Appendix

[***Editing Note:*** *Page numbers from the reported opinion, 868 F.3d 438, are indicated, e.g., [****438****].*]

[Filed: 08/18/2017]

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARK CRAWFORD, RAND PAUL, in his official capacity as member of the United States Senate, ROGER JOHNSON, DANIEL KUETTEL, STEPHEN J. KISH, DONNA-LANE NELSON, L. MARC ZELL, *Plaintiffs-Appellants*	No. 16-3539
v.	
UNITED STATES DEPARTMENT OF THE TREASURY, UNITED STATES INTERNAL REVENUE SERVICE, UNITED STATES FINANCIAL CRIMES ENFORCEMENT NETWORK, *Defendants-Appellees*	

Appeal from the United States District Court
for the Southern District of Ohio at Dayton.
No. 3:15-cv-00205—Thomas M. Rose, District Judge

Argued: January 24, 2017

Decided and Filed: August 18, 2017

Before: BOGGS, SILER, and MOORE, Circuit Judges.

COUNSEL

[omitted]

OPINION

BOGGS, Circuit Judge. In 2010, Congress passed the Foreign Account Tax Compliance Act (FATCA), a law aimed at reducing tax evasion by United States taxpayers holding funds in foreign accounts. FATCA imposes account-reporting requirements (and hefty penalties for noncompliance) on both individual taxpayers and foreign financial institutions (FFIs). FFIs are further required to deduct and withhold a "tax" equal to 30% of every payment made by the FFI to a noncompliant (or "recalcitrant") account holder. To implement FATCA worldwide, the United States Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) have concluded intergovernmental agreements (IGAs), which facilitate FFIs' disclosure of financial-account information to the United States government, with more than seventy countries. Separately from FATCA and the IGAs, the Bank Secrecy Act imposes a foreign bank account reporting (FBAR) requirement on Americans living abroad who have aggregate foreign-account balances over $10,000; willful failure to file an FBAR invites a penalty of 50% of the value of the reportable accounts or $100,000, whichever is greater.

Plaintiffs—who include Senator Rand Paul and several individuals who claim to be subject to FATCA and the FBAR—sought to enjoin the enforcement of FATCA, the IGAs, and the FBAR, and they now appeal the dismissal of their lawsuit for lack of standing. For the reasons that follow, we affirm the judgment of the

district court.

I

A. The Parties

Plaintiffs' original verified complaint asserts claims against three defendants: Treasury, which administers FATCA and the FBAR; the IRS (an office of Treasury that also administers FATCA and the FBAR); and the United States Financial Crimes Enforcement Network (FinCEN), a Treasury Department bureau with administrative authority over the FBAR. Each of the seven plaintiffs alleges a unique set of harms:

Mark Crawford

Plaintiff Mark Crawford is an American citizen living in Albania with a residence in Dayton, Ohio. Crawford owns Aksioner, a brokerage firm in Albania that is a partner of Saxo Bank in Copenhagen. Crawford alleges injury because Saxo will not allow Aksioner to accept clients who are United States citizens "in part because the bank does not wish to assume the burdens that would be foisted on it by FATCA." Crawford also claims that Aksioner—which he owns—denied Crawford's own application for a brokerage account, and that Crawford [***444**] has suffered financial harm because FATCA is "forcing him to turn away prospective American clients living in Albania."

Senator Rand Paul

Senator Rand Paul claims that he "has been denied the opportunity to exercise his constitutional right as a member of the U.S. Senate to vote against the FATCA IGAs." Senator Paul claims that he would vote against the IGAs if they were submitted to the Senate for advice and consent under Article II, Section 2, of

the United States Constitution, or if they were submitted to the whole Congress for approval as "congressional-executive agreements." Senator Paul does not otherwise challenge FATCA, and he does not in any way challenge the FBAR.

Roger Johnson

Plaintiff Roger Johnson is an American citizen living in Brno, Czech Republic. Johnson is married to Katerina Johnson, a Czech citizen with whom Johnson previously shared joint financial accounts before they separated their accounts to avoid subjecting Katerina's account information to disclosure under FATCA.

Stephen J. Kish

Plaintiff Stephen J. Kish is a Canadian citizen living in Toronto. Kish was also an American citizen at the time Plaintiffs' complaint was filed, but he has since renounced his American citizenship. Kish and his wife, a Canadian citizen, share a joint bank account at a Canadian bank. Kish alleges that "FATCA has at times caused some discord between" Kish and his wife because Kish's wife "strongly opposes the disclosure of her personal financial information from [the] joint bank account to the U.S. government." Kish's wife, however, is neither a plaintiff nor a proposed plaintiff in this litigation.

Daniel Kuettel

Plaintiff Daniel Kuettel is a Swiss citizen and former American citizen living in Bremgarten, Switzerland. Kuettel and his wife—a citizen of Switzerland and the Philippines—have a daughter (a citizen of the United States, the Philippines, and Switzerland) and a son (a citizen of the Philippines and Switzerland),

both minors. Kuettel alleges that he renounced his citizenship in 2012 "because of difficulties caused by FATCA." For instance, Kuettel alleges that before renunciation, his efforts to refinance his mortgage with Swiss banks were unsuccessful but that he "was able to refinance his home with a Swiss bank shortly thereafter." Kuettel also alleges that he has a college savings account for his daughter in his own name at a Swiss bank and wishes to transfer it to his daughter, but that he has refrained from doing so for fear that if he does, either he or his daughter or the account will be subject to the FBAR penalty "if the IRS determines that his daughter has 'wilfully' failed to file an FBAR." Kuettel alleges that his daughter is incapable of filing the FBAR or of renouncing her United States citizenship because "she is only ten years old and too young to shoulder such an obligation," and Kuettel does not wish to file the FBAR on his daughter's behalf as FinCEN would ordinarily require the parent of a minor child to do.

Donna-Lane Nelson

Plaintiff Donna-Lane Nelson is a Swiss citizen and former American citizen living in both Geneva, Switzerland, and Argèles-sur-Mer, France. Nelson claims that she renounced her citizenship when, after FATCA was enacted, her Swiss bank (UBS) "notified her that she would not be [***445**] able to open a new account if she ever closed her existing one[,] because she was an American." Nelson subsequently married an American citizen with whom she shares a joint bank account at BNP Paribas in France. Nelson alleges that she "has had her private financial account information disclosed to the IRS and the Treasury Department despite the

fact that she is not a U.S. citizen," although Plaintiffs' pleadings provide no further insight as to the nature of this alleged disclosure, such as who made it, when it was made, or what it contained. Nelson has also had to prove or explain to UBS, BNP Paribas, and Raiffeisen (another European bank) that she is not a United States citizen.

L. Marc Zell

Plaintiff L. Marc Zell is an American and Israeli citizen living in Israel. Zell, an attorney, alleges that "[b]ecause of FATCA, [he] and his firm have been required by their Israeli banking institutions to complete IRS withholding forms ... as a precondition for opening trust accounts for both U.S. and non-U.S. persons and entities" (emphasis added). Zell alleges that the "Israeli banking officials have stated that they will require such submissions regardless of whether the beneficiary is a U.S. person ... because the trustee is or may be a U.S. person," and that, as a result, "banks have required [him] and his firm to close the trust account in some cases, and in other instances the banks have refused to open the requested trust account." Zell alleges that he holds in trust certain client securities that are required by Israeli financial regulations to be "held by a qualified Israeli financial institution," but Zell's Israeli financial institution has requested Zell to transfer the securities elsewhere "because both he and the beneficiary in this instance are U.S. citizens." Finally, Zell alleges that his non-United States clients have been required by Israeli banks "to fill out the IRS forms even though they have no connection with the United States," and that "banking officials have stated that the mere fact a U.S. person trustee or his law firm

is acting as a fiduciary is reason enough to require non-U.S. person beneficiaries to" report their identities and assets to the United States. Zell alleges that in "a few such instances," the client-beneficiary has terminated the attorney-client relationship, "resulting in palpable financial loss" to Zell and his firm.

Proposed Additional Plaintiffs

In addition to these seven plaintiffs, Plaintiffs' Proposed Amended Complaint sought to add three new plaintiffs: Plaintiff Johnson's wife Katerina Johnson, Plaintiff Kuettel's daughter Lois Kuettel, and Plaintiff Nelson's husband Richard Adams. The amended complaint also includes statements, absent from the original complaint, that some of Plaintiffs' bank balances exceeded the threshold amounts at which FATCA or FBAR requirements might apply, but the amended complaint otherwise recites the same claims and substantially the same facts as the original complaint. Importantly, none of the original plaintiffs or proposed plaintiffs alleges that they have faced direct consequences such as the imposition or threatened imposition of a financial penalty for noncompliance with FATCA, the IGAs, or the FBAR.

B. FATCA, the IGAs, and the FBAR

Plaintiffs assert challenges against five sets of laws: (1) FATCA's individual-reporting requirements; (2) FATCA's "FFI Penalty"; (3) FATCA's "Passthru Penalty"; (4) the IGAs; and (5) the FBAR Willfulness Penalty. [***446**]

1. FATCA's Individual-Reporting Requirements

FATCA requires United States taxpayers with "specified foreign financial assets" to file a special re-

port with their annual tax returns that discloses the name and address of the financial institution that maintains each specified account; the name and address of any issuers of specified stocks or securities; information necessary to identify other specified instruments, contracts, or interests and their issuers; and the maximum value of each specified asset during the taxable year. 26 U.S.C. § 6038D(b)-(c). The reporting requirement applies to any United States taxpayer when the "aggregate value of all [specified] assets exceeds $50,000 (or such higher dollar amount as the secretary may prescribe)." § 6038D(a) (emphasis added). Notably, the Secretary of the Treasury has prescribed higher dollar amounts for many taxpayers depending on their marital status, maximum asset value during the tax year, and place of residence. The following individual-reporting thresholds have been in place since at least 2012:

	Asset Value on Last Day of Tax Year	***Asset Value at Any Time During Tax Year***
If living in the United States		
Unmarried; married filing separately	$50,000	$75,000
Married filing jointly	$100,000	$150,000
If living outside the United States		

Unmarried; married filing separately	$200,000	$300,000
Married filing jointly	$400,000	$600,000

See 26 C.F.R. § 1.6038D-2(a); *see also* Treasury Insp. Gen. for Tax Admin., U.S. Dept. of Treasury, "The Internal Revenue Service Has Made Progress in Implementing the Foreign Account Tax Compliance Act," Fig. 1., Ref. No. 2015-30-085 (Sept. 23, 2015).

Plaintiffs' pleadings below and principal brief on appeal acknowledge only the $50,000 and $75,000 values applicable to single filers residing in the United States. *See, e.g.*, Appellants' Br. 2. Plaintiffs' reply brief obliquely acknowledges the $200,000/$300,000 threshold values that would seem to apply to most of the Plaintiffs on account of their overseas residences, noting that "the secretary has recently increased the triggering amount for individuals living abroad," but Plaintiffs argue that "the threshold could be lowered to the statutory minimum at any time, thus triggering reporting for Plaintiffs." Reply Br. 7.

Failure to report carries a penalty of up to $10,000 per violation plus 40% of the amount of any underpaid tax "attributable to" the assets for which disclosure was required. 26 U.S.C. §§ 6038D(d) ("[S]uch person shall pay a penalty of ....") (emphasis added), 6662(j)(3). No penalty is due, however, if failure to report is "due to reasonable cause and not due to willful neglect." *Id.* § 6038D(g).

Plaintiffs seek to enjoin the statutory reporting re-

quirement, 26 U.S.C. § 6038D; the regulation that implements the reporting requirement, 26 C.F.R. § 1.6038D-4(a)(5); a regulation that requires disclosing the opening or closing of a specified foreign account, 26 C.F.R. § 1.6038D-4(a)(6); and a regulation that requires disclosing "income, gain, loss, deduction, or credit recognized ... with respect to" specified assets, 26 C.F.R. § 1.6038D-4(a)(8). [***447**]

2. FATCA's Institutional-Reporting Requirements, the FFI Penalty, and the Passthru Penalty

FATCA also imposes an institutional-reporting requirement on FFIs,[1] which an FFI can satisfy in one of three ways as set forth in 26 U.S.C. § 1471(b)(1), (b)(2), and (b)(3). First, the FFI may enter into an agreement with Treasury whereby the FFI agrees, among other things, to take the following five actions:

> (1) "to obtain such information regarding each holder of each account maintained by such institution as is necessary to determine which (if any) of

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[1] A "foreign financial institution" (FFI) is "any financial institution which is a foreign entity." 26 U.S.C. § 1471(d)(4). Financial institutions include any entity that "accepts deposits in the ordinary course of a banking or similar business," "holds financial assets for the account of others" "as a substantial portion of its business," or "is engaged (or holding itself out as being engaged) primarily in the business of investing, reinvesting, or trading in securities ..., partnership interests, commodities ..., or any interest" in the same. 26 U.S.C. § 1471(d)(5). FATCA thus reaches across the globe, although its extraterritorial reach is not directly at issue in this litigation, nor is it at issue at all in the present appeal, which concerns only the Plaintiffs' standing to sue.

such accounts are United States accounts";[2]
(2) to make annual reports to Treasury providing details on United States accounts, including the "name, address, and [Taxpayer Identification Number] of each account holder which is a specified United States person and, in the case of any account holder which is a United States owned foreign entity, the name, address, and [Taxpayer Identification Number] of each substantial United States owner of such entity"; the account number; the account balance or value; and "the gross receipts and gross withdrawals or payments from the account";
(3) "to deduct and withhold a tax equal to 30 percent of ... any passthru payment[3] which is made by

[2] A "United States account" is "any financial account which is held by one or more specified United States persons or United States owned foreign entities," subject to certain exceptions not applicable here. 26 U.S.C. § 1471(d)(1)(A). United States persons include citizens and residents of the United States, domestic partnerships and corporations, estates other than foreign estates, and trusts subject to primary administrative supervision by a court of the United States where a United States person has authority to control "all substantial decisions" of the trust. 26 U.S.C. § 7701.

[3] A "passthru payment" is defined as "any withholdable payment or other payment to the extent attributable to a withholdable payment." 26 U.S.C. § 1471(d)(7). Withholdable payments include "(i) any payment of interest (including any original issue discount), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income, if such payment is

such institution to a recalcitrant account holder[4] or another foreign financial [***448**] institution which does not meet the requirements of this subsection"—the so-called Passthru Penalty;

(4) to attempt to obtain a waiver from each account holder of any foreign law that would (but for such a waiver) prohibit the disclosure of the required information to the United States; and

(5) to close the accounts of any account holders from which such a waiver "is not obtained ... within a reasonable period of time." 26 U.S.C. § 1471(b)(1).

Second, the FFI "may be treated by the Secretary as meeting the requirements of" FATCA if the FFI either "complies with such procedures as the Secretary may prescribe to ensure that such institution does not

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from sources within the United States, and (ii) any gross proceeds from the sale or other disposition of any property of a type which can produce interest or dividends from sources within the United States." Id. § 1473(1)(A). The "withholding agent" with respect to each withholdable payment is obligated to deduct and withhold the 30% tax. Withholding agents include "all persons, in whatever capacity acting, having the control, receipt, custody, disposal, or payment of any withholdable payment." Id. § 1473(4).

[4] "Recalcitrant account holder" means any account holder that fails to comply with an FFI's "reasonable requests" for information necessary to determine which accounts are United States accounts; fails to provide name, address, Taxpayer Identification Number, and account-number information to an FFI for United States accounts; or fails, upon an FFI's request, to waive the applicability of a foreign law that would (but for a valid and effective waiver by the account holder) otherwise prohibit disclosure of such information. 26 U.S.C. § 1471(d)(6).

maintain United States accounts" or "is a member of a class of institutions with respect to which the Secretary has determined that the application of [FATCA's reporting requirement] is not necessary." 26 U.S.C. § 1471(b)(2). As we discuss below, FFIs subject to the jurisdiction of countries that have signed IGAs with Treasury may be deemed compliant under 26 U.S.C. § 1471(b)(2) by virtue of their (and their country's) compliance with an IGA.

Third, the FFI may "elect" to withhold a tax from payments sent to the FFI from "accounts held by recalcitrant account holders or foreign financial institutions which do not meet the requirements of this subsection" rather than agreeing to withhold the 30% tax from the FFI's payments to recalcitrant account holders or noncompliant FFIs. 26 U.S.C. § 1471(b)(3).

If an FFI fails to meet FATCA's institutional-reporting requirement in one of these three ways, then the FFI is subject to having "a tax equal to 30 percent" deducted and withheld from all withholdable payments sent to the FFI. 26 U.S.C. § 1471(a). Plaintiffs assert and the government does not dispute that this tax—the so-called "FFI Penalty"—applies to United States-sourced income payable to the FFI as well as foreign-sourced income payable to the FFI from other FFIs. *See* 26 C.F.R. § 1.1471-2; Compl. 29; Appellees' Br. 4.

In short, if an FFI is not subject to the jurisdiction of a country that has concluded an IGA, the FFI must either comply with FATCA (and withhold the Passthru Penalty from payments it makes to recalcitrant account holders and noncompliant FFIs) or elect to have a 30% tax withheld from incoming payments from recalcitrant account holders or noncompliant FFIs; other-

wise, the FFI becomes noncompliant itself and thus subject to the FFI Penalty of 30% of all withholdable payments[5] it receives from any source whatsoever.

Plaintiffs seek to enjoin the enforcement of the reporting requirement, the withholding provisions, the regulations implementing these provisions, and the IRS's use of Form 8966, "FATCA Report," on which FFIs make FATCA disclosures. Plaintiffs also seek to enjoin the enforcement of the Passthru Penalty, which is the 30% "tax"[6] that FFIs deduct and withhold from payments to recalcitrant account holders or noncompliant FFIs under 26 U.S.C. § 1471(b)(1)(D). *See also* 26 C.F.R. §§ 1.1471-4(a)(1), 1.1471-4T(b)(1). [***449**]

3. The IGAs

Treasury, on behalf of the United States, has reached agreements with dozens of foreign governments to "facilitate the implementation of FATCA." 26 C.F.R. § 1.1471-1(b)(79). These intergovernmental agreements (IGAs) take two forms: "Model 1" IGAs and "Model 2" IGAs.

Under a Model 1 IGA, the foreign government agrees to collect the financial information that FATCA would otherwise require FFIs to report, and the foreign government itself reports that information directly to the IRS. Notably, the Model 1 IGA makes clear that as long as the foreign government "complies with its obligations under" the IGA, any FFI within that government's jurisdiction that also complies with its own obligations under the IGA (such as sending account holder

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[5] *See* n.3, *supra*.

[6] We decline to address whether the 30% deduction is a tax or a penalty.

information to the foreign government) "shall be treated as complying with" FATCA[7] and is exempt from FATCA reporting, penalties, and withholding. *See, e.g.*, U.S. Dept. of Treasury FATCA Resource Center, Model 1A IGA Reciprocal, Preexisting TIEA or DTC, Art. 4, § 1, (Nov. 30, 2014), http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Reciprocal-Model-1A-Agreement-Preexisting-TIEA-or-DTC-11-30-14.pdf .

Treasury has signed Model 1 IGAs with Canada (in force June 27, 2014), Czech Republic (in force December 18, 2014), Israel (in force August 29, 2016), France (in force October 14, 2014), and Denmark (in force September 30, 2015). Plaintiffs' original complaint, in which they sought to enjoin the Canadian, Czech, and Israeli IGAs, was filed July 14, 2015; Plaintiffs sought leave to file their proposed amended complaint, which would also enjoin the French and the Danish IGAs, on October 30, 2015. Neither complaint mentions that although all the above-mentioned Model 1 IGAs were signed on June 30, 2014, the Israeli IGA was not yet in force at the time of filing either complaint. U.S. Dept. of Treasury FATCA Resource Center, https://www.irs.gov/pub/irs-drop/a-16-27.pdf. Indeed, the Israeli Knesset did not approve regulations implementing FATCA until August 4, 2016. Nevertheless, Treasury has declared that any foreign jurisdiction that signed an IGA before November 30, 2014, would be treated "as if [it had] an IGA in effect" and would thus be exempt from FATCA reporting, penalties, and withholding—includ-

[7] The IGAs are the principal means by which an FFI may be treated as complying with FATCA under 26 U.S.C. § 1471(b)(2), discussed above.

ing penalties against recalcitrant account holders—"as long as the jurisdiction is taking the steps necessary to bring the IGA into force within a reasonable period of time." *See* IRS Announcement 2016-27, https://www.irs.gov/pub/irs-drop/a-16-27.pdf; IRS Announcement 2013-43, https://www.irs.gov/pub/irs-drop/ n-13-43.pdf. One such announcement set December 31, 2016, as the date by which jurisdictions whose IGAs were not yet in force owed "a detailed explanation" to Treasury. *See* IRS Announcement 2016-27 at 2-3. The result of the Treasury notices and the pending IGA is that from the time Plaintiffs' complaint was filed until well after the district-court record closed, neither FATCA nor any IGA had any legal effect in Israel.

Under a Model 2 IGA, the foreign government agrees to modify its laws to the extent necessary to enable its FFIs to report their United States account information directly to the IRS. Treasury has signed a Model 2 IGA with Switzerland (in force June 2, 2014), in which the Swiss government has agreed to "direct all Reporting Swiss Financial Institutions" to "register with the IRS" and comply with [***450**] applicable FATCA provisions. Swiss IGA Art. 3 § 1. One provision of the Swiss IGA, Article 5, is not yet in force because it requires that a separate "Protocol"—an amendment to a bilateral tax treaty that was signed by the United States and Switzerland in 2009—first come into force, but the United States Senate has not yet approved that Protocol, leaving Article 5 inoperative. Article 5 would authorize the United States to make "group requests" to the Swiss Federal Department of Finance or its designee for aggregated reportable-account information. Swiss IGA Art. 2 § 1; Art. 5. Despite the fact that Article 5 is inoperative, however, the Swiss Model 2

IGA, somewhat like the Model 1 IGAs, provides that Swiss FFIs that register with the IRS and comply with an "FFI Agreement" (essentially, an agreement between an individual Swiss FFI and the United States government to report United States account information) "shall be treated as complying with" FATCA and are thus exempt from any provisions of FATCA beyond those incorporated into the IGA or FFI Agreement. Swiss IGA Art. 6. Swiss FFIs' obligations are lighter under the IGA than under FATCA: for example, as long as a Swiss FFI complies with the registration and reporting requirements in Article 3 of the IGA, it is not required to withhold the passthru tax from recalcitrant account holders or to close any account holders' accounts. Swiss IGA Art. 7 § 1.

Plaintiffs seek to invalidate the Canadian, Czech, Israeli, French, Danish, and Swiss IGAs.

4. The FBAR Willfulness Penalty

The last set of laws at issue is the foreign-bank-account-reporting (FBAR) requirement of the Bank Secrecy Act, which requires any United States person with "a financial interest in or signature authority over at least one financial account located outside of the United States" to file FinCEN Form 114 (also referred to as the FBAR) with Treasury annually. Reporting is required for accounts held during the previous calendar year if "the aggregate value of all foreign financial accounts exceeded $10,000 at any time during the calendar year reported." *See* 31 U.S.C. § 5314; 31 C.F.R. §§ 1010.306(c), .350. The FBAR appears to have nothing to do with FATCA or the IGAs other than that presumably most if not all individuals subject to FATCA's reporting requirement are also required to file an

FBAR, since the reporting threshold for the FBAR is lower than any reporting threshold for FATCA.

Nevertheless, Plaintiffs challenge the FBAR's willful-failure-to-report penalty ("Willfulness Penalty"), which provides that "[t]he Secretary of the Treasury may impose" a penalty equal to the greater of $100,000 or half the value in the reportable account(s) at the time of the violation. 31 U.S.C. § 5321(a)(5)(A), (C) (emphasis added). The ordinary penalty (absent a showing of willfulness), which Plaintiffs do not challenge, is $10,000 per violation. *Id.* § 5321(a)(5)(B)(i). Plaintiffs also seek to enjoin the FBAR account-balance-reporting requirement—that is, the requirement to complete FinCEN Form 114.

C. Counts Enumerated in the Complaint

In both the original complaint and the proposed amended complaint, Plaintiffs brought eight counts against Defendants. A brief summary of the counts is provided here as relevant background, although Plaintiffs need not demonstrate that they are likely to prevail as to any of these counts in order to have standing to bring them. [***451**]

Counts 1 & 2: The IGAs Were Unconstitutionally Executed

Plaintiffs claim in Count 1 that the IGAs are "unconstitutional sole executive agreements" that exceed the scope of the President's constitutional power because they are not authorized by Congress through the ordinary legislative process. Compl. 37. Plaintiffs claim that the only constitutionally permissible means by which the executive branch may make international agreements are by the Treaty Clause, an Act of Congress, a provision in an existing treaty, or the Presi-

dent's independent constitutional foreign-affairs power —which Plaintiffs claim does not include the power to impose a tax or to create a tax-collection mechanism like the IGAs.

Alternatively, in Count 2, Plaintiffs claim that the IGAs are impermissible because they are "inconsistent with legislation enacted by Congress in the exercise of its constitutional authority"—namely, FATCA—to the extent that they, among other things, allow FFIs to report to their national governments rather than to the IRS. Amended Compl. 49 (quoting State Department Foreign Affairs Manual). Plaintiffs thus claim that the IGAs "override" FATCA and "must be held unlawful and set aside" because "Treasury and the IRS have acted contrary to the President's constitutional power" in entering into the IGAs.

Count 3: The FATCA, IGA, and FBAR Reporting Requirements Violate the Equal Protection Clause

Plaintiffs claim that compared to the various data reported to the IRS about foreign accounts under FATCA, the IGAs, and the FBAR, "[t]he only financial information reported to the IRS about domestic accounts is the amount of interest paid to the accounts during a calendar year." Plaintiffs thus claim that United States citizens living abroad are treated differently than United States citizens living in the United States, in violation of the Fourteenth Amendment Equal Protection Clause (as incorporated against the federal government through the Fifth Amendment Due Process Clause). *See United States v. Ovalle*, 136 F.3d 1092, 1095 n.2 (6th Cir. 1998).

Counts 4-6: The FFI Penalty, Passthru Penalty, and FBAR Willfulness Penalty Impose Unconstitutionally Excessive Fines

In Count 4, Plaintiffs challenge the FFI Penalty, which is imposed directly upon FFIs for noncompliance with FATCA, as an unconstitutionally excessive fine, claiming that "[t]he penalty is used as a hammer to coerce compliance by [FFIs] everywhere in the world." Plaintiffs claim that the penalty is unconstitutional because it "is grossly disproportional to the gravity of the offense it seeks to punish." In Count 5, Plaintiffs lodge the same attack against the Passthru Penalty, which FFIs apply to recalcitrant account holders under FATCA. In Count 6, Plaintiffs lodge the same attack against the FBAR Willfulness Penalty.

Counts 7 & 8: The Institutional-Reporting Requirements of FATCA and the IGAs Violate Plaintiffs' Fourth Amendment Right to Privacy

In Count 7, Plaintiffs claim that FATCA's requirement that FFIs report account data to the United States constitutes a warrantless search in violation of Plaintiffs' Fourth Amendment protection against unreasonable searches and seizures. In Count 8, Plaintiffs claim that the IGAs' requirement that FFIs report account data either to their governments or [***452**] to the United States likewise violates the Fourth Amendment.

D. Procedural History

Plaintiffs filed their original complaint in the United States District Court for the Southern District of Ohio on July 14, 2015. Plaintiffs moved for a preliminary injunction, which the district court denied, holding that Plaintiffs were not likely to succeed on the

merits because they lacked standing and, alternatively, because they had brought allegations that failed as a matter of law. On October 30, 2015, Plaintiffs moved for leave to amend their complaint. The government filed both a motion to dismiss and an opposition to Plaintiffs' motion for leave to amend.

On April 26, 2016, the district court granted the government's motion to dismiss for lack of standing, declined to reach the government's motion to dismiss for failure to state a claim, and denied Plaintiffs' motion for leave to amend. The district court denied leave to amend only after considering the new plaintiffs and their new claims and after determining that even if leave to amend were granted, Plaintiffs still would not have standing to sue, rendering leave to amend futile. This timely appeal followed.

In the interest of simplicity, we will discuss whether Plaintiffs have standing in light of the facts pleaded in both the original complaint and the proposed amended complaint. For the reasons that follow, the district court rightly held that none of the plaintiffs had standing to sue, and that granting leave to amend would not cure the defect in standing.

II

A. Elements of Standing

Federal courts have constitutional authority to decide only "cases" and "controversies." U.S. Const. art. III § 2; *see Muskrat v. United States*, 219 U.S. 346, 31 (1911). The requirement of standing is "rooted in the traditional understanding of a case or controversy." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). To bring suit, Plaintiffs must have "alleged such a personal stake in the outcome of the controversy as to as-

sure that concrete adverseness which sharpens the presentation of issues" before the court. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

The "irreducible constitutional minimum" of standing is that for each claim, each plaintiff must allege an actual or imminent injury that is traceable to the defendant and redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992) (holding wildlife-conservation organizations lacked standing to seek injunctive relief against the Secretary of the Interior's interpretation of the Endangered Species Act where organization members' harm was the endangering of wild animals in Sri Lanka but where the members had no current plans to go to Sri Lanka to observe the animals); *see Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 185 (2000) (agreeing that "a plaintiff must demonstrate standing separately for each form of relief sought").

1. Injury

The injury must be an "injury in fact," meaning "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."'" *Lujan*, 504 U.S. at 560 (emphasis added) (citations omitted) (first quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984); then [***453**] quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983))).

There is no "legally protected interest" in maintaining the privacy of one's bank records from government access. *United States v. Miller*, 425 U.S. 435, 442 (1976) (holding bank clients had no legitimate expectation of privacy in banking information revealed to a

third party); *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010) (noting that *Miller* involved "business records" as opposed to "confidential communications").

The requirement that an injury be "concrete and particularized" has two discrete parts: concreteness, which is the requirement that the injury be "real," and not "abstract," *Spokeo*, 136 S. Ct. at 1548, and particularization, which is the requirement that the plaintiff "personally [have] suffered some actual or threatened injury" as opposed to bringing a generalized grievance. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (emphasis added).

Concreteness. "Abstract, intellectual problems," *FEC v. Akins*, 524 U.S. 11, 20 (1998), "abstract concern," *Diamond v. Charles*, 476 U.S. 54, 67 (1986), and "[a]bstract injury," *Lyons*, 461 U.S. at 101, do not present concrete injuries. That said, concrete is not synonymous with tangible: intangible harms such as those produced by defamation or the denial of individual rights may certainly be concrete enough to constitute an injury in fact. *Spokeo*, 136 S. Ct. at 1549.

Particularization. Additionally, "a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74 (emphasis added); *see also Massachusetts v. Mellon*, 262 U.S. 447, 487 (1923) (denying municipal taxpayer standing to challenge federal spending measure because the taxpayer's "in-

terest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable"); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) ("[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone[.]").

Legislative standing. The general rule that individual legislators lack standing to sue in their official capacity as congressman or senator follows from the requirement that an injury must be concrete and particularized. *See Raines v. Byrd*, 521 U.S. 811, 816, 821, (1997) (in action by members of Congress to challenge the Line Item Veto Act, "loss of political power"—as opposed to loss of a private right—was not a concrete injury, and any institutional injury to Congress arising from the Act was not particularized to any individual plaintiff). An apparent exception to the general rule against legislative standing arises when the legislators are suing on a vote-nullification theory and allege that if their votes had been given effect, those votes would have been sufficient to defeat or enact a specific legislative [***454**] action. *Coleman v. Miller*, 307 U.S. 433, 438 (1939) (holding that where forty-member Kansas State Senate had deadlocked twenty-to-twenty in voting on a proposed constitutional amendment, the twenty senators who had voted against the amendment had standing to challenge the constitutionality of the lieutenant governor's tie-breaking vote in favor of the amendment, because the lieutenant governor's vote effectively nullified the plaintiffs' votes and the plaintiffs' votes would have been sufficient to prevent ratification of the amendment); *see also Baird v. Norton*, 266 F.3d 408, 410 (6th Cir. 2001) (holding that a Michigan

House member and a Michigan state senator lacked standing to challenge gaming compacts that were approved by a concurrent-resolution procedure requiring only a majority of votes cast rather than by the ordinary legislative process that would have required a majority of the votes of all members in each house).

We held in *Baird* that to the extent that the legislators complained of the deprivation of procedural safeguards built into the ordinary legislative process, they had "at most, a generalized grievance shared by all Michigan residents alike," and thus lacked the sort of particularized injury in fact that standing requires. *Baird*, 266 F.3d at 411. And we held that the legislators could not show a Coleman-like vote-nullification injury because their votes "would not have been sufficient to defeat either the concurrent resolution ... or legislation to similar effect." *Id*. at 412. In such circumstances, legislators' remedy lies not with the courts but with the legislative process, for, as the Supreme Court noted in *Raines*, the legislature could simply "vote to repeal" offending legislation. 521 U.S. at 824.

Actual or imminent. Standing can derive from an imminent, rather than an actual, injury, but only when "the threatened injury is real, immediate, and direct." *Davis v. FEC*, 554 U.S. 724, 734 (2008) (holding candidate for House of Representatives had standing to challenge election regulation exempting opponents of self-financing candidates from certain campaign-contribution limits where plaintiff candidate had declared his candidacy and was demonstrably a self-financing candidate whose opponents would imminently receive expanded access to campaign funding).

In a pre-enforcement challenge to a federal statute, the Supreme Court has held that a plaintiff satisfies

the injury requirement of standing by alleging "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)); *see* also *Warth v. Seldin*, 422 U.S. 490 (1975); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977) (holding that one of the plaintiffs had standing to challenge a discriminatory zoning law where an injunction against the law would have produced "at least a 'substantial probability,' *Warth*, 422 U.S. at 504, that" the plaintiff's desired housing project would "materialize").

The mere possibility of prosecution, however—no matter how strong the plaintiff's intent to engage in forbidden conduct may be—does not amount to a "credible threat" of prosecution. Instead, the threat of prosecution "must be certainly impending to constitute injury in fact." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, [***455**] (2013) (quoting *Whitmore*, 495 U.S. at 158). Putting the Supreme Court's language in *Warth*, *Driehaus*, and *Clapper* together: to have standing to bring a pre-enforcement challenge to a federal statute, there must be a substantial probability that the plaintiff actually will engage in conduct that is arguably affected with a constitutional interest, and there must be a certain threat of prosecution if the plaintiff does indeed engage in that conduct.

Further, lawsuits that do not challenge "specifically identifiable Government violations of law," but instead challenge "particular programs agencies establish to carry out their legal obligations are ... rarely if ever

appropriate for federal-court adjudication." *Lujan*, 504 U.S. at 568 (citation omitted).

Past injury is also inadequate to constitute an injury in fact when the plaintiff seeks injunctive relief but not does suffer "any continuing, present adverse effects." *Lyons*, 461 U.S. at 102 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)).

Third-party standing. Generally, "a plaintiff must 'assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Coyne ex rel. Ohio v. Am. Tobacco Co.*, 183 F.3d 488, 494 (6th Cir. 1999) (quoting *Warth*, 422 U.S. at 499); *see also Ovalle*, 136 F.3d at 1100-01; *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). The rare "third-party standing" exception to this requirement allows federal courts to hear cases in which a plaintiff can "show that (1) it has suffered an injury in fact; (2) it has a close relationship to the third party; and (3) there is some hindrance to the third party's ability to protect his or her own interests." *Mount Elliott Cemetery Ass'n v. City of Troy*, 171 F.3d 398, 404 (6th Cir. 1999); *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281, 295 (6th Cir. 1998). Plaintiffs have expressly stated that they "rely neither on third-party standing nor [on] the harms of others," Appellants' Br. 24, but the Government contends that without invoking third-party standing, Plaintiffs would have no way to attack the FFI Penalty, which is imposed only on financial institutions that are not parties to this litigation.

2. Causation

Even if a plaintiff alleges an actual or imminent injury that is concrete and particularized, the plaintiff

must also show that the injury is "fairly traceable to the defendant's allegedly unlawful conduct." *Allen*, 468 U.S. at 751 (holding parents of schoolchildren lacked standing to sue IRS to challenge private schools' tax exemptions where the parents' alleged harm of increased school segregation was caused by the private schools' choice to racially discriminate and was not fairly traceable to the IRS). When a plaintiff's alleged injury is the result of "the independent action of some third party not before the court," the plaintiff generally lacks standing to seek its redress. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976); *see also Lujan*, 504 U.S. at 560-61; *Shearson v. Holder*, 725 F.3d 588, 592 (6th Cir. 2013); *Ammex, Inc. v. United States*, 367 F.3d 530, 533 (6th Cir. 2004) (holding that a retailer lacked standing to challenge a federal excise tax assessed against a third-party fuel supplier, even where the retailer was required by contract to pay the supplier an amount equal to the excise tax up front at the time of purchase, since the "alleged injury ... [***456**] in the form of increased fuel costs was not occasioned by the Government").

Neither is injury caused by market conditions fairly traceable to a regulation that happens to regulate that market. *Warth*, 422 U.S. at 506 (holding Rochester-area residents lacked standing to challenge suburb's zoning as unconstitutionally excluding low-and moderate-income residents where plaintiffs were unable to allege other than in conclusory terms that they had been injured; where none of the plaintiffs personally owned property in the suburb or had been denied a variance or permit by the suburb; and where the plaintiffs' "inability to reside in [the suburb was] the consequence of the economics of the area housing market,

rather than respondents' assertedly illegal acts").

Nor is an injury fairly traceable to the defendant's conduct if the plaintiffs have "inflict[ed] [the] harm on themselves based on their fears of hypothetical future harm." *Clapper*, 133 S. Ct. at 1151.

As we noted above, Plaintiffs do not rely on third-party standing. Rather, Plaintiffs argue that they have suffered "indirect" harm. An indirect harm is an injury caused to a plaintiff when the defendant's unlawful conduct harms a third party who in turn causes the plaintiff's harm—unlike in third-party standing cases, a plaintiff claiming indirect harm is seeking to vindicate the plaintiff's own rights and not a third party's. Appellants' Br. 23 (citing *Roe v. Wade*, 410 U.S. 113, 124 (1973)). Plaintiffs rely heavily on *Roe*: they argue that the law challenged in *Roe* directly harmed abortionists, not women seeking abortions, but that the indirect harm to women seeking abortions was nevertheless fairly traceable to the law. Plaintiffs argue that in *Roe*, the doctors had only two options (provide abortions and thus break the law, or comply with the law by declining to provide abortions); Plaintiffs argue that in this case, similarly, FFIs have only two options: disregard FATCA and thus become subject to the 30% FFI Penalty, or comply with FATCA by refusing to do business with certain United States persons.

