanish Central
16 Authorities for the purpose of seeking extradition, which remains pending.

17 Most egregiously, the government’s extradition “package” submitted to the
18 Spanish authorities on August 19, 2024 included the original indictment, including
19 the baseless claim that Ver withheld information from his accountants regarding his
20 2017 tax filings *despite the government having reviewed the full communication*
21 *between Ver and his accountants revealing the indisputable falsity of that allegation*
22 *provided to the government by Ver on July 18, 2024.* Notwithstanding the
23 government’s possession of that exculpatory information, it further permitted the
24 Spanish prosecutor to reiterate the same false claims to the Spanish court on October
25 24, 2024, and sought—and continues to seek—an illegal extradition of Ver based in
26 part on allegations it knows to be untrue.
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1 **III. ARGUMENT**

2 The indictment must be dismissed. The charges are unconstitutional: they rely
3 on a tax that is itself a violation of both the Sixteenth Amendment and the Due
4 Process Clause of the Fifth Amendment; they rely on impermissibly vague laws that,
5 at all relevant times, provided no basis for a person of reasonable intelligence to
6 understand the proper application of tax laws to digital currencies; and they rely on
7 the government’s persistent trampling on basic rights and notions of fair play.⁹

8 **A. The Exit Tax Violates the Constitution**

9 The exit tax obligates a covered expatriate to pretend that they “sold” “[a]ll
10 [of their personal and real] property ... on the day before the expatriation date for its
11 fair market value.” 26 U.S.C. § 877A(a)(1). The covered expatriate is then taxed on
12 the imaginary gain from that pretend sale as though that gain had in fact been
13 realized. 26 U.S.C. § 877A(a)(2)(A).

14 “[T]axes on personal property [are] direct taxes” that “must be apportioned
15 among the several States” under U.S. Const. art. I § 9. *Nat’l Fed’n of Indep. Bus. v.*
16 *Sebelius*, 567 U.S. 519, 571 (2012) (citing *Eisner v. Macomber*, 252 U.S. 189
17 (1920)). The Sixteenth Amendment creates a limited exception for direct taxes on
18 incomes derived from any source. That exception does not apply to the exit tax. The
19 exit tax is unapportioned, direct, and not exempted by the Sixteenth Amendment.
20 The tax, moreover, presents an unjustified burden on the fundamental right to
21 expatriate. For all of these reasons, the exit tax is unconstitutional.

22 _____
23 ⁹ The government may oppose this motion by relying on a situation of the
24 government’s own making, namely Ver’s presence in Spain at the time of his
25 sudden arrest. However, the “fugitive disentitlement” doctrine does not apply to
26 Ver for purposes of this motion. Ver is neither a fugitive nor subject to
27 disentitlement. *See United States v. Bescond*, 24 F.4th 759 (2d Cir. 2021). Ver, a
28 foreign citizen, was living abroad long before the offenses in this matter arose, and
was actively engaged in negotiations with the government when the government
chose to secretly indict Ver and seek his arrest while he was on vacation in Spain.

1 **1) The Exit Tax is Unapportioned**

2 Apportionment requires measures ensuring that the tax collected from each
3 state is in proportion to its population. The exit tax does not require such measures,
4 and it is therefore indisputably unapportioned.

5 **2) The Exit Tax is Direct**

6 The exit tax imposes a direct tax because it applies regardless of whether the
7 owner transfers their assets or engages in any other particular use or enjoyment of
8 the assets. Direct taxes are those that are “levied upon or collected from persons
9 because of their general ownership of property [and] which fall[] upon the owner
10 merely because he is owner, regardless of the use or disposition made of his
11 property.” *Bromley v. McCaughn*, 280 U.S. 124, 136-38 (1929). A tax levied upon
12 property in all of its uses is direct, whereas an indirect tax is imposed “upon a
13 particular use or enjoyment of property or the shifting from one to another or any
14 power or privilege incidental to the ownership or enjoyment of property.” *Compare*
15 *id.* at 137, *with Fernandez v. Weiner*, 326 U.S. 340, 352 (1945).

16 The exit tax applies to “the increase in value of assets that continue to be held”
17 without any transfer, use, or enjoyment. *See* J. Comm. on Tax’n, 104th Cong., Issues
18 Presented by Proposals to Modify the Tax Treatment of Expatriation, at 69 (1995).
19 While the expatriating individual may be changing locations, the exit tax applies to
20 assets like real property, stock, and allegedly BTC that do not move or undergo any
21 event whatsoever.

22 **3) The Exit Tax Is Not Excepted by the Sixteenth Amendment**

23 For an unapportioned direct tax, like the exit tax, to be constitutional, it must
24 satisfy the Sixteenth Amendment. The Sixteenth Amendment requires proof that the
25 amount being taxed qualifies as “income” to the taxpayer. *Taft v. Bowers*, 278 U.S.
26 470, 481 (1929); *see also Edwards v. Cuba R. Co.*, 268 U.S. 628, 631 (1925) (“The
27 Sixteenth Amendment, like other laws authorizing or imposing taxes, is to be taken
28

1 as written, and is not to be extended beyond the meaning clearly indicated by the
2 language used.”). The constitutionality of the exit tax therefore turns on whether the
3 unrealized increase in value of property is an “income.” An unrealized and
4 potentially temporary increase in value is not income, and as a result, the exit tax is
5 unconstitutional.