But Plaintiffs' analogy overlooks a third option available here and not in *Roe*: FFIs may comply with FATCA and do business with United States persons—without imposing additional requirements on their clients beyond what FATCA and the IGAs themselves require.[8] As we will [***457**] discuss, several of

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[8] Plaintiffs' *Roe* analogy also fails when individual ac-

Plaintiffs' alleged harms arise not from FFIs' acting under the command of FATCA or an IGA, but rather from the FFIs' voluntary choice to go above and beyond FATCA and the IGAs. FFIs may do so, for example, by gathering FATCA-compliance-related information from non-United States persons, or by choosing not to do business with certain individuals, whether to protect their own interests in FATCA compliance or for some other reason. *See, e.g.*, Amended Compl. 12 ("[R]ather

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count holders are compared to the plaintiffs in *Roe*: the account holders' options are not "close your account or pay the penalty," but rather "close your account, pay the penalty, or keep your account open while filing the required paperwork to do so." This is unlike *Roe* where a woman seeking an abortion that was not otherwise permitted had no "third option": the only options were to seek an illicit abortion or to decline to have the abortion in the first place. A similar analogy could be drawn to highway-speed laws: a motorist wishing to travel quickly, perhaps to transport perishable goods or to visit an ill relative, has only the option to speed (and risk a traffic citation) or to comply with the law (and risk having spoiled goods or missing the death of a relative). In such a situation, the motorist might well be able to argue that the injury of having spoiled goods or missing the death of the relative was fairly traceable to the speed-limit law. But this situation would not be like the Plaintiffs' situation here—rather, it would be analogous to the Plaintiffs' situation here if the motorist had a third option of speeding upon condition of filing paperwork with the state attesting to the reasons why speeding is necessary. Perhaps if that paperwork itself were difficult to file, an injury could arise from the time and trouble spent filing it—but, notably, Plaintiffs stated at oral argument that they do not assert that the time and trouble of filing FATCA paperwork is itself an injury for standing purposes.

than reporting information about U.S. clients, Saxo Bank is turning away U.S. citizens like Mark."). And although an injury "produced by" a defendant's "determinative or coercive effect" upon a third party (such as the injury of inability to obtain an abortion, produced by the determinative effect of the challenged law in *Roe* upon abortionists) may suffice for standing, an injury that results from the third party's voluntary and independent actions or omissions does not. *Bennett v. Spear*, 520 U.S. 154, 169 (1997).

3. Redressability

Finally, a plaintiff must also plead facts sufficient to establish that the court is capable of providing relief that would redress the alleged injury. *Lujan*, 504 U.S. at 561-62.

B. Burden of Proof and Standard of Review

Each plaintiff has the burden "clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *Warth*, 422 U.S. at 518. "[W]e assess standing as of the time a suit is filed." *Clapper*, 133 S. Ct. at 1157. And standing must remain "extant at all stages of review." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)).

"Standing cannot be 'inferred argumentatively from averments in the pleadings,'" *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (quoting *Grace v. American Central Ins. Co.*, 109 U.S. 278, 284 (1883)), or even from the government's concession of standing, "but rather 'must affirmatively appear in the record.'" *FW/PBS*, 493 U.S. at 231-36 (quoting *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)) (holding certain plaintiffs did not have standing to attack ordi-

nance governing sexually oriented businesses where the record did not reveal that any one of these plaintiffs was subject to the ordinance, even though the city attorney conceded at oral argument before the Supreme Court that "one or two" of them had had their licenses denied under the ordinance). The Supreme Court has "always insisted on strict compliance with this jurisdictional standing requirement," *Raines*, 521 U.S. at 819. And the inquiry into whether plaintiffs have standing is "especially rigorous" where, as here, "reaching the merits of the dispute would force [a court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Clapper*, 133 S. Ct. at 1147 (quoting *Raines*, 521 U.S. at 819-20).

We review de novo the district court's dismissal for lack of standing, we accept as true all the material allegations in the Plaintiffs' complaints, and we construe Plaintiffs' complaints in Plaintiffs' favor. *See Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969); *Haines v. Fed. Motor Carrier Safety* [***458**] *Admin.*, 814 F.3d 417, 423 (6th Cir. 2016).

C. No Plaintiff Has Standing as to Any Claim

1. No Plaintiff Has Standing to Challenge FATCA

No Plaintiff has standing to challenge FATCA's individual-reporting requirements or the Passthru Penalty because no Plaintiff (or proposed Plaintiff) has alleged either an actual injury that is fairly traceable to FATCA or an imminent threat of prosecution from noncompliance with FATCA.

First, no Plaintiff has alleged any actual enforcement of FATCA such as a demand for compliance with the individual-reporting requirement, the imposition of

a penalty for noncompliance, or an FFI's deduction of the Passthru Penalty from a payment to or from a foreign account.

Second, no Plaintiff can satisfy the *Driehaus* test for standing to bring a pre-enforcement challenge to FATCA because no Plaintiff claims to hold enough foreign assets to be subject to the individual-reporting requirement, and, as a result, no Plaintiff can claim that there is a "credible threat" of either prosecution for failing to comply with FATCA or imposition of a Passthru Penalty by an FFI. All but two of the Plaintiffs either fail to state the value of their foreign assets altogether or allege only that they have foreign accounts with an aggregate value "greater than $10,000" —but FATCA's individual-reporting requirement applies only to individuals with at least $50,000 worth of assets held in foreign accounts, with significantly higher thresholds in some cases. *See*, e.g., Amended Compl. 12, 19, 21, 28, 30, 34.

The two exceptions are Johnson and Zell. Johnson has alleged that "[t]he aggregate value of [his] foreign accounts has been greater than $75,000 in 2014 and 2015[,] which subjects him to both FATCA individual reporting and FBAR reporting." *Id*. at 16. But Johnson lives outside the United States and would thus have to hold foreign accounts with an aggregate value in excess of $200,000 to be subject to the individual-reporting requirement. That Treasury might someday lower the threshold from $200,000 to $50,000 (the statutory minimum) or $75,000 or any other level does not change the fact that, now and at the time Plaintiffs filed suit, Johnson is not subject to FATCA. Nor is it of any consequence that Johnson's foreign banks may be subject to FATCA's institutional-reporting requirement on ac-

count of Johnson's ownership of accounts exceeding $75,000 in value. Johnson cannot challenge the individual-reporting requirement or the Passthru Penalty without showing that Johnson himself is subject to those provisions, and based on the facts as stated in Plaintiffs' pleadings, Johnson is not.

Further, Johnson—like all Plaintiffs—lacks standing to challenge FATCA's FFI Penalty (the penalty imposed upon financial institutions for their noncompliance with FATCA) because such a challenge would require either that the foreign banks themselves bring suit or that Plaintiffs rely on third-party standing, and Plaintiffs have made clear that they do not.

As for Zell, he alleges that he "had *signatory authority* over accounts with an aggregate year-end balance of greater than $200,000 in 2014, which would subject him to FATCA individual reporting." *Id.* at 34 (emphasis added). But, although the Israeli IGA imposes a reporting requirement for trust accounts like Zell's, FATCA *itself* does not require reporting where, as here, the trust accounts are held entirely for the benefit of non-United States persons. And although the Israeli IGA appears as of August 2016 to be in force in [***459**] Israel, it was not in force prior to then. Zell could not have been subject to FATCA's individual-reporting requirement, either at the time Plaintiffs' complaint was filed or at the time Plaintiffs sought leave to amend their complaint, based either on Zell's own accounts (for which he alleges only an aggregate value exceeding $10,000) or on Zell's "signatory authority" over his clients' trust accounts, because only the Israeli IGA, not FATCA itself, required (or requires) reporting of accounts based on signatory authority, and the Israeli IGA was not in effect when Plaintiffs filed or sought to

amend their complaint.

Finally, some Plaintiffs allege other harms arising from FATCA apart from its individual-reporting requirement or its Passthru Penalty. But none of these alleged harms are injuries that are fairly traceable to FATCA. Crawford alleges that Saxo Bank's decision not to allow Crawford (or Aksioner, Crawford's brokerage firm) to accept United States clients, is an injury; even if it is, however, it is not fairly traceable to FATCA but rather, as in *Allen* and *Ammex*, to Saxo Bank's own independent actions. The Johnsons' decision to separate their own assets to avoid disclosing Katerina Johnson's financial affairs to the United States government when there is no allegation that FATCA has actually compelled any such disclosure, similarly, is traceable to the Johnsons' own independent actions, not to FATCA.

Nelson alleges that she has "had her private financial account information disclosed to the IRS and the Treasury Department despite the fact that she is not a U.S. citizen." Amended Compl. 28. But Nelson has stated no facts whatsoever indicating that her account information was disclosed because of FATCA—and thus any injury resulting from this disclosure cannot fairly be traced to FATCA.

In Plaintiffs' complaint, Adams and Zell have alleged that they have had difficulty obtaining banking services from foreign banks. Zell specifically alleges that he has been told to move securities out of an Israeli bank and that he has been informed that his non-United States clients are required to complete IRS forms at the request of Israeli banks. But, again, a foreign bank's choice either not to do business with Adams or Zell, or (as in Zell's case) to require Zell's

non-United States clients to make financial or other disclosures even though these clients are not subject to FATCA, is a choice voluntarily made by the bank and is not fairly traceable to FATCA. And the resulting choice of any of Zell's clients not to do business with Zell is fairly traceable to the clients or perhaps to the Israeli banks, but is not fairly traceable to FATCA. Likewise with Kuettel, who alleges that he had difficulty refinancing his mortgage until after he renounced his American citizenship: such difficulty cannot serve as the basis for standing because it is, at best, past injury that is insufficient to warrant injunctive relief (it is past injury because Kuettel has renounced his American citizenship and no longer claims to have difficulty refinancing his mortgage), and, in any event, it is traceable only to the foreign banks and not to FATCA because nothing in FATCA prevented the foreign banks from refinancing Kuettel's mortgage.

Several plaintiffs allege injuries that are not concrete. Kish, for example, alleges that "FATCA has at times caused some discord between" him and his wife. *Id*. at 19. But marital discord, particularized though it may be, is not the sort of concrete injury that can give rise to standing. Neither is Crawford or Johnson's discomfort with FATCA's reporting requirements, or Nelson's "resent[ment]," *id.* at 28, at having to prove to European banks [***460**] that she is no longer a United States citizen in order to obtain banking services.

In sum, no Plaintiff has standing to challenge FATCA's individual-reporting requirements, the Passthru Penalty, or the FFI Penalty, because no Plaintiff has suffered direct harm that is fairly traceable to any of these challenged provisions, and because no Plaintiff has alleged sufficient facts to show a credi-

ble threat of prosecution for noncompliance with any of these challenged provisions. At best, Plaintiffs' claimed injuries are the second-order effects of government regulation on the market for international banking services. But "consequence[s] of the economics" of holding foreign assets are not, on their own, injuries in fact for the purpose of demonstrating Article III standing. *Warth*, 422 U.S. at 506. Because the burden of establishing standing falls squarely on the plaintiff, and because we are constrained to examine the district-court pleadings alone to determine whether standing existed at the time the complaint was filed, we hold that no Plaintiff has standing to challenge FATCA.

2. No Plaintiff Has Standing to Challenge the IGAs

Senator Paul challenges the constitutionality of the IGAs. Senator Paul alleges harm because he "has been denied the opportunity to exercise his constitutional right as a member of the U.S. Senate to vote against the FATCA IGAs." *Id.* at 13. But, as in *Raines*, any incursion upon Senator Paul's political power is not a concrete injury like the loss of a private right, and any diminution in the Senate's lawmaking power is not particularized but is rather a generalized grievance. Unlike in *Coleman*, in which the plaintiff-legislators' votes would have been sufficient to defeat the contested legislation, Senator Paul has not pleaded that his vote on its own would have been sufficient to forestall the IGAs. Rather, Senator Paul has a remedy in the legislature, which is to seek repeal or amendment of FATCA itself, under the aegis of which Treasury is

executing the IGAs.[9] Senator Paul therefore lacks legislative standing to challenge the IGAs. None of the other Plaintiffs have alleged injuries that are traceable to the IGAs. The other Plaintiffs thus also lack standing to challenge the IGAs.

3. No Plaintiff Has Standing to Challenge the FBAR

Although most Plaintiffs have alleged foreign account balances over $10,000 so as to be subject to the FBAR requirement, no Plaintiff has alleged both an intent to violate the FBAR requirement and a credible threat of the imposition of a failure-to-file penalty, as Driehaus would require in order for there to be standing to bring a pre-enforcement challenge to the FBAR penalty. Other than Zell, no Plaintiff has alleged any intent to violate the FBAR requirement. Zell has alleged that he "is not currently complying with" the FBAR. Amended Compl. 34. But Zell has not alleged any facts that would show a credible threat of enforcement against him. Even if there were a credible threat of enforcement, the FBAR penalty is a discretionary penalty under 31 U.S.C. § 5321(a)(5)(A). Zell has not alleged any facts that show that the Willfulness Penalty, as opposed to the lower ordinary penalty (which Plaintiffs do not challenge, *see* Part I.B.4, *supra*), would be imposed for Zell's noncompliance with the FBAR.

[***461**] Further, no Plaintiff has alleged any actual injury arising from the FBAR other than Lois Kuettel. Lois has alleged that she would like to have a col-

[9] We note that Senator Paul introduced a bill to repeal FATCA in April 2017. S. 869, 115th Cong. (2017).

lege-savings account placed in her name that her father is currently holding for her benefit in his own name, but that her father does not want to transfer the account to her for fear that it will trigger an FBAR requirement for Lois. This injury, however, is traceable to Daniel Kuettel's personal choice not to transfer the account, and not to the FBAR.

In sum, none of the plaintiffs have standing to sue, and the district court was correct to dismiss their suit.

III

The District Court Properly Denied Leave to Amend

We generally review a district court's decision to deny leave to file an amended complaint, other than amendments as a matter of course under Fed. R. Civ. P. 15(a)(1), for abuse of discretion. *United States ex rel. Bledsoe v. Cmty. Health Sys.*, 342 F.3d 634, 644 (6th Cir. 2003). When a district court bases its denial of a motion to amend "on the legal conclusion that the proposed amendment would not survive a motion to dismiss," however, we review the district court's decision de novo. *Greenberg v. Life Ins. Co. of Va.*, 177 F.3d 507, 522 (6th Cir. 1999). Here, even if Plaintiffs were granted leave to amend their complaint in order to bring claims by Katerina Johnson, Lois Kuettel, and Richard Adams, and in order to plead additional facts such as some of the Plaintiffs' account balances, no plaintiff would have standing to bring any of the claims in the proposed amended complaint for the reasons set forth above. The district court thoroughly reviewed all of the proposed new parties and proposed new claims in the amended complaint, and the district court properly held that leave to amend would be fu-

tile. Accordingly, we affirm the ruling of the district court denying Plaintiff's motion for leave to amend.

CONCLUSION

FATCA imposes far-reaching reporting obligations on individuals and financial institutions, which, like many government regulations, undoubtedly exact monetary and other costs of compliance. The IGAs, to be sure, are part of an unprecedented scheme of international tax enforcement. And the FBAR Willfulness Penalty, if it were to be imposed, is admittedly steep: it could theoretically bring a $100,000 fine for failure to report a foreign account with a balance of $10,000.01.

None of these considerations, however, help these Plaintiffs at this time to clear the initial jurisdictional hurdle of standing.

Accordingly, we **AFFIRM** the judgment of the district court, and we **DENY** as moot Defendants' motion to strike.

[***Editing Note:*** *Page numbers from the reported opinion, 2016 U.S. Dist. LEXIS 55395, are indicated, e.g.,* ****1**.*]

[Filed: 04/26/2016]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION AT DAYTON

Mark Crawford, et al., *Plaintiffs,*	
vs.	**Case No.: 3-15-CV-00250**
United States Department of the Treasury, et al., *Defendants.*	**Judge Thomas M. Rose**

ENTRY AND ORDER DENYING PLAINTIFFS' MOTION FOR LEAVE TO FILE AN AMENDED VERIFIED COMPLAINT (DOC. 32); GRANTING DEFENDANTS' MOTION TO DISMISS (DOC. 26) PLAINTIFFS' COMPLAINT (DOC. 1); AND TERMINATING CASE.

Plaintiffs[1] filed suit against the United States De

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[1] Plaintiffs include Mark Crawford ("Plaintiff Crawford"), Senator Rand Paul ("Plaintiff Paul"), in his official capacity as a member of the United States Senate, Roger Johnson ("Plaintiff Roger Johnson"), Katerina Johnson ("Plaintiff Katerina Johnson"), Daniel Kuettel ("Plaintiff Daniel Kuettel"), Lois Kuettel ("Plaintiff Lois Kuettel"), a

partment of the Treasury ("Treasury Department"), United States Internal Revenue Service ("IRS"), and United States Financial [*2] Crimes Enforcement Network ("FinCEN"), referred to, collectively, as "Defendants", seeking declaratory and injunctive relief on all claims. (Doc. 1, at PageID# 48-50.) Plaintiffs' Verified Complaint (doc. 1) and proposed Amended Verified Complaint (doc. 32-1) challenge the Foreign Account Tax Compliance Act ("FATCA"), the intergovernmental agreements ("IGAs") negotiated by the Treasury Department to supplant FATCA in the signatory countries, and the Report of Foreign Bank and Financial Accounts ("FBAR") administered by FinCEN. FATCA mandates that foreign financial institutions ("FFIs") report the tax return information of their U.S. citizen account holders directly to the IRS using the FATCA Report (Form 8966). 26 U.S.C. § 1471(b)(1)(C); 26 C.F.R. §§ 1.1471-4(d)(3)(v), -4(d)(3)(vi).

Previously, Plaintiffs moved for a preliminary injunction on all claims (doc. 8, at PageID# 135-38) and attached a Memorandum in Support of their Motion for Preliminary Injunction. (Doc. 8-1, at PageID# 139-74.) After full briefing, the Court denied Plaintiffs' Motion for Preliminary Injunction. (Doc. 30.) Now before the Court is Defendants' Motion to Dismiss filed pursuant to Fed. R. Civ. P. 12(b)(1), (6). (Docs. 26, 27.) Plaintiffs filed a Memorandum in Opposition to the Motion to Dismiss. (Doc. 37.) Defendants filed a Reply Memoran-

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minor child, by and through her next friend, Daniel Kuettel, Stephen J. Kish ("Plaintiff Kish"), Donna-Lane Nelson ("Plaintiff [*3] Nelson"), Richard Adams ("Plaintiff Adams"), and L. Marc Zell ("Plaintiff Zell"), referred to, collectively, as "Plaintiffs."

dum in Support of their Motion to Dismiss. (Doc. 38.)

In addition, Plaintiffs filed a Motion for Leave to File an Amended Verified Complaint, (doc. 32), and attached a proposed Amended Verified Complaint, (doc. 32-1), to their motion. Defendants filed a Memorandum in Opposition to Plaintiffs' Motion for Leave, (doc. 34), arguing that amendment is futile because the proposed Amended Verified Complaint does not cure the deficiencies stated in Defendants' Motion to Dismiss, (docs. 26, 27), and the Court's Entry and Order Denying Plaintiff's Motion for Preliminary [*4] Injunction. (Doc. 30.) Plaintiffs filed a Reply Memorandum in support of their Motion for Leave. (Doc. 35.)

There are eight proposed claims before the Court. (Doc. 32-1, at 154-209.) The first claim challenges the validity of the Canadian, Czech, Israeli, French, Danish, and Swiss IGAs[2] used by the Treasury Department.

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[2] Agreement Between the Government of the United States of America and the Government of Canada to Improve International Tax Compliance through Enhanced Exchange of Information under the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, Can.-U.S., Feb. 5, 2014, U.S. Dep't of Treasury, available at https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Canada-2-5-2014.pdf [hereinafter Canadian IGA]; Agreement between the United States of America and the Czech Republic to Improve International Tax Compliance and with Respect to the United States Information and Reporting Provisions Commonly Known as the Foreign Account Tax Compliance Act, Czech-U.S., Aug. 4, 2014, U.S. Dep't of Treasury, available at https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Czech-Republic-8-4-2-14.pdf [hereinafter Czech

(*Id.*, at 154-65.) The second claim addresses the information reporting provisions FATCA and the IGAs impose not on Plaintiffs, but on FFIs. (*Id.*, at 166-71.) The third claim aims at the heightened reporting requirements for foreign bank accounts under FATCA, the IGAs, and the FBAR. (*Id.*, at 172-78.) The fourth claim challenges the 30% tax imposed by FATCA on payments to FFIs from U.S. sources when these foreign institutions choose not to report to the IRS about the

IGA]; Agreement between the Government of the United States of America and the Government of the State of Israel to Improve International Tax Compliance and to Implement FATCA, [*6] Isr.-U.S., June 30, 2014, U.S. Dep't of Treasury, available at https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Israel-6-30-2014.pdf [hereinafter Israeli IGA]; Agreement Between the Government of the United States of America and the Government of the French Republic to Improve International Tax Compliance and to Implement FATCA, Fr.-U.S., Nov. 14, 2013, available at https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/BilateralAgreementUSFranceImplementFATCA.pdf [hereinafter French IGA]; Agreement between the Government of the United States of America and the Government of the Kingdom of Denmark to Improve International Tax Compliance and to Implement FATCA, Den.-U.S., Nov. 19, 2012, available at https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Denmark-11-19-2012.pdf [hereinafter Danish IGA]; Agreement between the United States of America and Switzerland for Cooperation to Facilitate the Implementation of FATCA, Switz.-U.S., Feb. 14, 2013, available at https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Switzerland-2-14-2013.pdf [hereinafter Swiss IGA].

bank accounts of their U.S. customers (the "FFI Penalty"). (*Id.*, at 179-88.) Similarly, the fifth claim challenges the 30% tax imposed by FATCA on account holders who exercise their rights under the statute not to identify themselves as United States citizens to their banks and to refuse to waive privacy protections afforded their accounts by foreign law (the "Passthrough Penalty"). (*Id.*, at 189-93.) The sixth claim challenges the penalty imposed under the Bank Secrecy Act for [*5] "willful" failures to file an FBAR for foreign accounts, which can be as much as the greater of $100,000 or 50% of the value of the unreported account (the "Willfulness Penalty"). (*Id.*, at 194-98.) The seventh and eighth claims challenge the information reporting requirements of FATCA and the IGAs as unconstitutional under the Fourth Amendment. (*Id.*, at 199-209.)

The Motion to Dismiss and Motion for Leave to Amend are now fully briefed and ripe for decision. A relevant factual background will first be set forth, followed by the applicable legal standard and analysis of the motions.

I. BACKGROUND

A. FATCA Statute and Regulations

Congress passed FATCA in 2010 to improve compliance with tax laws by U.S. taxpayers holding foreign accounts. FATCA accomplishes this through two forms of reporting: (1) by FFIs [*7] about financial accounts held by U.S. taxpayers or foreign entities in which U.S. taxpayers hold a substantial ownership interest, 26 U.S.C. § 1471; and, (2) by U.S. taxpayers about their interests in certain foreign financial accounts and offshore assets. 26 U.S.C. § 6038D.

1. FATCA

President Obama signed FATCA into law on March 18, 2010. Senator Carl Levin, a co-sponsor of the FATCA legislation, declared, "offshore tax abuses [targeted by FATCA] cost the federal treasury an estimated $100 billion in lost tax revenues annually." 156 Cong. Rec. 5 S1745-01 (2010). FATCA became law as the IRS began its Offshore Voluntary Disclosure Program ("OVDP"), which since 2009 has allowed U.S. taxpayers with undisclosed overseas assets to disclose them and pay reduced penalties. By 2014, the OVDP collected $6.5 billion through voluntary disclosures from 45,000 participants. IRS Makes Changes to Offshore Programs; Revisions Ease Burden and Help More Taxpayers Come into Compliance, IRS (June 18, 2014), https://www.irs.gov/uac/Newsroom/IRS-Makes-Changes-to-Offshore-Programs%3B-Revisions-Ease-Burden-and-Help-More-Taxpayers-Come-into-Compliance . The success of the voluntary program has likely been enhanced by the existence of FATCA.

2. Foreign Financial Institution Reporting Under FATCA

Foreign Financial Institution reporting encourages FFIs to disclose information on U.S. [*8] taxpayer accounts. If the FFI does not, then a 30% withholding tax may apply to U.S.-sourced payments to the non-reporting FFI. A 30% withholding tax may also apply to FFI account holders who refuse to identify themselves as U.S. taxpayers.

> In the case of any withholdable payment to a foreign financial institution which does not meet the requirements of subsection (b) [specifying reporting criteria], the withholding agent with respect to such

> payment shall deduct and withhold from such payment a tax equal to 30 percent of the amount of such payment.

26 U.S.C. § 1471(a).

Section 1471(b)(1) then provides that, "[t]he requirements of this subsection are met with respect to any foreign financial institution if an agreement is in effect between such institution and the Secretary [of the Treasury] under which such institution agrees" to make certain information disclosures and "to deduct and withhold a tax equal to 30 percent of ... [a]ny [pass-through] payment which is made by such institution to a recalcitrant account holder or another foreign financial institution which does not meet the requirements of this subsection[.]" § 1471(b)(1)(D)(i); *see also* § 1471(d)(7) (defining "pass[-through] payment"). A "recalcitrant account holder" is one who "[f]ails to comply with reasonable requests [*9] for information" that is either information an FFI needs to determine if the account is a U.S. account, § 1471(b)(1)(A), or basic information like the account holder's name, address, and taxpayer identification number. § 1471(c)(1)(A). Section 1471(c)(1) specifies the "information required to be reported on U.S. accounts," including "account balance or value." § 1471(c)(1)(C). In their Amended Verified Complaint, Plaintiffs seek a preliminary injunction against enforcement of § 1471(a), (b)(1)(D), (c)(1), and (c)(1)(C). (Doc. 32-1, Prayer for Relief at W.)

Under § 1471(b)(2), "Financial Institutions Deemed to Meet Requirements in Certain Cases," an FFI "may be treated by the Secretary as meeting the requirements of this subsection if ... such institution is a member of a class of institutions with respect to which the Secretary has determined that the application of this

section is not necessary to carry out the purposes of this section." That means that an FFI that is treated this way is not subject to the reporting criteria in § 1471(b)(1). The Secretary can statutorily exempt FFIs from "attempt[ing] to obtain a valid and effective waiver" of foreign nondisclosure laws from each account holder and can exempt FFIs from closing such account "if a waiver ... is not obtained from each such holder within a reasonable [*10] period of time." § 1471(b)(1)(F).[3] The Secretary's exemption of an FFI under § 1471(b)(2) also means that the FFI no longer has to make the report described in § 1471(c)(1) because that report is based on "[t]he agreement described in subsection (b)" that an FFI the Secretary has exempted does not need to have in place to avoid withholding. Furthermore, the FATCA statute provides, "[t]he Secretary shall prescribe such regulations or other guidance as may be necessary or appropriate to carry out the purposes of, and prevent the avoidance of, this chapter," i.e., §§ 1471-74. 26 U.S.C. § 1474(f).

Plaintiffs also seek to enjoin enforcement of 26 C.F.R. § 1.1471-2T(a)(1). The "[g]eneral rule of withholding" under § 1471(a) is largely reiterated by 26 C.F.R. § 1.1471-2T(a)(1), which Plaintiffs also target. (Doc. 32-1, Prayer for Relief at Z.) Plaintiffs seek to enjoin enforcement of 26 C.F.R. §§ 1.1471-4(a)(1), 1.1471-4(d), and 1.1471-4(d)(3)(ii), which repeat the content of § 1471(b) and (c). (*Id.*, Prayer for Relief at AA.) In addition, Plaintiffs seek an injunction against 26 C.F.R. § 1.1471-4T(b)(1), which addresses the 30%

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[3] If the country enters into an IGA this provision becomes irrelevant because consent is no longer a legal impediment under foreign law.

withholding tax for recalcitrant account holders established by the statute. (*Id.*, Prayer for Relief at BB.) Plaintiffs also seek to enjoin the IRS's use of Form 8966, "FATCA Report", the [*11] form on which FFIs make disclosures under § 1471(c). *See* 26 C.F.R. § 1.1471-4(d)(3)(v); (doc. 32-1, Prayer for Relief at DD.) In Plaintiffs' view, these FATCA regulations "primarily elaborate on the [] requirements of the statutory provisions and clarify the statutory requirements." (Doc. 32-1, at 37.)

3. Individual Reporting Under FATCA

There is a companion individual reporting requirement to § 1471's FFI reporting requirement located at 26 U.S.C. § 6038D. Under § 6038D, individuals holding more than $50,000 of aggregate value in "specified foreign financial assets", § 6038D(b), must file a report with their annual tax returns, § 6038D(a), that includes, for each asset "[t]he maximum value of the asset during the taxable year." § 6038D(c)(4). Plaintiffs seek to enjoin this asset-value reporting requirement. (Doc. 32-1, Prayer for Relief at X.) Section 6038D(h) also provides that, "[t]he Secretary shall prescribe such regulations or other guidance as may be necessary or appropriate to carry out the purposes of this section ...." Plaintiffs seek to enjoin enforcement of the regulation that states this same reporting requirement. 26 C.F.R. § 1.6038D-4(a)(5); (*see* doc. 32-1, Prayer for Relief at CC.) Plaintiffs also target two other regulatory reporting requirements: disclosing whether a depository or custodial account was opened or closed [*12] during the taxable year, 26 C.F.R. § 1.6038D-4(a)(6); and "[t]he amount of any income, gain, loss, deduction, or credit recognized for the taxable year with respect to the re-

ported specified foreign financial asset", 26 C.F.R. § 1.6038D-4(a)(8). (Doc. 32-1, Prayer for Relief at CC.)

B. The Canadian, Czech, Israeli, French, Danish, and Swiss Intergovernmental Agreements

Once FATCA became law, the Government began requiring coordination with FFIs and foreign governments. To facilitate FATCA implementation, the United States has concluded over seventy IGAs with foreign governments addressing the exchange of tax information. Plaintiffs seek to enjoin IGAs with Canada, the Czech Republic, Israel, France, Denmark, and Switzerland in their entirety. (Doc 32-1, Prayer for Relief at B1,[4] E, I, M, Q, U.) Alternatively, they seek to enjoin parts of those IGAs. (*Id.*, Prayer for Relief at B2—D, F—H, J—L, N—P, R—T, V.)

The Canadian, Czech, French, Danish, and Israeli IGAs are similar because they are all "Model 1" IGAs, whereas the Swiss IGA is [*13] a "Model 2" IGA. The key distinction is that under Model 1 IGAs, foreign governments agree to collect their FFIs' U.S. account information and to send it to the IRS, whereas under Model 2 IGAs, foreign governments agree to modify their laws to the extent necessary to enable their FFIs to report their U.S. account information directly to the IRS. All six IGAs, in their preambulatory clauses, recognize the partner governments' mutual "desire to conclude an agreement to improve international tax com-

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[4] Plaintiffs' proposed Amended Verified Complaint contains two "B" sections in the Prayer for Relief; therefore, the first "B" section will be referred to as "B1" and the second "B" section will be referred to as "B2".

pliance"[5] or, in the case of Switzerland, a "desire to conclude an agreement to improve their cooperation in combating international tax evasion."[6]

All six IGAs mention the Tax Information Exchange Agreements ("TIEAs") that the United States has with these six countries as part of preexisting treaties. *See supra* notes 5-6. All six IGAs similarly note the need

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[5] Canadian IGA pmbl.; Czech IGA pmbl.; Israel IGA pmbl.; French IGA pmbl.; Danish IGA pmbl.

[6] Swiss IGA pmbl.; see also Convention between the United States and Canada with Respect to Taxes on Income and Capital, Can.-U.S., art. XXVII, Sept. 26, 1980 ("Canadian Convention"); Convention between the United States of America and the Czech Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, Czech-U.S., art. 29, Sept. 16, 1993 ("Czech Convention"); Convention between the Government of [*14] the United States of America and the Government of the State of Israel with Respect to Taxes on Income, Isr.-U.S., art. 29, Nov. 20, 1975 ("Israeli Convention"); Convention between the Government of the United States of America and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, Together with Two Related Exchanges of Notes, Fr.-U.S., art. 26(2), Aug. 31, 1994 ("French Convention"); Convention between the United States of America and the Government of the Kingdom of Denmark for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Den.-U.S., art. 26, Aug. 19, 1999 ("Danish Convention"); Convention between the United States and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, Switz.-U.S., art. 26, Oct. 2, 1996 ("Swiss Convention").

for "an intergovernmental approach to FATCA [*15] implementation", or, in the Swiss case, "intergovernmental cooperation to facilitate FATCA implementation". *Id.*

The five Model 1 IGAs—Canadian, Czech, French, Danish, and Israeli—define "Obligations to Obtain and Exchange Information with Respect to Reportable Accounts" in Article 2. Canadian IGA art. 2; Czech IGA art. 2; French IGA art. 2; Danish IGA art. 2; Israel IGA art. 2. In addition to seeking to enjoin Article 2 in full, (doc. 32-1, Prayer for Relief at B2, F, J, N, R), Plaintiffs attack the agreement that IGA partners, with respect to each "U.S. Reportable Account" of its FFIs, will report, "the account balance or value ... as of the end of the relevant calendar year or other appropriate reporting period ...." Canadian IGA art. 2, § 2(a)(4); Czech IGA art. 2, § 2(a)(4); French IGA art. 2, § 2(a)(4); Danish IGA art. 2, § 2(a)(4); Israeli IGA art. 2, § 2(a)(4); (*see* doc. 32-1, Prayer for Relief at C, G, K, O, S.) If Model 1 partner countries comply with Article 2 as well as the "Time and Manner of Exchange of Information" agreed to in Article 3 and other rules, then their reporting FFIs "shall be treated as complying with, and not subject to withholding under, section 1471", nor will they be required to withhold "with respect to an account held by a [*16] recalcitrant account holder" under § 1471. Canadian IGA art. 4, §§ 1, 2; Czech IGA art. 4 §§ 1, 2; French IGA art. 4 §§ 1, 2; Danish IGA art. 4 §§ 1, 2; Israeli IGA art. 4, §§ 1, 2. This is consistent with the Treasury Secretary's power to deem FFIs to be in compliance with § 1471 if statutory purposes are met. 26 U.S.C. § 1471(b)(2)(B).

The Israeli IGA is not yet in force. *See* Israeli IGA art. 10, § 1. However, the Government asserts that the

Treasury Secretary has exercised his discretion not to impose § 1471 withholding against Israeli FFIs or recalcitrant account holders.

The Swiss IGA is different in that under its Article 3—which Plaintiffs seek to enjoin (doc. 32-1, Prayer for Relief at V)—the Swiss government agrees to "direct all Reporting Swiss Financial Institutions" to report certain information directly to the IRS. Swiss IGA art. 3, § 1. Under Article 5—which Plaintiffs also seek to enjoin (doc. 32-1, Prayer for Relief at V)—the U.S. government "may make group requests ... based on the aggregate information reported to the IRS pursuant to" Article 3. Swiss IGA art. 5, § 1. "Such requests shall be made pursuant to Article 26 of the [Swiss] Convention, as amended by the Protocol," and, "such requests shall not be made prior to the entry into force of the Protocol[.]" [*17] Swiss IGA art. 5, § 2. The "Protocol" being "the Protocol Amending the [Swiss] Convention that was signed at Washington on September 23, 2009." Swiss IGA pmbl. That Protocol has not yet been approved by the Senate, and because of that, Article 5 of the Swiss IGA cannot yet be implemented.

C. Report of Foreign Bank and Financial Accounts

The third body of law at issue in this case pertains to the FBAR requirements. U.S. persons who hold a financial account in a foreign country that exceeds $10,000 in aggregate value must file a FBAR with the Treasury Department reporting the account. *See* 31 U.S.C. § 5314; 31 C.F.R. §§ 1010.306(c), .350. The current FBAR form is FinCEN Form 114. The form has been due by June 30 of each year regarding accounts held during the previous calendar year. 31 C.F.R. §

1010.306(c). Beginning with the 2016 tax year, the due date of the form will be April 15. Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, Pub. L. No. 114-41, § 2006(b)(11), 129 Stat. 443. A person who fails to file a required FBAR may be assessed a civil monetary penalty. 31 U.S.C. § 5321(a)(5)(A). The amount of the penalty is capped at $10,000 unless the failure was willful. *See* § 5321(a)(5)(B)(i), (C). A willful failure to file increases the maximum penalty to $100,000 or half the value in the account at the time of the violation, whichever is greater. [*18] § 5321(a)(5)(C). In either case, whether to impose the penalty and the amount of the penalty are committed to the Secretary's discretion. *See* § 5321(a)(5)(A) ("The Secretary of the Treasury may impose a civil money penalty[.]"); § 5321(a)(5)(B) ("[T]he amount of any civil penalty ... shall not exceed" the statutory ceiling). Plaintiffs seek to enjoin enforcement of the willful FBAR penalty under § 5321(a)(5). (Doc. 32-1, Prayer for Relief at Y.) They also ask for an injunction against "the FBAR account-balance reporting requirement" of FinCen Form 114. (*Id.*, Prayer for Relief at EE.)

II. MOTIONS TO AMEND AND DISMISS PURSUANT TO FED. R. CIV. P. 12(B)(1), 15(A)(2)

A. Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for Lack of Standing

1. Standard of Review

Defendants challenge Plaintiffs' standing, which relates to the Court's jurisdiction; therefore, the Court must consider the issue first. *Sault Ste. Marie v. United States*, 9 Fed. App'x. 457, 460 (6th Cir. 2001) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S.

83, 93-94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)). Federal courts may only decide actual cases or controversies. *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 341, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006). "One element of the case-or-controversy requirement" is that plaintiffs "must establish that they have standing to sue." *Raines v. Byrd*, 521 U.S. 811, 818, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997). The standing requirement protects the "time-honored concern about keeping the Judiciary's power within its proper constitutional sphere." *Id.* at 820. "[S]tanding inquir[ies are] especially rigorous when reaching the merits of the dispute [*19] would force [a court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146, 185 L. Ed. 2d 264 (2013).

Standing contains three elements:

> First, plaintiffs must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992) (citations and internal quotation omitted).

As for the first consideration, a "threatened injury must be certainly impending to constitute injury in

fact," and "'[a]llegations of possible future injury' are not sufficient." *Clapper*, 133 S. Ct at 1147 (quoting *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990)) (emphasis in original). Similarly, "a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking [*20] relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74; *see also id.* at 577 (rejecting attempt "to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts"). In addition, plaintiffs generally cannot establish standing indirectly when their injury is the result of "the independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976); *see also Lujan*, 504 U.S. at 560-61 (same); *Shearson v. Holder*, 725 F.3d 588, 592 (6th Cir. 2013) (same); *Ammex, Inc. v. United States*, 367 F.3d 530, 533 (6th Cir. 2004) (finding no standing to challenge excise tax assessed against third party, since "alleged injury ... in the form of increased fuel costs was not occasioned by the Government").

As to the second consideration, "a plaintiff must 'assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Coyne*, 183 F.3d at 494 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)); *see also United States v. Ovalle*, 136 F.3d 1092, 1100-01 (6th Cir. 1998); *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). The rare exception to this requirement arises where a plaintiff can "show that (1) it has suffered an injury in

fact; (2) it has a close relationship to the third party; and (3) there is some hindrance to the third party's ability to protect his or her own interests." *Mount Elliott Cemetery Ass'n v. City of Troy*, 171 F.3d 398, 404 (6th Cir. 1999); *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281, 295 (6th Cir. 1998).

"A plaintiff [*21] bears the burden of demonstrating standing and must plead its components with specificity." *Coyne*, 183 F.3d at 494; *see also Lujan*, 504 U.S. at 561. A plaintiff "must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)). The Supreme Court has "always insisted on strict compliance with this jurisdictional standing requirement." *Raines*, 521 U.S. at 819. Moreover, "suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations are, even when premised on allegations of several instances of violations of law, rarely if ever appropriate for federal-court adjudication." *Lujan*, 504 U.S. at 568 (quotation omitted).

2. United States Senator Rand Paul

Plaintiff Paul seeks to base legal standing for Counts 1 and 2 on his role as a U.S. Senator, charged with the institutional task of advice and consent under the U.S. Constitution. He contends that the IGAs exceed the proper scope of Executive Branch power and should have been submitted for Senate approval. (Doc. 32-1, at 32-33.) In its Entry and Order Denying Plaintiffs' Motion for Preliminary Injunction, the Court found this insufficient to meet the requirements of standing for three reasons, stating: (1) Plaintiff Paul

has [*22] alleged no injury to himself as an individual, (2) the institutional injury he alleges is wholly abstract and widely dispersed, and (3) his attempt to litigate this dispute at this time and in this form is contrary to historical experience. (Doc. 30, at 14.)

As Defendants argue, Plaintiffs have failed to cure the deficiencies behind the Court's denial for preliminary injunction. The lone amendment in Plaintiffs' proposed amended complaint, in regards to Plaintiff Paul, states:

> Senator Paul now suffers, and will continue to suffer, the concrete and particularized injury of not being able to vote against the FATCA IGAs, which injury was caused by the unconstitutional and illegal action creating the IGAs, and which injury will be redressed by the IGAs being held beyond constitutional and statutory authority.

(Doc. 32-1, at 34.) This proposed amendment formulaically recites the elements for standing, while reasserting the same basis for standing that the Court previously found insufficient. As Plaintiff Paul's claim of standing is based on a loss of political power, not a loss of any private right, the asserted injury is not "concrete" for purposes of Article III standing. (*See* doc. 30, at [*23] 13 (citing *Raines*, 521 U.S. at 821.) Moreover, the additional deficiencies previously identified by the Court are likewise, not cured, by the proposed amendment. Senator Paul has neither been authorized to sue on behalf of the Senate nor can he base his standing on a more generalized interest in "vindication of the rule of law." (Doc. 30, at 14 (citation omitted).) A legislator does not hold any legally protected interest in proper application of the law that is distinct from the interest held by every member of the public. Therefore, Plaintiff

Paul does not allege a particularized, legally cognizable injury by his claim that the Executive Branch is not adhering to the law. *See Campbell v. Clinton*, 203 F.3d 19, 22, 340 U.S. App. D.C. 149 (D.C. Cir. 2000) (stating Congressional plaintiffs do not "have standing anytime a President allegedly acts in excess of statutory authority").

Plaintiff Paul has an adequate remedy to challenge the reporting requirements and penalties that he opposes by working to repeal these laws through the legislative process. *Raines*, 521 U.S. at 821.

3. Individual Plaintiffs

The Court previously found that all Plaintiffs lacked standing to sue, except Plaintiff Daniel Kuettel because Defendants conceded he had standing with respect to Counts three and six regarding FBAR requirements. [*24] (Doc. 30 at 14-23.) Defendants, in their Motion to Dismiss, assert that they did not make such concession; therefore, the Court will analyze standing as it relates to all individual plaintiffs on all counts. (Doc. 27, at 4 n.1.) This analysis will include three new plaintiffs—Katerina Johnson, Lois Kuettel, and Richard Adams—named in Defendants' proposed Amended Verified Complaint. (Doc. 32-1, at 1.)

The basis for the Court's previous finding for lack of standing was due to no individual plaintiffs alleging they suffered or was about to suffer injury under the FATCA withholding tax. (Doc. 30, at 14.) Neither were any plaintiffs an FFI to which the tax under § 1471 applies nor were they assessed the tax. (*Id.*) No plaintiffs had even been informed that the IRS intends to assess the recalcitrant account holder withholding tax imposed by § 1471(b). (*Id.* at 14-15.) Moreover, all

Plaintiffs, but Crawford, live in jurisdictions where FFIs are not currently subject to the § 1471(b) withholding tax.

a. Mark Crawford

Plaintiff Crawford seeks to invalidate FATCA and the FBAR requirements on three bases: (1) his brokerage firm cannot accept U.S. citizens—including Crawford himself—as clients, due to a relationship with a bank that [*25] has a policy against taking on American clients, (*see* doc. 32-1, at 11-12); (2) he does not want the "financial details of his accounts" disclosed to the U.S. government, (*see id.*, at 12); and (3) he fears "unconstitutionally excessive fines imposed by 31 U.S.C. § 5321 if he willfully fails to file an FBAR." (*See id.*, at 12-13).

Previously, the Court found Plaintiff Crawford lacked standing because standing cannot be established when third parties are the causes of the alleged injuries. (Doc. 30, at 15.) The alleged injury involved his bank's policy against U.S. citizens as clients, and subsequent denial of his application for a brokerage account as possibly affecting Plaintiff Crawford financially. (Doc. 32-1, at 11-12.) The Court found any such harm as not fairly traceable to an action by Defendants, which are not responsible for the decisions of a third party. (Doc. 30, at 15.) In an attempt to cure this deficiency, Plaintiff Crawford identifies a specific denial of his application by Saxo Bank in Copenhagen, Denmark, which was allegedly because he is a U.S. citizen. (Doc. 32-1, at 12.) However, this amendment fails to establish the required connection between the Defendants and the harm. Instead, the amendment provides [*26] further explanation of the harm that the

Court previously found to be not fairly traceable to an action by Defendants.

Plaintiffs argue that *Warth v. Seldon* recognized that indirect harm may be sufficient to establish standing. (Doc. 35, at 9 (citing 422 U.S. 490, 504-05).) The Supreme Court in *Warth*, stated:

> The fact that the harm to petitioners may have resulted indirectly does not in itself preclude standing. When a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights. But it may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm.

Id. (citation omitted). While an injury may be indirect, in certain circumstances, the injury must still be "fairly traceable to the challenged action of the defendant[,]" *Lujan*, 504 U.S. at 560-61, and "not dependent on speculation about the possible actions of third parties not before the court." [*27] *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 264 (1977). Although the amendment does identify that Plaintiff Crawford was unsuccessful in his attempt to obtain a brokerage account, the causation of such harm is dependent on speculation of possible third party action by the Court.

In *Village of Arlington Heights*, an African-American man alleged that he sought and would qualify for a prospective housing complex, and that he would prob-

ably move there, as it was closer to his job. 429 U.S. at 264. However, the man alleged that he was unable to move there because he was an African American. *Id.* The Supreme Court found it compelling that if the Court were to grant the relief sought, there was at least a "substantial probability" the man would be afforded the housing opportunity. *Id.* (citation omitted). Here, if the Court were to grant the relief sought, the facts as alleged do not suggest that there is a "substantial probability" that Plaintiff Crawford will be successful in his banking endeavors. Rather, it requires the Court to speculate as to the actions of Saxo Bank. The question of whether or not Saxo Bank would grant Plaintiff Crawford's application for a brokerage account cannot be determined with "substantial probability" without speculation as to the [*28] general practices and policies of Saxo Bank, if Plaintiff Crawford meets the criteria of the Saxo Bank's general practices and policies for a brokerage account, and any other aspects of Saxo Bank's application process that fall squarely within their discretion.

In addition, as the Court previously found, Plaintiff Crawford's discomfort with the information reporting requirements of FATCA does not establish the concrete, particularized harm that confers standing. (Doc. 30, at 15.) Plaintiff Crawford states, "[he] now suffers, and will continue to suffer, concrete and particularized injuries to legally protected interest, which interests are caused by the challenged government actions and will be redressed by the requested relief." (Doc. 32-1, at 13.) However, merely reciting the elements of a cause of action is not sufficient to convey standing. Furthermore, regardless of Plaintiff Crawford's fear of "unconstitutionally excessive fines imposed by 31 U.S.C. §

5321 if he willfully fails to file an FBAR, (*id.*, at 12-13), there was no allegation that he failed to file any FBAR that may have been required, much less the assessment of an "excessive" FBAR penalty, (doc. 30, at 15), nor was there any proposed amendment [*29] that spoke to this deficiency.

b. Roger and Katerina Johnson

Plaintiff Roger Johnson states that he is a U.S. citizen who resides in the Czech Republic. (Doc 32-1, at 14.) Plaintiff Katerina Johnson is a citizen of, and resides, in the Czech Republic. (*Id.*, at 16.) They seek to invalidate the Czech IGA, FATCA, and the FBAR reporting requirements because: (1) Plaintiff Katerina Johnson, Plaintiff Roger Johnson's wife, who has been added as a party in the proposed Amended Verified Complaint, "strongly objected to having her financial affairs disclosed to the United States government", leading to the couple's decision to separate their assets, (*see id.*, at 15, 17); (2) they do not want the financial details of their accounts disclosed, (*see id.*, at 16); and (3) they fear "unconstitutionally excessive fines" if they willfully fail to file an FBAR. (*See id.*).

Previously, the Court found Plaintiff Roger Johnson lacking standing for three reasons. (Doc. 30, at 16.) First, the harm Plaintiff Roger Johnson alleges resulted from his wife's objections to FATCA and the choices they made in response were not traceable to the government. (*Id.*); *see Simon*, 426 U.S. at 41-42. Second, Plaintiff Roger Johnson's discomfort with reporting requirements of American [*30] law did not support standing, as he did not allege any concrete constitutional injury. (Doc. 30, at 16 (citing *Lujan*, 504 U.S. at 561).) Third, the prospect of the hypothetical imposi-

tion of an excessive fine, if he willfully fails to file a required FBAR, was insufficient. (Doc. 30, at 16 (citing *Clapper*, 133 S. Ct. at 1147).)

To cure these deficiencies, Plaintiffs Roger Johnson states the value of his accounts subjects him to the reporting requirements of FACTA and FBAR, as well as adds a recurring recitation of the elements of standing, that they "now suffer[], and will continue to suffer, concrete and particularized injuries to legally protected interests, which injuries are caused by the challenged government actions and will be redressed by the requested relief." (Doc. 30, at 16.) However, the reporting requirement, itself, does not constitute "an invasion of a legally protected interest" and despite Plaintiffs discomfort with the alleged invasion of their privacy, they still have not identified a constitutionally protected interest for the same reasons identified in the Court's denial of Plaintiffs' Motion for Preliminary Injunction. (*Id.*, at 22-23.) Therefore, the new allegations regarding being subjected to reporting requirements [*31] do not cure the aforementioned deficiencies. There is no allegation that they failed to file any FBAR that may have been required, much less that the Government has assessed an "excessive" FBAR penalty against them.

c. Stephen J. Kish

Plaintiff Kish states that he is a dual citizen of the United States and Canada, residing in Toronto, Canada. (Doc. 32-1, at 18.) The Court previously found that Kish's allegation that his wife "strongly opposes the disclosure of her personal financial information" under FATCA to be insufficient to convey standing because his wife is not a plaintiff. (Doc. 30, at 17 (citing *Coyne*,

183 F.3d at 494).) Plaintiff Kish's proposed amendments include being subjected to reporting requirements and the same recurring recitation of the elements of standing, that he "now suffers, and will continue to suffer, concrete and particularized injuries to legally protected interests, which injuries are caused by the challenged government actions and will be redressed by the requested relief." (Doc. 32-1, at 19.) However, as analyzed above, these proposed amendments do not cure the deficiencies previously identified by the Court to have standing. As before, Plaintiff Kish may not assert claims on [*32] his wife's behalf. (Doc. 30, at 17.) The fact that he has suffered some "discord" in his marriage, (*id.*), is too vague and indirect of a harm to establish standing. Furthermore, as explained above, reluctance to comply with the requirements of American law and theoretical "excessive fines" that would be imposed if he willfully violated the law, do not convey standing. (Doc. 32-1, at 19.)

d. Daniel and Lois Kuettel

Plaintiff Daniel Kuettel states that he is a citizen of Switzerland who renounced his U.S. Citizenship in 2012. (*Id.*, at 20.) The Court previously found that the only ongoing injury that Plaintiff Daniel Kuettel alleged was related to a college savings account maintained at a Swiss bank for his daughter, Plaintiff Lois Kuettel, who has been added to this action. (Doc. 32-1, at 22-23; Doc. 30, at 17.) The Court previously inferred a concession by Defendants as to standing for Plaintiff Daniel Kuettel on Counts 3 and 6; however, the Defendants deny such concession and these Counts will be analyzed in the same regard as all other Counts. (*See* doc. 30, at 18; doc. 34, at 4 n.1 (discussing doc. 16, at

PageID# 216).) Plaintiff Lois Kuettel is a tri-citizen of the United States, Switzerland, [*33] and the Philippines. (Doc. 32-1, at 23.) There were several issues identified by the Court with regard to standing, for Plaintiff Daniel Kuettel, which will be analyzed in conjunction with Plaintiff Lois Kuettel.

First, the account balance was approximately $8,400, which fell below the $10,000 threshold for FBAR reporting. (Doc. 30, at 17.) This deficiency is cured by alleging that "[t]he account currently has a balance of greater than $10,000." (Doc. 32-1, at 22.) Second, Plaintiff Daniel Kuettel's daughter was only ten years old and not a plaintiff to the case. (Doc. 30, at 17.) This deficiency is also cured as Plaintiff Daniel Kuettel's daughter has been added as a plaintiff, as a minor child, by and through her next friend, Plaintiff Daniel Kuettel. (Doc. 32-1, at 1, 23.) Third, Plaintiff Daniel Kuettel's objection "to filing an FBAR as required by FinCEN because he is not a U.S. citizen and would not do so for his daughter's account" was insufficient because "[t]he relief for any wrong [was] either for Kuettel's daughter to sue her Swiss bank for disparate treatment ..., or to seek recourse in the power of the market moving her accounts to an institution that wishes to compete for her [*34] business." (Doc. 30, at 18.)

Plaintiffs Daniel and Lois Kuettel allege that Plaintiff Lois Kuettel cannot avoid FBAR reporting by renouncing her U.S. citizenship and that Plaintiff Daniel Kuettel does not want to violate his daughter's privacy by filing the FBAR on her behalf. (Doc. 32-1, at 23-24.) For these reasons, Plaintiff Daniel Kuettel closed his daughter's account and opened another account in his name. (*Id.*, at 24.) However, as stated in the Court's

denial for preliminary injunction, any advantages his daughter might receive by Plaintiff Daniel Kuettel filing an FBAR on his daughter's behalf or by placing the account in his name are based on a bank policy, not the conduct of the Defendants. (Doc. 30, at 18-19.) The failure to reap those advantages is due to the Bank's policies regarding someone like Plaintiff Daniel Kuettel's reluctance to comply with the FBAR requirements, not any action that is fairly traceable to the Government. (*See* doc. 30, at 18.)

Likewise, any assertion of past harm because Plaintiff Daniel Kuettel was "mostly unsuccessful" in refinancing his mortgage due to FATCA still does not convey standing. Any conceivable harm is attributable to the actions of a third-party [*35] foreign bank, not the actions of the Government. Finally, any past harm alleged is not redressable here because Plaintiff Daniel Kuettel renounced his American citizenship and has since obtained acceptable refinancing. (*See id.*, at 18 (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210-11, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) ("[T]he fact of past injury ... does nothing to establish a real and immediate threat that he would again suffer similar injury in the future." (quotations omitted)).)

e. Donna-Lane Nelson and Richard Adams

Plaintiff Nelson is a citizen of Switzerland who has renounced her U.S. citizenship. (Doc. 32-1, at 26-27.) She renounced her citizenship because a Swiss bank "offered investment opportunities that were not available to her as an American." (*Id.*, at 27.) She "resents having to provide" "explanations" to Swiss banks that have requested information on her past U.S. citizen-

ship and payments to her daughter, who lives in the United States, and she sees "threats implied by these requests which appear to be prompted by FATCA." (*Id.*, at 28.) Furthermore, she does not want to disclose financial information to the Government, and fears she may be subjected to willful FBAR penalties, despite no such penalty having been imposed or threatened against her. Additionally, she fears the 30% [*36] withholding tax may be imposed against her "if her business partner", who is her husband, with whom she holds joint accounts, "opts to become a recalcitrant account holder." (*Id.*, at 28-29.)

Previously, the Court found Plaintiff Nelson lacked standing because her allegations of harm stemmed from third-party conduct. (Doc. 30, at 19.) Consistent with the above analyses, fear of hypothetical events that might have befallen her if she had not renounced her citizenship was not sufficient to constitute concrete harm to confer Article III standing. (*Id.*, at 19-20.) The Court further found that discretionary decisions of a foreign bank do not create standing, and without standing, she could not air her "resentment" of U.S. law in this Court. (*Id.*, at 20.) In order to attempt to cure the above deficiencies, Plaintiff Nelson claims that she was "worried that her account would be closed and that she would be unable to open another account with her U.S. citizenship. (Doc. 32-1, at 27.) However, this allegation fails to cure the deficiencies for the same reasons. The discretionary decisions or future discretionary decisions of a foreign bank do not create standing. Furthermore, as identified above, fear of a hypothetical harm that [*37] may or may not occur if she had not renounced her citizenship is not sufficient to constitute concrete harm.

Plaintiff Nelson also proposes the following amendment: "[s]he also knew of many accounts of U.S. citizens that had been closed because of a person's ties to the U.S. and because of FATCA and IGAs." (*Id.*) This amendment fails to cure her standing deficiencies for all the same reasons previously stated. Moreover, knowledge of hypothetical harm to people not a party to this case by a third party cannot confer standing for Plaintiff Nelson.

Plaintiff Adams, Plaintiff Nelson's business partner and husband, is named as a party in the proposed amended complaint, and is a United States citizen currently residing in Switzerland. (*Id.*, at 29.) Plaintiff Adams alleges that he was unable to incorporate the business he shares with his wife in France because he is a U.S. citizen. (*Id.*) Like his wife, Plaintiff Adams is fearful that he will be unable to continue banking in Switzerland, and anticipates his account may be closed. (*Id.*, at 30.) If such event occurs, the couple will reluctantly consider separating their accounts. (*Id.*) With a closed account and separated marital accounts, Plaintiff Adams fears that he [*38] will be unable to open another account for everyday use. (*Id.*) Additionally, Plaintiff Adams does not wish to disclose the financial details of the accounts he currently holds. (*Id.*) Again, like his wife, Plaintiff Adams fears "unconstitutionally excessive fines" due to FBAR reporting requirements. (*Id.*, at 31.)

Plaintiff Adams lacks standing for all the same reasons as his wife. Plaintiff Adams' hypothetical fear of the harms that may be caused by a third party bank are insufficient to confer standing because it does constitute concrete harm. Likewise, as discussed above, the discretionary decisions of a foreign bank do not

create standing.

Consistent with the aforementioned proposed amendments, Plaintiffs Nelson and Adams formulaically recite the elements of standing, "[Nelson and Adams] now suffer[], and will continue to suffer, concrete and particularized injuries to legally protected interests, which injuries are caused by the challenged government actions and will be redressed by the requested relief." (*Id.*, at 29, 31.) As analyzed above, this is insufficient to convey standing.

f. L. Marc Zell

Plaintiff Zell is a dual citizen of the United States and the State of Israel, currently residing in Israel. ([*39] *Id.*, at 31.) In the Court's denial for a preliminary injunction, the Court found that the majority of Plaintiff Zell's allegations concerned the conduct of Israeli banks and his belief that these actions have been unfair to him or his clients, as a practicing attorney. (Doc. 30, at 21.) As stated above, the conduct of third parties—even if related to the banks' compliance with FATCA—does not confer standing to bring suit against Defendants, nor may Plaintiff Zell seek redress on behalf of third parties who have allegedly suffered harm, including unidentified clients not a party to this case.

Moreover, his compliance with a client's wish to avoid the FATCA reporting requirements potentially subjected the client—not Plaintiff Zell—to the risk of imposition of a 30% tax. (*See id.* (citing 26 U.S.C. § 1471(b)(1)(D).) Plaintiff Zell had not alleged that he has been assessed a 30% withholding tax under FATCA, nor could he (or his clients) be, because such withholding under § 1471 is not presently being im-

posed against Israeli FFIs or their recalcitrant account holders. (Doc. 30, at 21-22.) Plaintiff Zell had not had a penalty imposed against him for any willful failure to file an FBAR either. (*Id.*, at 22.) Therefore, he had suffered no concrete [*40] and particularized injury sufficient to convey standing. (*Id.* (citing *Lujan*, 504 U.S. at 560).)

Plaintiff Zell's newly proposed allegations do not cure the above-mentioned deficiencies. The proposed amendments include statements that his accounts are subject to FATCA and FBAR required reporting, to which he is choosing not to comply. (Doc. 32-1, at 34.) But, again, Plaintiff Zell does not allege that he has been assessed a withholding tax under FATCA, as they are not presently imposed against Israeli recalcitrant account holders, nor has he alleged that he has been assessed a penalty for his willful failure to file an FBAR. Based on the Court's previous holdings, these allegations do not support that Plaintiff Zell has suffered a concrete and particularized injury sufficient to convey standing. Additionally, Plaintiff Zell recites the same statement that he meets the elements of standing, by formulaically reciting such elements, (doc. 32-1, at 35), which the Court finds as insufficient to confer standing.

4. Motion to Amend

Plaintiffs bring their Motion for Leave to Amend pursuant to Fed. R. Civ. P. 15(a)(2). "Rule 15(a)(2) provides that leave to amend is to be freely given when justice so requires." *Riverview Health Institute LLC v. Medical Mutual of Ohio*, 601 F.3d 505, 520 (6th Cir. 2010). "However, a motion for leave to amend may [*41] be denied where there is 'undue delay, bad faith,

or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.'" *Id.* (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962) (emphasis in original). A proposed amendment is futile if the amendment could not withstand a motion to dismiss. *Riverview Health*, 601 F.3d at 520 (citing *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 420 (6th Cir. 2000)) (quotations omitted); *Thiokel Corp. v. Dep't of Treasury, Revenue Div.*, 987 F.2d 376, 383 (6th Cir. 1993).

Here, analyzing each Plaintiff individually, the Court finds that none of the Plaintiffs has standing to sue Defendants. No individual Plaintiff has suffered an invasion of a legally protected interest, which is concrete and particularized, and actual or imminent, not conjectural or hypothetical. Moreover, no alleged injury is fairly traceable to the actions of the Defendants, but rather, the actions of an independent third party. Finally, there are no allegations that it is likely that the alleged injury will be redressed by a favorable decision. *See Lujan*, 504 U.S. at 560-61. In reaching these holdings, the Court analyzed the proposed Amended Verified Complaint, (doc. 32-1), which could not withstand Defendants' Motion to Dismiss, (doc. 26); therefore, the proposed amendments [*42] are futile.

Accordingly, all claims are **DISMISSED** for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1), against all Defendants, without prejudice.

III. MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(B)(6)

In addition to challenging Plaintiffs' standing pursuant to Fed. R. Civ. P. 12(b)(1), Defendants' Motion to Dismiss, (*id.*), challenged Plaintiffs' proposed Amended Verified Complaint, (doc. 32-1), under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. (Doc. 26.) Because the Court has dismissed all claims under Rule 12(b)(1), the Court does not reach Defendants' Rule 12(b)(6) arguments.

IV. CONCLUSION

For the reasons set forth above, the Court **DENIES** Plaintiffs' Motion for Leave to File an Amended Verified Complaint, (doc. 32), and the Court **GRANTS** Defendants' Motion to Dismiss, (doc. 26), Plaintiffs' Complaint. The captioned case is hereby **TERMINATED** upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.[7]

DONE and **ORDERED** in Dayton, Ohio, this Monday, April 25, 2016.

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[7] The Court acknowledges the assistance of student extern Anthony Graber of the University of Dayton School of Law in the preparation of this opinion.

[Filed: 09/29/2015]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Mark Crawford, et al.,

Plaintiffs,

v. **Case No.: 3-15-CV-00250**
Judge Thomas M. Rose

United States Department of the Treasury, et al.,

Defendants.

ENTRY AND ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, ECF. 8.

Plaintiffs request that the Court enjoin Defendants from enforcing the Foreign Account Tax Compliance Act ("FATCA"), the intergovernmental agreements ("IGAs") negotiated by the United States Department of the Treasury ("Treasury Department") to supplant FATCA in the signatory countries, and the Report of Foreign Bank and Financial Accounts ("FBAR") administered by the United States Financial Crimes Enforcement Network ("FinCEN"). FATCA mandates that foreign financial institutions report the tax return information of their U.S. citizen account holders directly to the IRS using the FATCA Report (Form 8966). 26 U.S.C.§ 1471(b)(1)(C); 26 C.F.R. §§ 1.1471-4(d)(3)(v), -

4(d)(3)(vi).

Plaintiffs seek preliminary injunctive relief on all claims. The first claim challenges the validity of the Canadian, Czech, Israeli, and Swiss IGAs used by the Treasury Department. The second claim addresses the information reporting provisions FATCA and the IGAs impose not on Plaintiffs, but on foreign financial institutions. The third claim aims at the heightened reporting requirements for foreign bank accounts under FATCA, the IGAs, and the FBAR. These reporting requirements require U.S. citizens to report information about their foreign bank accounts. The fourth claim challenges the 30% tax imposed by FATCA on payments to foreign financial institutions from U.S. sources when these foreign institutions choose not to report to the IRS about the bank accounts of their U.S. customers (the "FFI Penalty"). Similarly, the fifth claim challenges the 30% tax imposed by FATCA on account holders who exercise their rights under the statute not to identify themselves as American citizens to their banks and to refuse to waive privacy protections afforded their accounts by foreign law (the "Passthrough Penalty"). The sixth claim challenges the penalty imposed under the Bank Secrecy Act for "willful" failures to file an FBAR for foreign accounts, which can be as much as the greater of $100,000 or 50% of the value of the unreported account (the "Willfulness Penalty").

I. Background

A. FATCA Statute and Regulations

Congress passed the Foreign Accounts Tax Compliance Act (FATCA) in 2010 to improve compliance with tax laws by U.S. taxpayers holding foreign accounts.

FATCA accomplishes this through two forms of reporting: (1) by foreign financial institutions (FFIs) about financial accounts held by U.S. taxpayers or foreign entities in which U.S. taxpayers hold a substantial ownership interest, 26 U.S.C. § 1471; and, (2) by U.S. taxpayers about their interests in certain foreign financial accounts and offshore assets. 26 U.S.C. § 6038D.

1. FATCA

President Obama signed FATCA into law on March 18, 2010. Senator Carl Levin, a co-sponsor of the FATCA legislation, declared that "offshore tax abuses [targeted by FATCA] cost the federal treasury an estimated $100 billion in lost tax revenues annually" 156 Cong. Rec. 5S1745-01 (2010). FATCA became law as the IRS began its Offshore Voluntary Disclosure Program (OVDP), which since 2009 has allowed U.S. taxpayers with undisclosed overseas assets to disclose them and pay reduced penalties. By 2014, the OVDP collected $6.5 billion through voluntary disclosures from 45,000 participants. "IRS Makes Changes to Offshore Programs; Revisions Ease Burden and Help More Taxpayers Come into Compliance," http://www.irs.gov/uac/Newsroom/IRS-Makes-Changes-to-Offshore-Programs;-Revisions-Ease-Burden-and-Help-More-Taxpayers-Come-into-Compliance (last visited Sept. 15, 2015). The success of the voluntary program has likely been enhanced by the existence of FATCA.

2. Foreign Financial Institution Reporting Under FATCA

Foreign Financial Institution reporting encourages FFIs to disclose information on U.S. taxpayer accounts. If the FFI does not, then a 30% withholding tax may

apply to U.S.-sourced payments to the non-reporting FFI. A 30% withholding tax may also apply to FFI account holders who refuse to identify themselves as U.S. taxpayers.

> In the case of any withholdable payment to a foreign financial institution which does not meet the requirements of subsection (b) [specifying reporting criteria], the withholding agent with respect to such payment shall deduct and withhold from such payment a tax equal to 30 percent of the amount of such payment.

26 U.S.C. § 1471(a).

Section 1471(b)(1) then provides that, "[t]he requirements of this subsection are met with respect to any foreign financial institution if an agreement is in effect between such institution and the Secretary [of the Treasury] under which such institution agrees" to make certain information disclosures and "to deduct and withhold a tax equal to 30 percent of ... [a]ny [pass-through] payment which is made by such institution to a recalcitrant account holder or another foreign financial institution which does not meet the requirements of this subsection[.]" § 1471(b)(1)(D)(i); see also § 1471(d)(7) (defining "pass[-through] payment"). A "recalcitrant account holder" is one who "[f]ails to comply with reasonable requests for information" that is either information an FFI needs to determine if the account is a U.S. account (§ 1471(b)(1)(A)) or basic information like the account holder's name, address, and taxpayer identification number (§1471(c)(1)(A)). Section 1471(c)(1) specifies the "information required to be reported on U.S. accounts," including "account balance or value." § 1471(c)(1)(C). Plaintiffs seek a preliminary injunction against enforcement of § 1471(a), (b)(1)(D),

(c)(1), and (c)(1)(C). Prayer for Relief (part O).

Under § 1471(b)(2), "Financial Institutions Deemed to Meet Requirements in Certain Cases," an FFI "may be treated by the Secretary as meeting the requirements of this subsection if … such institution is a member of a class of institutions with respect to which the Secretary has determined that the application of this section is not necessary to carry out the purposes of this section." That means that an FFI that is treated this way is not subject to the reporting criteria in § 1471(b)(1). The Secretary can statutorily exempt FFIs from "attempt[ing] to obtain a valid and effective waiver" of foreign nondisclosure laws from each account holder and can exempt FFIs from "close such account ... if a waiver ... is not obtained from each such holder within a reasonable period of time." § 1471(b)(1)(F).[1] The Secretary's exemption of an FFI under § 1471(b)(2) also means that the FFI no longer has to make the report described in § 1471(c)(1) because that report is based on "[t]he agreement described in subsection (b)" that an FFI that the Secretary has exempted does not need to have in place to avoid withholding. Furthermore, the FATCA statute provides that, "[t]he Secretary shall prescribe such regulations or other guidance as may be necessary or appropriate to carry out the purposes of, and prevent the avoidance of, this chapter," i.e., §§ 1471-74. 26 U.S.C. § 1474(f). The Government asserts that the intergovernmental agreements (IGAs) constitute the Secretary's exercise of the statutory discretion afforded by §§ 1471(b)(2)

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[1] If the country enters into an intergovernmental agreement (IGA) this provision becomes irrelevant because consent is no longer a legal impediment under foreign law.

and 1474(f).

Plaintiffs also seek to enjoin enforcement of 26 C.F.R. § 1.1471-2T(a)(1). The "[g]eneral rule of withholding" under § 1471(a) is largely reiterated by 26 C.F.R. § 1.1471-2T(a)(1), which Plaintiffs also target. Prayer for Relief (part R). Plaintiffs seek to enjoin enforcement of 26 C.F.R. §§ 1.1471-4(a)(1), 1.1471-4(d), and 1.1471- 4(d)(3)(ii), which repeat the content of § 1471(b) and (c). Prayer for Relief (part S). In addition, Plaintiffs seek an injunction against 26 C.F.R. § 1.1471-4T(b)(1), which addresses the 30% withholding tax for recalcitrant account holders established by the statute. Prayer for Relief (part T). Plaintiffs also seek to enjoin the IRS's use of Form 8966, "FATCA Report," the form on which FFIs make disclosures under § 1471(c). See 26 C.F.R. § 1.1471-4(d)(3)(v); Prayer for Relief (part V). In Plaintiffs' view, these FATCA regulations "primarily elaborate on the [] requirements of the statutory provisions and clarify the statutory requirements." Complaint ¶ 95(a).

3. Individual Reporting Under FATCA

There is a companion individual reporting requirement to § 1471's FFI reporting requirement located at 26 U.S.C. § 6038D. Under § 6038D, individuals holding more than $50,000 of aggregate value in "specified foreign financial assets," § 6038D(b), must file a report with their annual tax returns (§ 6038D(a)) that includes, for each asset "[t]he maximum value of the asset during the taxable year." § 6038D(c)(4). Plaintiffs seek to enjoin this asset-value reporting requirement. Prayer for Relief (part P). Section 6038D(h) also provides that, "[t]he Secretary shall prescribe such regulations or other guidance as may be necessary or appro-

priate to carry out the purposes of this section ....” Plaintiffs seek to enjoin enforcement of the regulation that states this same reporting requirement. 26 C.F.R. § 1.6038D-4(a)(5); see Prayer for Relief (part U). Plaintiffs also target two other regulatory reporting requirements: disclosing whether a depository or custodial account was opened or closed during the taxable year (26 C.F.R. § 1.6038D-4(a)(6)); and “[t]he amount of any income, gain, loss, deduction, or credit recognized for the taxable year with respect to the reported specified foreign financial asset,” (26 C.F.R. § 1.6038D-4(a)(8)). Prayer for Relief (part U).

B. The Canadian, Czech, Israeli, and Swiss Intergovernmental Agreements

Once FATCA became law, the Government began requiring coordination with FFIs and foreign governments. To facilitate FATCA implementation, the United States has concluded over 70 intergovernmental agreements (IGAs) with foreign governments addressing the exchange of tax information. Plaintiffs seek to enjoin IGAs with Canada, the Czech Republic, Israel, and Switzerland in their entirety. Prayer for Relief (parts A, E, I, M). Alternatively, they seek to enjoin parts of those IGAs. Prayer for Relief (parts B-D, FH, J-L, N).

The Canadian, Czech and Israeli IGAs are similar because they are all “Model 1” IGAs, whereas the Swiss IGA is a “Model 2” IGA. The key distinction is that under Model 1 IGAs, foreign governments agree to collect their FFIs’ U.S. account information and to send it to the IRS, whereas under Model 2 IGAs, foreign governments agree to modify their laws to the extent necessary to enable their FFIs to report their U.S. account

information directly to the IRS.

All four IGAs, in their preambulatory clauses, recognize the partner governments' mutual "desire to conclude an agreement to improve international tax compliance" or, in the case of Switzerland, a "desire to conclude an agreement to improve their cooperation in combating international tax evasion." IGA Preambles (first clause). All four IGAs mention the Tax Information Exchange Agreements (TIEAs) that the United States has with these four countries as part of preexisting treaties. IGA Preambles (second clause).[2] All four IGAs similarly note the need for "an intergovernmental approach to FATCA implementation" (or, in the Swiss case, "intergovernmental cooperation to facilitate FATCA implementation").

The three Model 1 IGAs (Canadian, Czech and Israeli) define "Obligations to Obtain and Exchange Information with Respect to Reportable Accounts" in Ar-

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[2] See Convention Between the United States and Canada with Respect to Taxes on Income and on Capital done at Washington on September 26, 1980 ("Canadian Convention"), Article XXVII; Convention between the United States of America and the Czech Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, done at Prague on September 16, 1993 ("Czech Convention"), Article 29; Convention between the Government of the United States of America and the Government of the State of Israel with Respect to Taxes on Income, done at Washington on November 20, 1975 ("Israeli Convention"), Article 29; and Convention between the United States and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, signed at Washington on October 2, 1996 ("Swiss Convention"), Article 26.

ticle 2. In addition to seeking to enjoin Article 2 in full (Prayer for Relief, parts B, F, and J), Plaintiffs attack the agreement that IGA partners, with respect to each "U.S. Reportable Account" of its FFIs, will report, "in the case of any Depository Account, the total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period[.]" Canadian IGA Art. 2, § 2(a)(6); Czech IGA Art. 2, § 2(a)(6); Israeli IGA Art. 2, § 2(a)(6); see Prayer for Relief (parts C, G, K). If Model 1 partner countries comply with Article 2 as well as the "Time and Manner of Exchange of Information" agreed to in Article 3 and other rules, then their reporting FFIs "shall be treated as complying with, and not subject to withholding under, section 1471," nor will they be required to withhold "with respect to an account held by a recalcitrant account holder" under § 1471. Canadian IGA Art. 4, §§ 1, 2; Czech IGA Art. 4 §§ 1, 2; Israeli IGA Art. 4, §§ 1, 2. This is consistent with the Treasury Secretary's power to deem FFIs to be in compliance with § 1471 if statutory purposes are met. 26 U.S.C. § 1471(b)(2)(B).

The Israeli IGA is not yet in force. See Israeli IGA, Art. 10, § 1. However, the Government asserts that the Treasury Secretary has exercised his discretion not to impose § 1471 withholding against Israeli FFIs or recalcitrant account holders.

The Swiss IGA is different in that under its Article 3—which Plaintiffs seek to enjoin (Prayer for Relief, part N)—the Swiss government agrees to "direct all Reporting Swiss Financial Institutions" to report certain information directly to the IRS. Swiss IGA, Art. 3, § 1. Under Article 5—which Plaintiffs also seek to enjoin (Prayer for Relief, part N)—the U.S. government "may make group requests ... based on the aggregate

information reported to the IRS pursuant to" Article 3. Swiss IGA Art. 5, § 1. "Such requests shall be made pursuant to Article 26 of the [Swiss] Convention, as amended by the Protocol," and, "such requests shall not be made prior to the entry into force of the Protocol[.]" Swiss IGA, Art. 5, § 2. The "Protocol" being "the Protocol Amending the [Swiss] Convention that was signed at Washington on September 23, 2009." Swiss IGA, preamble (clause 3). That Protocol has not yet been approved by the Senate, and because of that, Article 5 of the Swiss IGA cannot yet be implemented.