6 Unrealized increases in capital asset spot prices are not income. A “gain” does
7 not become income until it is “‘derived,’ that is, received or drawn by the recipient
8 (the taxpayer) for his *separate* use, benefit and disposal.” *Macomber*, 252 U.S. at
9 207. An “increase in value of capital investment is not income,” until it has been
10 “realized or received” in a transaction. *Id.* at 212, 214-15. Because any increase in
11 the spot price of BTC had not been “realized or received,” it was not taxable income.

12 The core rule remains that gains in a capital asset’s value are not “income”
13 within the meaning of the Sixteenth Amendment until they are “realized.” *Moore v.*
14 *United States*, 144 S. Ct. 1680, 1701 (2024) (Barrett, Alito, JJ., concurring); *id.* at
15 1721-22 (Thomas, Gorsuch, JJ., dissenting). Where the owner of a capital asset has
16 “not received a dividend, profit from selling their [asset], or any other pecuniary
17 benefit from their [asset] ownership,” that owner has “not [yet] ‘derived’ income
18 from their [asset] because nothing has come in.” *Moore*, 144 S. Ct. at 1702 (Barrett
19 op.); *see also id.* at 1722 (Thomas op.) (“The fact is, property is a tree; income is the
20 fruit.” (quoting *Waring v. Mayor and Aldermen of Savannah*, 60 Ga. 93, 100
21 (1878))). Unrealized appreciation in the value of an asset cannot be taxed as income.

22 The Ninth Circuit’s holding in *Moore*, 36 F.4th 930 (9th Cir. 2022), *aff’d on*
23 *other grounds*, 144 S. Ct. 1680 (2024) is not to the contrary. 36 F.4th 930 (9th Cir.
24 2022), *aff’d on other grounds*, 144 S. Ct. 1680 (2024). In *Moore*, the court reviewed
25 the constitutionality of a tax on incomes realized by a foreign corporation but not yet
26 distributed to the corporation’s shareholders. The court observed that “[w]hether *the*
27 *taxpayer* has realized income does not determine whether a tax is constitutional”
28 because income can be taxed even when it has been realized by a corporate entity

1 and not yet realized by the taxpayer. 36 F.4th at 935-36 (emphasis added).¹⁰ Instead,
2 taxable income can include “attributing a corporation’s income pro-rata to its
3 shareholders.” *Id.* at 936. Because the corporation had undisputedly recognized
4 income and the taxpayer “ha[d] some ability to control distribution” of that realized
5 income, the income could be taxed. *Id.* at 936-37. *Moore* does not hold that gains
6 that have not been realized by *anyone* can nonetheless be taxed. Such a holding
7 would contradict controlling Supreme Court case law.

8 Section 877A creates a fictitious realization event (*i.e.*, a constructive sale)
9 where none has occurred. Section 877A, by its very operation, is a tax on the
10 unrealized appreciation of property owned by an individual. Because section 877A
11 taxes unrealized appreciation, it is not a tax on “income” within the meaning of the
12 Sixteenth Amendment, and is unconstitutional under Article I’s apportionment
13 clause.

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17 ¹⁰ The court also stated in this paragraph that “the Supreme Court has made clear
18 that realization of income is not a constitutional requirement.” *Id.* (citing *Helvering*
19 *v. Horst*, 311 U.S. 112, 116 (1940); *Helvering v. Griffiths*, 318 U.S. 371, 393-94
20 (1943)). To the extent this statement addresses instances in which gain has not
21 been realized by anyone, it is dicta. The statement is also incorrect. Both *Horst* and
22 *Griffiths* had no cause to reconsider the realization requirement because both
23 involved cases in which the gains were realized. *See Horst*, 311 U.S. at 115
24 (holding that gains in interest coupons were taxable to a donor because they were
25 “realiz[ed] ... when the last step is taken by which [the taxpayer] obtains the
26 fruition of the economic gain which has already accrued to him”) (citations
27 omitted); *Griffiths*, 318 U.S. at 394 (declining to reconsider *Macomber*’s
28 realization requirement because the tax in question did not reach unrealized gains).
Since *Horst* and *Griffiths*, “[T]he Supreme Court has described “‘income” in its
constitutional sense’ as ‘instances of undeniable accessions to wealth, *clearly*
realized, and over which the taxpayers have complete dominion.” *Quijano v.*
United States, 93 F.3d 26, 30 (1st Cir. 1996) (quoting *Comm’r v. Glenshaw Glass*
Co., 348 U.S. 426, 432 n.11 (1955) (emphasis added)).

1 **4) The Exit Tax Is an Unconstitutional Infringement on the**
2 **Right to Expatriate**

3 The right to leave the country is fundamental. All Americans have a
4 “constitutional right of voluntary expatriation.” *Richards v. Sec’y of State*, 752 F.2d
5 1413, 1422 (9th Cir. 1985). The constitutional right to expatriate is fundamental
6 because it is “deeply rooted in this Nation’s history and tradition and implicit in the
7 concept of ordered liberty” *See Washington v. Glucksberg*, 521 U.S. 702, 720-
8 21 (1997) (internal quotations and citations omitted); *Murray v. The Charming*
9 *Betsy*, 6 U.S. 64, 93 (1804) (“[E]very man has a right to expatriate himself, is
10 admitted by all the writers upon general law; and it is a principle peculiarly congenial
11 to those upon which our constitutions are founded.”); *Maehr v. U.S. Dep’t of State*,
12 5 F.4th 1100, 1112 (10th Cir. 2021) (holding that both the right of expatriation and
13 right to travel internationally are “deeply woven into our country’s history”). The
14 Supreme Court and Congress have each recognized that the right to leave one’s
15 country is “a natural and inherent right of all people, indispensable to the enjoyment
16 of the rights of life, liberty, and the pursuit of happiness.” *Savorgnan v. United*
17 *States*, 338 U.S. 491, 497 & n.11 (1950) (quoting Preamble to the Act of July 27,
18 1868, ch. 249, 15 Stat. 223).

19 Because the right to expatriate is a fundamental right, a substantial restriction
20 on that right is subject to strict scrutiny and may only survive if narrowly tailored to
21 promote a compelling government interest. *See Aptheker v. Sec’y of State*, 378 U.S.
22 500, 507-08 (1964) (holding that the denial of passports to United States citizens,
23 who were communist party members, was an unconstitutional burden on the
24 fundamental right of international travel).¹¹ In order “[t]o assure the continued
25

26 ¹¹ The scrutiny applied to burdens on the right to vote depend on the degree of the
27 burden. Under *Burdick-Anderson* doctrine, “severe” restrictions must be narrowly
28 drawn to advance a state interest of compelling importance. *Burdick v. Takushi*,

1 dedication of the United States to *fundamental human rights*,” U.S. law prohibits the
2 government from extending certain trade benefits to certain other countries if they
3 deny their citizens “the right or opportunity to emigrate” or “impose[] more than a
4 nominal tax on emigration.” 19 U.S.C. § 2432(a).¹² In light of the standard chosen
5 by Congress as necessary to protect fundamental human rights in other nations, it
6 would be anomalous to conclude that U.S. law can “impose[] more than a nominal
7 tax” on expatriates.

8 But the current exit tax attempts to do just that: demanding millions of dollars
9 from expatriates in taxation that would not apply to anyone else. The only potential
10 government interest is raising revenue, and there are innumerable less restrictive
11 means through which revenue can be raised. *See Shapiro v. Thompson*, 394 U.S.
12 618, 633 (1969) (holding that fiscal concerns were insufficient to justify burden on
13 public assistance programs based on exercise of right to interstate migration);
14 *Bullock v. Carter*, 405 U.S. 134, 147 (1972) (holding that the imposition of filing
15

16 504 U.S. 428, 434 (1992) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788
17 (1983)). “[R]easonable, nondiscriminatory restrictions” are subject to lower
18 scrutiny. *Id.* To the extent that the *Burdick-Anderson* doctrine applies here, the exit
19 tax imposes a severe burden and is neither “reasonable” nor “nondiscriminatory.”
20 The exit tax discriminates against both the wealthy and U.S. origin non-citizens by
21 singling them out for immense tax bills on unrealized gains that do not apply to
anyone else. Regardless of the level of scrutiny applied, the exit tax fails.

22 ¹² International law likewise recognizes the fundamental right to expatriate. *See*,
23 *e.g.*, Universal Declaration of Human Rights, U.N.G.A. Res. 217A (III) (Dec. 10,
24 1948) (recognizing the universal right to leave one’s country and the right to
25 change one’s nationality); International Covenant on Civil and Political Rights,
26 U.N.G.A. Res. 2000A (XXI) (Dec. 16, 1966) (prohibiting restrictions on the right
27 to leave one’s country except those which are provided by law and necessary to
28 protect national security, public order, public health, morals, or the rights and
freedoms of others); Restatement of the Law of Foreign Relations § 211
(recognizing that imposing involuntary nationality on an individual may violate
international law).

1 fees up to \$8,900 were an unconstitutional burden on the right to run for office and
2 interest in financing elections was insufficient). The exit tax is an unconstitutional
3 burden on the fundamental right to expatriate.