C. Report of Foreign Bank and Financial Account

The third body of law at issue in this case pertains to the Report of Foreign Bank and Financial Account (FBAR) requirements. U.S. persons who hold a financial account in a foreign country that exceeds $10,000 in aggregate value must file an FBAR with the Treasury Department reporting the account. See 31 U.S.C. § 5314; 31 C.F.R. § 1010.350; 31 C.F.R. § 1010.306(c). The current FBAR form is FinCEN Form 114. The form has been due by June 30 of each year regarding accounts held during the previous calendar year. § 1010.306(c). Beginning with the 2016 tax year , the due date of the form will be April 15. Pub. L. No. 114-41, § 2006(b)(11). A person who fails to file a required FBAR may be assessed a civil monetary penalty. 31 U.S.C. § 5321(a)(5)(A). The amount of the penalty is capped at $10,000 unless the failure was willful. See § 5321(a)(5)(B)(i), (C). A willful failure to file increases the maximum penalty to $100,000 or half the value in the account at the time of the violation, whichever is greater. § 5321(a)(5)(C). In either case, whether to im-

pose the penalty and the amount of the penalty are committed to the Secretary's discretion. See § 5321(a)(5)(A) ("The Secretary of the Treasury may impose a civil money penalty[.]") & § 5321(a)(5)(B) ("[T]he amount of any civil penalty ... shall not exceed" the statutory ceiling). Plaintiffs seek to enjoin enforcement of the willful FBAR penalty under § 5321(a)(5). Prayer for Relief, part Q. They also ask for an injunction against "the FBAR account-balance reporting requirement" of FinCen Form 114. Prayer for Relief, part W.

The Government asserts that the information in the FBAR assists law enforcement and the IRS in identifying unreported taxable income of U.S. taxpayers that is held in foreign accounts as well as investigating money laundering and terrorism.

II. Legal Standard for Preliminary Injunctions

The standard for determining whether to issue a preliminary injunction involves the examination of: (1) the likelihood of plaintiff's success on the merits; (2) whether or not the injunctive relief will save plaintiff from irreparable injury; (3) whether or not the injunctive relief will harm others; and (4) whether or not public interest will be served by the injunction. See *Rock and Roll Hall of Fame and Museum, Inc. v. Gentile Prods.*, 134 F.3d 749, 753 (6th Cir. 1998); *In re DeLorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985). These factors are not prerequisites, but elements balanced by the Court. *Frisch's Restaurants, Inc. v. Shoney's Inc.*, 759 F.2d 1261, 1263 (6th Cir. 1985) and *DeLorean Motor Co.*, 755 F.2d at 1229. The Court will evaluate each of these factors.

A. Likelihood of Prevailing on the Merits

Defendants initially contend that Plaintiffs are not

likely to prevail on the merits of their claim because they lack standing to bring their action. Federal courts may only decide actual cases or controversies. *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). "One element of the case-or-controversy requirement" is that plaintiffs "must establish that they have standing to sue." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). The standing requirement protects the "time-honored concern about keeping the Judiciary's power within its proper constitutional sphere." Id. at 820. "[S]tanding inquir[ies are] especially rigorous when reaching the merits of the dispute would force [a court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013).

Standing contains three elements:

> First, plaintiffs must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations and internal quotation omitted).

As for the first consideration, a "threatened injury must be certainly impending to constitute injury in fact," and "'[a]llegations of possible future injury' are

not sufficient." *Clapper*, 133 S. Ct at 1147 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)) (emphasis in original). Similarly, "a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74; see also id. at 577 (rejecting attempt "to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts").

Also, plaintiffs generally cannot establish standing indirectly when their injury is the result of "the independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976); see also *Lujan*, 504 U.S. at 560-61 (same); *Shearson v. Holder*, 725 F.3d 588, 592 (6th Cir. 2013) (same); *Ammex, Inc. v. United States*, 367 F.3d 530, 533 (6th Cir. 2004) (no standing to challenge excise tax assessed against third party, since "alleged injury ... in the form of increased fuel costs was not occasioned by the Government").

As to the second consideration, "a plaintiff must 'assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Coyne*, 183 F.3d at 494 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)); see also *United States v. Ovalle*, 136 F.3d 1092, 1100-01 (6th Cir. 1998); *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). The rare exception to this requirement arises where a plaintiff can "show that (1) it has suffered an injury in fact; (2) it has a close relationship to the third party;

and (3) there is some hindrance to the third party's ability to protect his or her own interests." *Mount Elliott Cemetery Ass'n v. City of Troy*, 171 F.3d 398, 404 (6th Cir. 1999); see also *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 295 (6th Cir. 1998).

"A plaintiff bears the burden of demonstrating standing and must plead its components with specificity." *Coyne*, 183 F.3d at 494; see also *Lujan*, 504 U.S. at 561. A plaintiff "must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)). The Supreme Court has "always insisted on strict compliance with this jurisdictional standing requirement," *Raines*, 521 U.S. at 819. Moreover, "suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations are, even when premised on allegations of several instances of violations of law, rarely if ever appropriate for federal-court adjudication." *Lujan*, 504 U.S. at 568 (quotation omitted).

Senator Paul seeks to base legal standing for Counts 1 and 2 in his role as a U.S. Senator, charged with the institutional task of advice and consent under the Constitution. He contends that the IGAs exceed the proper scope of Executive Branch power and should have been submitted for Senate approval. ¶¶ 28, 29.

Senator Paul's argument that the Executive Branch is usurping Congress's powers by not submitting the IGAs for a vote—that he has a "right to vote"—is a claim that the Executive Branch is not acting in accordance with the law and that he may remedy such violation in his official capacity as a senator. In *Raines v. Byrd*, several members of Congress challenged the con-

stitutionality of the Line Item Veto Act of 1996, asserting that the statute infringed on their power as legislators. 521 U.S. at 816. The Supreme Court held that they lacked Article III standing. It noted that their claim asserted "a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally." *Id*. at 821. Because Plaintiffs' "claim of standing [was] based on a loss of political power, not loss of any private right," their asserted injury was not "concrete" for the purposes of Article III standing. *Id*. *Raines* bars Senator Paul's claims. This is true even if he frames the conduct he challenges as a "usurpation" of congressional authority. See *Chenoweth v. Clinton*, 181 F.3d 112, 116 (D.C. Cir. 1999) (a claim of usurpation of congressional authority is not sufficient to satisfy the standing requirement); see also *Walker v. Cheney*, 230 F. Supp. 2d 51, 73 (D.D.C. 2002) ("the role of Article III courts has not historically involved adjudication of disputes between Congress and the Executive Branch based on claimed injury to official authority or power.").

Senator Paul has not been authorized to sue on behalf of the Senate. This fact also weighs against finding standing. See *Raines*, 521 U.S. at 829 ("We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action[.]"). Members of Congress possess an adequate remedy (since they may repeal the Act or exempt appropriations bills from funding its implementation). *Raines*, 521 U.S. at 829.

Nor can Senator Paul base his standing on a more generalized interest in "vindication of the rule of law." See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83,

106 (1998); see also *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) ("[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone[.]" (quotation omitted)). A legislator does not hold any legally protected interest in proper application of the law that is distinct from the interest held by every member of the public. Senator Paul thus fails to allege a particularized, legally cognizable injury by his claim that the Executive Branch is not adhering to the law. See *Campbell v. Clinton*, 203 F.3d 19, 22 (D.C. Cir. 2000) (Congressional plaintiffs do not "have standing anytime a President allegedly acts in excess of statutory authority").

Senator Paul has "not been singled out for specially unfavorable treatment." *Raines*, 521 U.S. at 821. All Plaintiffs here, including Senator Paul, have an adequate remedy to challenge the reporting requirements and penalties that they oppose: they may work toward repeal of the laws through the legislative process. *Id.* Of course, FATCA, the IGAs, and the FBAR requirements are not exempt from constitutional challenge, but they must be challenged by an individual who has suffered a judicially cognizable injury. *Id.* Plaintiffs in this case do not qualify.

In sum, Paul has alleged no injury to himself as an individual, the institutional injury he alleges is wholly abstract and widely dispersed, and his attempt to litigate this dispute at this time and in this form is contrary to historical experience. *Raines*, 521 U.S. at 829

None of the other Plaintiffs has alleged that he or she has suffered or is about to suffer injury under the FATCA withholding tax: none is an FFI to which the tax under § 1471(a) applies, and none has been assessed, or informed that IRS intends to assess, the re-

calcitrant account holder withholding tax imposed by § 1471(b). Moreover, all Plaintiffs but Crawford live in jurisdictions where FFIs are not currently subject to the § 1471(b) withholding tax. No plaintiff has alleged that he or she is subject to § 6038D reporting due to an aggregate asset value exceeding $50,000 or FBAR reporting due to a bank account exceeding $10,000 in value.

Mark Crawford decries his bank's policy against taking U.S. citizens as clients and claims the denial of his application for a brokerage account may have "impacted Mark financially," ¶ 21, any such harm is not fairly traceable to an action by Defendants, which are not responsible for decisions that foreign banks make about whom to accept as clients. Crawford cannot establish standing indirectly when third parties are the causes of his alleged injuries. See *Shearson*, 725 F.3d at 592. Moreover, his discomfort with complying with the disclosures required by FATCA, see ¶ 23, does not establish the concrete, particularized harm that confers standing to sue. See, e.g., *Lujan*, 504 U.S. at 561 (requiring "concrete and particularized" and "actual or imminent" injury). Even if Crawford fears "unconstitutionally excessive fines imposed by 31 U.S.C. § 5321 if he willfully fails to file an FBAR," ¶ 24, there is no allegation that he failed to file any FBAR that may have been required, much less that the Government has assessed an "excessive" FBAR penalty against him. Any harm that may come his way from imagined future events is speculative and cannot form the foundation for his lawsuit.

Crawford states that he is a United States citizen who lives in Albania and maintains a residence in Dayton, Ohio. ¶ 13. The United States does not have a

FATCA IGA with Albania, and Crawford does not allege that he has a bank account in any of the four countries whose IGAs are challenged in the complaint. That means that Crawford has no standing to assert the violations alleged in Counts 1, 2, or 8, which exclusively concern those four IGAs.

Crawford seeks to invalidate FATCA and the FBAR requirements on three bases: (1) his brokerage firm cannot accept U.S. citizens—including Crawford himself—as clients, due to a relationship with a bank that has a policy against taking on American clients, see ¶ 21; (2) he does not want the "financial details of his accounts" disclosed to the U.S. government, see ¶ 23; and (3) he fears "unconstitutionally excessive fines imposed by 31 U.S.C. § 5321 if he willfully fails to file an FBAR," see ¶ 24.

Roger Johnson states that he is a U.S. citizen who resides in the Czech Republic. ¶ 31. He seeks to invalidate the Czech IGA, FATCA, and the FBAR reporting requirements because: (1) his wife, who is not a plaintiff, "strongly objected to having her financial affairs disclosed to the United States government," leading to the couple's decision to separate their assets, see ¶ 35; (2) he does not want the financial details of his accounts disclosed, see ¶ 38; and (3) he fears "unconstitutionally excessive fines" if he willfully fails to file an FBAR, see ¶ 39.

The harm Johnson alleges resulted from his wife's objections to FATCA and the choices that they made in response; this is not traceable to the Government. See *Simon*, 426 U.S. at 41-42. The Johnsons are free to reverse the separation of their assets at any time, regardless of FATCA, and the lack of legal compulsion defeats any claim to third-party standing. Johnson's

personal discomfort with reporting requirements of American law does not support standing, as he does not allege any concrete constitutional injury. See *Lujan*, 504 U.S. at 561. Nor is the prospect of the hypothetical imposition of an excessive fine, if he willfully fails to file a required FBAR, sufficient. *Clapper*, 133 S. Ct at 1147 ("Allegations of possible future injury" do not convey standing). In effect, Johnson seeks an advisory opinion that future, hypothetical conduct by the Government would violate his constitutional rights.

Stephen J. Kish states that he is a dual citizen of the United States and Canada who lives in Toronto. ¶ 41. Kish alleges that his wife "strongly opposes the disclosure of her personal financial information" under FATCA. ¶ 47. His wife is not a plaintiff. Kish may not assert claims on her behalf. See *Coyne*, 183 F.3d at 494. That he has allegedly suffered some "discord" in his marriage, see ¶ 47, is too vague and indirect of a harm to establish standing. As explained above, reluctance to comply with the reporting requirements of American law, see ¶ 48, and theoretical "excessive fines" that would be imposed if he willfully violated the law, see ¶ 49, do not convey standing. Daniel Kuettel states that he is a citizen of Switzerland who renounced his U.S. citizenship in 2012. ¶ 51. He claims that he decided to renounce due to "difficulties caused by FATCA," and he complains that "many Swiss banks have been unwilling to accept American clients because of FATCA." ¶ 55. He blames this practice of the Swiss banks for his "mostly unsuccessful" efforts to obtain mortgage refinancing prior to his renunciation of citizenship. *Id*. The only ongoing injury that Kuettel alleges is related to a college savings account for his daughter that he maintains at a Swiss bank. See ¶ 56.

The account balance is currently only about $8,400, which is below the $10,000 threshold for FBAR reporting. Kuettel's daughter is ten years old, see ¶ 54, and is not a plaintiff in this case. Supposedly the account would receive "several advantages such as better interest rates and discounts for local businesses" if it were titled in her name. ¶ 56. The Complaint states Kuettel would like to transfer ownership of the account to his daughter, but he will not do so out of a concern that she might in the future be subjected to willful FBAR penalties, that she might be subject to an alleged harm. ¶ 57.13 Kuettel could obviate this concern by filing an FBAR for the account on his daughter's behalf, but "Daniel objects to filing an FBAR as required by FinCEN because he is not a U.S. citizen and would not do so for his daughter's account." ¶ 57. His wife similarly objects. His daughter is said to be too young to renounce her own U.S. citizenship. ¶ 57. Neither his wife, nor his daughter are named as plaintiffs, however. Thus, having renounced his own American citizenship, Kuettel now seeks relief based on his daughter's ineligibility for preferable interest rates and local discounts. The relief for any wrong here is either for Kuettel's daughter to sue her Swiss bank for disparate treatment, if Swiss law provides such protection, or to seek recourse in the power of the market moving her accounts to an institution that wishes to compete for her business.

None of the allegations states that Kuettel is presently being harmed by FATCA or the Swiss IGA, and neither FATCA nor the IGA apply to him as a non-U.S. citizen. See ¶¶ 51-58. His assertion of past harm because he was "mostly unsuccessful" in refinancing his mortgage due to FATCA does not convey standing. If

that was a harm, it was due to actions of third-party foreign banks not those of Defendants. Regardless, having now renounced his American citizenship and obtained refinancing on terms he found acceptable, any past harm is not redressable here. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210-11 (1995) ("[T]he fact of past injury ... does nothing to establish a real and immediate threat that he would again suffer similar injury in the future." (quotation omitted)). This leaves Kuettel's claims concerning the FBAR requirement, in Counts 3 and 6, for which the Government concedes Kuettel has standing. Response, ECF 16, at 15, PAGEID 216.

Kuettel also lacks standing to challenge the FBAR reporting requirements that might apply not to him, but to his daughter. The reporting requirement would be hers, and any harm to the account is a detriment to her. Advantages his daughter might receive if Kuettel or his wife filed an FBAR on his daughter's behalf are based on a bank policy, not conduct of Defendants. The failure to reap those advantages is due to the Bank's policies regarding someone like Kuettel's reluctance to comply with the FBAR requirements, not any action fairly traceable to the Government. In any event, Kuettel has not established standing to sue on behalf of his daughter. See *Ovalle*, 136 F.3d at 1100-01.

Donna-Lane Nelson is a citizen of Switzerland who has also renounced her U.S. citizenship. ¶ 59. She alleges that her Swiss bank "notified her that she would not be able to open a new account if she ever closed her existing one because she was an American. Fearing that she would eventually not be able to bank in the country where she lived, she decided to relinquish her U.S. citizenship." ¶ 65. After she renounced, a Swiss

bank "offered investment opportunities that were not available to her as an American." *Id.* She "resents having to provide" "explanations" to Swiss banks that have requested information on her past U.S. citizenship and payments to her daughter, who lives in the United States, and she sees "threats implied by these requests which appear to be prompted by FATCA." ¶ 68. Like other Plaintiffs, Nelson does not want to disclose financial information to the Government, and she fears willful FBAR penalties, even though no such penalty has been imposed or threatened against her. ¶¶ 69, 70. Unlike the preceding Plaintiffs, however, she adds that she fears the 30% withholding tax may be imposed against her "if her business partner," who is now her husband, and with whom she has joint accounts, "opts to become a recalcitrant account holder." ¶ 71.

Nelson's allegations of harm stem from third-party conduct and do not grant her standing against Defendants. Fear of hypothetical events that might have befallen her if she had not renounced her U.S. citizenship does not constitute concrete harm sufficient to confer Article III standing. Her claim "that she had to choose between having the ability to access local financial services where she lived or be a U.S. citizen" is refuted by her admission that UBS would have allowed her to continue banking in Switzerland as before, using her existing account, regardless of her citizenship. ¶ 65. Discretionary decisions of a foreign bank do not create standing. If her business partner and husband causes Nelson to be subjected to FBAR penalties by his future conduct that will be his fault, not Defendants'. Having renounced her U.S. citizenship and without standing to assert these claims, Nelson cannot air her "resentment" of U.S. law in this Court.

L. Marc Zell states that he is a practicing attorney and a citizen of both the United States and Israel who lives in Israel. He alleges that: (1) he and his firm have been required by Israeli banking institutions to complete IRS withholding forms for individuals whose funds his firm holds in trust, regardless of whether the forms are legally required, causing certain clients to leave his firm, ¶¶ 79 & 81; (2) Israeli banks have required his firm to close accounts, refused to open others, and requested conduct contrary to banking regulations, ¶¶ 79-80; and, (3) the compelled disclosure of his fiduciary relationship with clients impinges on the attorney-client relationship, ¶ 82. On request of clients, who claim their rights are violated by FATCA, Zell "has decided not to comply with the FATCA disclosure requirements whenever that alternative exists." ¶ 83. He fears that the FATCA 30% withholding tax on pass-through payments to recalcitrant account holders could be imposed due to his refusal to provide identifying information about a client to an Israeli bank. ¶ 84. He also has refused to provide information to his own bank and "fears that he will be classified as a recalcitrant account holder," ¶ 85. Like the other Plaintiffs, he does not want his financial information disclosed, ¶ 86, and fears an FBAR penalty if the IRS determines that he willfully failed to file an FBAR, ¶ 87.

The majority of Zell's allegations concern conduct of Israeli banks and his belief that these actions have been unfair to him or his clients. But conduct of third parties (even if related to the banks' compliance with FATCA) does not confer standing to bring suit against Defendants. See, e.g., *Ammex Inc. v. United States*, 367 F.3d 530, 533 (6th Cir. 2004). Nor may Zell seek redress on behalf of third parties who have allegedly suf-

fered harm, including unidentified clients. See *Warth v. Seldin*, 422 U.S. 490, 499 (1975). The third parties who have allegedly suffered harm are not plaintiffs, thus, alleged harm to them does not provide a basis for Zell to maintain this suit.

The contention that disclosure of the identity of clients for whom Zell holds funds in trust violates the attorney-client privilege is also without merit. He gives no example of harm that has occurred or how he was harmed by disclosure of clients' identities. He cannot raise the attorney-client privilege on his clients' behalf, nor is the fact of representation privileged. See *In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d 49, 62 (7th Cir. 1980) ("[A]ttorney-client privilege belongs to the client alone[.]"); *United States v. Robinson*, 121 F.3d 971, 976 (5th Cir. 1997) ("The fact of representation ... is generally not within the privilege."). It is the fiduciary relationship, not the attorney-client relationship, that is the basis for the reporting requirement.

The claims that Zell asserts on his own behalf fare no better. His compliance with a client's wish to avoid the FATCA reporting requirements potentially subjects the client—not Zell—to the risk of imposition of a 30% tax. See 26 U.S.C. § 1471(b)(1)(D). Zell himself has not been assessed a 30% withholding tax under FATCA, nor could he (or his clients) be, because 30% withholding under § 1471 is not presently being imposed against Israeli FFIs or their recalcitrant account holders. Zell has not had a penalty imposed against him for any willful failure to file an FBAR either. He has therefore suffered no concrete and particularized injury sufficient to convey standing. See *Lujan*, 504 U.S. at 560. Taking the allegations of the complaint at face value, Zell is losing clients because of discriminatory

actions of the Israeli banks. Indeed, in their Reply, Plaintiffs admit it is Zell's client, a non-party, who objects to reporting. Reply at 4.

In their reply, Plaintiffs are more focused, directing all of their ire at the invasion of their privacy:

> A central burden is extensive financial disclosure that Plaintiffs do not want. … This opposition to disclosure provides standing to challenge provisions (including IGAs) expressly *requiring* disclosure…. So [P]laintiffs have standing to challenge FATCA, IGAs, and FBAR disclosure requirements, and they have standing to challenge the FFI Penalty (30% tax on payments to non-compliant FFIs)…because those FFIs disclose account holders' information *because of* that penalty.

Reply at 3. They continue, "Plaintiffs object to disclosure and also object to this penalty specifically designed to compel them to this disclosure, providing them standing." Reply at 4.

> But Plaintiffs verified that they do not want their financial affairs disclosed to the U.S. Government under FATCA, including [26 U.S.C. 6038D(a)], the necessary implication of which is either that Plaintiffs are doing such disclosure and want to cease or that Plaintiffs have arranged their affairs so as to avoid such disclosure that would otherwise have occurred, either of which gives them standing. (See, e.g., Doc. No. 1, PageID 12 (¶ 23), 14-15 (¶¶ 35, 37) (altered financial affairs to avoid disclosure), 15 (¶ 38).) Moreover, individuals may report otherwise qualifying accounts under that amount, are encouraged to do so, and the Government has not said that it would refuse such reports.

The Government claims Plaintiffs may not chal-

lenge the FBAR requirement's Willfulness Penalty, 31 U.S.C. 5321(b)(C)(i), because none alleged "a bank account exceeding $10,000 in value." (Doc. No. 16, PageID 213.) But Plaintiffs alleged that they reasonably feared they would be subject to the Willfulness Penalty for willful failure to file FBARs.

Reply at 5.

Plaintiffs also contend that the existence of applicable statutory requirements and penalties might suffice for standing to challenge the unconstitutional provisions. Reply at 6 (citing *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341-46 (2014); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) and *Doe v. Bolton*, 410 U.S. 179, 188 (1973)). However, this only applies where petitioners have alleged "an intention to engage in a course of conduct arguably affected with a constitutional interest." *Susan B. Anthony List*, 134 S. Ct. at 2332. Plaintiffs here have not identified a constitutionally protected interest.

The Supreme Court has held that depositors have no "reasonable expectation of privacy" in "information kept in bank records" because documents like "financial statements and deposit slips[] contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." *United States v. Miller*, 425 U.S. 435, 442 (1976); see also *id.* at 440 (noting that the depositor "can assert neither ownership nor possession" over the records at issue); *Smith*, 442 U.S. at 743-44 (1979) ("[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.").[3]

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[3] Here, the Supreme Court's estimation of what a rea-

The only Plaintiff to have standing then is Kuettel, who is limited to claims concerning the FBAR requirement present in Count Three and Count Six.

Count Three challenges what it characterizes as heightened reporting requirements for foreign financial accounts denying U.S. citizens living abroad the equal protection of the laws. Plaintiffs quote both the Administrative Procedure Act and the Constitution. Under section 706 of the Administrative Procedure Act ("APA"), a court must "hold unlawful and set aside agency action ... found to be – ... (B) contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706. In the Constitution, the Fifth Amendment provides that "No person shall ... be deprived of life, liberty, or property, without due process of law...." U.S. Const. amend. V. The Due Process Clause of the Fifth Amendment includes a guarantee of equal protection equivalent to that expressly provided for under the Equal Protection Clause of the Fourteenth Amend-

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sonable person might expect appears to be diverging from reality. "A 2003 study conducted by Christopher Slobogin and Joseph E. Schumacher found that the 217 subjects considered 'perusing bank records" as more intrusive than a patdown or even an arrest for 48 hours." Samantha Arrington, *Expansion of the Katz Reasonable Expectation of Privacy Test Is Necessary to Perpetuate A Majoritarian View of the Reasonable Expectation of Privacy in Electronic Communications to Third Parties*, 90 U. Det. Mercy L. Rev. 179, 180 (2013). See also, e.g., Henry F. Fradella et. al., *Quantifying Katz: Empirically Measuring "Reasonable Expectations of Privacy" in the Fourth Amendment Context*, 38 Am. J. Crim. L. 289, 371 (2011) ("judges often fail to appreciate the degree to which 'society' believes privacy should be protected from law enforcement intrusions.").

ment. "An equal protection claim against the federal government is analyzed under the Due Process Clause of the Fifth Amendment." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995); United *States v. Ovalle*, 136 F.3d 1092, 1095 (6th Cir. 1998). Thus, the federal government may not "deny to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, § 1.

"We begin, of course, with the presumption that the challenged statute"—FATCA—"is valid. Its wisdom is not the concern of the courts; if a challenged action does not violate the Constitution, it must be sustained[.]" *INS v. Chadha*, 426 U.S. 919, 944 (1983); see also *National Federation of Independent Business v. Sebelius* 132 S. Ct. 2566, 2594 (2012) ("'[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895))).

Plaintiffs contend the only financial information the IRS requires to be reported about domestic accounts is the amount of interest paid to the accounts during a calendar year, 26 U.S.C. §§ 6049(a), (b); 26 C.F.R. §§ 1.6049-4(a)(1), 1.6049-4T(b)(1). For a foreign account, the information reported to the IRS includes not only the interest paid to the account, 26 USC § 1471(c)(1)(C); 26 C.F.R. §§ 1.1471-4(d)(3)(ii), -4(d)(4) (iv); Canadian IGA, art. 2, § 2(a)(4); Czech IGA, art. 2, § 2(a)(4); Israeli IGA, art. 2, § 2(a)(4); Swiss IGA, arts. 3, 5, but also the amount of any income, gain, loss, deduction, or credit recognized on the account, 26 C.F.R. § 1.6038D-4(a)(8), whether the account was opened or closed during the year, id. § 1.6038D-4(a)(6), and the balance of the account, 26 USC §§ 1471(c)(1)(C), 6038D(c)(4); 26 CFR §§ 1.1471-4(d)(3)(ii), 1.6038D-4(a)(5); Canadian

IGA, art. 2, § 2(a)(6); Czech IGA, art. 2, § 2(a)(6); Israeli IGA, art. 2, § 2(a)(6); Swiss IGA, arts. 3, 5; FinCEN, BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Verified Complaint for Declaratory and Injunctive Relief 41 Case: 3:15-cv-00250-TMR Doc #: 1 Filed: 07/14/15 Page: 41 of 59 PAGEID #: 41 Accounts (FinCEN Form 114) 15 (June 2014), http://www.fincen.gov/forms/files/FBAR%20 Line%20Item%20Filing%20Instructions.pdf. Plaintiffs assert that comparable information is not required to be disclosed regarding domestic accounts of U.S. citizens.

Plaintiffs decry that U.S. citizens living in foreign countries are in this manner treated differently than U.S. citizens living in the United States. According to Plaintiffs, the federal government has no legitimate interest in knowing the amount of any income, gain, loss, deduction, or credit recognized on a foreign account, whether a foreign account was opened or closed during the year, or the balance of a foreign account.

Plaintiffs contend that the "heightened reporting requirements" imposed by FATCA, the FBAR information-reporting requirements, and the Canadian, Swiss, Czech, and Israeli IGAs, violate the Fifth Amendment rights of "U.S. citizens living in a foreign country" and should be enjoined. See Complaint ¶¶ 124-130.

Plaintiffs are unlikely to succeed on the merits of their claim that "U.S. citizens living in a foreign country are treated differently than U.S. citizens living in the United States," Complaint ¶ 128, without rational basis. A litigant may challenge federal government action under the Fifth Amendment's due process clause on the same grounds as a challenge to state action under the Fourteenth Amendment's equal protection

clause. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); see also *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). "Under the Due Process Clause, if a statute has a reasonable relation to a proper legislative purpose, and [is] neither arbitrary nor discriminatory, the requirements of due process are satisfied." *Nebbia v. New York*, 291 U.S. 502, 537 (1934) (internal quotation marks and citations omitted). Likewise, under the Equal Protection Clause, a statute not directed at a suspect or quasi-suspect class must be upheld if it has a rational basis. *Clements v. Fashing*, 457 U.S. 957, 967 (1982) (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955)). "U.S. citizens living in a foreign country" are not a suspect or semi-suspect class of people, so Defendants need only show that "the classification drawn by [a] statute is rationally related to a legitimate state interest." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); see also *Igartua de la Rosa v. United States*, 842 F. Supp. 607, 611 (D.P.R. 1994).

A court "will not overturn [government conduct] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [it] can only conclude that the [government's] actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979); see also *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-14 (1993) (a statute subject to rational basis review must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."). A facial challenge, because of the extraordinary relief, requires a "heavy burden" and is "the most difficult challenge to mount successfully[.]" *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Plaintiffs' equal protection claims fail because the statutes, regulations, and executive agreements that they challenge simply do not make the classification they assert. None of the challenged provisions single out U.S. citizens living abroad. Instead, all Americans with specified foreign bank accounts or assets are subject to reporting requirements, no matter where they happen to live. The provisions Plaintiffs contend discriminate against "U.S. citizens living abroad" actually apply to all U.S. taxpayers, no matter their residence. Plaintiffs argue that "[i]n practice, the increased reporting requirements for foreign financial accounts discriminate against U.S. citizens living abroad," see Doc. No. 8-1 at 22 (PageID 160), suggesting a claim of discrimination based on disparate impact. But it is well-settled that "mere disparate impact is insufficient to demonstrate an equal protection violation." *Copeland v. Machulis*, 57 F.3d 476, 481 (6th Cir. 1995); see also *Washington v. Davis*, 426 U.S. 229, 244-45 (1976).

FATCA requires FFIs to provide specified information about "United States Accounts." See 26 U.S.C. § 1471(c)(1)(C). "United States Accounts" are defined in the statute as "any financial account which is held by one or more specified United States persons or United States owned foreign entities." 26 U.S.C. § 1471(d)(1)(A). Similarly, the individual reporting requirements of FATCA under § 6038D(c)(4) apply to "any individual who, during any taxable year, holds any interest in a specified foreign financial asset[.]" 26 U.S.C. § 6038D(a) (emphasis added). The Bank Secrecy Act, under which the FBAR reporting requirement arises, also applies to any taxpayer with a financial interest in, or signatory authority over, a foreign financial account exceeding certain monetary thresholds.

See 31 U.S.C. § 5314; 31 C.F.R. §§ 1010.350 & 1010.306(c). Neither do the challenged regulations make the classification Plaintiffs challenge; they apply to all taxpayers holding certain foreign accounts or assets. See 26 C.F.R. § 1.1471-4(d)(3)(ii) (FFI reporting requirement regarding "accounts held by specified U.S. persons"); 26 C.F.R. § 1.6038D-4(a)(5), (6), & (8) (setting forth information to be reported in Statement of Specified Foreign Financial Assets). Neither do the IGAs distinguish between the residence of the account holders whose information must be reported.

Plaintiffs have not correctly identified the classification made by these laws. The most basic element of an equal protection claim is the existence of at least two classifications of persons treated differently under the law. See *Silver v. Franklin Twp. Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992). But Plaintiffs fail to recognize that similarly situated persons to themselves—U.S. taxpayers living in the United States who hold foreign accounts—are not treated differently. In fact, for U.S. citizens living abroad, the regulations under 26 C.F.R. § 1.6038D-2 do not kick in until higher reporting thresholds are reached, as the regulations recognize that such individuals are likely to have significant foreign accounts in the ordinary course of their lives. For married individuals filing jointly, the filing threshold goes from $50,000 for U.S. residents to $150,000 for non-U.S. residents. To the extent that the law treats U.S. citizens living abroad unequally, it is in their favor insofar as the reporting requirements for foreign accounts are actually less onerous.

The distinction that the regulations do make is rationally related to a legitimate government interest. The U.S. tax system is based in large part on voluntary

compliance: taxpayers are expected to disclose their sources of income annually on their federal tax returns. The information reporting required by FATCA is intended to address the use of offshore accounts to facilitate tax evasion, and to strengthen the integrity of the voluntary compliance system by placing U.S. taxpayers that have access to offshore investment opportunities in an equal position with U.S. taxpayers that invest within the United States. Third party information reporting is an important tool used by the IRS to close the tax gap between taxes due and taxes paid. The knowledge that financial institutions will also be disclosing information about an account encourages individuals to properly disclose their income on their tax returns. See Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance*, 60 STAN. L. REV. 695, 711 (2007). Unlike most countries, U.S. taxpayers are subject to tax on their worldwide income, and their investments have become increasingly global in scope. Absent the FATCA reporting by FFIs, some U.S. taxpayers may attempt to evade U.S. tax by hiding money in offshore accounts where, prior to FATCA, they were not subject to automatic reporting to the IRS by FFIs. The information required to be reported, including payments made or credited to the account and the balance or value of the account is to assist the IRS in determining previously unreported income and the value of such information is based on experience from the DOJ prosecution of offshore tax evasion. See *Senate Permanent Subcommittee on Investigations bipartisan report on "Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts,"* February 26, 2014; see also *Cal. Bankers Ass'n v. Shultz*, 416 U.S.

21, 29 (1974) ("when law enforcement personnel are confronted with the secret foreign bank account or the secret foreign financial institution they are placed in an impossible situation…they must subject themselves to time consuming and often times fruitless foreign legal process.").

The FBAR reporting requirements, likewise, have a rational basis. As the Supreme Court noted in *California Bankers*, when Congress enacted the Bank Secrecy Act (which provides the statutory basis for the FBAR), it "recognized that the use of financial institutions, both domestic and foreign, in furtherance of activities designed to evade the regulatory mechanism of the United States, had markedly increased." *Id.* at 38. The Government has a legitimate interest in collecting information about foreign accounts, including account balances held by U.S. citizens, for the same reason that it requires reporting of information on U.S.-based accounts. The information assists law enforcement and the IRS, among other things, in identifying unreported taxable income of U.S. taxpayers that is held in foreign accounts. Without FBAR reporting, the Government's efforts to track financial crime and tax evasion would be hampered. Congress, through FBAR reporting, attempted to complement domestic reporting on financial transactions. U.S. taxpayers who place their funds in foreign accounts cannot put themselves on a better footing than U.S. taxpayers who conduct their transactions stateside. FBAR reporting prevents individuals from trying to evade domestic regulation and provides a deterrent for those who would use foreign accounts to engage in criminal activity.

The distinctions made by FATCA, the FBAR reporting requirements, and the IGAs simply do not evince,

on their face, discrimination that is "so unjustifiable as to be violative of due process." *Schneider v. Rusk*, 377 U.S. 163, 168 (1964).

In Count Six, Plaintiffs contend that the FBAR "Willfullness Penalty" is unconstitutional under the Excessive Fines Clause. Plaintiffs decry that 26 U.S.C. § 5321 imposes a penalty of up to $100,000 or 50% of the balance of the account at the time of the violation, whichever is greater, for failures to file an FBAR as required by 26 U.S.C. § 5314 (the FBAR "Willfulness Penalty"). 31 U.S.C. § 5321(b)(5)(C)(i).

Plaintiffs allege the Willfulness Penalty is designed to punish and is therefore subject to the Excessive Fines Clause. Plaintiffs further allege the Willfulness Penalty is grossly disproportionate to the gravity of the offense.

Plaintiffs' Eighth Amendment claims, however, are not ripe for adjudication because no withholding or FBAR penalty has been imposed against any Plaintiff; indeed, the 30% FFI withholding tax under § 1471(a) will never be imposed against any of them because they are individuals, not FFIs. Additionally, Plaintiffs' claims fail because they cannot show that the FATCA taxes and the willful FBAR penalties are grossly disproportional to the gravity of their (as yet unspecified) conduct. See *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

"Ripeness is a justiciability doctrine designed to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements. Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all." *Kentucky Press Ass'n v. Kentucky*, 454 F.3d 505, 509 (6th Cir. 2006) (citation and internal quotation

marks omitted). The Sixth Circuit has listed three factors to be considered when deciding whether claims are ripe for adjudication: (1) the likelihood that the harm alleged by the plaintiffs will ever come to pass; (2) whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claim; and (3) the hardship to the parties if judicial relief is denied at this stage in the proceedings. *Id.*

Plaintiffs' Eighth Amendment challenges are not ripe under the *Kentucky Press Association* factors. First, it is not clear that any harm Plaintiffs contemplate will ever come to pass. With respect to the FATCA withholding tax in § 1471(b)(1), Plaintiffs can request a credit or refund of a future withheld amount on their federal income tax returns. See 26 U.S.C § 1474(a); 26 C.F.R. § 1.1474-3. Several Plaintiffs are United States citizens, so they must file federal income tax returns anyway. 26 C.F.R. § 1.6012-1(a)(1). Nelson and Kuettel, who renounced their U.S. citizenship, may possibly also be required to file returns if they have U.S.-source income. 26 C.F.R. § 1.6012-1(b)(1)(i). As for the willful FBAR penalty, whether it is imposed is entirely in IRS's discretion. See 31 U.S.C. § 5321(a)(5); 31 C.F.R. § 1010.810(g).

Second, the factual record is not sufficiently developed to weigh whether the FATCA withholding taxes or FBAR penalty is grossly disproportionate, and such a factual record cannot reasonably be developed here. An Eighth Amendment proportionality analysis is "guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the [penalty] imposed on other [offenders] in the same jurisdiction; and (iii) the [penalty] imposed for commis-

sion of the same [offense] in other jurisdictions." *Solem v. Helm*, 463 U.S. 277, 292 (1983) (Cruel and Unusual Punishments Clause analysis); see also *Bajakajian*, 524 U.S. at 336 (drawing Excessive Fines Clause standard from Cruel and Unusual Punishments Clause jurisprudence). The first factor requires review of the circumstances of the offense "in great detail." *Solem*, 463 U.S. at 290-91. In this case, there are no circumstances to review, because no FATCA tax or FBAR penalty has been imposed. A fact-specific determination of excessiveness is impossible where any wrongful conduct is hypothetical.