4 **B. The Indictment Rests on Impermissibly Vague Statutory**
5 **Foundations**

6 The government’s charges against Ver rest on an attempt to impart a
7 semblance of “clarity” regarding cryptocurrencies’ tax treatment offered by the IRS
8 in March 2014 to activities occurring prior to March 25, 2014. The lack of any rules
9 in effect at that time deprived Ver of notice and rendered the law unconstitutionally
10 vague. Moreover, the purported “clarity” offered by the IRS as to the tax treatment
11 of digital assets as a monolithic category, as issued in its Notice 2014-21 Guidance,
12 a set of Q&A’s not subject to notice and comment review, is precisely the type of
13 agency rule interpretation that does violence to the underlying statutory regime that
14 “guidance” purports to interpret. In the wake of the Supreme Court’s decision in
15 *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024), that shaky interpretation
16 warrants no deference and, once set aside, only serves to emphasize the vagueness
17 of the laws that the government would use to imprison cryptocurrency entrepreneurs
18 who labored under that lack of statutory and regulatory clarity.

19 **1) Bitcoin’s Regulatory Uncertainty and the Tax Code’s Vague**
20 **Provisions**

21 Prior to March 25, 2014, no official IRS or other government guidance existed
22 as to the U.S. tax classification of BTC, and no obvious analogy to BTC existed
23 under then-current law. With no precedent or applicable guidance, taxpayers were,
24 prior to that date, without a basis to track BTC holdings as “property,” under the exit
25 tax or any other provision of U.S. tax law, that would later require a fair-market
26 value analysis—a state of affairs that the government now weaponizes against Ver.
27 That anachronistic attempt to criminalize a purported “failure” on the part of a good-
28 faith taxpayer warrants rejection by the Court.

1 “In our constitutional order, a vague law is no law at all.”¹³ As the Supreme
2 Court recently explained, “[o]nly the people’s elected representatives in Congress
3 have the power to write new federal criminal laws. And when Congress exercises
4 that power, it has to write statutes that give ordinary people fair warning about what
5 the law demands of them.”¹⁴ Congress is not permitted to “set a net large enough to
6 catch all possible offenders, and leave it to the courts to step inside and say who
7 could be rightfully detained, and should be set at large.”¹⁵

8 The prohibition against vague laws “rests on the twin constitutional pillars of
9 due process and separation of powers.”¹⁶ Courts may thus find a statute
10 unconstitutionally vague “for either of two independent reasons. First, if it fails to
11 provide people of ordinary intelligence a reasonable opportunity to understand what
12 conduct it prohibits. Second, if it authorizes or even encourages arbitrary and
13 discriminatory enforcement.”¹⁷ Of the two concerns, “the more important . . . is not
14 actual notice, but the other principal element of the doctrine—the requirement that
15 a legislature establish minimal guidelines to govern law enforcement.”¹⁸ Here, Ver
16 was one of the first individuals who attempted in good faith to track and pay taxes
17 on virtual currency assets. At the same time, thousands of virtual currency users
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20 ¹³ *United States v. Davis*, 588 U.S. 445, 447 (2019).

21 ¹⁴ *Id.* at 447-48.

22 ¹⁵ *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (quoting *United States v.*
Reese, 92 U.S. 214, 221 (1875)).

23 ¹⁶ *Davis*, 588 U.S. at 451.

24 ¹⁷ *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

25 ¹⁸ *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (internal quotation and citation
26 omitted); *Wyoming Gun Owners v. Gray*, 83 F.4th 1224, 1237 (10th Cir. 2023) (“A
27 vague law impermissibly delegates basic policy matters to policemen, judges, and
28 juries for resolution on an ad hoc and subjective basis.”) (quoting *Granyned v. City*
of Rockford, 408 U.S. 104, 108-09 (1972)).

1 made no such effort and instead withheld their virtual currency from the IRS
2 altogether. While the government prosecuted Ver, it provided amnesty or a mere
3 warning letter to those who hid their virtual currency until the vagueness marginally
4 dissipated in 2019. This is a paradigm of arbitrary prosecution: criminal prosecution
5 of those who attempt to discern the correct treatment of virtual currency while
6 leaving untouched those who made no good faith attempt—a tacit concession that
7 the law was in fact vague.

8 On March 25, 2014—*following* Ver’s expatriation—the IRS issued Notice
9 2014-21, which purported to provide guidance on the IRS’s view of the U.S. tax
10 treatment of BTC. The IRS did not issue any additional guidance until 2019 and,
11 notwithstanding Notice 2014-21, uncertainties regarding the U.S. tax treatment of
12 BTC persisted through 2018. The result has been a regulatory environment that
13 presents significant hurdles to those who, in good faith, would account for digital
14 asset holdings and attempt to report earnings related to those assets to the IRS. The
15 indictment criminalizes Ver for, in the government’s view, the “wrong” treatment of
16 BTC, but the ability of a reasonable person to recognize what would be considered
17 the “wrong” treatment was not, and is not, sufficiently clear to justify criminal
18 prosecution.

19 U.S. tax law describes a finite number of ideal transactions, for example,
20 ownership and disposition of indebtedness, corporate stock, or precious metals. For
21 those described transactions, the law attaches a set of operative tax rules. Whenever
22 the public, including tax professionals, are confronted with a *new* asset or transaction
23 for which no specific guidance has been issued, it becomes necessary to determine
24 which “idealized” category that new asset or transaction it fits most neatly into.¹⁹
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26

27 ¹⁹ Edward D. Kleinbard, *Equity Derivative Products: Financial Innovation’s*
28 *Newest Challenge to the Tax System*, 69 TEX. L. REV. 1319, 1320 (1991).

1 This task of navigating regulatory uncertainty posed special difficulties in the
2 case of cryptocurrencies, particularly for BTC in its infancy. The United States
3 government—though not the DOJ or IRS—specifically acknowledged this
4 difficulty. According to a report issued in 2013 by the U.S. Government
5 Accountability Office (the “GAO Report”), in the absence of authoritative guidance,
6 taxpayers were “uncertain about the proper tax treatment of virtual transactions” like
7 transactions in BTC.²⁰ Some “ideal” analogues posited for BTC before the issuance
8 of Notice 2014-21, and mentioned in the GAO Report, were (a) foreign currency,
9 (b) non-currency capital asset, and (c) financial instrument. Each, given the actual
10 and potential uses of digital assets like BTC, was (and remains) entirely plausible,
11 and each carries with it differences in how such assets would be accounted for by
12 businesses and individuals.

13 *1. Foreign Currency*

14 Foreign currency is subject to special rules under the U.S. tax code.²¹ Gain or
15 loss from the disposition of foreign currency is ordinary instead of capital.²²
16 Individuals generally are entitled to preferential rates on net long-term capital
17 gains,²³ although they are subject to limitations on their ability to deduct net capital
18
19

20 ²⁰ Government Accountability Office, “Virtual Economies and Currencies:
21 Additional IRS Guidance Could Reduce Tax Compliance Risks,” GAO-13-516
22 (2013), <https://www.gao.gov/assets/gao-13-516.pdf>.

23 ²¹ All section references herein are to the U.S. Internal Revenue Code of 1986, as
24 amended (the IRC), and the regulations promulgated thereunder by the U.S.
25 Department of the Treasury.

26 ²² 26 U.S.C. § 988(a).

27 ²³ The top marginal U.S. federal income tax rate for individuals was 35% in 2012,
28 39.6% from 2013-2017, and 37% in 2018; the top long-term capital gains rate was
15% in 2012 and 20% from 2013-2018. *See* 26 U.S.C. § 1.

1 losses against ordinary income.²⁴ Individuals are not taxed on personal foreign
2 currency transactions that give rise to less than \$200 of gain in a tax year.²⁵
3 Moreover, if an individual’s business has a “functional currency” other than the U.S.
4 dollar, the business generally can compute its net income or loss in that functional
5 currency and translate it into U.S. dollars at the average exchange rate for the entire
6 tax year, instead of separately determining its foreign currency exchange gain or loss
7 on every transaction.²⁶ A business’ functional currency is the currency of the
8 economic environment in which a significant part of its activities are conducted,
9 provided the business keeps its books and records in that currency.²⁷ Finally, an
10 assortment of other special provisions under the tax code could be implicated if an
11 individual taxpayer engages in transactions with foreign currency or instruments
12 related to foreign currency.²⁸

13 Notwithstanding those special rules, the U.S. tax code does not define
14 currency. In 1999, the Federal Circuit defined currency as “a medium of
15 exchange.”²⁹ Given that BTC was originally conceived as, and intended to be, a
16

17 ²⁴ Individuals can deduct net capital losses against only \$3,000 of ordinary income
18 each year and can carry forward the remainder. *See* 26 U.S.C. § 1211(b); 26 U.S.C.
19 § 1212(b).

20 ²⁵ 26 U.S.C. § 988(e).

21 ²⁶ 26 U.S.C. § 987.

22 ²⁷ 26 U.S.C. § 985(b).

23 ²⁸ *See, e.g.*, 26 U.S.C. § 351(e) (treating foreign currency as stocks and securities
24 for determining whether a corporation is an investment company); 26 U.S.C. §
25 721(b) (analogous rule for partnerships); 26 U.S.C. § 1256 (treating foreign
26 currency contracts as “section 1256 contracts” generally subject to tax on
disposition at 60% long-term capital gain or loss and 40% short-term capital gain
or loss).

27 ²⁹ *AMP Inc. v. United States*, 185 F.3d 1333 (Fed. Cir. 1999), *citing* Webster’s
28 Ninth New Collegiate Dictionary (1988); *see also* IRS Revenue Ruling 74-218

1 medium of exchange,³⁰ it was and remains reasonable to treat BTC as a foreign
2 currency for U.S. tax purposes—entirely at odds with the indictment’s apparent
3 assumption as to the “proper” treatment and reporting of BTC. *See, e.g., Ind. ¶¶ 13,*
4 *34.*

5 *2. Non-Currency Capital Assets*

6 Property, other than foreign currency, that is held for investment or personal
7 use, and not as business inventory, generally is a capital asset for U.S. tax purposes.³¹
8 Unlike foreign currency, capital assets generally give rise to capital gain or loss
9 (instead of ordinary income or loss) when disposed of for cash, services, or different
10 property. Under regulations applicable to stocks and securities, which typically are
11 capital assets for individuals, if a taxpayer purchases multiple lots of identical stocks
12 or securities at different dates or prices and then sells part of the holdings, the
13 taxpayer generally is deemed to sell lots in the same order acquired (so-called “first
14 in, first out,” or “FIFO,” accounting) unless the taxpayer “adequately identif[ies]”
15 which lots it has sold.³² Although BTC is not a stock or security within the meaning
16 of the Tax Code, the Tax Court has applied the principles of the regulations to
17 commodity futures, which are treated as commodities (and not stock or securities)
18 for U.S. tax purposes.³³ Treating BTC as a capital asset, therefore, would permit
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20
21

22 (defining currency in a different context to include “gold, silver, [and] other metals
23 or paper used as a circulating medium of exchange”).