Finally, Plaintiffs will not suffer appreciable hardship from the Court declining to hear their Eighth Amendment challenges. The Sixth Circuit has noted that, "[r]ipeness will not exist … when a plaintiff has suffered (or will immediately suffer) a small but legally cognizable injury, yet the benefits to adjudicating the dispute at some later time outweigh the hardship the plaintiff will have to endure by waiting." *Airline Profs. Ass'n of Int'l Broth. of Teamsters, Local No. 1224 v. Airborne, Inc.*, 332 F.3d 983, 988 n.4 (6th Cir. 2003). Challenges to statutes are not ripe where delaying judicial review results in no real harm. See *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 810-11 (2003). Once an amount is actually withheld from a payment, Plaintiffs can (after properly exhausting administrative remedies) file a refund suit if the IRS improperly fails to refund the withholding. See 26 U.S.C. § 7422. If an FBAR penalty is assessed against a Plaintiff, that Plaintiff may challenge the penalty at a later time. See *Moore v. United States*, No. C13-2063-RAJ, 2015 WL 1510007 at *12-*13 (W.D. Wash. Apr. 1, 2015) (rejecting Eighth Amendment challenge to non-willful FBAR

penalty). At present, Plaintiffs have not established that their Eighth Amendment claims require immediate injunctive relief.

Because they have not alleged that any FATCA withholding taxes or willful FBAR penalties have actually been imposed against them, Plaintiffs appear to raise a facial challenge to those exactions under the Excessive Fines Clause. To prevail on a facial challenge, Plaintiffs must show that the statutes are "unconstitutional in all of [their] applications," *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015) (internal quotation omitted). The FATCA taxes satisfy neither of the two *Bajakajian* factors: they are not fines, nor are they grossly disproportional. 524 U.S. at 334. The willful FBAR penalty, while arguably equivalent to a fine, is not grossly disproportional in all applications.

The FATCA withholding taxes in § 1471(a) and § 1471(d)(1)(B) are taxes, not penalties. The Eighth Amendment applies to payments that "constitute punishment for an offense." *Bajakajian*, 524 U.S. at 328. Neither taxes nor remedial fines are punishment for an offense, and thus are not subject to the Eighth Amendment. See *Austin v. United States*, 509 U.S. 602, 621-22 (1993) (a fine is not "punishment for an offense" if it serves a wholly remedial purpose).

The FATCA withholding tax rate of 30% is remedial because it is the same rate imposed on all fixed or determinable annual or periodic income paid from a U.S. source to a non-resident alien. 26 U.S.C. § 1441(a), (b). FATCA's withholding tax on FFIs effectively assumes that if an FFI refuses to disclose information to the IRS, all U.S.-sourced payments to its account holders may be subject to that rate of taxation. Similarly, FATCA's withholding tax on recalcitrant account hold-

ers under § 1471(b)(1)(D) merely extends the same withholding rate as § 1441 to account where the account holder refuses to be identified. The rate is effectively reduced if the FFI's country has a substantive tax treaty reducing the rate of tax on a particular payment, see 26 U.S.C. § 1474(b)(2)(A)(i), underlining that the FATCA withholdings are meant to collect tax, not to impose a punishment. Again, to the extent that one of the individual Plaintiffs has money withheld over and above what is necessary to pay his or her federal income tax, the withholding is refundable. 26 U.S.C. § 1474; 26 C.F.R. §§ 1.1474-3, 1.1474-5. At least as to these Plaintiffs, the FATCA withholding taxes serve the remedial purpose of protecting the fisc. See *Helvering v. Mitchell*, 303 U.S. 391, 400-01 (1938) (50% fraud penalty was remedial in nature because it was "provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation").

Nor is the magnitude of the withholding tax grossly disproportional, since it roughly approximates the presumed tax loss from FATCA non-compliance. Congress's determination that a 30% withholding tax rate was appropriate is accorded substantial deference. See, e.g., *United States v. Dobrowolski*, 406 F. App'x 11, 12-13 (6th Cir. 2010) (citing cases) (noting traditional deference given to legislative policy determinations). A penalty that is equal to, and does not duplicate, the applicable tax rate on a given payment is proportional to the "offense" of failing to report information under FATCA—it certainly is not excessive in "all" applications. Therefore, Plaintiffs' facial Eighth Amendment challenge to the § 1471 taxes is rejected.

The willful FBAR penalty also survives a facial

challenge because the maximum penalty will be constitutional in at least some circumstances. A maximum penalty fixed by Congress is due substantial deference from the courts. See *Bajakajian*, 524 U.S. at 336 ("[J]udgments about the appropriate punishment for an offense belong in the first instance to the legislature."); see also *United States v. 817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F.3d 1304, 1309 (11th Cir. 1999). Congress increased the maximum FBAR penalty to its present level in 2004. See 31 U.S.C. § 5321(a)(5)(C). Congress chose this penalty range because FBAR reporting furthers an important law enforcement goal. The Senate Finance Committee explained:

> The Committee understands that the number of individuals involved in using offshore bank accounts to engage in abusive tax scams has grown significantly in recent years .... The Committee is concerned about this activity and believes that improving compliance with this reporting requirement is vitally important to sound tax administration, to combating terrorism, and to preventing the use of abusive tax schemes and scams.

S. Rep. 108-257, at 32 (2004) (explaining increase in maximum willful penalty and creation of new civil nonwillful penalty). Indeed, FBARs are available not only to the IRS but also to a variety of law enforcement agencies investigating crimes like money laundering and terrorist financing. See, e.g., *Amendment to the Bank Secrecy Act Regulations–Reports of Foreign Financial Accounts*, 75 Fed. Reg. 8844, 8844 (Feb. 26, 2010). Setting the maximum willful penalty as a substantial proportion of the account ensures that the willful penalty is not merely a cost of doing business for

tax evaders, terrorists, and organized criminals.

A 50% willful FBAR penalty—the maximum permitted by statute—is severe. But given the ills it combats, it is an appropriate penalty in at least some circumstances. Accordingly, the Plaintiffs' facial challenge to it under the Eighth Amendment fails.

IV. Conclusion

Plaintiffs have failed to establish that they are entitled to a preliminary injunction. First, Plaintiffs are not likely to succeed on the merits. They lack standing, as the harms they allege are remote and speculative harms, most of which would be caused by third parties, illusory, or self-inflicted. Plaintiffs' allegations also fail as a matter of law, as there is no constitutionally recognized right to privacy of bank records.

Second, Plaintiffs are not likely to suffer irreparable injury if a preliminary injunction is not granted. Their lack of standing means that they lack a sufficiently concrete and particularized injury to sue in the first instance, much less an injury that is so imminent and irreparably harmful as to justify preliminary injunctive relief. The absence of the irreparable injury is reinforced by the facts that: their Fifth Amendment equal-protection allegation is based on a classification that does not exist; their Eighth Amendment claims are not ripe, with no FATCA withholding or willful FBAR penalties having been imposed against them; and their Fourth Amendment counts are based on information reporting that does not violate the Constitution.

The third factor, the balance of the equities, also weighs against the entry of a preliminary injunction. That is because the fourth factor, the public interest, is best served by keeping the statutory provisions at is-

sue, as well as their implementing regulations and international agreements, in place and enforceable during the pendency of this lawsuit. The FATCA statute, the IGAs, and the FBAR requirements encourage compliance with tax laws, combat tax evasion, and deter the use of foreign accounts to engage in criminal activity. A preliminary injunction would harm these efforts and intrude upon the province of Congress and the President to determine how best to achieve these policy goals. Thus, Plaintiffs' Motion for Preliminary Injunction, ECF 8, is **DENIED**.

DONE and **ORDERED** in Dayton, Ohio, this Tuesday, September 29, 2015.

[Filed: 09/26/2017]

No. 16-3539

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARK CRAWFORD, RAND PAUL, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE UNITED STATES SENATE, ROGER JOHNSON, DANIEL KUETTEL, STEPHEN J. KISH, DONNA-LANE NELSON, L. MARC ZELL, Plaintiffs-Appellants v. UNITED STATES DEPARTMENT OF THE TREASURY, UNITED STATES INTERNAL REVENUE SERVICE, UNITED STATES FINANCIAL CRIMES ENFORCEMENT NETWORK, Defendants-Appellees	ORDER

BEFORE: BOGGS, SILER, and MOORE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

[Filed: 07/14/2015]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Mark Crawford, **Senator Rand Paul**, in his official capacity as a member of the United States Senate, **Roger Johnson**, **Daniel Kuettel**, **Stephen J. Kish**, **Donna-Lane Nelson**, and **L. Marc Zell**, *Plaintiffs*, **v.** **United States Department of the Treasury**, **United States Internal Revenue Service**, and **United States Financial Crimes Enforcement Network**, *Defendants*.	**Civil Case No. ________** **VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs complain as follows:

Introduction

1. This is a challenge to the Foreign Account Tax Compliance Act ("FATCA"), the intergovernmental agreements ("IGAs") unilaterally negotiated by the United States Department of the Treasury ("Treasury Department") to supplant FATCA in the signatory countries, and the Report of Foreign Bank and Finan-

cial Accounts ("FBAR") administered by the United States Financial Crimes Enforcement Network ("FinCEN"). These laws and agreements impose unique and discriminatory burdens on U.S. citizens living and working abroad.

2. FATCA was intended to address tax evasion by U.S. taxpayers who fail to report foreign assets located outside of the United States. But in practice it is a sweeping financial surveillance program of unprecedented scope that allows the Internal Revenue Service ("IRS") to peer into the financial affairs of any U.S. citizen with a foreign bank account. At its core, FATCA is a bulk data collection program requiring foreign financial institutions to report to the IRS detailed information about the accounts of U.S. citizens living abroad, including their account balances and account transactions. 26 U.S.C. § 1471(c)(1). FATCA eschews the privacy rights enshrined in the Bill of Rights in favor of efficiency and compliance by requiring institutions to report citizens' account information to the IRS even when the IRS has no reason to suspect that a particular taxpayer is violating the tax laws.

3. FATCA imposes enormous economic costs on individuals and financial institutions. The cost of implementing FATCA has been estimated to cost large banks approximately $100 million each to become fully compliant and around $8 billion total systemwide.[1]

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[1] Robert W. Wood, *FATCA Carries Fat Price Tag*, Forbes, Nov. 30, 2011, http://www.forbes.com/sites/robertwood/2011/11/30/fatca-carries-fat-price-tag/; Deloitte Regulatory Review, FATCA: Determined to Pierce the Corporate Veil (Apr. 2011), p. 3, available at http://www.deloitte.com/assets/Dcom-Australia/Local%20Assets/Docu-

Four years after it was first passed, financial institutions are still working to make themselves compliant, but are finding that it is costing more than they originally anticipated. According to a survey conducted in late 2014, 55% of financial institutions surveyed said that they expected to exceed their original budget for FATCA compliance while only 35% said they expected to remain within budget.[2] More than a quarter (27%) of surveyed financial institutions estimated their annual compliance cost for 2015 to be between $100,000 and $1 million.[3] And as the IRS continues to move toward full implementation of FATCA, costs for year-over-year compliance are expected to increase as the number of surveyed financial institutions that reported FATCA compliance costs between $100,000 and $1 million increased by 69% from 2014 to 2015.[4]

4. What's most striking about these costs is that they are expected to equal or exceed the amount of additional revenue that FATCA is projected to raise.[5] At

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ments/Industries/Financial%20services/Regulatory%20Review%20April%202011/Deloitte_Regulatory_Review_April_2011_FATCA.pdf.

[2] Thomson Reuters, *Thomson Reuters survey indicates FATCA compliance to cost more than anticipated*, Nov. 6, 2014, http://fatca.thomsonreuters.com/wp-content/uploads/2014/11/Final-FATCA-webinar-release-.pdf.

[3] Thomson Reuters, *supra* note 2.

[4] Thomson Reuters, *supra* note 2.

[5] Taxpayer Advocate Service, 2013 Annual Report to Congress, MSP #23 Reporting Requirements: The Foreign Account Tax Compliance Act Has the Potential to be Burdensome, Overly Broad, and Detrimental to Taxpayer

the time of its passage, the Joint Committee on Taxation estimated that FATCA would generate approximately $8.7 billion in additional tax revenue between 2010 and 2020.[6] With the numerous delays in implementing various features of the law,[7] the actual amount of additional revenue being collected as a result of FATCA is rapidly diminishing. The disjunction between FATCA's costs and benefits is perhaps best illustrated by the Australian experience where experts estimate that FATCA will extract an additional $20 million in revenue for the U.S. at an estimated implementation cost of around $1 billion.[8] This marked inefficiency has led many, including the U.S. Taxpayer Advocate, to question whether FATCA's costs and diffi-

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Rights, p.6 (2013), http://www.taxpayeradvocate.irs. gov/2013-Annual-Report/downloads/REPORTING-REQUIREMENTS-The-Foreign-Account-Tax-Compliance-Act-Has-the.pdf.

[6] Joint Committee on Taxation, JCX-6-10, Estimated Revenue Effects of HIRE Act, p.1 (Mar. 4, 2010), https://www.jct.gov/publications.html?func=startdown&id=3650.

[7] David Kinkade, *IRS Delays FATCA Enforcement for Banks as Start Date Looms*, U.S. Chamber of Commerce, May 23, 2014, https://www.uschamber.com/blog/irs-delays-fatca-enforcement-banks-start-date-looms; Joe Harpaz, *Financial Firms Get FATCA Reprieve*, Forbes, May 9, 2014, http://www.forbes.com/sites/joeharpaz/2014/05/09/financial-firms-get-fatca-reprieve/; Sullivan & Cromwell LLP, FATCA: Delayed Start Dates (July 15, 2013), http://www.sullcrom.com/siteFiles/Publications/SC_Publication_FATCA_Delayed_Start_Dates.pdf.

[8] Deloitte, *supra* note 1.

culties are worth the marginal increase in revenues.[9]

5. FATCA's burdens, however, are not limited to financial institutions and fall most heavily on individual U.S. citizens. On the most fundamental level, FATCA deprives individuals of the right to the privacy of their financial affairs. FATCA authorizes the IRS to collect information on the financial assets of U.S. citizens living abroad that it cannot collect on U.S. citizens domestically. On a practical level, FATCA is severely impinging on the ability of U.S. citizens to live and work abroad. It is affecting all facets of individuals' lives from day-to-day finances and employment to family relations and citizenship.

6. FATCA is causing many foreign financial institutions to curtail their business dealings with U.S. citizens living abroad because the costs associated with compliance are simply not worth the trouble. According to a study conducted by the group Democrats Abroad, almost one-quarter (22.5%) of Americans living abroad who attempted to open a savings or retirement account and 10% of those who attempted to open a checking account were unable to due so.[10] The study also revealed that some Mexican financial institutions are even refusing to cash checks for Americans living in

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[9] William Hoffman, *FATCA 'Tormenting' Taxpayers, Olson Says*, Tax Analysts, Oct. 8, 2014, http://www.taxanalysts.com/www/features.nsf/Articles/FD2860D17810639485257D6B0052AC9C?OpenDocument; Taxpayer Advocate Service, *supra* note 5, at 1–2 and n.7.

[10] Democrats Abroad, FATCA: Affecting Everyday Americans Every Day 6 (2014), https://www.democratsabroad.org/sites/default/files/Democrats%20Abroad%202014%20FATCA%20Research%20Report_0.pdf.

that country, many of whom are retirees.[11] But banks are not only refusing to open new accounts or cash checks for U.S. citizen, they are also closing existing customer accounts.[12] Approximately one million Americans living abroad (one-sixth of all such citizens) have had bank accounts closed because of FATCA.[13] Nearly two-thirds (60%) of those who reported having an account closed had lived abroad for twenty or more years, and most affected appear to be "overwhelmingly middle class Americans, not high income individuals."[14] More than two-thirds (68%) of checking accounts and nearly half (40.4%) of savings accounts closed had balances of less than $10,000.[15] And, over two-thirds (69.3%) of

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[11] Democrats Abroad, *supra* note 10, at 7.

[12] Martin Hughes, *FATCA Fall Out Closes A Million US Bank Accounts*, Money International, Oct. 7, 2014, http://www.moneyinternational.com/tax/fatca-fall-closes-million-us-bank-accounts/; Eyk Henning, *Deutsche Bank Asks U.S. Clients in Belgium to Close Accounts*, The Wall Street Journal, May 2, 2014, http://www.wsj.com/articles/SB10001424052702303678404579537610638716116; Nat Rudarakanchana, *Americans Abroad Can't Bank Smoothly As FATCA Tax Evasion Reform Comes Into Play*, International Business Times, Dec. 20, 2013, http://www.ibtimes.com/americans-abroad-cant-bank-smoothly-fatca-tax-evasion-reform-comes-play-1517032; Jeff Berwick, *Breaking News: US Expats in Mexico Left Stranded in Latest FATCA Escalation*, The Dollar Vigilante, undated, http://dollarvigilante.com/blog/2014/6/4/breaking-news-us-expats-in- mexico-left-stranded-in-latest-fa.html.

[13] Hughes, *supra* note 12.

[14] Democrats Abroad, *supra* note 10, at 4, 6.

[15] Democrats Abroad, *supra* note 10, at 6.

dedicated retirement accounts and more than half (58.9%) of other investment or brokerage accounts closed had a balance of less than $50,000.[16]

7. In addition to causing Americans overseas to lose access to basic financial services abroad, FATCA is also having a detrimental impact on U.S. citizens living abroad at work and at home. Many have reported that they are being denied consideration for promotions at their jobs, particularly with respect to high level positions,[17] because of the concomitant compliance burdens foisted on employers by FATCA.[18] Indeed, in the study by Americans Abroad, 5.6% of respondents reported that they had been denied a position because of FATCA.[19] Others reported difficulty opening a business or partnering with others in joint ventures because of obstacles created by FATCA.[20] Such trends will undoubtedly affect the ability of U.S. citizens to remain economically competitive in an increasingly globalized world.

8. At home, FATCA is forcing Americans abroad to

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[16] Democrats Abroad, *supra* note 10, at 6.

[17] Democrats Abroad, Data From the Democrats Abroad 2014 FATCA Research Project 21 at Table VII.3 (2014), https://www.democratsabroad.org/sites/default/files/Democrats%20Abroad%202014%20FATCA%20Research%20Datapack_0.pdf.

[18] Barbara Stcherbatcheff, *Why Americans Abroad Are Giving Up Their Citizenship*, July 1, 2014, http://www.newsweek.com/2014/07/04/why-americans-abroad-are-giving-their-citizenship-261603.html.

[19] Democrats Abroad, *supra* note 10, at 9.

[20] Democrats Abroad, *supra* note 10, at 10.

rearrange not only their financial affairs but also reconsider their personal relationships.[21] More than one-fifth (20.8%) of Americans abroad surveyed by Democrats Abroad have already or are considering separating their accounts from their non-American spouse.[22] And 2.4% have or are considering separating or divorcing as a result of FATCA's expansive reporting requirements,[23] further destabilizing American families by adding to the already increasing divorce rate.[24] This instability is likely having the harshest impact on Americans living abroad whose spouses are the primary breadwinners and themselves not American citizens. For these individuals, such as stay-at-home mothers, FATCA is undermining their financial security and placing them in "highly vulnerable" positions because of the need to separate American spouses from a family's non-American earned financial assets.[25] It can leave them without property and without access to their families' bank accounts and credit.[26]

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[21] *See generally* Democrats Abroad, *supra* note 10, at 7–9 (noting several instances where FATCA was negatively affecting familial relationships).

[22] Democrats Abroad, *supra* note 10, at 7.

[23] Democrats Abroad, *supra* note 10, at 7.

[24] Christophen Ingraham, *Divorce is actually on the rise, and it's the baby boomers' fault*, The Washington Post, March 27, 2014, http://www.washingtonpost.com/blogs/wonkblog/wp/2014/03/27/divorce-is-actually-on-the-rise-and-its-the-baby-boomers-fault/.

[25] Democrats Abroad, *supra* note 10, at 8.

[26] Democrats Abroad, *supra* note 10, at 8 (reporting numerous situations where non-income earning spouses were

9. For some Americans living abroad, FATCA's burdens have become so heavy that they are choosing to relinquish their US citizenship just so they can avoid the crushing weight of this unprecedented law. Indeed, record numbers of Americans have relinquished their U.S. citizenship in the five years since FATCA's passage.[27] The five highest annual totals of citizenship renunciations have occurred in each of the five years from 2010 to 2015.[28] More than 10,000 overseas individuals have given up their U.S. citizenship during that time.[29] And the trend shows no signs of slowing

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removed from the families financial affairs).

[27] Catherine Bosley and Richard Rubin, *A Record Number of Americans Are Renouncing Their Citizenship*, Bloomberg Business, Feb. 10, 2015, http://www.bloomberg.com/news/articles/2015-02-10/americans-overseas-top-annual-record-for-turning-over-passports; Ali Weinberg, *Record Number of Americans Renouncing Citizenship Because of Overseas Tax Burdens*, ABC News, Oct. 28, 2014, http://abcnews.go.com/International/record-number-americans-renouncing-citizenship-overseas-tax-burdens/story?id=26496154; Laura Saunders, *More Americans Renounce Citizenship, With 2014 on Pace for a Record*, The Wall Street Journal, Oct. 24, 2014, http://blogs.wsj.com/totalreturn/2014/10/24/more-americans-renounce-citizenship-with-2014-on-pace-for-a-record/; Robert W. Wood, *Americans Renouncing Citizenship Up 221%, All Aboard The FATCA Express*, Forbes, Feb. 6, 2014, http://www.forbes.com/sites/robertwood/2014/02/06/americans-renouncing-citizen-ship-up-221-all-aboard-the-fatca-express/.

[28] Bosley and Rubin, *supra* note 27.

[29] Bosley and Rubin, *supra* note 27.

down with a record number of Americans (1,335) giving up their citizenship in the first quarter of 2015, exceeding the previous quarterly record by 18%.[30] In some cases, non-American spouses are pressuring their American spouses to relinquish their U.S. citizenship to avoid entangling the non-American spouses financial affairs in FATCA.[31] And, at the same time, as if to add insult to injury, the U.S. government has sought to make the price of citizenship for these persons even higher. For, just as FATCA's burdens are growing steadily more burdensome as the law moves toward full implementation, the U.S. government has simultaneously increased the cost of citizenship renunciation five-fold, from $450 to $2,350.[32]

10. But FATCA is not the only attack being leveled at Americans living abroad. The Bank Secrecy Act imposes an extra requirement on overseas Americans in the form of a special reporting requirement for foreign accounts. Under the FBAR, Americans living abroad must disclose detailed information about any foreign bank accounts with a balance in excess of $10,000. In practice, it is just a trap for the unprepared and the uninformed, pinching regular middle-class Americans residing outside the United States. The penalties for failing to file the report can be financially devastating and can wipe out a person's entire savings. The maximum penalty for failing to file an FBAR is $100,000 or

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[30] Richard Rubin, *Americans Living Abroad Set Record for Giving Up Citizenship*, Bloomberg, May 7, 2015, http://www.bloomberg.com/news/articles/2015-05-07/americans- abroad-top-quarterly-record-for-giving-up-citizenship.

[31] Democrats Abroad, *supra* note 10, at 9.

[32] Weinberg, *supra* note 27.

50% of the value of the account, *whichever is greater* with each unfiled report begetting a separate penalty. 31 U.S.C. § 5321(a)(5)(C). As a result, a single unreported account with a static balance can be penalized multiple times for the same course of conduct continued over multiple years. Because the FBAR civil penalties are cumulative, ultimately the fine for failing to file the FBAR can far exceed the actual value of the unreported financial asset. A person who fails to report an account for only two years could be subject to a penalty *equal to the full balance of the account.* Each unfiled FBAR could subject the person to a fine of 50% of the balance of the account, resulting in an aggregate fine after two years of 100% of the value of the account. One person who failed to file the FBAR for four years was recently subjected to a fine of 150% of the balance of his account.[33]

Jurisdiction and Venue

11. This court has jurisdiction under 28 U.S.C. § 1331 and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 because the case arises under the Treaty Clause of the Constitution, Article II, Section 2, Clause 2, and section 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702.

12. Venue is proper under 28 U.S.C. § 1391(e) because Plaintiff Mark Crawford is a resident of Dayton, Ohio.

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[33] David Voreacos and Susannah Nesmith, *Florida Man Owes Record 150% IRS Penalty on Swiss Account*, Bloomberg Business, May 29, 2014, http://www. bloomberg. com/news/articles/2014-05-28/florida-man-87-owes-150-of-swiss-account-jury-says.

Parties

Plaintiff Mark Crawford

13. Mark Crawford is a citizen of the United States of America. He currently lives in Albania and also maintains a residence in Dayton, Ohio.

14. Mark was born in Pasadena, California in 1971, while his father was working for NASA's Jet Propulsion Laboratory. A job offer from NCR relocated the family to Wichita, Kansas for five years and eventually to Dayton, Ohio when Mark was in second grade. Mark graduated from Dayton Christian High School in 1989. He earned an undergraduate degree from Miami University of Ohio in 1993 and a masters degree with a focus in economics from University College London in England in 1995. During college, Mark spent time teaching English in China and, after graduation, spent one year in Albania as a missionary with Campus Crusade for Christ.

15. After finishing his masters degree, Mark returned to Dayton for a year to work for his father's financial planning business where he became a licensed stock broker, earning his Series 7. He was then recruited to join the Tirana, Albania office of the Albanian-American Enterprise Fund (AAEF), a New York based non-political, not-for-profit United States corporation established by Congress pursuant to the Support for East European Democracy Act of 1989 ("SEED Act"). The AAEF was established as part of a United States initiative to promote the private sector development in formerly Communist countries in Europe and Central Asia. It invests solely in Albania. While Mark was at the AAEF, the fund invested in banking, real estate, trade finance companies and a

range of production initiatives. Since its inception the AAEF has invested in or lent to over 40 Albanian companies. As of September 30, 2008, net assets of the AAEF amounted to $178 million or 6 times the original capital. Companies financed by AAEF have contributed more than $1 billion to the country's GDP and created more than 5,000 jobs.

16. In 2001, Mark was recruited by a USAID funded group to found a bank in Montenegro. As CEO he led the bank to become the most profitable in the country and help introduce SWIFT, MasterCard, VISA, and ATM services in the country. He also helped found a separate USAID related bank in Serbia and served on its board of directors.

17. After the split with Serbia, at the request of US Ambassador Rod Moore, Mark led the establishment of the American Chamber of Commerce in Montenegro and served as its founding Chairman.

18. Currently Mark is the owner of an international investment and advisory firm, the chairman of an international securities brokerage firm, a partner within a top-five global audit/advisory network, and a senior adviser to a publicly listed natural resources company. He has taught at the university level on two continents and volunteers to work alongside the United States Embassy in Albania as the president of the board of the American Chamber of Commerce. He also serves as the volunteer chairman of an international affiliate of Campus Crusade for Christ.

19. Mark is a native English speaker, is fluent in Albanian, and speaks basic Serbian/Montenegrin and basic Greek.

20. Mark's wife Irena is a naturalized American citizen, who also holds Albanian citizenship. She is

from the Greek minority of southern Albania. They have three children, all of whom are American. Mark and his wife split their time between the United States and Europe in order that the children can learn Greek and Albanian.

21. Mark is the founder and sole owner of Aksioner International Securities Brokerage, sh.a., located in Tirana, Albania. It is the only licensed brokerage firm in Albania and is a partner of Saxo Bank in Copenhagen. The Saxo relationship will not allow Aksioner to accept clients who are U.S. citizens in part because the bank does not wish to assume the burdens that would be foisted on it by FATCA if it were to accept U.S. citizens. This has impacted Mark financially, forcing him to turn away prospective American clients living in Albania who come to him for brokerage services. Ironically, in April of 2012, Mark applied for a brokerage account with his own company and was denied because he is a U.S. citizen.

22. Mark and his wife maintain three personal bank accounts at Intesa Sanpaolo bank in Albania. The accounts are used to support Mark and his family's day-to-day financial needs such as purchasing food, clothing, and fuel and paying for housing. Each of the three accounts is denominated in a different currency—one in U.S. dollars, one in Euros, and one in Albanian Lek.

23. Mark does not want the financial details of his accounts, including the account numbers, the account balances, and the gross receipts and withdrawals from the accounts, disclosed to the United States government, the IRS, or the Treasury. Mark would not disclose or permit others, including his bank, to disclose his private account information to the United States government, the IRS, or the Treasury but for the fact

that FATCA and the FBAR require the disclosure.

24. Mark reasonably fears that he, his wife, or the funds in their joint bank accounts will be subject to the unconstitutionally excessive fines imposed by 31 U.S.C. § 5321 if he wilfully fails to file an FBAR for the accounts.

25. Mark has no adequate remedy at law and is suffering irreparable harm.

Plaintiff Senator Rand Paul

26. Rand Paul is a United States Senator from the Commonwealth of Kentucky. He is a United States citizen and was first elected to the Senate in 2010.

27. Senator Paul lives with his wife and children in Bowling Green, Kentucky, which is located in Warren County. Senator Paul owned his own ophthalmology practice and performed eye surgery for 18 years in Bowling Green prior to being elected to the Senate. He grew up in Lake Jackson, Texas and attended Baylor University. He graduated from Duke Medical School in 1988 and completed a general surgery internship at Georgia Baptist Medical Center in Atlanta, completing his residency in ophthalmology at Duke University Medical Center.

28. Senator Paul has been a vocal opponent of FATCA from the beginning. He has introduced legislation to repeal parts of FATCA in 2013 and 2015 and opposed international tax treaties in the Senate related to FATCA. However, because the Treasury Department and IRS have refused to abide by the constitutional framework for concluding international agreements, Senator Paul has been denied the opportunity to exercise his constitutional right as a member of the U.S. Senate to vote against the FATCA IGAs.

29. Senator Paul would vote against the FATCA IGAs if the Executive Branch submitted them to the Senate for advice and consent under Article II or to the Congress as a whole for approval as congressional-executive agreements.

30. Senator Paul has no adequate remedy at law and is suffering irreparable harm.

Plaintiff Roger Johnson

31. Roger G. Johnson is citizen of the United States of America. He currently resides in Brno, Czech Republic.

32. Roger was born on September 19, 1952 in Dinuba, California. He first grew up on a fruit ranch in Fresno County, California. Then, in 1963, he moved to Southern California with his family so that his father could accept a teaching position there. He completed his elementary, high school, and college education in Orange County.

33. Roger is a veteran of the United States Army, having served twelve years on active duty and ten years in the U.S. Army Reserve. Roger joined the Army as a private in 1975. During his service, Roger attended Officer Candidate School, earned a Masters degree during his off-duty time, and attended the Defense Language Institute where he learned German. By the time he left active duty service in 1987, Roger had attained the rank of captain. Following active service, he continued his military service as a member of the U.S. Army Reserve, during which time he was recalled to active duty service for the first Iraq war in 1990 for six months and served in combat during Operation Desert Storm with the 3rd Armored Division. He retired from the U.S. Army Reserve as a major.

34. Roger remained in Germany after leaving active military service. He met his wife in Berlin where he was working as a project manager for a German grocery firm. He and his wife lived in Berlin, Germany until 1994, and later moved to Brno, his wife's hometown, so that his wife could resume her law practice. He and his wife have two adult children who are attending college. His wife is a citizen of the Czech Republic, and his children are dual citizens of the United States and the Czech Republic.

35. During the course of the twenty one years that Roger and his wife have made their home in the Czech Republic, they have founded two small advertising businesses, purchased a personal residence together, purchased several rental properties, invested their money, and maintained joint bank accounts. FATCA, however, forced Roger and his wife to significantly alter their financial affairs. Roger's wife strongly objected to having her financial affairs disclosed to the United States government under FATCA. After consulting with their tax advisor, who strongly recommended that they separate their assets, Roger and his wife decided to legally separate all of their jointly owned assets to protect his wife's privacy. As a result of that separation, Roger no longer has any ownership interest in his home, rental properties, or his wife's company. Roger and his wife are now forced to maintain completely separate bank accounts to protect her privacy.

36. Roger has five bank accounts that he uses to conduct his affairs: two in the United States and three in the Czech Republic. He maintains the two U.S. accounts to pay bills associated with a home he owns in California and for certain transactions which are more

conveniently completed using a U.S. account. The Czech accounts are all maintained at Citibank in the Czech Republic and are used to support Roger's day-to-day financial needs such as paying for housing and purchasing food, clothing, and fuel for his vehicle. Each of the three Czech accounts is denominated in a different currency—one in U.S. dollars, one in Euros, and one in Czech Crowns—to enable Roger to conduct his affairs when he travels in Europe and elsewhere.

37. Roger and his wife would reverse the legal separation of their assets and financial affairs if they were not required to be reported under FATCA and the Czech IGA.

38. Roger does not want the financial details of his accounts, including the account numbers, the account balances, and the gross receipts and withdrawals from the accounts, disclosed to the United States government, the IRS, or the Treasury. Roger would not disclose or permit others, including his bank, to disclose his private account information to the United States government, the IRS, or the Treasury but for the fact that the IGAs, FATCA, and the FBAR require the disclosure.

39. Roger reasonably fears that he or the funds in his bank accounts will be subject to the unconstitutionally excessive fines imposed by 31 U.S.C. § 5321 if he wilfully fails to file an FBAR for the accounts.

40. Roger has no adequate remedy at law and is suffering irreparable harm.

Plaintiff Stephen J. Kish

41. Stephen J. Kish, Ph.D. is a citizen of the United States of America and a citizen of Canada. He currently resides in Toronto, Ontario, Canada.

42. Stephen is a professor of psychiatry and pharmacology at the University of Toronto and the head of the Human Brain Laboratory at the Centre for Addiction and Mental Health (CAMH) in Toronto, Ontario.

43. Stephen was born in Seattle, Washington on July 11, 1948. He lived in Seattle for the duration of his childhood, completing his primary and high school education there. After high school, Stephen enrolled at the University of Notre Dame in South Bend, Indiana where he graduated in 1970 with a bachelors degree in biology. He received a masters degree in biochemical pharmacology at the University of Southampton in England in 1973 and a Ph.D in pharmacology at the University of British Columbia in Vancouver in 1980. From 1980 to 1981, he undertook a post-doctoral fellowship training at the University of Vienna in Austria in Parkinson's disease studies.

44. In 1981, Stephen joined the Human Brain Laboratory at CAMH, which at that time was known as the Clarke Institute of Psychiatry. He has remained at CAMH since 1981, eventually becoming Head of the Human Brain Laboratory.

45. Eventually, in 1985, Stephen decided to become a Canadian citizen to ensure that he would be able to remain in Canada with his wife and remain able to pursue his research career in Toronto.

46. Stephen met his wife in Toronto in April, 1981 shortly after joining CAMH. She is a Canadian citizen. Stephen and his wife have built a life together in Toronto and established deep roots in the community.

47. Stephen and his wife maintain a joint bank account at the Canadian Imperial Bank of Commerce ("CIBC") in Toronto that is used to support their day-to-day financial needs such as paying for housing and

purchasing food, clothing, and fuel for their personal vehicle. And, while they have a good marriage, FATCA has at times caused some discord between the two because she, as a Canadian citizen, strongly opposes the disclosure of her personal financial information from her and Stephen's joint bank account to the U.S. government.

48. Stephen does not want the financial details of his accounts, including the account numbers, the account balances, and the gross receipts and withdrawals from the accounts, disclosed to the United States government, the IRS, or the Treasury. Stephen would not disclose or permit others, including his bank, to disclose his private account information to the United States government, the IRS, or the Treasury but for the fact that the IGAs, FATCA, and the FBAR require the disclosure.

49. Stephen reasonably fears that he, his wife, or the funds in their joint bank account will be subject to the unconstitutionally excessive fines imposed by 31 U.S.C. § 5321 if he wilfully fails to file an FBAR for the accounts.

50. Stephen has no adequate remedy at law and is suffering irreparable harm.

Plaintiff Daniel Kuettel

51. Daniel Kuettel is a citizen of Switzerland and a former citizen of the United States of America. Daniel resides in Bremgarten, Switzerland.

52. Daniel's childhood was divided between Colorado and Switzerland. His mother was a citizen of the United States, and his father is a citizen of Switzerland and the United States. His parents met in the United States after his father emigrated to the United

States after World War II. Daniel was born in Greeley, Colorado in a farmhouse in 1972. He lived in Greeley until he was ten years old, but, after his parents divorced in 1981, moved with his father to Switzerland. He spent the next five years in Switzerland and then returned to Greeley to live with his mother when he was fifteen years old. Two years later, Daniel moved back to Switzerland to live with his father again, and then returned to finish high school in the United States.

53. In 1992, after graduating from high school, Daniel enlisted in the United States Army, serving as a crane operator in a rapid deployment unit for three years. He was stationed primarily at Fort Stewart, Georgia during his service. Upon completing his enlistment in 1995, he returned to Greeley, Colorado and joined the U.S. Army Reserve. He spent the next several years advancing his education and working in various capacities in the computer and information technology fields. During this time, he lived in Greeley, Colorado as well as California, moving first to Silicon Valley and later to San Diego. After the dot-com bubble burst in 2000, Daniel eventually decided to move to Switzerland in search of employment in 2001. He worked first for Price Waterhouse Cooper and then for Flextronics (formerly RIWISA), his current employer.

54. Daniel met his wife, who is originally from the Philippines, in 2000. She is a citizen of Switzerland and the Philippines. She is a nurse and is currently working as a stay-at-home mother to their two young children. His daughter, born in 2005, is a citizen of Switzerland, the Philippines, and the United States. His son, born in 2013, is a citizen of Switzerland and the Philippines.

55. Daniel relinquished his U.S. citizenship in 2012 because of difficulties caused by FATCA. He and his wife's home is located in Switzerland, and many Swiss banks have been unwilling to accept American clients because of FATCA. Daniel made several inquiries at Swiss banks attempting to find one that would refinance his mortgage. His efforts, however, were mostly unsuccessful with all of them citing policies related to his U.S. citizenship. He contacted both the U.S. Veterans Administration and the U.S. Department of Housing and Urban Development for assistance, but both agencies declined and stated that they do not provide assistance in obtaining mortgages to Americans living abroad. Left with few options, Daniel decided to renounce his citizenship so that he and his family could continue with the life they had built in Switzerland. After renouncing his U.S. citizenship, Daniel was able to refinance his home with a Swiss bank shortly thereafter. Daniel will always consider himself an American but felt that renunciation was the only real option for his family.

56. Daniel currently maintains a college savings account for his daughter in his own name at PostFinance bank in Switzerland but would like to transfer ownership of the account to her and place it in her name. Having the account in her name would offer several advantages such as better interest rates and discounts for local businesses. The account currently has a balance of approximately $8,400. If the account were in his daughter's name, Daniel would transfer the full balance plus an additional $2,500 from his own, separate funds into the account. He would also make monthly deposits of $200 ($1,400 annually) to the account for the foreseeable future.