24 ³⁰ *See* Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System* (2008).

25 ³¹ *See* 26 U.S.C. § 1221 (defining capital asset through exclusion of inventory,
26 depreciable real property, and other categories of property).

27 ³² 26 C.F.R. § 1.1012-1(c).

28 ³³ *Perlin v. Commissioner*, 86 T.C. 388 (1986).

1 taxpayers to identify which lots of BTC they sold and otherwise require FIFO
2 accounting.³⁴

3 *3. Financial Instruments*

4 If all BTC held by an individual taxpayer were treated as a single financial
5 instrument, the taxpayer likely would still recognize capital gain or loss on disposing
6 of the BTC for cash, services, or different property, but would calculate that gain or
7 loss using a unitary tax basis and holding period in the BTC.³⁵ Again, this plausible
8 treatment would result in a different accounting—and require different accounting
9 tools and methods—for BTC as compared to other “ideal” forms of described assets;
10 a source of uncertainty in the underlying legal framework against which the
11 indictment would seek to hold Ver criminally liable.

12 **2) Notice 2014-21 Warrants No Deference and Does Not Remedy**
13 **the Tax Code’s Vagueness**

14 Notice 2014-21 reflects the IRS’s post-Ver-extradition view that BTC is
15 property and not virtual currency—a view that was and remains hotly disputed.³⁶ As
16

17 ³⁴ For example, a registration statement filed with the U.S. Securities and
18 Exchange Commission in 2013 for an investment vehicle that intended to invest in
19 BTC disclosed that the vehicle intended to treat its BTC as a non-currency capital
20 asset for U.S. tax purposes in the absence of any contradictory guidance. *See*
21 *Winklevoss Bitcoin Trust Form S-1 Registration Statement at 68 (July 1, 2013),*
22 *available at*
[https://www.sec.gov/Archives/edgar/data/1579346/000119312513279830/d562329](https://www.sec.gov/Archives/edgar/data/1579346/000119312513279830/d562329ds1.htm#tx562329_16)
[ds1.htm#tx562329_16](https://www.sec.gov/Archives/edgar/data/1579346/000119312513279830/d562329ds1.htm#tx562329_16).

23 ³⁵ *See* 26 U.S.C. § 1012 (“The basis of property shall be the cost of such
24 property.”); 26 U.S.C. § 1222 (defining long-term and short-term).

25 ³⁶ *See, e.g.,* Government Accountability Office, *Virtual Economies and*
26 *Currencies: Additional IRS Guidance Could Reduce Tax Compliance Risks*, GAO-
27 13-516 (2013) (suggesting potential tax treatment for cryptocurrency as a foreign
28 currency, non-currency capital asset, or financial instrument); Texas Society of
Certified Public Accountants, *Comments on Notice 2014-21 Outlining Application*

1 property, according to the guidance, BTC typically would be treated as a capital asset
2 for individual investors who do not hold it as inventory. However, Notice 2014-21
3 does not even attempt to explain *why* BTC is not foreign currency, asserting simply
4 (and today, incorrectly) that BTC “does not have legal tender status in any
5 jurisdiction.” Today of course, BTC holds status as legal tender in a growing number
6 of jurisdictions, raising questions as to the continued validity of Notice 2014-21 on
7 its own terms.³⁷

8 By its own terms, Notice 2014-21’s reasoning no longer warrants excluding
9 BTC from the category of foreign currency, but even were that not so the Supreme
10 Court’s recent decision in *Loper Bright* invites the Court to set aside the IRS’s
11 unfounded “guidance” and recognize the fundamentally uncertain status of digital
12 assets and cryptocurrency under the U.S. tax code. In *Loper Bright*, the Supreme
13 Court reassessed its prior *Chevron* decision. *See Chevron, U.S.A., Inc. v. Nat. Res.*
14 *Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984), *overruled by Loper Bright Enters.*
15 *v. Raimondo*, 144 S. Ct. 2244 (2024). *Chevron* had established a standard of review
16 for the validity of agency regulations, under which a court would 1) determine
17 whether a statute speaks directly to the subject of a particular regulation or agency
18 guidance, and 2) determine, in the face of a truly ambiguous statute, whether the

19 _____
20 *of General Tax Principles to Transactions Involving Bitcoin, Other Virtual*
21 *Currencies*, 1 (“Because a virtual currency functions as a currency, is widely
22 accepted in some cases as tender and is a fungible asset, drawing on the large body
23 of case law, regulations and rulings that already exists with respect to foreign
24 currency transactions would present a more sensible approach.”); Mindy Lowy and
25 Miriam Abraham, *Taxation of Virtual Currency, Tax Notes*, 649, 652 (Nov. 11,
26 2013) (“we see a trend toward treating the Bitcoin as currency for legal and
27 regulatory purposes, which could provide a basis for treating it that way for tax
28 purposes as well”).

³⁷ *See, e.g., Joe Hernandez, El Salvador Just Became The First Country to Accept Bitcoin As Legal Tender*, NPR (Sept. 21, 2021); Ibrahim Ajibade, *Argentina Approves Bitcoin (*BTC) as “Official” Currency*, Nasdaq (December 21, 2023).

1 agency’s regulation was a reasonable interpretation of the statute, thereby warranting
2 judicial deference to the agency’s “reasonable” interpretation.

3 *Loper Bright* overruled *Chevron*, holding that “[c]ourts must exercise their
4 independent judgment in deciding whether an agency has acted within its statutory
5 authority.” 144 S. Ct. at 2273. Because *Chevron* previously applied to the
6 interpretation of tax regulations and guidance, *see Mayo Found. v. United States*,
7 562 U.S. 44 (2010), *Chevron*’s demise returns this Court to its proper role in
8 assessing the ambiguity of statutes without deference to a regulation purporting to
9 save that statute from its own ambiguity.

10 **3) The Indictment Charges an Impermissibly Vague “Offense”**

11 Without the already unpersuasive “guidance” issued under Notice 2014-21,
12 the Tax Code is impermissibly vague as to the proper treatment of BTC. That
13 vagueness, in turn, places taxpayers acting in good faith in an untenable position:
14 Unanswered questions on the U.S. tax treatment of BTC result in the reasonable
15 adoption of different tax basis tracking and reporting positions by different taxpayers
16 and tax professionals. The reasonable possibility of these multiple approaches, in
17 turn, renders the indictment an attempt to criminalize conduct in the face of a
18 fundamentally unclear statutory regime. While the indictment’s charges are
19 themselves filed under the mail fraud statute (18 U.S.C. § 1341) and various sections
20 of Title 26, each of those charges incorporates the Tax Code. Repeatedly, the
21 indictment references the Tax Code as a means of defining the substance of its
22 charges. *See, e.g., Ind. ¶¶ 13, 14, 18.* At bottom, the indictment claims that Ver failed
23 to disclose the “number and value of bitcoins he owned,” without once grappling
24 with the Tax Code’s lack of any provision that would make reporting in such a
25 manner necessary.

26 Given the undefined sweep of the Tax Code outside of its small set of defined
27 and described categories of property, *Congress*—not the Executive or Judicial
28 Branches—must return to the drawing board. “[T]he role of courts under our

1 Constitution is not to fashion a new, clearer law to take its place, but to treat the law
2 as a nullity and invite Congress to try again.”³⁸

3 **C. The Government’s Selective Quotation and Disregard of**
4 **Exculpatory Evidence Warrants Dismissal**

5 The indictment incorporates by reference and selectively quotes a number of
6 communications and documents that, when provided in full, exonerate rather than
7 inculcate. The indictment arose, moreover, from blatant interference in Ver’s
8 attorney-client privilege and in apparent contravention of Department of Justice
9 policy. This consistent disregard for fundamental fairness before the Grand Jury also
10 warrants dismissal of the indictment.

11 The Constitution provides that “[n]o person shall be held to answer for a
12 capital or otherwise infamous crime unless on a presentment or indictment of a grand
13 jury.” U.S. Const. amend. V. While prosecutors have broad powers in conducting
14 grand jury proceedings, that discretion is not boundless. “The prosecutor may not
15 circumvent [the grand jury’s constitutional] safeguard by overreaching conduct that
16 deprives the grand jury of autonomous and unbiased judgment.” *United States v. Al*
17 *Mudarris*, 695 F.2d 1182, 1184 (9th Cir. 1983). “Courts therefore will act when the
18 grand jury’s function has been so subverted as to compromise the integrity of the
19 judicial process. They may dismiss an indictment as an exercise of their inherent
20 supervisory power, or to protect a defendant’s due process rights.” *Id.* at 1185
21 (citations omitted).

22 As recounted above, the government’s grand jury presentation, and the
23 resulting indictment, appears to have relied on a pattern of selective presentation of
24 out-of-context, partial quotations to present a false narrative of willful tax evasion.

25 For instance, Ind. ¶ 27.c portrays Ver as a man intent on leaving the United
26 States:

27 _____
28 ³⁸ *Davis*, 588 U.S. at 448.

1 19 c. After failing to obtain citizenship in several other
2 20 countries, in early December 2013, defendant VER told Law Firm 1 that
3 21 he believed he would be able to obtain citizenship from St. Kitts and
4 22 renounce his U.S. citizenship by the end of the year.