57. However, Daniel will refrain from transferring ownership of the college savings account to his daughter because he reasonably fears that he, his daughter, or the funds in the account will be subject to the unconstitutionally excessive fines of $100,000 or 50% of the balance of the account imposed by 31 U.S.C. § 5321 if the IRS determines that his daughter has "wilfully" failed to file an FBAR for the account. According to the instructions for filing the FBAR, published by FinCEN, a child who is a U.S. citizen is required to file an FBAR for their foreign accounts. FinCEN, BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114) 6 (2014), http://www.fincen.gov/forms/files/FBAR%20Line%20Item%20Filing%20Instructions.pdf. Where the child is incapable of filing, FinCEN requires the child's parent to file the FBAR on their behalf. *Id.* Daniel's daughter is not capable of complying with this reporting requirement because she is only ten years old and too young to shoulder such an obligation. Daniel objects to filing an FBAR as required by FinCEN because he is not a U.S. citizen and would not do so for his daughter's account. Daniel's wife has told him that she too objects to filing an FBAR for his daughter's account and would not do so. Daniel's daughter cannot avoid the FBAR reporting requirement by renouncing her U.S. citizenship because she is too young. Daniel inquired about this possibility on June 2, 2015 and received a response from the U.S. Embassy in Bern, Switzerland advising him that his daughter cannot renounce her citizenship until at least the age of 16. (Ex. 1. [cxhibit omitted])

58. Daniel has no adequate remedy at law and is suffering irreparable harm.

Plaintiff Donna-Lane Nelson

59. Donna-Lane Nelson is a citizen of Switzerland and a former citizen of the United States of America. She lives in Geneva, Switzerland and Argelès-sur-mer, France.

60. Donna-Lane was born in the United States and grew up in the small New England town of Reading, Massachusetts. As a teenager, she was member of the International Order of the Rainbow for Girls ("IORG") which is a youth service organization designed to encourage community service, honesty, and leadership. She served in the role of Patriotism for her group. The organization has counted among its members U.S. Senator Olympia Snowe and former Supreme Court Justice Sandra Day O'Conner.

61. Donna-Lane was married in 1962 to a member of the United States military. During the first years of their marriage, they lived in Stuttgart, Germany while her then-husband was stationed for service at the Army base in Möhringen. It was during this time that Donna-Lane became acquainted with Europe, its lifestyle, and its history. After a few years in Germany, she and her then-husband returned to the United States. She earned her bachelors degree at Lowell University in 1967 and later earned a masters degree at Glamorgan University in Wales. In 1969, her then-husband left her shortly after the birth of their daughter. After his departure, she worked various jobs in public relations and communications while raising her daughter as a single mother.

62. Donna-Lane moved back to Europe after her daughter began college. Her daughter has since earned a bachelors degree from Northeastern University and a masters degree from Napier University in Scotland.

When she returned to Europe, Donna-Lane first moved to France but then moved to Switzerland in 1990 for a job, working first for Interskill and later for the International Electrical Commission.

63. Donna-Lane has written eleven novels, which are published in the United States by Five Star Publishing.

64. Donna-Lane became a Swiss citizen in 2006 because she believed it was her civic duty as a resident of the Swiss community to participate in local affairs and politics through voting. She also wanted to ensure that she would be able to remain in Switzerland if she was unable to obtain a work permit. Nonetheless, Donna-Lane did not eschew her American heritage and remained an active citizen in the United States, monitoring legislation on a wide-array of subjects and urging her elected representatives to take appropriate action.

65. After FATCA was enacted, Donna-Lane's local bank in Switzerland, UBS, notified her that she would not be able to open a new account if she ever closed her existing one because she was an American. Fearing that she would eventually not be able to bank in the country where she lived, she decided to relinquish her U.S. citizenship. She did so on December 11, 2011 at the U.S. Consulate in Bern, Switzerland. The decision to relinquish her U.S. citizenship was not easy, but ultimately she felt that she had to choose between having the ability to access local financial services where she lived or be a U.S. citizen. Once she had completed the renunciation process, Donna-Lane approached a local Swiss bank and was offered investment opportunities that were not available to her as an American.

66. In 2011, Donna-Lane remet a professional colleague and an American. He moved to Europe. They

married in May 2015. Prior to marrying, they started a business together and opened a joint business account at BNP Paribas. The two also have a joint personal account at BNP Paribas.

67. Because her partner is a U.S. citizen, their joint accounts are subject to the requirements of the Swiss IGA, FATCA, and the FBAR. Donna-Lane has been required to prove to BNP Paribas that she is not a U.S. citizen and has had her private financial account information disclosed to the IRS and the Treasury Department despite the fact that she is not a U.S. citizen.

68. In May 2015, she was contacted by UBS in Geneva, Switzerland and made to explain why she was sending $300 to the United States each month. She explained that the money was for her daughter so that she could build up an emergency fund. Donna-Lane was allowed to keep her account open because the bank accepted her explanation. Her other bank, Raiffeisen, has asked her to come to their office to explain her prior U.S. citizenship three years after having renounced her citizenship. She resents having to provide these explanations and the threats implied by these requests which appear to be prompted by FATCA.

69. Donna-Lane does not want the financial details of her business account, including the account number, the account balance, or the gross receipts and withdrawals from the account, disclosed to the United States government, the IRS, or the Treasury Department. Donna-Lane would not disclose or permit others, including her partner and her bank, to disclose her private business account information to the United States government, the IRS, or the Treasury but for the fact that the IGAs, FATCA, and the FBAR require the disclosure.

70. Donna-Lane reasonably fears that she and/or the funds in her joint business account will be subject to the unconstitutionally excessive fines imposed by 31 U.S.C. § 5321 if the IRS should determine that her business partner has "wilfully" failed to file an FBAR for the account.

71. Donna-Lane reasonably fears that she and/or the funds in her joint business account will be subject to the unconstitutionally excessive FATCA Passthrough Penalty imposed under 26 U.S.C. § 1471(b)(1)(D) if her business partner opts to become a recalcitrant account holder.

72. Donna-Lane has no adequate remedy at law and is suffering irreparable harm.

Plaintiff L. Marc Zell

73. L. Marc Zell is a dual citizen of the United States of America and the State of Israel. He currently resides in Israel.

74. Marc was born in Washington, D.C. on February 25, 1953. He attended public high school in Montgomery County, Maryland, graduating in 1970. Following high school, Marc earned a Bachelor of Arts degree in Germanic Languages and Literatures with a concentration in Theoretical Linguistics from Princeton University in 1974. He then continued his education at the University of Maryland School of Law, earning his Juris Doctor with honors in 1977.

75. Marc is a member of the bars of the State of Maryland (1977), the District of Columbia (1978), the Commonwealth of Virginia (1981), and the State of Israel (1987).

76. After law school, Marc served as a law clerk to the late Judge Irving A. Levine of the Maryland Court

of Appeals. He then joined a large international law firm in Washington, D.C. as an associate attorney in 1978. Marc left that firm in 1981 and, over the course of the next thirty-four years co-founded three different law firms in the United States and Israel. He currently practices with the third firm he co-founded, Zell, Aron & Co., which is based in Jerusalem, Israel.

77. Marc and his family moved to Israel in 1986 and have resided there ever since that time.

78. As an Israeli-American attorney, Marc has been approached several times during the last year by other Israeli-Americans who want to renounce their citizenship. Many are concerned about the hardships imposed on them by FATCA. Many are American citizens because they were born to Americans but in all other respects call Israel home and have never lived in the United States and yet have found themselves trapped by FATCA by virtue of birth.

79. Marc and his firm, Zell, Aron & Co., are frequently asked by their clients to hold funds and foreign securities in trust. Because of FATCA, Marc and his firm have been required by their Israeli banking institutions to complete IRS withholding forms (either W-8BEN or W-8BEN-E) as a precondition for opening trust accounts for both U.S. and non-U.S. persons and entities. The Israeli banking officials have stated that they will require such submissions regardless of whether the beneficiary is a U.S. person (i.e. citizen or resident alien) because the trustee is or may be a U.S. person. As a result, the banks have required Marc and his firm to close the trust account in some cases, and in other instances the banks have refused to open the requested trust account.

80. In one case, Marc has been repeatedly requested

by his firm's bank to transfer securities of a company registered on the Tel Aviv Stock Exchange to remove the securities (having a current fair market value in excess of $2.5 million) from the trust account. These securities which are required to be held in trust under Israeli financial regulations can only be held by a qualified Israeli financial institution. Yet, because of FATCA, the bank is demanding that Marc transfer the securities to another bank. This has trapped Marc in a "Catch 22" situation: he must hold the securities in an Israeli financial institution and is simultaneously being ordered to remove the securities because both he and the beneficiary in this instance are U. S. citizens.

81. There also have been instances recently where Israeli banks have required non-U.S. persons represented by Marc and his firm to fill out the IRS forms even though they have no connection with the United States. When questioned about this practice, the banking officials have stated that the mere fact a U.S. person trustee or his law firm is acting as a fiduciary is reason enough to require non-U.S. person beneficiaries to disclosure their identities and their assets to the United States. In a few such instances, the non-U.S. person beneficiary has terminated the attorney-client relationship with Marc and his law firm resulting in palpable financial loss in the form of lost fees to the firm and Marc.

82. FATCA has also impinged on the sanctity of the attorney-client relationship between Marc, his firm, and his clients. In certain cases, the disclosure of the very existence of an attorney-client relationship between a foreign individual or an entity and Marc as an Israeli attorney may prove injurious to the foreign client. This is true, for example, in connection with enter-

prises and their principals doing business in parts of the world which do not have diplomatic relations with the State of Israel. The fact that such firms have a professional relationship with an Israeli law firm, even one owned by a U.S. citizen, may prove embarrassing and harmful to such enterprises. The compelled disclosure of the relationship through the filing of FATCA-based forms is in and of itself a violation of the attorney-client privilege and the principles of confidentiality that underlie the attorney-client relationship.

83. Numerous clients have indicated to Mr. Zell and his firm that they consider the disclosure mandated by FATCA a gross violation of their constitutionally and legally protected right of privacy and have instructed Marc and his firm not to comply with the FATCA requirements. For this reason and for the other reasons mentioned above, Marc has decided not to comply with the FATCA disclosure requirements whenever that alternative exists.

84. Marc holds funds in trust for one client at Israel Discount Bank. The bank has asked Marc to provide information necessary to identify him and the client as U.S. persons subject to FATCA. The client has instructed Marc not to complete the forms seeking this information, and Marc has complied. He reasonably fears that he and/or the client will be classified as a recalcitrant account holder and subject to the unconstitutionally excessive FATCA Passthrough Penalty imposed under 26 U.S.C. § 1471(b)(1)(D).

85. Marc also has two personal checking accounts at Israel Discount Bank that he uses to support his day-to-day financial needs such as paying for housing and purchasing food, clothing, and fuel for his personal vehicle. His bank has asked him to provide additional

information necessary to identify him as an American citizen subject to FATCA. Marc has refused to complete these forms and reasonably fears that he will be classified as a recalcitrant account holder and subject to the unconstitutionally excessive FATCA Passthrough Penalty imposed under 26 U.S.C. § 1471(b)(1)(D).

86. Marc does not want the financial details of his accounts, including the account numbers, the account balances, and the gross receipts and withdrawals from the accounts, disclosed to the United States government, the IRS, or the Treasury. Marc would not disclose or permit others, including his bank, to disclose his private account information to the United States government, the IRS, or the Treasury but for the fact that the IGAs, FATCA, and the FBAR require the disclosure.

87. Marc also reasonably fears that he or the funds in his accounts will be subject to the unconstitutionally excessive fines imposed by 31 U.S.C. § 5321 if the IRS should determine that he has "wilfully" failed to file an FBAR for his accounts.

88. Marc has no adequate remedy at law and is suffering irreparable harm.

Defendants

89. The U.S. Department of the Treasury is the administrative agency charged with administering FATCA and the FBAR. *See* 26 U.S.C. §§ 1474(f), 5314(a).

90. The Internal Revenue Service is an office of the Treasury Department and administers FATCA and the FBAR. 26 U.S.C. § 7803(a)(1)(A); 31 C.F.R. § 103.56(g); *see also e.g.*, Reporting by Foreign Financial Institutions, 78 Fed. Reg. 5874 (Jan. 28, 2013) (referring to

joint rule-makings by IRS and Treasury Department regarding FATCA).

91. FinCEN is a bureau of the Treasury Department and has administrative authority over the FBAR.

FATCA

92. The Foreign Account Tax Compliance Act, Pub. L. No. 111-147, 124 Stat. 97 (2010) (codified at 26 U.S.C. §§ 1471–74, 6038D, and other scattered sections of Title 26) ("FATCA"), was enacted on March 18, 2010 as a fiscal offset provision to the Hiring Incentives to Restore Employment Act of 2010, Pub. L. No. 11-147, 124 Stat. 71 ("HIRE Act").

93. FATCA was enacted for the ostensible purpose of reducing tax evasion by U.S. taxpayers on foreign financial holdings. U.S. Dept. of the Treasury, *Foreign Account Tax Compliance Act (FATCA)*, http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx (last visited July 6, 2015).

94. **FATCA Structure.** FATCA applies both to individuals and to foreign financial institutions and has two primary components:

(a) **Individual Reporting.** The first component operates on individuals and requires them to report foreign financial assets when the aggregate value of all such assets exceeds $50,000. 26 U.S.C. § 6038D(a). These assets must be reported to the IRS with the individual's annual tax return. *Id.* Individuals who fail to report such assets are subject to penalties of $10,000 for each failure to file a timely report and 40% of the amount of any underpaid tax related to the asset. *Id.* §§ 6038D(d), 6662(j)(3).

(b) **FFI Reporting.** The second component operates

on all foreign financial institutions ("FFIs") worldwide. FATCA requires them to report detailed account information for any account held by a U.S. person to the U.S. government each year irrespective of whether the U.S. account-holder is suspected of tax evasion. *Id.* § 1471(b). FFIs that fail to comply with FATCA's reporting scheme are subject to a substantial penalty of 30% of the amount of any payment originating from sources within the United States. *Id.* § 1471(a).

95. **Implementation.** The Treasury Department and IRS have chosen to implement FATCA by adopting regulations and by entering into unconstitutional intergovernmental agreements ("IGAs") with foreign nations.

(a) **FATCA Regulations.** The regulations primar ily elaborate on the requirements of the statutory provisions and clarify the statutory requirements. *See* Reporting by Foreign Financial Institutions, 78 Fed. Reg. 5874 (Jan. 28, 2013); Reporting by Foreign Financial Institutions, 79 Fed. Reg. 12812 (Mar. 6, 2014); Withholding of Tax on Certain U.S. Source Income Paid to Foreign Persons, 79 Fed. Reg. 12726 (Mar. 6, 2014); Reporting of Specified Foreign Financial Assets, 79 Fed. Reg. 73817 (Dec. 12, 2014).

(b) **FATCA IGAs.** The Treasury Department has entered into IGAs with several foreign countries, including Canada, Czech Republic, Israel, and Switzerland. U.S. Dept. of the Treasury, List of Agreements in Effect, http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx (last visited July 6, 2015). The IGAs are styled as either Model 1 or Model

2 agreements. In a Model 1 IGA, the foreign government (called "FATCA Partner") agrees to collect the financial account information that FATCA requires FFIs to report on behalf of the U.S. government and report that information to the IRS itself. *See, e.g.*, U.S. Dept. of Treasury FATCA Resource Center, Model 1A IGA Reciprocal, Preexisting TIEA or DTC, Art. 2, § 1, (Nov. 30, 2014), http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Reciprocal-Model-1A-Agreement-Preexisting-TIEA-or-DTC-11-30-14.pdf. FFIs located in the FATCA Partner's jurisdiction that comply with the obligations imposed under the IGA are exempted from FATCA—such FFIs are "treated as complying with, and not subject to withholding under, section 1471." *Id.* Art. 4, § 1. In a Model 2 IGA, the FATCA Partner agrees to remove domestic legal impediments in the FATCA Partner jurisdiction that would otherwise prevent FFIs from complying with FATCA's reporting requirements and direct all FFIs to register with the IRS and comply with FATCA. U.S. Dept. of Treasury FATCA Resource Center, Model 2 IGA, Preexisting TIEA or DTC, Art. 2 (Nov. 30, 2014), http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Model-2-Agreement-Preexisting-TIEA-or-DTC-11-30-14.pdf.

96. **Individual Reporting - Content of Reports.** Under section 6038D, individuals with reportable foreign financial assets must file Form 8938 with the IRS each year. *See* 26 C.F.R. § 1.6038D-4(a)(11). For each foreign account, the individual must report:

(a) the name and address of the financial institution at which the account is maintained;
(b) the account number;
(c) the maximum value of the account during the taxable year;
(d) whether the account was opened or closed dur ing the taxable year;
(e) the amount of any income, gain, loss, deduction, or credit recognized for the taxable year and the schedule, form, or return filed with the IRS on which such amount is reported; and
(f) the foreign currency in which the account is maintained, the foreign currency exchange rate, and the source of the rate used to determine the asset's U.S. dollar value.

26 U.S.C. § 6038D(c); 26 C.F.R. § 1.6038D-4(a). Form 8938 additionally requires an individual to report the aggregate amount of interest, dividends, royalties, other income, gains, losses, deductions, and credits for all accounts. IRS, Form 8938, http://www.irs.gov/pub/irs-pdf/f8938.pdf.

97. **FFI Reporting - Content of Reports.** Foreign financial institutions must report U.S. accounts annually to the IRS on Form 8966. The report must include:
(a) the name, address, and TIN of each account holder;
(b) the account number
(c) the average calendar year or year-end balance or value of the account, depending on which information the FFI reports to the account holder; and
(d) the aggregate gross amount of interest paid or credited to the account during the year.

26 U.S.C. § 1471(c)(1); 26 C.F.R. § 1.1471-4(d)(3)(ii).

Form 8966 additionally requires an FFI to report the aggregate gross amount of all income paid or credited to an account for the calendar year less any interest, dividends, and gross proceeds. IRS, Instructions for Form 8966 at 10, http://www.irs.gov/pub/irs-pdf/i8966.pdf.

98. **Canadian IGA.** The Canadian IGA was signed on February 5, 2014 and is a Model 1 IGA. Agreement Between the Government of the United States of America and the Government of Canada to Improve International Tax Compliance through Enhanced Exchange of Information under the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, U.S.-Can., Feb. 5, 2014, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Canada-2-5-2014.pdf (hereinafter "Canadian IGA"). The Canadian IGA has not been submitted to the Senate for its advice and consent pursuant to Article II, section 2, clause 2 of the Constitution or approved by a majority vote in both houses of Congress. Nor is the Canadian IGA authorized by an existing Article II treaty. Under the agreement, the Canadian government has agreed to collect information similar to, but not coextensive with, the information required to be reported by an FFI to the U.S. government under FATCA. *Id.* art. 2, § 2. The information required to be collected regarding depository accounts includes:

(a) the name, address, and U.S. TIN of each U.S. account holder;
(b) the account number of each U.S. account holder;
(c) the name and identifying number of the Canadian FFI maintaining the account;
(d) the calendar year-end balance or value of the

account; and

(e) the total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period.

Id., art. 2, § 2(a). The Canadian government has agreed to transmit that information directly to the U.S. government. *Id.*, art. 2, § 1.) The U.S. government has agreed to treat each reporting Canadian FFI as complying with FATCA and as not subject to withholding under section 1471(a). *Id.*, art. 4, § 1.

99. **Czech IGA.** The Czech IGA was signed on August 4, 2014 and is a Model 1 IGA. Agreement between the United States of America and the Czech Republic to Improve International Tax Compliance and with Respect to the United States Information and Reporting Provisions Commonly Known as the Foreign Account Tax Compliance Act, U.S.-Czech Rep., Aug. 4, 2014, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Czech-Republic-8-4-2-14.pdf (hereinafter "Czech IGA"). The Czech IGA has not been submitted to the Senate for its advice and consent pursuant to Article II, section 2, clause 2 of the Constitution or approved by a majority vote in both houses of Congress. Nor is the Czech IGA authorized by an existing Article II treaty. Under the agreement, the Czech government has agreed to collect information similar to, but not coextensive with, the information required to be reported by an FFI to the U.S. government under FATCA. *Id.* art. 2, § 2. The information required to be collected regarding depository accounts includes:

(a) the name, address, and U.S. TIN of each U.S. account holder;

(b) the account number of each U.S. account holder;

(c) the name and identifying number of the Czech FFI maintaining the account;
(d) the calendar year-end balance or value of the account; and
(e) the total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period.

Id., art. 2, § 2(a). The Czech government has agreed to transmit that information to the U.S. government. *Id.*, art. 2, § 1. The U.S. government has agreed to treat each reporting Czech FFI as complying with FATCA and as not subject to withholding under section 1471(a). *Id.*, art. 4, § 1.

100. **Israeli IGA.** The Israeli IGA was signed on June 30, 2014 and is a Model 1 IGA. Agreement between the Government of the United States of America and the Government of the State of Israel to Improve International Tax Compliance and to Implement FATCA, U.S.-Isr., Jun. 30, 2014, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Israel-6-30-2014.pdf (hereinafter "Israeli IGA"). The Israeli IGA has not been submitted to the Senate for its advice and consent pursuant to Article II, section 2, clause 2 of the Constitution or approved by a majority vote in both houses of Congress. Nor is the Israeli IGA authorized by an existing Article II treaty. Under the agreement, the Israeli government has agreed to collect information similar to, but not coextensive with, the information required to be reported by an FFI to the U.S. government under FATCA. *Id.* art. 2, § 2. The information required to be collected regarding depository accounts includes:

(a) the name, address, and U.S. TIN of each U.S. account holder;

(b) the account number of each U.S. account holder;
(c) the name and identifying number of the Israeli FFI maintaining the account;
(d) the calendar year-end balance or value of the account; and
(e) the total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period.

Id., art. 2, § 2(a). The Israeli government has agreed to transmit that information to the U.S. government. *Id.*, art. 2, § 1. The U.S. government has agreed to treat each reporting Israeli FFI as complying with FATCA and as not subject to withholding under section 1471(a). *Id.*, art. 4, § 1.

101. **Swiss IGA.** The Swiss IGA was signed on February 14, 2013 and is a Model 2 IGA. Agreement between the United States of America and Switzerland for Cooperation to Facilitate the Implementation of FATCA, U.S.-Switz., Feb. 14, 2013, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Switzerland-2-14-2013.pdf (hereinafter "Swiss IGA"). The Swiss IGA has not been submitted to the Senate for its advice and consent pursuant to Article II, section 2, clause 2 of the Constitution or approved by a majority vote in both houses of Congress. Nor is the Swiss IGA authorized by an existing Article II treaty. Under the agreement, the Swiss government has agreed (1) to direct all covered Swiss FFIs to register with the IRS and comply with all obligations under FATCA and (2) to exempt such FFIs from any Swiss laws that would prohibit or otherwise criminalize such conduct. *Id.* art. 3, § 1, art. 4. The U.S. government has agreed to treat each Swiss FFI that complies with the Swiss IGA as complying

with FATCA and not subject to withholding under section 1471(a). *Id.* art. 6.

FBAR

102. The Report of Foreign Bank and Financial Accounts ("FBAR") must be filed annually with the IRS by persons who have a financial interest or signatory authority over a bank, securities, or other financial account in a foreign country with an aggregate value of more than $10,000. 31 U.S.C. § 5314; 31 C.F.R. §§ 1010.306(c), 1010.350(a).

103. Persons required to file include citizens and residents of the United States as well as other entities such as corporations, partnerships, trusts, etc. 31 C.F.R. § 1010.350(b). Reportable accounts include bank accounts like savings, depository, and checking accounts as well as securities accounts and "other financial accounts." *Id.* § 1010.350(c). A person can have a financial interest in a reportable account in several circumstances, including when a person owns or holds legal title to a reportable account, when they are the agent or attorney with respect to the account, and when they own more than 50% of the voting power, total value of equity, interest, or assets, or interest in profits. *Id.* § 1010.350(e). A person has signature authority over a reportable account when the person has "authority . . . (alone or in conjunction with another) to control the disposition of money, funds or other assets held in a financial account by direct communication (whether in writing or otherwise) to the person with whom the financial account is maintained." *Id.* § 1010.350(f)(1).

104. The FBAR must be filed separately from an individual's regular federal income tax return by June

30 of each year. FinCEN, BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114) 8 (2014), http://www.fincen.gov/forms/files/FBAR%20Line%20Item%20Filing%20Instructions.pdf. The filing deadline cannot be extended. *Id.*

105. Failure to file the FBAR can bring both civil and criminal penalties. 31 U.S.C. § 5321(d). Civil penalties vary depending on whether the failure to file was willful. *Id.* § 5321(b)(5). For non-willful violations, the maximum penalty is $10,000 for each unfiled report. *Id.* § 5321(b)(5)(B)(i). The penalty may not imposed for non-willful violations if the violation was due to "reasonable cause" and the account balance was "properly reported." *Id.* § 5321(b)(5)(B)(ii). For willful violations, the maximum penalty is $100,000 or 50% of the balance of the account at the time of the violation. *Id.* § 5321(b)(5)(C)(i). The "reasonable cause" defense is unavailable for willful violations. *Id.* § 5321(b)(5)(C)(ii). The maximum criminal penalty for FBAR violations is a $250,000 fine and five years imprisonment. *Id.* § 5322(a).

Count 1
The IGAs are Unconstitutional Sole Executive Agreements Because they Exceed the Scope of the President's Independent Constitutional Powers

106. Plaintiffs reallege and incorporate by reference all of the allegations in all of the preceding paragraphs.

107. Under section 706 of the Administrative Procedure Act ("APA"), a court must "hold unlawful and set aside agency action ... found to be – ... (B) contrary to constitutional right, power, privilege, or immunity

[and] ... (D) without observance of procedure required by law." 5 U.S.C. § 706.

108. There are four recognized sources of authority for the Executive Branch to make international agreements: (1) the Treaty Clause, (2) an act of Congress, (3) an existing treaty, and (4) the President's independent constitutional powers. Restatement (Third) of Foreign Relations Law § 303 (1987). These four sources give rise to four types of international agreements: (1) Article II treaties, (2) congressional-executive agreements, (3) treaty-based agreements, and (4) sole executive agreements. John E. Nowak & Ronald D. Rotunda, Treatise on Const. L. § 6.8(a).

109. The Executive Branch has long accepted this framework. *See* 11 Foreign Affairs Manual ("FAM") §§ 723.2-1, 723.2-2, 723.2-2(A), 723.2-2(B), 723.2-2(C) (2006), available at http://www.state.gov/documents/organization/88317.pdf.

110. Each of the first three types of agreements require action by at least one chamber of Congress. Treaties must be ratified by two-thirds of the Senators present. U.S. Const. art. II, § 2, cl. 2. Congressional-executive agreements must be authorized or approved by a majority vote in both Houses like ordinary legislation. Restatement (Third) of Foreign Relations Law § 303. Treaty-based agreements must be made pursuant to authorization contained in an existing Article II treaty. Nowak & Rotunda, *supra* § 6.8(a).

111. Only the fourth type of agreement—sole executive agreements—can be brought into force, if at all, without congressional action. *Id.*; 11 FAM § 723.2-2(C). They are "reserved for agreements made solely on the basis of the constitutional authority of the President." 11 FAM § 723.2-2; *accord United States v. Guy W.*

Capps, Inc., 204 F.2d 655, 658–59 (4th Cir. 1953), *aff'd*, 348 U.S. 296, 75 S. Ct. 326, 99 L. Ed. 329 (1955).

112. The Executive Branch has identified possible sources of the President's independent power to make international agreements as including "(1) The President's authority as Chief Executive to represent the nation in foreign affairs; (2) The President's authority to receive ambassadors and other public ministers, and to recognize foreign governments; (3) The President's authority as 'Commander-in-Chief'; and (4) The President's authority to "take care that the laws be faithfully executed." *See id.* § 723.2-2(C).

113. The President, however, lacks an independent power to impose taxes or specify the manner of their collection or any other power which would grant him the power to enter the IGAs unilaterally. *See generally* U.S. Const. art. II (reserving taxing power exclusively to Congress).

114. The Canadian, Czech, Israeli, and Swiss IGAs (collectively "the IGAs") are fundamentally international agreements concerning taxation and the collection of taxes.

115. None of the IGAs have received Senate or congressional approval nor are they pursuant to any authorization contained in any Article II treaty. The IGAs have not been submitted to the Senate for advice and consent. U.S. Dep't of State, Treaties Pending in the Senate (updated as of April 27, 2015), http://www.state.gov/s/l/treaty/pending/index.htm (last visited July 6, 2015). Furthermore, while FATCA authorizes the Treasury Department to adopt regulations and "other guidance," it does not authorize the making of international agreements like the IGAs. *See* 26 U.S.C. § 1474(f). Finally, there is no valid treaty that other-

wise authorizes the IGAs. Allison Christians, *The Dubious Legal Pedigree of IGAs (and Why it Matters)*, 69 Tax Notes Int'l 565, 567 (2013) (The "IGAs are not treaty-based agreements.").

116. The President, therefore, lacks the power to conclude the IGAs as sole executive agreements because their subject matter lies outside his constitutional powers.

117. Accordingly, the IGAs must be held unlawful and set aside under section 706 of the APA. The Treasury and the IRS have acted contrary to the President's constitutional power to make international agreements and without observance of the procedure for adopting international agreements required by the Constitution. Defendants should be enjoined from enforcing them.

Count 2

The IGAs are Unconstitutional Sole Executive Agreements Because They Override FATCA

118. Plaintiffs reallege and incorporate by reference all of the allegations in all of the preceding paragraphs.

119. Under section 706 of the Administrative Procedure Act ("APA"), a court must "hold unlawful and set aside agency action ... found to be – ... (B) contrary to constitutional right, power, privilege, or immunity [and] ... (D) without observance of procedure required by law." 5 U.S.C. § 706.

120. Sole executive agreements may not be "inconsistent with legislation enacted by the Congress in the exercise of its constitutional authority." 11 FAM § 732.2-2(C); *accord Guy W. Capps*, 204 F.2d at 658-600; *Swearingen v. United States*, 565 F. Supp. 1019 (D. Colo. 1983).

121. The IGAs establish a different regulatory

scheme than the one mandated by FATCA. The Model 1 IGAs, for example, exempt covered FFIs from the statutory requirement that FFIs report account information directly to the Treasury Department, 26 U.S.C. § 1471(b)(1)(C), and instead allow such FFIs to report the account information to their national governments, *see e.g.*, Canadian IGA, Art. 2, § 2. The Model 2 IGAs, for example, exempt covered FFIs from the obligation "to obtain a valid and effective waiver" of any foreign law that would prevent the reporting of information required by FATCA, 26 U.S.C. § 1471(b)(1)(F)(i), and instead obligates the foreign government to suspend such laws with respect to FATCA reporting by covered FFIs, *see e.g.*, Canadian IGA, *supra*, Art. 2, § 2. This deprives account holders of their right under the statute to refuse a waiver.

122. The President, therefore, lacks the power to conclude the IGAs as sole executive agreements because they override a duly enacted statute.

123. Accordingly, the IGAs must be held unlawful and set aside under section 706 of the APA. The Treasury and the IRS have acted contrary to the President's constitutional power to make international agreements and without observance of the procedure for adopting treaties required by the Constitution. Defendants should be enjoined from enforcing them.

Count 3
The Heightened Reporting Requirements for Foreign Financial Accounts Deny U.S. Citizens Living Abroad the Equal Protection of the Laws

124. Plaintiffs reallege and incorporate by reference all of the allegations in all of the preceding paragraphs.

125. Under section 706 of the Administrative Procedure Act ("APA"), a court must "hold unlawful and set aside agency action ... found to be – ... (B) contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706.

126. The Fifth Amendment provides that "No person shall ... be deprived of life, liberty, or property, without due process of law...." U.S. Const. amend. V. The Due Process Clause of the Fifth Amendment includes a guarantee of equal protection equivalent to that expressly provided for under the Equal Protection Clause of the Fourteenth Amendment. "An equal protection claim against the federal government is analyzed under the Due Process Clause of the Fifth Amendment." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995); *United States v. Ovalle*, 136 F.3d 1092, 1095 (6th Cir. 1998). Thus, the federal government may not "deny to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, § 1.

127. The only financial information reported to the IRS about domestic accounts is the amount of interest paid to the accounts during a calendar year, 26 U.S.C. §§ 6049(a), (b); 26 C.F.R. §§ 1.6049-4(a)(1), 1.6049-4T(b)(1). For a foreign account, the information reported to the IRS includes not only the interest paid to the account, 26 USC § 1471(c)(1)(C); 26 C.F.R. §§ 1.1471-4(d)(3)(ii), -4(d)(4)(iv); Canadian IGA, art. 2, § 2(a)(4); Czech IGA, art. 2, § 2(a)(4); Israeli IGA, art. 2, § 2(a)(4); Swiss IGA, arts. 3, 5, but also the amount of any income, gain, loss, deduction, or credit recognized on the account, 26 C.F.R. § 1.6038D-4(a)(8), whether the account was opened or closed during the year, *id.* § 1.6038D-4(a)(6), and the balance of the account, 26

USC §§ 1471(c)(1)(C), 6038D(c)(4); 26 CFR §§ 1.1471-4(d)(3)(ii), 1.6038D-4(a)(5); Canadian IGA, art. 2, § 2(a)(6); Czech IGA, art. 2, § 2(a)(6); Israeli IGA, art. 2, § 2(a)(6); Swiss IGA, arts. 3, 5; FinCEN, BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114) 15 (June 2014), http://www.fincen.gov/forms/files/FBAR%20Line%20Item%20Filing%20Instructions.pdf. Comparable information is not required to be disclosed regarding domestic accounts of U.S. citizens.

128. The result is that U.S. citizens living in a foreign country are treated differently than U.S. citizens living in the United States.

129. The federal government has no legitimate interest in knowing the amount of any income, gain, loss, deduction, or credit recognized on a foreign account, whether a foreign account was opened or closed during the year, or the balance of a foreign account. The fact that the local bank accounts of citizens living abroad are not held in the United States bears no rational relationship to any legitimate state interest the federal government might have in prying into the private affairs of citizens living abroad.

130. Accordingly, 26 U.S.C. §§ 1471(c)(1)(C), 6038D(c)(4), 26 C.F.R. §§ 1.1471-4(d)(3)(ii), 1.6038D-4(a)(5), 1.6038D-4(a)(6), 1.6038D-4(a)(8), Canadian IGA, art. 2, § 2(a)(6); Czech IGA, art. 2, § 2(a)(6); Israeli IGA, art. 2, § 2(a)(6); Swiss IGA, arts. 3, 5; and the FBAR account-balance reporting requirement, FinCEN, BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114) 15 (June 2014), http://www.fincen.gov/forms/filesFBAR%20Line%20Item%20Filing%20 Instructions.pdf, are unconstitutional, and Defendants should be enjoined

from enforcing them.

Count 4
The FATCA FFI Penalty is Unconstitutional under the Excessive Fines Clause

131. Plaintiffs reallege and incorporate by reference all of the allegations in all of the preceding paragraphs.

132. The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII.

133. The Excessive Fines Clause is not limited only to fines that are criminal in nature but extends to civil fines as well. *Austin v. United States*, 509 U.S. 602, 610 (1993). A fine is subject to the Excessive Fines Clause if one of the purposes of the fine is punishment. *Id.*; *United States v. Bajakajian*, 524 U.S. 321, 328 (1998). Fines calibrated for retributive or deterrent purposes are considered to be for the purpose of punishment. *Austin*, 509 U.S. at 610.

134. To withstand constitutionality, fines governed by the Excessive Fines Clause must not be “excessive.” U.S. Const. amend. VIII. The “touchstone” of the excessiveness analysis is “principle of proportionality,” requiring a comparison of the amount of the fine and the gravity of offense. *Bajakajian*, 524 U.S. at 334. A fine violates the Eighth Amendment when the fine is grossly disproportional to the gravity of the offense. *Id.*.

135. The Supreme Court has identified three “general criteria” to guide the determination of whether a fine is grossly disproportionate: (1) “the degree the defendant’s reprehensibility or culpability”; (2) “the relationship between the penalty and the harm to the victim caused by the defendant's actions”; and (3) “the

sanctions imposed in other cases for comparable misconduct." *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 434–35 (2001).

136. Under FATCA, payments from U.S. sources to foreign financial institutions not compliant with FATCA are subject to a 30% "tax" (hereinafter the FATCA "FFI Penalty"). 26 U.S.C. § 1471(a); 26 C.F.R. § 1.1471-2T(a)(1). This penalty can be applied to any financial institution anywhere in the world if an institution fails to comply with FATCA.

137. Without the FFI Penalty, foreign financial institutions likely would not comply with FATCA and Plaintiffs' private financial information would not be disclosed to the United States government. The penalty leaves foreign financial institutions no meaningful alternative but to implement costly compliance systems and comply with FATCA.

138. The FFI Penalty is intended as punishment and is therefore subject to the Excessive Fines Clause. *Austin*, 509 U.S. at 610. The penalty is used as a hammer to coerce compliance by foreign financial institutions everywhere in the world, whether or not they fall within the regulatory jurisdiction of the United States.

139. The FFI Penalty is grossly disproportional to the gravity of the offense it seeks to punish and is therefore unconstitutional. *Bajakajian*, 524 U.S. at 334.

140. Accordingly, 26 U.S.C. § 1471(a) and 26 C.F.R. § 1.1471-2T(a)(1) should be declared unconstitutional, and Defendants should be enjoined from enforcing them.

Count 5
The FATCA Passthrough Penalty is Unconstitutional under the Excessive Fines Clause

141. Plaintiffs reallege and incorporate by reference all of the allegations in all of the preceding paragraphs.

142. FATCA and the IGAs require foreign financial institutions to "deduct and withhold a tax equal to 30 percent of" any payments made to recalcitrant account holders (hereinafter the FATCA "Passthrough Penalty"). 26 U.S.C. § 1471(b)(1)(D); 26 C.F.R. §§ 1.1471-4(a)(1), 1.1471-4T(b)(1); Canadian IGA, art. 4, § 2; Czech IGA, art. 4, § 2; Israeli IGA, art. 4, § 2; Swiss IGA, art. 3. Recalcitrant account holders are persons who fail to provide (a) information sufficient to determine whether the account is a United States account to the foreign financial institution holding their account, (b) their name, address, or TIN to the foreign financial institution holding the account, or (c) who fails to provide waiver of a foreign law that would prevent the foreign financial institution from reporting the information to the IRS under FATCA. *Id.* § 1471(d)(6).

143. The Passthrough Penalty is designed to punish and is therefore subject to the Excessive Fines Clause. *Austin*, 509 U.S. at 610.

144. The Passthrough Penalty is grossly disproportionate to the gravity of the offense and is therefore unconstitutional. *Bajakajian*, 524 U.S. at 334.

145. Accordingly, 26 U.S.C. § 1471(b)(1)(D); 26 C.F.R. §§ 1.1471-4(a)(1), 1.1471-4T(b)(1); and Canadian IGA, art. 4, § 2; Czech IGA, art. 4, § 2; Israeli IGA, art. 4, § 2; Swiss IGA, art. 3. should be declared unconstitutional, and Defendants should be enjoined from enforcing them.

Count 6
The FBAR Willfullness Penalty is Unconstitutional under the Excessive Fines Clause

146. Plaintiffs reallege and incorporate by reference all of the allegations in all of the preceding paragraphs.

147. Section 5321 of the United States Code imposes a maximum penalty of $100,000 or 50% of the balance of the account at the time of the violation, whichever is greater, for failures to file an FBAR as required by section 5314 (hereinafter the FBAR "Willfulness Penalty"). 31 U.S.C. § 5321(b)(5)(C)(i).

148. The Willfulness Penalty is designed to punish and is therefore subject to the Excessive Fines Clause. *Austin*, 509 U.S. at 610.

149. The Willfulness Penalty is grossly disproportionate to the gravity of the offense and is therefore unconstitutional. *Bajakajian*, 524 U.S. at 334.

150. Accordingly, 31 U.S.C. § 5321(a)(5)(C) should be declared unconstitutional, and Defendants should be enjoined from enforcing them.

Count 7
FATCA's Information Reporting Requirements are Unconstitutional under the Fourth Amendment

151. Plaintiffs reallege and incorporate by reference all of the allegations in all of the preceding paragraphs.

152. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly de-

scribing the place to be searched, and the persons or things to be seized.

153. The Amendment is violated in where "the Government, through 'unreviewed executive discretion,' [is permitted to make] a wide-ranging inquiry that unnecessarily 'touch(es) upon intimate areas of an individual's personal affairs.'" *U.S. v. Miller*, 425 U.S. 435, 444 n.6 (1976) (quoting *California Bankers Assn. v. Shultz*, 416 U.S. 21, at 78-79 (1974) (Powell, J., concurring)). Such indiscriminate searches may only may only be conducted, at a minimum, after some "invocation of the judicial process" because "the potential for abuse is particularly acute." *California Bankers Assn.*, 416 U.S. at 79 (Powell, J., concurring); *see also*, *Miller* 425 U.S. at 444 n.6 (distinguishing situation where "the Government has exercised its powers through narrowly directed subpoenas Duces tecum subject to the legal restraints attendant to such process"); *Los Angeles v. Patel*, No. 13-1175, 576 U.S. ___, slip op. at 9–10 (2015) (holding that, for administrative searches, "the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker.").

154. FATCA requires foreign financial institutions to report a broad range of information about the accounts of United States account holders to the United States government, including:

(a) the name, address, and TIN of the account holder;
(b) the account number;
(c) the average calendar year or year-end balance or value of the account;
(d) the aggregate gross amount of interest paid or credited to the account during the year; and

(e) the aggregate gross amount of all income paid or credited to an account for the calendar year less any interest, dividends, and gross proceeds.

26 U.S.C. § 1471(c)(1); 26 C.F.R. § 1.1471-4(d)(3)(ii); IRS, Instructions for Form 8966 at 10, http://www.irs.gov/pub/irs-pdf/i8966.pdf.

155. FATCA makes no provision for judicial oversight of the searches of the private financial records of American citizens held by foreign financial institutions in violation of the Fourth Amendment.

156. Accordingly, FATCA's information reporting provisions—26 U.S.C. § 1471(c)(1); 26 C.F.R. § 1.1471-4(d); and the FATCA aggregate gross income reporting requirement of Form 8966, IRS, Instructions for Form 8966 at 10, http://www.irs.gov/pub/irs-pdf/i8966.pdf—should be declared unconstitutional, and Defendants should be enjoined from enforcing them.

Count 8

The IGAs' Information Reporting Requirements are Unconstitutional under the Fourth Amendment

157. Plaintiffs reallege and incorporate by reference all of the allegations in all of the preceding paragraphs.

158. Under section 706 of the Administrative Procedure Act ("APA"), a court must "hold unlawful and set aside agency action ... found to be – ... (B) contrary to constitutional right, power, privilege, or immunity [and] ... (D) without observance of procedure required by law." 5 U.S.C. § 706.

159. The IGAs require foreign financial institutions and their governments to report a broad range of information about the accounts of United States account holders to the United States government, including:

(a) the name, address, and U.S. TIN of each U.S. account holder;
(b) the account number of each U.S. account holder;
(c) the name and identifying number of the foreign financial institution maintaining the account;
(d) the calendar year-end balance or value of the account; and
(e) the total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period.

Canadian IGA, art. 2, § 2; Czech IGA, art. 2, § 2; Israeli IGA, art. 2, § 2; Swiss IGA, arts. 3, 5.

160. The IGAs make no provision for judicial oversight of the searches of the private financial records of American citizens held by foreign financial institutions in violation of the Fourth Amendment.

161. Accordingly, the information reporting provisions of the IGAs—Canadian IGA, art. 2; Czech IGA, art. 2; Israeli IGA, art. 2; Swiss IGA, arts. 3, 5—should be declared unconstitutional, and Defendants should be enjoined from enforcing them.

Prayer for Relief

162. Plaintiffs ask this Court to declare unconstitutional and enjoin Defendants from enforcing the following:

A. Agreement Between the Government of the United States of America and the Government of Canada to Improve International Tax Compliance through Enhanced Exchange of Information under the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, U.S.-Can., Feb. 5, 2014, available at http://www.treasury.gov/

resource-center/ tax-policy/treaties/Documents/FATCA-Agreement-Canada-2-5-2014.pdf (hereinafter "Canadian IGA");

B. Canadian IGA, art. 2;

C. Canadian IGA, art. 2, § 2(a)(6);

D. Canadian IGA, art. 4, § 2;

E. Agreement between the United States of America and the Czech Republic to Improve International Tax Compliance and with Respect to the United States Information and Reporting Provisions Commonly Known as the Foreign Account Tax Compliance Act, U.S.-Czech Rep., Aug. 4, 2014, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Czech-Republic-8-4-2-14.pdf (hereinafter "Czech IGA");

F. Czech IGA, art. 2;

G. Czech IGA, art. 2, § 2(a)(6);

H. Czech IGA, art. 4, § 2;

I. Agreement between the Government of the United States of America and the Government of the State of Israel to Improve International Tax Compliance and to Implement FATCA, U.S.-Isr., Jun. 30, 2014, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Israel-6-30-2014.pdf (hereinafter "Israeli IGA");

J. Israeli IGA, art. 2;

K. Israeli IGA, art. 2, § 2(a)(6);

L. Israeli IGA, art. 4, § 2;

M. Agreement between the United States of

America and Switzerland for Cooperation to Facilitate the Implementation of FATCA, U.S.-Switz., Feb. 14, 2013, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Switzerland-2-14-2013.pdf (hereinafter "Swiss IGA");

N. Swiss IGA, arts. 3, 5;

O. 26 U.S.C. §§ 1471(a), 1471(b)(1)(D), 1471(c)(1), 1471(c)(1)(C);

P. 26 U.S.C. § 6038D(c)(4);

Q. 31 U.S.C. § 5321(a)(5)(C);

R. 26 C.F.R. §§ 1.1471-2T(a)(1);

S. 26 C.F.R. §§ 1.1471-4(a)(1), 1.1471-4(d), 1.1471-4(d)(3)(ii);

T. 26 C.F.R. §§ 1.1471-4T(b)(1);

U. 26 C.F.R. §§ 1.6038D-4(a)(5), 1.6038D-4(a)(6), 1.6038D-4(a)(8);

V. the FATCA aggregate gross income reporting requirement of Form 8966, IRS, Instructions for Form 8966 at 10, http://www.irs.gov/pub/irs-pdf/i8966.pdf; and

W. the FBAR account-balance reporting requirement articulated at FinCEN, BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114) 15 (June 2014), http://www.fincen.gov/forms/files/FBAR%20Line%20Item%20Filing%20Instructions.pdf.

163. Grant any and all other relief this Court deems just and equitable.

Dated: July 14, 2015 Respectfully Submitted,

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[Filed: 10/30/2015]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Mark Crawford, **Senator Rand Paul**, in his official capacity as a member of the United States Senate, **Roger Johnson**, **Daniel Kuettel**, **Stephen J. Kish**, **Donna-Lane Nelson**, and **L. Marc Zell**, *Plaintiffs*, **v.** **United States Department of the Treasury**, **United States Internal Revenue Service**, and **United States Financial Crimes Enforcement Network**, *Defendants*.	**Civil Case No. 3:15-cv-00250** **AMENDED VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs complain as follows:

Introduction

1. This is a challenge to the Foreign Account Tax Compliance Act ("FATCA"), the intergovernmental agreements ("IGAs") unilaterally negotiated by the United States Department of the Treasury ("Treasury Department") to supplant FATCA in the signatory countries, and the Report of Foreign Bank and Financial Accounts ("FBAR") administered by the United

States Financial Crimes Enforcement Network ("FinCEN"). These laws and agreements impose unique and discriminatory burdens on U.S. citizens living and working abroad.

2. FATCA was intended to address tax evasion by U.S. taxpayers who fail to report foreign assets located outside of the United States. But in practice it is a sweeping financial surveillance program of unprecedented scope that allows the Internal Revenue Service ("IRS") to peer into the financial affairs of any U.S. citizen with a foreign bank account. At its core, FATCA is a bulk data collection program requiring foreign financial institutions to report to the IRS detailed information about the accounts of U.S. citizens living abroad, including their account balances and account transactions. 26 U.S.C. § 1471(c)(1). FATCA eschews the privacy rights enshrined in the Bill of Rights in favor of efficiency and compliance by requiring institutions to report citizens' account information to the IRS even when the IRS has no reason to suspect that a particular taxpayer is violating the tax laws.

3. FATCA imposes enormous economic costs on individuals and financial institutions. The cost of implementing FATCA has been estimated to cost large banks approximately $100 million each to become fully compliant and around $8 billion total systemwide.[1]

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[1] Robert W. Wood, *FATCA Carries Fat Price Tag*, Forbes, Nov. 30, 2011, http://www.forbes.com/sites/robertwood/2011/11/30/fatca-carries-fat-price-tag/; Deloitte Regulatory Review, FATCA: Determined to Pierce the Corporate Veil (Apr. 2011), p. 3, available at http://www.deloitte.com/assets/Dcom-Australia/Local%20Assets/Documents/Industries/Financial%20services/Regula-

Four years after it was first passed, financial institutions are still working to make themselves compliant, but are finding that it is costing more than they originally anticipated. According to a survey conducted in late 2014, 55% of financial institutions surveyed said that they expected to exceed their original budget for FATCA compliance while only 35% said they expected to remain within budget.[2] More than a quarter (27%) of surveyed financial institutions estimated their annual compliance cost for 2015 to be between $100,000 and $1 million.[3] And as the IRS continues to move toward full implementation of FATCA, costs for year-over-year compliance are expected to increase as the number of surveyed financial institutions that reported FATCA compliance costs between $100,000 and $1 million increased by 69% from 2014 to 2015.[4]

4. What's most striking about these costs is that they are expected to equal or exceed the amount of additional revenue that FATCA is projected to raise.[5] At

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tory%20Review%20April%202011/Deloitte_Regulatory_Review_April_2011_FATCA.pdf.

[2] Thomson Reuters, *Thomson Reuters survey indicates FATCA compliance to cost more than anticipated*, Nov. 6, 2014, http://fatca.thomsonreuters.com/wp-content/uploads/2014/11/ Final-FATCA-webinar-release-.pdf.

[3] Thomson Reuters, *supra* note 2.

[4] Thomson Reuters, *supra* note 2.

[5] Taxpayer Advocate Service, 2013 Annual Report to Congress, MSP #23 Reporting Requirements: The Foreign Account Tax Compliance Act Has the Potential to be Burdensome, Overly Broad, and Detrimental to Taxpayer Rights, p.6 (2013), http://www.taxpayeradvocate.irs. gov/

the time of its passage, the Joint Committee on Taxation estimated that FATCA would generate approximately $8.7 billion in additional tax revenue between 2010 and 2020.[6] With the numerous delays in implementing various features of the law,[7] the actual amount of additional revenue being collected as a result of FATCA is rapidly diminishing. The disjunction between FATCA's costs and benefits is perhaps best illustrated by the Australian experience where experts estimate that FATCA will extract an additional $20 million in revenue for the U.S. at an estimated implementation cost of around $1 billion.[8] This marked inefficiency has led many, including the U.S. Taxpayer Advocate, to question whether FATCA's costs and difficulties are worth the marginal increase in revenues.[9]

2013-Annual-Report/downloads/REPORTING-REQUIREMENTS-The-Foreign-Account-Tax-Compliance-Act-Has-the.pdf.

[6] Joint Committee on Taxation, JCX-6-10, Estimated Revenue Effects of HIRE Act, p.1 (Mar. 4, 2010), https://www.jct.gov/publications.html?func=startdown&id=3650.

[7] David Kinkade, *IRS Delays FATCA Enforcement for Banks as Start Date Looms*, U.S. Chamber of Commerce, May 23, 2014, https://www.uschamber.com/blog/irs-delays-fatca-enforcement-banks-start-date-looms; Joe Harpaz, *Financial Firms Get FATCA Reprieve*, Forbes, May 9, 2014, http://www.forbes.com/sites/joeharpaz/2014/05/09/financial-firms-get-fatca-reprieve/; Sullivan & Cromwell LLP, FATCA: Delayed Start Dates (July 15, 2013), http://www.sullcrom.com/siteFiles/Publications/SC_Publication_FATCA_Delayed_Start_Dates.pdf.

[8] Deloitte, *supra* note 1.

[9] William Hoffman, *FATCA 'Tormenting' Taxpayers,*

5. FATCA's burdens, however, are not limited to financial institutions and fall most heavily on individual U.S. citizens. On the most fundamental level, FATCA deprives individuals of the right to the privacy of their financial affairs. FATCA authorizes the IRS to collect information on the financial assets of U.S. citizens living abroad that it cannot collect on U.S. citizens domestically. On a practical level, FATCA is severely impinging on the ability of U.S. citizens to live and work abroad. It is affecting all facets of individuals' lives from day-to-day finances and employment to family relations and citizenship.

6. FATCA is causing many foreign financial institutions to curtail their business dealings with U.S. citizens living abroad because the costs associated with compliance are simply not worth the trouble. For example, Avanza, one of the largest online stock brokers in Sweden, is completely turning away all U.S. citizens.[10] According to a study conducted by the group Democrats Abroad, almost one-quarter (22.5%) of Americans living abroad who attempted to open a savings or retirement account and 10% of those who attempted to open a checking account were unable to due so.[11] The study also revealed that some Mexican finan-

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Olson Says, Tax Analysts, Oct. 8, 2014, http://www.taxanalysts.com/www/features.nsf/Articles/FD2860D17810639485257D6B0052AC9C?OpenDocument; Taxpayer Advocate Service, *supra* note 5, at 1–2 and n.7.

[10] *See* Exhibit 1 [exhibit omitted].

[11] Democrats Abroad, FATCA: Affecting Everyday Americans Every Day 6 (2014), https://www.democratsabroad.org/sites/default/files/Democrats%20Abroad%202014%20FATCA%20Research%20Report_0.pdf.

cial institutions are even refusing to cash checks for Americans living in that country, many of whom are retirees.[12] But banks are not only refusing to open new accounts or cash checks for U.S. citizen, they are also closing existing customer accounts.[13] Approximately one million Americans living abroad (one-sixth of all such citizens) have had bank accounts closed because of FATCA.[14] Nearly two-thirds (60%) of those who reported having an account closed had lived abroad for twenty or more years, and most affected appear to be "overwhelmingly middle class Americans, not high income individuals."[15] More than two-thirds (68%) of checking accounts and nearly half (40.4%) of savings

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[12] Democrats Abroad, *supra* note 10, at 7.

[13] Martin Hughes, *FATCA Fall Out Closes A Million US Bank Accounts*, Money International, Oct. 7, 2014, http://www.moneyinternational.com/tax/fatca-fall-closes-million -us-bank-accounts/; Eyk Henning, *Deutsche Bank Asks U.S. Clients in Belgium to Close Accounts*, The Wall Street Journal, May 2, 2014, http://www.wsj.com/articles/SB10001424052702303678404579537610638716116; Nat Rudarakanchana, *Americans Abroad Can't Bank Smoothly As FATCA Tax Evasion Reform Comes Into Play*, International Business Times, Dec. 20, 2013, http://www.ibtimes.com/americans-abroad-cant-bank-smoothly-fatca-tax-evasion-reform-comes-play-1517032; Jeff Berwick, *Breaking News: US Expats in Mexico Left Stranded in Latest FATCA Escalation*, The Dollar Vigilante, undated, http://dollarvigilante.com/blog/2014/6/4/breaking-news-us-expats-in-mexico-left-stranded-in-latest-fa.html.

[14] Hughes, *supra* note 12.

[15] Democrats Abroad, *supra* note 10, at 4, 6.

accounts closed had balances of less than $10,000.[16] And, over two-thirds (69.3%) of dedicated retirement accounts and more than half (58.9%) of other investment or brokerage accounts closed had a balance of less than $50,000.[17]

7. In addition to causing Americans overseas to lose access to basic financial services abroad, FATCA is also having a detrimental impact on U.S. citizens living abroad at work and at home. Many have reported that they are being denied consideration for promotions at their jobs, particularly with respect to high level positions,[18] because of the concomitant compliance burdens foisted on employers by FATCA.[19] Indeed, in the study by Democrats Abroad, 5.6% of respondents reported that they had been denied a position because of FATCA.[20] Others reported difficulty opening a business or partnering with others in joint ventures because of obstacles created by FATCA.[21] Such trends will undoubtedly affect the ability of U.S. citizens to remain

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[16] Democrats Abroad, *supra* note 10, at 6.

[17] Democrats Abroad, *supra* note 10, at 6.

[18] Democrats Abroad, Data From the Democrats Abroad 2014 FATCA Research Project 21 at Table VII.3 (2014), https://www.democratsabroad.org/sites/default/files/Democrats%20Abroad%202014%20FATCA%20Research%20Datapack_0.pdf.

[19] Barbara Stcherbatcheff, *Why Americans Abroad Are Giving Up Their Citizenship*, July 1, 2014, http://www.newsweek.com/2014/07/04/why-americans-abroad-are-giving-their-citizenship-261603.html.

[20] Democrats Abroad, *supra* note 10, at 9.

[21] Democrats Abroad, *supra* note 10, at 10.

economically competitive in an increasingly globalized world.

8. At home, FATCA is forcing Americans abroad to rearrange not only their financial affairs but also reconsider their personal relationships.[22] More than one-fifth (20.8%) of Americans abroad surveyed by Democrats Abroad have already or are considering separating their accounts from their non-American spouse.[23] And 2.4% have or are considering separating or divorcing as a result of FATCA's expansive reporting requirements,[24] further destabilizing American families by adding to the already increasing divorce rate.[25] This instability is likely having the harshest impact on Americans living abroad whose spouses are the primary breadwinners and themselves not American citizens. For these individuals, such as stay-at-home mothers, FATCA is undermining their financial security and placing them in "highly vulnerable" positions because of the need to separate American spouses from a family's non-American earned financial assets.[26] It can leave them without property and without access to

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[22] *See generally* Democrats Abroad, *supra* note 10, at 7–9 (noting several instances where FATCA was negatively affecting familial relationships).

[23] Democrats Abroad, *supra* note 10, at 7.

[24] Democrats Abroad, *supra* note 10, at 7.

[25] Christophen Ingraham, *Divorce is actually on the rise, and it's the baby boomers' fault*, The Washington Post, March 27, 2014, http://www.washingtonpost.com/blogs/wonkblog/wp/2014/03/27/divorce-is-actually-on-the-rise-and-its-the-baby-boomers-fault/.

[26] Democrats Abroad, *supra* note 10, at 8.

their families' bank accounts and credit.[27]

9. For some Americans living abroad, FATCA's burdens have become so heavy that they are choosing to relinquish their US citizenship just so they can avoid the crushing weight of this unprecedented law. Indeed, record numbers of Americans have relinquished their U.S. citizenship in the five years since FATCA's passage.[28] The five highest annual totals of citizenship renunciations have occurred in each of the five years from 2010 to 2015.[29] More than 10,000 overseas individuals have given up their U.S. citizenship during

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[27] Democrats Abroad, *supra* note 10, at 8 (reporting numerous situations where non-income earning spouses were removed from the families financial affairs).

[28] Catherine Bosley and Richard Rubin, *A Record Number of Americans Are Renouncing Their Citizenship*, Bloomberg Business, Feb. 10, 2015, http://www.bloomberg.com/news/articles/2015-02-10/americans-overseas-top-annual-record-for-turning-over-passports; Ali Weinberg, *Record Number of Americans Renouncing Citizenship Because of Overseas Tax Burdens*, ABC News, Oct. 28, 2014, http://abcnews.go.com/International/record-number-americans-renouncing-citizenship-overseas-tax-burdens/story?id=26496154; Laura Saunders, *More Americans Renounce Citizenship, With 2014 on Pace for a Record*, The Wall Street Journal, Oct. 24, 2014, http://blogs.wsj.com/totalreturn/2014/10/24/more-americans-renounce-citizenship-with-2014-on-pace-for-a-record/; Robert W. Wood, *Americans Renouncing Citizenship Up 221%, All Aboard The FATCA Express*, Forbes, Feb. 6, 2014, http://www.forbes.com/sites/robertwood/2014/02/06/americans-renouncing-citizenship-up-221-all-aboard-the-fatca-express/.

[29] Bosley and Rubin, *supra* note 27.

that time.[30] And the trend shows no signs of slowing down with a record number of Americans (1,335) giving up their citizenship in the first quarter of 2015, exceeding the previous quarterly record by 18%.[31] In some cases, non-American spouses are pressuring their American spouses to relinquish their U.S. citizenship to avoid entangling the non-American spouses financial affairs in FATCA.[32] And, at the same time, as if to add insult to injury, the U.S. government has sought to make the price of citizenship for these persons even higher. For, just as FATCA's burdens are growing steadily more burdensome as the law moves toward full implementation, the U.S. government has simultaneously increased the cost of citizenship renunciation five-fold, from $450 to $2,350.[33]

10. As of October 1, 2015, FFI's have begun reporting information under their respective IGAs.

11. But FATCA is not the only attack being leveled at Americans living abroad. The Bank Secrecy Act imposes an extra requirement on overseas Americans in the form of a special reporting requirement for foreign accounts. Under the FBAR, Americans living abroad must disclose detailed information about any foreign bank accounts with a balance in excess of $10,000. In practice, it is just a trap for the unprepared and the

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[30] Bosley and Rubin, *supra* note 27.

[31] Richard Rubin, *Americans Living Abroad Set Record for Giving Up Citizenship*, Bloomberg, May 7, 2015, http://www.bloomberg.com/news/articles/2015-05-07/americans-abroad-top-quarterly-record-for-giving-up-citizenship.

[32] Democrats Abroad, *supra* note 10, at 9.

[33] Weinberg, *supra* note 27.

uninformed, pinching regular middle-class Americans residing outside the United States. The penalties for failing to file the report can be financially devastating and can wipe out a person's entire savings. The maximum penalty for failing to file an FBAR is $100,000 or 50% of the value of the account, *whichever is greater* with each unfiled report begetting a separate penalty. 31 U.S.C. § 5321(a)(5)(C). As a result, a single unreported account with a static balance can be penalized multiple times for the same course of conduct continued over multiple years. Because the FBAR civil penalties are cumulative, ultimately the fine for failing to file the FBAR can far exceed the actual value of the unreported financial asset. A person who fails to report an account for only two years could be subject to a penalty *equal to the full balance of the account*. Each unfiled FBAR could subject the person to a fine of 50% of the balance of the account, resulting in an aggregate fine after two years of 100% of the value of the account.[34] One person who failed to file the FBAR for four years was recently subjected to a fine of 150% of the balance of his account.[35]

Jurisdiction and Venue

12. This court has jurisdiction under 28 U.S.C.

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[34] *See generally Comparison of Form 8938 and FBAR Requirements*, https://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements (last visited Oct. 22, 2015).

[35] David Voreacos and Susannah Nesmith, *Florida Man Owes Record 150% IRS Penalty on Swiss Account*, Bloomberg Business, May 29, 2014, http://www.bloomberg.com/news/articles/2014-05-28/florida-man-87-owes-150-of-swiss-account-jury-says.

§ 1331 and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 because the case arises under the Treaty Clause of the Constitution, Article II, Section 2, Clause 2, and section 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702.

13. Venue is proper under 28 U.S.C. § 1391(e) because Plaintiff Mark Crawford is a resident of Dayton, Ohio.

Parties

Plaintiff Mark Crawford

14. Mark Crawford is a citizen of the United States of America. He currently lives in Albania and also maintains a residence in Dayton, Ohio.

15. Mark was born in Pasadena, California in 1971, while his father was working for NASA's Jet Propulsion Laboratory. A job offer from NCR relocated the family to Wichita, Kansas for five years and eventually to Dayton, Ohio when Mark was in second grade. Mark graduated from Dayton Christian High School in 1989. He earned an undergraduate degree from Miami University of Ohio in 1993 and a masters degree with a focus in economics from University College London in England in 1995. During college, Mark spent time teaching English in China and, after graduation, spent one year in Albania as a missionary with Campus Crusade for Christ.

16. After finishing his masters degree, Mark returned to Dayton for a year to work for his father's financial planning business where he became a licensed stock broker, earning his Series 7. He was then recruited to join the Tirana, Albania office of the Albanian-American Enterprise Fund (AAEF), a New York based non-political, not-for-profit United States

corporation established by Congress pursuant to the Support for East European Democracy Act of 1989 ("SEED Act"). The AAEF was established as part of a United States initiative to promote the private sector development in formerly Communist countries in Europe and Central Asia. It invests solely in Albania. While Mark was at the AAEF, the fund invested in banking, real estate, trade finance companies and a range of production initiatives. Since its inception the AAEF has invested in or lent to over 40 Albanian companies. As of September 30, 2008, net assets of the AAEF amounted to $178 million or 6 times the original capital. Companies financed by AAEF have contributed more than $1 billion to the country's GDP and created more than 5,000 jobs.

17. In 2001, Mark was recruited by a USAID funded group to found a bank in Montenegro. As CEO he led the bank to become the most profitable in the country and help introduce SWIFT, MasterCard, VISA, and ATM services in the country. He also helped found a separate USAID related bank in Serbia and served on its board of directors.

18. After the split with Serbia, at the request of US Ambassador Rod Moore, Mark led the establishment of the American Chamber of Commerce in Montenegro and served as its founding Chairman.

19. Currently Mark is the owner of an international investment and advisory firm, the chairman of an international securities brokerage firm, a board member of an American owned bank in Albania, and a senior adviser to a publicly listed natural resources company. He was also a partner within a top-five global audit/advisory network. He has taught at the university level on two continents and volunteers to work along-

side the United States Embassy in Albania as the president of the board of the American Chamber of Commerce. He also serves as the volunteer chairman of an international affiliate of Campus Crusade for Christ.

20. Mark is a native English speaker, is fluent in Albanian, and speaks basic Serbian/Montenegrin and basic Greek.

21. Mark's wife Irena is a naturalized American citizen, who also holds Albanian citizenship. She is from the Greek minority of southern Albania. They have three children, all of whom are American. Mark and his wife split their time between the United States and Europe in order that the children can learn Greek and Albanian.

22. Mark is the founder and sole owner of Aksioner International Securities Brokerage, sh.a., located in Tirana, Albania. Until the Summer of 2015, it was the only licensed brokerage firm in Albania and an introductory broker, working with Saxo Bank in Copenhagen, Denmark. The Saxo relationship would not allow Aksioner to accept clients who are U.S. citizens in part because the bank does not wish to assume the burdens that would be foisted on it by FATCA if it were to accept U.S. citizens. This has impacted Mark financially, forcing him to turn away prospective American clients living in Albania who come to him for brokerage services.

23. Aksioner has sent many applications to Saxo Bank throughout the years, but only *one* client was ever rejected. Ironically, that person was Mark. In April of 2012, Mark applied for a brokerage account with his own company and was denied by Saxo Bank in Copenhagen, Denmark because he is a U.S. citizen. Saxo Bank is governed by Danish law which has a

Model 1 IGA, therefore, rather than reporting information about U.S. clients, Saxo Bank is turning away U.S. citizens like Mark.

24. Mark and his wife maintain three personal bank accounts at Intesa Sanpaolo bank in Albania. The accounts are used to support Mark and his family's day-to-day financial needs such as purchasing food, clothing, and fuel and paying for housing. Each of the three accounts is denominated in a different currency—one in U.S. dollars, one in Euros, and one in Albanian Lek.

25. The aggregate value of Mark's foreign accounts has been greater than $10,000 in both 2014 and 2015, which subjects him to FBAR reporting for both years. Mark has filed the required FBAR report each year but does not want to continue to file such reports because they violate his and his wife's privacy.

26. Mark does not want the financial details of his accounts, including the account numbers, the account balances, and the gross receipts and withdrawals from the accounts, disclosed to the United States government, the IRS, or the Treasury. Mark would not disclose or permit others, including his bank, to disclose his private account information to the United States government, the IRS, or the Treasury but for the fact that FATCA and the FBAR require the disclosure.

27. Mark reasonably fears that he, his wife, or the funds in their joint bank accounts will be subject to the unconstitutionally excessive fines imposed by 31 U.S.C. § 5321 if he wilfully fails to file an FBAR for the accounts.

28. Mark now suffers, and will continue to suffer, concrete and particularized injuries to legally protected interests, which injuries are caused by the challenged government actions and will be redressed by the re-

quested relief.

29. Mark has no adequate remedy at law and is suffering irreparable harm.

Plaintiff Senator Rand Paul

30. Rand Paul is a United States Senator from the Commonwealth of Kentucky. He is a United States citizen and was first elected to the Senate in 2010.

31. Senator Paul lives with his wife and children in Bowling Green, Kentucky, which is located in Warren County. Senator Paul owned his own ophthalmology practice and performed eye surgery for 18 years in Bowling Green prior to being elected to the Senate. He grew up in Lake Jackson, Texas and attended Baylor University. He graduated from Duke Medical School in 1988 and completed a general surgery internship at Georgia Baptist Medical Center in Atlanta, completing his residency in ophthalmology at Duke University Medical Center.

32. Senator Paul has been a vocal opponent of FATCA from the beginning. He has introduced legislation to repeal parts of FATCA in 2013 and 2015 and opposed international tax treaties in the Senate related to FATCA. However, because the Treasury Department and IRS have refused to abide by the constitutional framework for concluding international agreements, Senator Paul has been denied the opportunity to exercise his constitutional right as a member of the U.S. Senate to vote against the FATCA IGAs.

33. Senator Paul would vote against the FATCA IGAs if the Executive Branch submitted them to the Senate for advice and consent under Article II or to the Congress as a whole for approval as congressional-executive agreements.

34. Senator Paul now suffers, and will continue to suffer, the concrete and particularized injury of not being able to vote against the FATCA IGAs, which injury was caused by the unconstitutional and illegal action creating the IGAs, and which injury will be redressed by the IGAs being held beyond constitutional and statutory authority.

35. Senator Paul has no adequate remedy at law and is suffering irreparable harm.

Plaintiff Roger Johnson

36. Roger G. Johnson is citizen of the United States of America. He currently resides in Brno, Czech Republic.

37. Roger was born on September 19, 1952 in Dinuba, California. He first grew up on a fruit ranch in Fresno County, California. Then, in 1963, he moved to Southern California with his family so that his father could accept a teaching position there. He completed his elementary, high school, and college education in Orange County.

38. Roger is a veteran of the United States Army, having served twelve years on active duty and ten years in the U.S. Army Reserve. Roger joined the Army as a private in 1975. During his service, Roger attended Officer Candidate School, earned a Masters degree during his off-duty time, and attended the Defense Language Institute where he learned German. By the time he left active duty service in 1987, Roger had attained the rank of captain. Following active service, he continued his military service as a member of the U.S. Army Reserve, during which time he was recalled to active duty service for the first Iraq war in 1990 for six months and served in combat during Oper-

ation Desert Storm with the 3rd Armored Division. He retired from the U.S. Army Reserve as a major.

39. Roger remained in Germany after leaving active military service. He met his wife, Katerina, in Berlin where he was working as a project manager for a German grocery firm. He and his wife lived in Berlin, Germany until 1994, and later moved to Brno, Katerina's hometown, so that his wife could resume her law practice. He and Katerina have two adult children who are attending college. His wife is a citizen of the Czech Republic, and his children are dual citizens of the United States and the Czech Republic.

40. During the course of the twenty one years that Roger and his wife have made their home in the Czech Republic, they have founded two small advertising businesses, purchased a personal residence together, purchased several rental properties, invested their money, and maintained joint bank accounts. FATCA, however, forced Roger and his wife to significantly alter their financial affairs. Roger's wife strongly objected to having her financial affairs disclosed to the United States government under FATCA. After consulting with their tax advisor, who strongly recommended that they separate their assets, Roger and his wife decided to legally separate all of their jointly owned assets to protect his wife's privacy. As a result of that separation, Roger no longer has any ownership interest in his home, rental properties, or his wife's company. Roger and his wife are now forced to maintain completely separate bank accounts to protect her privacy.

41. Roger has five bank accounts that he uses to conduct his affairs: two in the United States and three in the Czech Republic. He maintains the two U.S. ac-

counts to pay bills associated with a home he owns in California and for certain transactions which are more conveniently completed using a U.S. account. The Czech accounts are all maintained at Citibank in the Czech Republic and are used to support Roger's day-to-day financial needs such as paying for housing and purchasing food, clothing, and fuel for his vehicle. Each of the three Czech accounts is denominated in a different currency—one in U.S. dollars, one in Euros, and one in Czech Crowns—to enable Roger to conduct his affairs when he travels in Europe and elsewhere.

42. Roger and his wife would reverse the legal separation of their assets and financial affairs if they were not required to be reported under FATCA and the Czech IGA.

43. The aggregate value of Roger's foreign accounts has been greater than $75,000 in 2014 and 2015 which subjects him to both FATCA individual reporting and FBAR reporting. However, Roger does not want the financial details of his accounts, including the account numbers, the account balances, and the gross receipts and withdrawals from the accounts, disclosed to the United States government, the IRS, or the Treasury. Roger would not disclose or permit others, including his bank, to disclose his private account information to the United States government, the IRS, or the Treasury but for the fact that the IGAs, FATCA, and the FBAR require the disclosure.

44. Roger reasonably fears that he or the funds in his bank accounts will be subject to the unconstitutionally excessive fines imposed by 31 U.S.C. § 5321 if he wilfully fails to file an FBAR for the accounts.

45. Roger now suffers, and will continue to suffer, concrete and particularized injuries to legally protected

interests, which injuries are caused by the challenged government actions and will be redressed by the requested relief.

46. Roger has no adequate remedy at law and is suffering irreparable harm.

Plaintiff JUDr. Katerina Johnson

47. JUDr. Katerina Johnson is a citizen of the Czech Republic and currently resides in Brno, Czech Republic.

48. Katerina was born in 1960 in Brno, Czechoslovakia. She is now married to Plaintiff Roger Johnson whom she met in Berlin, Germany shortly after the fall of the Berlin Wall. The couple remained in Berlin for a few years before returning to Katerina's hometown. Katerina and Roger have two adult children who are attending university and are dual citizens of the United States and the Czech Republic.

49. Katerina is an attorney and a businesswoman. During the course of the twenty one years that Katerina and her husband have made their home in the Czech Republic, they have founded two small advertising businesses, purchased a personal residence together, purchased several rental properties, invested their money, and maintained joint bank accounts

50. Katerina strongly objects to having her personal financial affairs disclosed to the United States government under FATCA. As a non-US citizen, she believes this is a gross invasion of her privacy.

51. Because of this gross invasion of her privacy, the couple were forced to legally separate all of their jointly owned assets in order to protect her interests as a non-U.S. citizen. Now, Katerina's husband no longer has any ownership interest in their home, rental proper-

ties, or her company and Katerina and Roger are forced to maintain completely separate bank accounts to protect her privacy.

52. Katerina feels that as a Czech citizen she should not have to disclose her private financial information to the United States government, nor should she have to separate all of their jointly held assets to prevent that disclosure. She would like to maintain a normal relationship with her husband and desires that both her and her husband have access to their finances. Katerina and Roger would reverse the legal separation of their assets and financial affairs if they were not required to be reported under FATCA and the Czech IGA.

53. Katerina does not want the financial details of her accounts, including the account numbers, the account balances, and the gross receipts and withdrawals from the accounts, disclosed to the United States government, the IRS, or the Treasury. She would not disclose or permit others, including his bank, to disclose her private account information to the United States government, the IRS, or the Treasury but for the fact that the IGAs, FATCA, and the FBAR require the disclosure if her accounts are joint with her husband.

54. Katerina reasonably fears that her husband and the funds in their joint accounts will be subject to the unconstitutionally excessive fines imposed by 31 U.S.C. § 5321 if they rejoin their accounts and he wilfully fails to file an FBAR for the accounts.

55. Katerina now suffers, and will continue to suffer, concrete and particularized injuries to legally protected interests, which injuries are caused by the challenged government actions and will be redressed by the requested relief.

56. Katerina has no adequate remedy at law and is suffering irreparable harm.

Plaintiff Stephen J. Kish

57. Stephen J. Kish, Ph.D. is a citizen of the United States of America and a citizen of Canada. He currently resides in Toronto, Ontario, Canada.

58. Stephen is a professor of psychiatry and pharmacology at the University of Toronto and the head of the Human Brain Laboratory at the Centre for Addiction and Mental Health (CAMH) in Toronto, Ontario.

59. Stephen was born in Seattle, Washington on July 11, 1948. He lived in Seattle for the duration of his childhood, completing his primary and high school education there. After high school, Stephen enrolled at the University of Notre Dame in South Bend, Indiana where he graduated in 1970 with a bachelors degree in biology. He received a masters degree in biochemical pharmacology at the University of Southampton in England in 1973 and a Ph.D in pharmacology at the University of British Columbia in Vancouver in 1980. From 1980 to 1981, he undertook a post-doctoral fellowship training at the University of Vienna in Austria in Parkinson's disease studies.