5
6 In fact, the underlying communication makes clear that Ver's primary focus
7 was ensuring that his "exit tax payments [were] as clean as possible, with *no room*
8 *to have trouble from the IRS.*"

9 **From:** Roger Ver [mailto:roger@memorydealers.com]

Sent: Friday, April 26, 2013 11:09 AM

To: Employee 1

Cc: Return Preparer 2, Return Preparer 3, Return Preparer 1, Law Firm 1, Appraiser 1

Subject: Renunciation

11 Hi Everyone,

12 (Return Preparer 2 team, Law Firm 1 team, Employee 1 and Appraiser 1)

13 Everything seems to take a bit longer than planned, but things are moving along with my citizenship
14 application in another country,
15 and I plan to be able to renounce my US citizenship by the first half of June.

16 ______011145

17
18 I want to make sure that my exit tax payments are as clean as possible, with no room to have trouble from the
19 IRS in the future.

20 See Ex. 1 (summarized, misleadingly and in part, in Ind. ¶ 27.c).

21 Likewise, the document quoted in Ind. ¶ 27.e.vi is used to claim that Ver was
22 expressly instructed by his advisors to use a spot price valuation method:
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21 vi. A few weeks later, Return Preparer 1 told
22 defendant VER that Lawyer 1, another employee of Law Firm 1, had
23 determined that they had to use the \$800 per bitcoin value and again
24 asked defendant VER how many bitcoins defendant VER personally held.
25 Defendant VER withheld the requested information once more, and
26 instead said that using the \$800 per bitcoin value was “impossible
27 and unreasonable.” Lawyer 1 later told defendant VER that they were
28 legally required to use the \$800 per bitcoin value.

9 In fact, this was effectively the *opposite* of the advice Ver ultimately received,
10 as the government well knows. In the same email, following “some additional
11 research,” Ver’s advisors determine that a discount should apply (*i.e.*, that they
12 would not be using the \$800/BTC spot price valuation), and recommend that Ver
13 hire an appraiser:
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1 Message

2 From: [REDACTED]
3 Sent: 10/14/2015 8:16:35 PM
4 To: Roger Ver [roger@memorydealers.com]; [REDACTED]
5 Subject: Re: Rental income, bitcoin valuation, update on company appraisals

6 Dear Roger,

7 We did some additional research on valuation of your BTC.

8 Not surprisingly, the IRS has no rules about cryptocurrency
9 specifically, but we can compare BTCs to publicly traded stock. This is
10 how it works for publicly traded stock.

11 DEFAULT RULE

12 Unit price is the exchange price. Total value is number of shares
13 multiplied by unit price.

14 EXCEPTION FOR LARGE SHAREHOLDERS

15 If you own a block of shares that you cannot sell without depressing the
16 market, then you can take this effect into consideration and discount
17 the shares. However, because the default rule is number of shares times
18 unit price, it is up to the shareholder to establish the discounted price.

19 NEXT ACTION

20 We think you can use this valuation method for your BTC. However,
21 because we have the burden of proving the value is not number of BTC
22 times exchange price, we would like an appraisal of your BTC value by a
23 third party who has no personal interest in the tax implications of the
24 appraisal. Do you know someone who is qualified to appraise your BTC
25 holdings who can do this?

26 Best regards,

27 [REDACTED]

28 **Law Firm 1**

See Ex. 4 (quoted, in part, in Ind. ¶ 27.e.vi).

The same game is played in Ind. ¶¶ 27.e.iv and 27.e.vii, in which the government presents Ver as actively avoiding questions from his advisors. The government knows the full communications reveal Ver grappling with questions that were impossible to answer given the data available to him, and the accounting

1 procedures used prior to federal guidance defining the tax treatment of BTC. *See* Ex.
2 6 (quoted, in part, in Ind. ¶ 27.e.iv); Ex. 7 (quoted, in part, in Ind. ¶ 26.e.vii).

3 Presented in context, these and other communications exculpate Ver again and
4 again. The omission of the full context of those communications raises the
5 significant specter of the government’s presentation of a misleading picture of Ver’s
6 intent.

7 **IV. CONCLUSION**

8 This prosecution must end. The evidence that the government withheld from
9 the grand jury and with which it has been recently provided make clear that this
10 indictment was obtained and continues to be prosecuted without regard to
11 fundamental fairness or due process. The charges are lodged against a legal
12 background that provides no guidance to people of reasonable intelligence—or,
13 indeed, people of highly trained specialization in U.S. tax law—as to the limits and
14 proscriptions of the criminal law. The exit tax ignores core constitutional protections
15 against an entire category of taxes. For all of these reasons, the indictment must be
16 dismissed.

17 *[Signature page to follow]*
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1 Dated: December 3, 2024

Respectfully submitted,

2
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L.R. 11-6.2 Certificate of Compliance

The undersigned, counsel of record for Defendant Roger K. Ver certifies that this brief contains 9,539 words, for which Defendant has requested an enlarged word limit.

Dated: December 3, 2024

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