60. In 1981, Stephen joined the Human Brain Laboratory at CAMH, which at that time was known as the Clarke Institute of Psychiatry. He has remained at CAMH since 1981, eventually becoming Head of the Human Brain Laboratory.

61. Eventually, in 1985, Stephen decided to become a Canadian citizen to ensure that he would be able to remain in Canada with his wife and remain able to pursue his research career in Toronto.

62. Stephen met his wife in Toronto in April, 1981

shortly after joining CAMH. She is a Canadian citizen. Stephen and his wife have built a life together in Toronto and established deep roots in the community.

63. Stephen and his wife maintain a joint bank account at the Canadian Imperial Bank of Commerce ("CIBC") in Toronto that is used to support their day-to-day financial needs such as paying for housing and purchasing food, clothing, and fuel for their personal vehicle. And, while they have a good marriage, FATCA has at times caused some discord between the two because she, as a Canadian citizen, strongly opposes the disclosure of her personal financial information from her and Stephen's joint bank account to the U.S. government.

64. The aggregate value of Stephen's foreign accounts was greater than $10,000 in 2014 and 2015 which subjects him to FBAR reporting. However, Stephen does not want the financial details of his accounts, including the account numbers, the account balances, and the gross receipts and withdrawals from the accounts, disclosed to the United States government, the IRS, or the Treasury.

65. Stephen would not disclose or permit others, including his bank, to disclose his private account information to the United States government, the IRS, or the Treasury but for the fact that the IGAs, FATCA, and the FBAR require the disclosure.

66. Stephen reasonably fears that he, his wife, or the funds in their joint bank account will be subject to the unconstitutionally excessive fines imposed by 31 U.S.C. § 5321 if he willfully fails to file an FBAR for the accounts.

67. Stephen now suffers, and will continue to suffer, concrete and particularized injuries to legally protected

interests, which injuries are caused by the challenged government actions and will be redressed by the requested relief.

68. Stephen has no adequate remedy at law and is suffering irreparable harm.

Plaintiff Daniel Kuettel

69. Daniel Kuettel is a citizen of Switzerland and a former citizen of the United States of America. Daniel resides in Bremgarten, Switzerland.

70. Daniel's childhood was divided between Colorado and Switzerland. His mother was a citizen of the United States, and his father is a citizen of Switzerland and the United States. His parents met in the United States after his father emigrated to the United States after World War II. Daniel was born in Greeley, Colorado in a farmhouse in 1972. He lived in Greeley until he was ten years old, but, after his parents divorced in 1981, moved with his father to Switzerland. He spent the next five years in Switzerland and then returned to Greeley to live with his mother when he was fifteen years old. Two years later, Daniel moved back to Switzerland to live with his father again, and then returned to finish high school in the United States.

71. In 1992, after graduating from high school, Daniel enlisted in the United States Army, serving as a crane operator in a rapid deployment unit for three years. He was stationed primarily at Fort Stewart, Georgia during his service. Upon completing his enlistment in 1995, he returned to Greeley, Colorado and joined the U.S. Army Reserve. He spent the next several years advancing his education and working in various capacities in the computer and information tech-

nology fields. During this time, he lived in Greeley, Colorado as well as California, moving first to Silicon Valley and later to San Diego. After the dot-com bubble burst in 2000, his debt burden pressured Daniel to search for employment in Switzerland in 2001. He worked first for Price waterhouse Cooper and then for his current employer.

72. Daniel met his wife, who is originally from the Philippines, in 2000. She is a citizen of Switzerland and the Philippines. She is a nurse and is currently working as a stay-at-home mother to their two young children. His daughter, born in 2005, is a citizen of Switzerland, the Philippines, and the United States. His son, born in 2013, is a citizen of Switzerland and the Philippines.

73. Daniel renounced his U.S. citizenship in 2012 because of difficulties caused by FATCA. He and his wife's home is located in Switzerland, and many Swiss banks have been unwilling to accept American clients because of FATCA. Banks have even gone as far as telling inquiring individuals that the bank cannot accept their application because they are U.S. citizens.[36] Banks explained that the FATCA legislation was too difficult and costly to implement so they had to resign themselves from accepting U.S. citizens.[37] This has caused many individuals, including Daniel, to consider renouncing their U.S. citizenship.

74. Daniel made several inquiries at Swiss banks attempting to find one that would refinance his mortgage prior to renouncing his citizenship. At the time, bank policies towards U.S. citizens were not made pub-

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[36] *See* Exhibit 2 [exhibit omitted].

[37] *Id.*

lic and upon inquiry, U.S. citizens were generally rejected, or rejected months later. He contacted both the U.S. Veterans Administration and the U.S. Department of Housing and Urban Development for assistance, but both agencies declined and stated that they do not provide assistance in obtaining mortgages to Americans living abroad. Left with few options, Daniel decided to renounce his citizenship so that he and his family could continue with the life they had built in Switzerland. After renouncing his U.S. citizenship, Daniel was able to refinance his home with a Swiss bank shortly thereafter and learned that he would not have been able to do so had he not renounced. Daniel will always consider himself an American but felt that renunciation was the only real option for his family.

75. Daniel currently maintains a college savings account for his daughter in his own name at PostFinance bank in Switzerland but would like to transfer ownership of the account to her and place it in her name. Having the account in her name would offer several advantages such as better interest rates and discounts for local businesses. The account currently has a balance of greater than $10,000. If the account were in his daughter's name, Daniel would transfer the full balance to her and would make monthly deposits of $200 ($1,400 annually) to the account for the foreseeable future. However, Daniel will refrain from transferring ownership of the college savings account to his daughter because he reasonably fears that he, his daughter, or the funds in the account will be subject to the unconstitutionally excessive fines of $100,000 or 50% of the balance of the account imposed by 31 U.S.C. § 5321 if the IRS determines that his daughter has "wilfully" failed to file an FBAR for the

account. According to the instructions for filing the FBAR, published by FinCEN, a child who is a U.S. citizen is required to file an FBAR for their foreign accounts. FinCEN, BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114) 6 (2014), http://www.fincen.gov/forms/files/FBAR%20Line%20Item%20Filing%20Instructions.pdf. Where the child is incapable of filing, FinCEN requires the child's parent to file the FBAR on their behalf. Id. Daniel's daughter is not capable of complying with this reporting requirement because she is only ten years old and too young to shoulder such an obligation. Daniel objects to filing an FBAR as required by FinCEN because he is not a U.S. citizen and does not want to violate his daughter's privacy. Daniel's wife has told him that she too objects to filing an FBAR for his daughter's account and would not violate Lois' privacy in order to do so. Daniel's daughter cannot avoid the FBAR reporting requirement by renouncing her U.S. citizenship because she is too young. Daniel inquired about this possibility on June 2, 2015 and received a response from the U.S. Embassy in Bern, Switzerland advising him that his daughter cannot renounce her citizenship until at least the age of 16.[38]

76. Daniel now suffers, and will continue to suffer, concrete and particularized injuries to a legally protected interest, which injury is caused by the challenged government actions and will be redressed by the requested relief.

77. Daniel has no adequate remedy at law and is suffering irreparable harm.

Plaintiff Lois Kuettel*, a minor child, by and through*

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[38] *See* Exhibit 3 [exhibit omitted].

her next friend, Daniel Kuettel

78. Lois Kuettel is a tri-citizen of the United States of America, Switzerland, and the Philippines. She lives in Bremgarten, Switzerland with her father, Daniel, and mother, Jodethe.

79. Lois was born in Muri, Switzerland and is now 10 years old. She is fluent in German and English and is able to speak some Swiss.

80. In 2011, Daniel opened an account at PostFinance bank in Switzerland for Lois so that she could begin saving money they received from the government and money she received from other sources.[39] At the time, Daniel registered her as a Swiss citizen in order to open a local savings account. However, as a result of FATCA in 2012, banks changed their policies to require the declaration of non-local citizenships.

81. Daniel knew that at her young age, she would be unable to file FBARs and he did not want to violate her privacy by filing them on her behalf, therefore, he closed the account and reopened it under his name because as a non-U.S. citizen, the U.S. government does not have access to the financial information of the account.

82. In 2015, Lois expressed an interest in having a bank account in her name once again. Thus, Daniel went to many banks inquiring about opening a savings account in Lois' name. Most banks rejected this request on the grounds of her U.S. citizenship and the conse-

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[39] In Switzerland, parents can receive 200 CHF each month to help with the cost of raising a child. Lois' parents have chosen to give the majority of this money to Lois so that she can save for future expenses, including her education.

quent need to comply with FATCA and the Swiss IGA. The banks stated that they would accept her as a client once she renounced her U.S. citizenship.

83. Daniel would like to transfer ownership of the current account to her and place it in her name. Having the account in her name would offer several advantages such as better interest rates and discounts for local businesses. The account currently has a balance of approximately $10,567.88 (1994.95 CHF and □ 7.413.72)[40]. If the account were in his daughter's name, Daniel would make monthly deposits of $200 ($1,400 annually) to the account for the foreseeable future.

84. However, Daniel will refrain from transferring ownership of the savings account to his daughter because he reasonably fears that Lois, or the funds in the account will be subject to the unconstitutionally excessive fines of $100,000 or 50% of the balance of the account imposed by 31 U.S.C. § 5321 if the IRS determines that she has "wilfully" failed to file an FBAR for the account. Lois is not capable of complying with this reporting requirement because she is only ten years old and too young to shoulder such an obligation. Her father objects to filing an FBAR as required by FinCEN because he is not a U.S. citizen and does not want to violate her privacy by disclosing her private financial information. Her mother also objects to filing an FBAR for her daughter's account and would not violate Lois' privacy in order to do so.

85. Lois cannot avoid the FBAR reporting requirement by renouncing her U.S. citizenship because she is too young.

86. Lois desires to have an account in her name in

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[40] Currency conversion done on Oct. 14, 2015.

order to save money for future expenses and her education. However, she is unable to do so as a result of FATCA and the Swiss IGA. Banks have been unwilling to open an account in her name due to her U.S. citizenship, and the PostFinance account, currently in Daniel's name, cannot be transferred to her without opening her up to unreasonable FBAR fines.

87. Lois would not want the financial details of her accounts, including the account number, the account balance, or the gross receipts and withdrawals from the account, disclosed to the United States government, the IRS, or the Treasury Department. Lois would not disclose or permit others, including her father, mother or her bank, to disclose her private business account information to the United States government, the IRS, or the Treasury but for the fact that the IGAs, FATCA, and the FBAR require the disclosure.

88. Lois now suffers, and will continue to suffer, concrete and particularized injuries to legally protected interests, which injuries are caused by the challenged government actions and will be redressed by the requested relief.

89. Lois has no adequate remedy at law and is suffering irreparable harm.

Plaintiff Donna-Lane Nelson

90. Donna-Lane Nelson is a citizen of Switzerland and a former citizen of the United States of America. She lives in Geneva, Switzerland and Argelès-sur-mer, France.

91. Donna-Lane was born in the United States and grew up in the small New England town of Reading, Massachusetts. As a teenager, she was member of the International Order of the Rainbow for Girls ("IORG")

which is a youth service organization designed to encourage community service, honesty, and leadership. She served in the role of Patriotism for her group. The organization has counted among its members U.S. Senator Olympia Snowe and former Supreme Court Justice Sandra Day O'Conner.

92. Donna-Lane was married in 1962 to a member of the United States military. During the first years of their marriage, they lived in Stuttgart, Germany while her then-husband was stationed for service at the Army base in Möhringen. It was during this time that Donna-Lane became acquainted with Europe, its lifestyle, and its history. After a few years in Germany, she and her then-husband returned to the United States. She earned her bachelors degree at Lowell University in 1967 and later earned a masters degree at Glamorgan University in Wales. In 1969, her then-husband left her shortly after the birth of their daughter. After his departure, she worked various jobs in public relations and communications while raising her daughter as a single mother.

93. Donna-Lane moved back to Europe after her daughter began college. Her daughter has since earned a bachelors degree from Northeastern University and a masters degree from Napier University in Scotland. When she returned to Europe, Donna-Lane first moved to France but then moved to Switzerland in 1990 for a job, working first for Interskill and later for the International Electrical Commission.

94. Donna-Lane has written eleven novels, which are published in the United States by Five Star Publishing.

95. Donna-Lane became a Swiss citizen in 2006 because she believed it was her civic duty as a resident of

the Swiss community to participate in local affairs and politics through voting. She also wanted to ensure that she would be able to remain in Switzerland if she was unable to obtain a work permit. Nonetheless, Donna-Lane did not eschew her American heritage and remained an active citizen in the United States, monitoring legislation on a wide-array of subjects and urging her elected representatives to take appropriate action.

96. After FATCA was enacted, Donna-Lane's local bank in Switzerland, UBS, notified her that she would not be able to open a new account if she ever closed her existing one because she was an American. She also knew of many accounts of U.S. citizens that had been closed because of a person's ties to the U.S. and because of FATCA and IGAs. Donna-Lane worried that her account would be closed and that she would be unable to open another with her U.S. citizenship.

97. Fearing that she would eventually not be able to bank in the country where she lived, she decided to relinquish her U.S. citizenship. She did so on December 11, 2011 at the U.S. Consulate in Bern, Switzerland. The decision to relinquish her U.S. citizenship was not easy, but ultimately she felt that she had to choose between having the ability to access local financial services where she lived or be a U.S. citizen. Once she had completed the renunciation process, Donna-Lane approached a local Swiss bank and was offered investment opportunities that were not available to her as an American.

98. In 2011, Donna-Lane remet a professional colleague and an American. He moved to Europe. They became engaged in 2013 and were married in May 2015. Prior to marrying, they started a business together and opened a joint business account at BNP

Paribas in France. The two also have a joint personal account at BNP Paribas.

99. Because her partner is a U.S. citizen, their joint accounts are subject to the requirements of the Swiss IGA, French IGA, FATCA, and the FBAR. Donna-Lane has been required to prove to BNP Paribas that she is not a U.S. citizen and has had her private financial account information disclosed to the IRS and the Treasury Department despite the fact that she is not a U.S. citizen.

100. In May 2015, she was contacted by UBS in Geneva, Switzerland and made to explain why she was sending $300 to the United States each month. She explained that the money was for her daughter so that she could build up an emergency fund. Donna-Lane was allowed to keep her account open because the bank accepted her explanation. Her other bank, Raiffeisen, has asked her to come to their office to explain her prior U.S. citizenship three years after having renounced her citizenship. She resents having to provide these explanations and the threats implied by these requests which appear to be prompted by FATCA.

101. The aggregate value of Donna-Lane's joint foreign accounts was greater than $10,000 in 2014 which subjects her and her husband to FBAR reporting for that year. However, Donna-Lane does not want the financial details of her business account, including the account number, the account balance, or the gross receipts and withdrawals from the account, disclosed to the United States government, the IRS, or the Treasury Department. Donna-Lane would not disclose or permit others, including her partner and her bank, to disclose her private business account information to the United States government, the IRS, or the Trea-

sury but for the fact that the IGAs, FATCA, and the FBAR require the disclosure.

102. Donna-Lane reasonably fears that she and/or the funds in her joint business account will be subject to the unconstitutionally excessive fines imposed by 31 U.S.C. § 5321 if the IRS should determine that her business partner has "wilfully" failed to file an FBAR for the account.

103. Donna-Lane now suffers, and will continue to suffer, concrete and particularized injuries to legally protected interests, which injuries are caused by the challenged government actions and will be redressed by the requested relief.

104. Donna-Lane has no adequate remedy at law and is suffering irreparable harm.

Plaintiff Richard Adams

105. Richard Adams is a United States citizen currently living in Switzerland.

106. Richard was born on April 21, 1951 in Johnson City, New York. He worked as a communications professional for more than 30 years, primarily in technology markets including aviation, defense, finance and telecommunications. Prior to moving to Switzerland, he lived in Texas.

107. Richard met his now wife, Plaintiff Donna-Lane Nelson, at a conference in the 1970s, when he lived in New York and she in Boston. They remained friends until she moved to Switzerland in the 1980s. At this time they lost touch. In 2012, Richard was attending an aviation conference in Geneva and reached out to Donna-Lane. They reconnected and began dating. The next year Richard left his job and moved to Switzerland and France in order to be closer to Donna-

Lane. The two became engaged in December 2013 and were married in 2015.

108. Richard is now a freelance writer. He has also worked with Donna-Lane to open a small business in France, however, because he is a U.S. citizen, he was not able to incorporate the company. As a result, Donna-Lane is the president of the company and he is considered an investor.

109. The couple has two joint bank accounts, a business and a personal account. However, just as Donna-Lane was prior to renouncing her citizenship, Richard is fearful that he will be unable to continue banking in the country he now lives in. He anticipates that they will soon receive a letter from their bank closing the accounts because of his U.S. citizenship, FATCA, and IGAs, as he has seen happen to many other U.S. citizens abroad.

110. In the event that their accounts are closed, the two will consider legally separating their assets so as not to infringe on his wife's privacy and banking options. However, this is a course neither would like to take. Instead, the couple desires to continue to maintain joint accounts as any other marital couple would. FATCA and the IGA poses a risk to that desire.

111. Separating Richard and his wife's assets will also put Richard in a difficult spot financially. Not only will he not have any interest in their finances, properties or business, he will likely also have difficulty opening an account in his name as a U.S. citizen. Without an account in his name, he will not have access to essential routine transactions like securing an apartment lease, a mobile phone contract, or paying bills. Richard also fears that without an account he will not be able to get a bank debit card or credit card which will cause

considerable difficulty reserving airline tickets and hotel rooms for business-related travel.

112. The aggregate value of Richard and his wife's joint foreign accounts has been greater than $10,000 in 2014 which subjects them to FBAR reporting for that year. However, Richard does not want the financial details of his accounts, including the account numbers, the account balances, and the gross receipts and withdrawals from the accounts, disclosed to the United States government, the IRS, or the Treasury.

113. Richard would not disclose or permit others, including his bank, to disclose his private account information to the United States government, the IRS, or the Treasury but for the fact that the IGAs, FATCA, and the FBAR require the disclosure.

114. Richard reasonably fears that he, his wife, or the funds in their joint bank account will be subject to the unconstitutionally excessive fines imposed by 31 U.S.C. § 5321 if he willfully fails to file an FBAR for the accounts.

115. Richard now suffers, and will continue to suffer, concrete and particularized injuries to legally protected interests, which injuries are caused by the challenged government actions and will be redressed by the requested relief.

116. Richard has no adequate remedy at law and is suffering irreparable harm.

Plaintiff L. Marc Zell

117. L. Marc Zell is a dual citizen of the United States of America and the State of Israel. He currently resides in Israel.

118. Marc was born in Washington, D.C. on February 25, 1953. He attended public high school in Mont-

gomery County, Maryland, graduating in 1970. Following high school, Marc earned a Bachelor of Arts degree in Germanic Languages and Literatures with a concentration in Theoretical Linguistics from Princeton University in 1974. He then continued his education at the University of Maryland School of Law, earning his Juris Doctor with honors in 1977.

119. Marc is a member of the bars of the State of Maryland (1977), the District of Columbia (1978), the Commonwealth of Virginia (1981), and the State of Israel (1987).

120. After law school, Marc served as a law clerk to the late Judge Irving A. Levine of the Maryland Court of Appeals. He then joined a large international law firm in Washington, D.C. as an associate attorney in 1978. Marc left that firm in 1981 and, over the course of the next thirty-four years co-founded three different law firms in the United States and Israel. He currently practices with the third firm he co-founded, Zell, Aron & Co., which is based in Jerusalem, Israel.

121. Marc and his family moved to Israel in 1986 and have resided there ever since that time.

122. As an Israeli-American attorney, Marc has been approached several times during the last year by other Israeli-Americans who want to renounce their citizenship. Many are concerned about the hardships imposed on them by FATCA. Many are American citizens because they were born to Americans but in all other respects call Israel home and have never lived in the United States and yet have found themselves trapped by FATCA by virtue of birth.

123. Marc and his firm, Zell, Aron & Co., are frequently asked by their clients to hold funds and foreign securities in trust. Because of FATCA, Marc and his

firm have been required by their Israeli banking institutions to complete IRS withholding forms (either W-8BEN or W-8BEN-E) as a precondition for opening trust accounts for both U.S. and non-U.S. persons and entities. The Israeli banking officials have stated that they will require such submissions regardless of whether the beneficiary is a U.S. person (i.e. citizen or resident alien) because the trustee is or may be a U.S. person. As a result, the banks have required Marc and his firm to close the trust account in some cases, and in other instances the banks have refused to open the requested trust account.

124. In one case, Marc has been repeatedly requested by his firm's bank to transfer securities of a company registered on the Tel Aviv Stock Exchange to remove the securities (having a current fair market value in excess of $2.5 million) from the trust account. These securities which are required to be held in trust under Israeli financial regulations can only be held by a qualified Israeli financial institution. Yet, because of FATCA, the bank is demanding that Marc transfer the securities to another bank. This has trapped Marc in a "Catch 22" situation: he must hold the securities in an Israeli financial institution and is simultaneously being ordered to remove the securities because both he and the beneficiary in this instance are U. S. citizens.

125. There also have been instances recently where Israeli banks have required non-U.S. persons represented by Marc and his firm to fill out the IRS forms even though they have no connection with the United States. When questioned about this practice, the banking officials have stated that the mere fact a U.S. person trustee or his law firm is acting as a fiduciary is reason enough to require non-U.S. person beneficiaries

to disclosure their identities and their assets to the United States. In a few such instances, the non-U.S. person beneficiary has terminated the attorney-client relationship with Marc and his law firm resulting in palpable financial loss in the form of lost fees to the firm and Marc.

126. FATCA has also impinged on the sanctity of the attorney-client relationship between Marc, his firm, and his clients. In certain cases, the disclosure of the very existence of an attorney-client relationship between a foreign individual or an entity and Marc as an Israeli attorney may prove injurious to the foreign client. This is true, for example, in connection with enterprises and their principals doing business in parts of the world which do not have diplomatic relations with the State of Israel. The fact that such firms have a professional relationship with an Israeli law firm, even one owned by a U.S. citizen, may prove embarrassing and harmful to such enterprises. The compelled disclosure of the relationship through the filing of FATCA-based forms is in and of itself a violation of the attorney-client privilege and the principles of confidentiality that underlie the attorney-client relationship.

127. Numerous clients have indicated to Mr. Zell and his firm that they consider the disclosure mandated by FATCA a gross violation of their constitutionally and legally protected right of privacy and have instructed Marc and his firm not to comply with the FATCA requirements. For this reason and for the other reasons mentioned above, Marc has decided not to comply with the FATCA disclosure requirements whenever that alternative exists.

128. Marc holds funds in trust for one client at Is-

rael Discount Bank. The bank has asked Marc to provide information necessary to identify him and the client as U.S. persons subject to FATCA. The client has instructed Marc not to complete the forms seeking this information, and Marc has complied. He reasonably fears that he and/or the client will be classified as a recalcitrant account holder and subject to the unconstitutionally excessive FATCA Passthrough Penalty imposed under 26 U.S.C. § 1471(b)(1)(D).

129. Marc also has two personal checking accounts at Israel Discount Bank that he uses to support his day-to-day financial needs such as paying for housing and purchasing food, clothing, and fuel for his personal vehicle. His bank has asked him to provide additional information necessary to identify him as an American citizen subject to FATCA. Marc has refused to complete these forms and reasonably fears that he will be classified as a recalcitrant account holder and subject to the unconstitutionally excessive FATCA Passthrough Penalty imposed under 26 U.S.C. § 1471(b)(1)(D).

130. The aggregate value of Marc's foreign accounts was greater than $10,000 in 2014 and 2015 which subjects him to FBAR reporting. He also had signatory authority over accounts with an aggregate year-end balance of greater than $200,000 in 2014, which would subject him to FATCA individual reporting for that year. However, Marc is not currently complying with these demands.

131. Marc does not want the financial details of his accounts, including the account numbers, the account balances, and the gross receipts and withdrawals from the accounts, disclosed to the United States government, the IRS, or the Treasury. Marc would not disclose or permit others, including his bank, to disclose

his private account information to the United States government, the IRS, or the Treasury but for the fact that the IGAs, FATCA, and the FBAR require the disclosure.

132. Marc also reasonably fears that he or the funds in his accounts will be subject to the unconstitutionally excessive fines imposed by 31 U.S.C. § 5321 if the IRS should determine that he has "wilfully" failed to file an FBAR for his accounts.

133. Marc now suffers, and will continue to suffer, concrete and particularized injuries to legally protected interests, which injuries are caused by the challenged government actions and will be redressed by the requested relief.

134. Marc has no adequate remedy at law and is suffering irreparable harm.

Defendants

135. The U.S. Department of the Treasury is the administrative agency charged with administering FATCA and the FBAR. *See* 26 U.S.C. §§ 1474(f), 5314(a).

136. The Internal Revenue Service is an office of the Treasury Department and administers FATCA and the FBAR. 26 U.S.C. § 7803(a)(1)(A); 31 C.F.R. § 103.56(g); *see also e.g.*, Reporting by Foreign Financial Institutions, 78 Fed. Reg. 5874 (Jan. 28, 2013) (referring to joint rule-makings by IRS and Treasury Department regarding FATCA).

137. FinCEN is a bureau of the Treasury Department and has administrative authority over the FBAR.

FATCA

138. The Foreign Account Tax Compliance Act, Pub. L. No. 111-147, 124 Stat. 97 (2010) (codified at 26

U.S.C. §§ 1471–74, 6038D, and other scattered sections of Title 26) ("FATCA"), was enacted on March 18, 2010 as a fiscal offset provision to the Hiring Incentives to Restore Employment Act of 2010, Pub. L. No. 11-147, 124 Stat. 71 ("HIRE Act").

139. FATCA was enacted for the ostensible purpose of reducing tax evasion by U.S. taxpayers on foreign financial holdings. U.S. Dept. of the Treasury, *Foreign Account Tax Compliance Act (FATCA)*, http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx (last visited July 6, 2015).

140. **FATCA Structure.** FATCA applies both to individuals and to foreign financial institutions and has two primary components:

(a) **Individual Reporting.** The first component operates on individuals and requires them to report foreign financial assets when the aggregate year-end value of all such assets exceeds $50,000. 26 U.S.C. § 6038D(a) These assets must be reported to the IRS with the individual's annual tax return. *Id.* Individuals who fail to report such assets are subject to penalties of $10,000 for each failure to file a timely report and 40% of the amount of any underpaid tax related to the asset. *Id.* §§ 6038D(d), 6662(j)(3).

(b) **FFI Reporting.** The second component op erates on all foreign financial institutions ("FFIs") worldwide. FATCA requires them to report detailed account information for any account held by a U.S. person to the U.S. government each year irrespective of whether the U.S. account-holder is suspected of tax evasion. *Id.* § 1471(b). FFIs that fail to

comply with FATCA's reporting scheme are subject to a substantial penalty of 30% of the amount of any payment originating from sources within the United States. *Id.* § 1471(a).

141. **Implementation.** The Treasury Department and IRS have chosen to implement FATCA by adopting regulations and by entering into unconstitutional intergovernmental agreements ("IGAs") with foreign nations.

(a) **FATCA Regulations.** The regulations pri marily elaborate on the requirements of the statutory provisions and clarify the statutory requirements. *See* Reporting by Foreign Financial Institutions, 78 Fed. Reg. 5874 (Jan. 28, 2013); Reporting by Foreign Financial Institutions, 79 Fed. Reg. 12812 (Mar. 6, 2014); Withholding of Tax on Certain U.S. Source Income Paid to Foreign Persons, 79 Fed. Reg. 12726 (Mar. 6, 2014); Reporting of Specified Foreign Financial Assets, 79 Fed. Reg. 73817 (Dec. 12, 2014).

(b) **FATCA IGAs.** The Treasury Department has entered into IGAs with several foreign countries, including Canada, Czech Republic, Israel, France, Denmark, and Switzerland. U.S. Dept. of the Treasury, List of Agreements in Effect, http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx (last visited Oct. 28, 2015). The IGAs are styled as either Model 1 or Model 2 agreements. In a Model 1 IGA, the foreign government (called "FATCA Partner") agrees to collect the financial account

information that FATCA requires FFIs to report on behalf of the U.S. government and report that information to the IRS itself. *See, e.g.*, U.S. Dept. of Treasury FATCA Resource Center, Model 1A IGA Reciprocal, Preexisting TIEA or DTC, Art. 2, § 1, (Nov. 30, 2014), http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Reciprocal-Model-1A-Agreement-Preexisting-TIEA-or-DTC-11-30-14.pdf. FFIs located in the FATCA Partner's jurisdiction that comply with the obligations imposed under the IGA are exempted from FATCA—such FFIs are "treated as complying with, and not subject to withholding under, section 1471." *Id.* Art. 4, § 1. In a Model 2 IGA, the FATCA Partner agrees to remove domestic legal impediments in the FATCA Partner jurisdiction that would otherwise prevent FFIs from complying with FATCA's reporting requirements and direct all FFIs to register with the IRS and comply with FATCA. U.S. Dept. of Treasury FATCA Resource Center, Model 2 IGA, Preexisting TIEA or DTC, Art. 2 (Nov. 30, 2014), http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Model-2-Agreement-Preexisting-TIEA-or-DTC-11-30-14.pdf.

142. **Individual Reporting - Content of Reports.** Under section 6038D, individuals with reportable foreign financial assets[41] must file Form 8938 with

[41] Financial assets become reportable under FATCA if the aggregate value of one's assets is equal to or greater

the IRS each year. *See* 26 C.F.R. § 1.6038D-4(a)(11). For each foreign account, the individual must report:

(a) the name and address of the financial institu tion at which the account is maintained;

(b) the account number;

(c) the maximum value of the account during the taxable year;

(d) whether the account was opened or closed dur ing the taxable year;

(e) the amount of any income, gain, loss, deduction, or credit recognized for the taxable year and the schedule, form, or return filed with the IRS on which such amount is reported; and

(f) the foreign currency in which the account is maintained, the foreign currency exchange rate, and the source of the rate used to determine the asset's U.S. dollar value.

26 U.S.C. § 6038D(c); 26 C.F.R. § 1.6038D-4(a). Form 8938 additionally requires an individual to report the aggregate amount of interest, dividends, royalties, other income, gains, losses, deductions, and credits for all accounts. IRS, Form 8938, http://www.irs.gov/pub/irs-pdf/f8938.pdf.

143. **FFI Reporting - Content of Reports.** Foreign financial institutions must report U.S. accounts annually to the IRS on Form 8966. The report must include:

(a) the name, address, and TIN of each account

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than $50,000 on the last day of the tax year or $75,000 at any time during the tax year. *See generally Comparison of Form 8938 and FBAR Requirements*, https://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements (last visited Oct. 22, 2015).

holder;

(b) the account number

(c) the average calendar year or year-end balance or value of the account, depending on which information the FFI reports to the account holder; and

(d) the aggregate gross amount of interest paid or credited to the account during the year.

26 U.S.C. § 1471(c)(1); 26 C.F.R. § 1.1471-4(d)(3)(ii). Form 8966 additionally requires an FFI to report the aggregate gross amount of all income paid or credited to an account for the calendar year less any interest, dividends, and gross proceeds. IRS, Instructions for Form 8966 at 10, http://www.irs.gov/pub/irs-pdf/i8966.pdf.

144. **Canadian IGA.** The Canadian IGA was signed on February 5, 2014 and is a Model 1 IGA. "Agreement Between the Government of the United States of America and the Government of Canada to Improve International Tax Compliance through Enhanced Exchange of Information under the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital", U.S.-Can., Feb. 5, 2014, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Canada-2-5-2014.pdf (hereinafter "Canadian IGA"). The Canadian IGA has not been submitted to the Senate for its advice and consent pursuant to Article II, section 2, clause 2 of the Constitution or approved by a majority vote in both houses of Congress. Nor is the Canadian IGA authorized by an existing Article II treaty. Under the agreement, the Canadian government has agreed to collect information similar to, but not coextensive with, the informa-

tion required to be reported by an FFI to the U.S. government under FATCA. *Id.* art. 2, § 2. The information required to be collected regarding depository accounts includes:

(a) the name, address, and U.S. TIN of each U.S. account holder;
(b) the account number of each U.S. account holder;
(c) the name and identifying number of the Canadian FFI maintaining the account;
(d) the calendar year-end balance or value of the account; and
(e) the total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period.

Id., art. 2, § 2(a). The Canadian government has agreed to transmit that information directly to the U.S. government. *Id.*, art. 2, § 1.) The U.S. government has agreed to treat each reporting Canadian FFI as complying with FATCA and as not subject to withholding under section 1471(a). *Id.*, art. 4, § 1.

145. **Czech IGA.** The Czech IGA was signed on August 4, 2014 and is a Model 1 IGA. "Agreement between the United States of America and the Czech Republic to Improve International Tax Compliance and with Respect to the United States Information and Reporting Provisions Commonly Known as the Foreign Account Tax Compliance Act", U.S.-Czech Rep., Aug. 4, 2014, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Czech-Republic-8-4-2-14.pdf (hereinafter "Czech IGA"). The Czech IGA has not been submitted to the Senate for its advice and consent pursuant to Article II, section 2, clause 2 of the Constitution or approved by a majority vote in both houses of Congress.

Nor is the Czech IGA authorized by an existing Article II treaty. Under the agreement, the Czech government has agreed to collect information similar to, but not coextensive with, the information required to be reported by an FFI to the U.S. government under FATCA. *Id.* art. 2, § 2. The information required to be collected regarding depository accounts includes:

(a) the name, address, and U.S. TIN of each U.S. account holder;

(b) the account number of each U.S. account holder;

(c) the name and identifying number of the Czech FFI maintaining the account;

(d) the calendar year-end balance or value of the account; and

(e) the total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period.

Id., art. 2, § 2(a). The Czech government has agreed to transmit that information to the U.S. government. *Id.*, art. 2, § 1. The U.S. government has agreed to treat each reporting Czech FFI as complying with FATCA and as not subject to withholding under section 1471(a). *Id.*, art. 4, § 1.

146. **Israeli IGA.** The Israeli IGA was signed on June 30, 2014 and is a Model 1 IGA. "Agreement between the Government of the United States of America and the Government of the State of Israel to Improve International Tax Compliance and to Implement FATCA", U.S.-Isr., Jun. 30, 2014, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Israel-6-30-2014.pdf (hereinafter "Israeli IGA"). The Israeli IGA has not been submitted to the Senate for its advice and consent pursuant to Article II, section 2, clause 2 of the Consti-

tution or approved by a majority vote in both houses of Congress. Nor is the Israeli IGA authorized by an existing Article II treaty. Under the agreement, the Israeli government has agreed to collect information similar to, but not coextensive with, the information required to be reported by an FFI to the U.S. government under FATCA. *Id.* art. 2, § 2. The information required to be collected regarding depository accounts includes:

(a) the name, address, and U.S. TIN of each U.S. account holder;
(b) the account number of each U.S. account holder;
(c) the name and identifying number of the Israeli FFI maintaining the account;
(d) the calendar year-end balance or value of the account; and
(e) the total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period.

Id., art. 2, § 2(a). The Israeli government has agreed to transmit that information to the U.S. government. *Id.*, art. 2, § 1. The U.S. government has agreed to treat each reporting Israeli FFI as complying with FATCA and as not subject to withholding under section 1471(a). *Id.*, art. 4, § 1.

147. **French IGA.** The French IGA was signed on November 14, 2013 and is a Model 1 IGA. "Agreement between the Government of the United States of America and the Government of the French Republic to Improve International Tax Compliance and to Implement FATCA", U.S.-Fr., Nov. 14, 2013, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/BilateralAgreementUSFranceImplementFATCA.pdf (hereinafter "FrenchIGA"). The French IGA has not been submitted to the Senate for

its advice and consent pursuant to Article II, section 2, clause 2 of the Constitution or approved by a majority vote in both houses of Congress. Nor is the French IGA authorized by an existing Article II treaty. Under the agreement, the French government has agreed to collect information similar to, but not coextensive with, the information required to be reported by an FFI to the U.S. government under FATCA. *Id.* art. 2, § 2. The information required to be collected regarding depository accounts includes:

(a) the name, address, and U.S. TIN of each U.S. account holder;
(b) the account number of each U.S. account holder;
(c) the name and identifying number of the French FFI maintaining the account;
(d) the calendar year-end balance or value of the account; and
(e) the total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period.

Id., art. 2, § 2(a). The French government has agreed to transmit that information to the U.S. government. *Id.*, art. 2, § 1. The U.S. government has agreed to treat each reporting French FFI as complying with FATCA and as not subject to withholding under section 1471(a). *Id.*, art. 4, § 1.

148. **Danish IGA.** The Danish IGA was signed on November 19, 2012 and is a Model 1 IGA. "Agreement between the Government of the United States of America and the Government of the Kingdom of Denmark to Improve International Tax Compliance and to Implement FATCA", U.S.-Den., Nov. 19, 2012, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Denmark-11-1

9-2012.pdf (hereinafter "Danish IGA"). The Danish IGA has not been submitted to the Senate for its advice and consent pursuant to Article II, section 2, clause 2 of the Constitution or approved by a majority vote in both houses of Congress. Nor is the Danish IGA authorized by an existing Article II treaty. Under the agreement, the Danish government has agreed to collect information similar to, but not coextensive with, the information required to be reported by an FFI to the U.S. government under FATCA. *Id.* art. 2, § 2. The information required to be collected regarding depository accounts includes:

(a) the name, address, and U.S. TIN of each U.S. account holder;
(b) the account number of each U.S. account holder;
(c) the name and identifying number of the Danish FFI maintaining the account;
(d) the calendar year-end balance or value of the account; and
(e) the total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period.

Id., art. 2, § 2(a). The Danish government has agreed to transmit that information to the U.S. government. *Id.*, art. 2, § 1. The U.S. government has agreed to treat each reporting Danish FFI as complying with FATCA and as not subject to withholding under section 1471(a). *Id.*, art. 4, § 1.

149. **Swiss IGA.** The Swiss IGA was signed on February 14, 2013 and is a Model 2 IGA. "Agreement between the United States of America and Switzerland for Cooperation to Facilitate the Implementation of FATCA", U.S.-Switz., Feb. 14, 2013, available at http://www.treasury.gov/resource-center/tax-policy/tr

eaties/Documents/FATCA-Agreement-Switzerland-2-14-2013.pdf (hereinafter "Swiss IGA"). The Swiss IGA has not been submitted to the Senate for its advice and consent pursuant to Article II, section 2, clause 2 of the Constitution or approved by a majority vote in both houses of Congress. Nor is the Swiss IGA authorized by an existing Article II treaty. Under the agreement, the Swiss government has agreed (1) to direct all covered Swiss FFIs to register with the IRS and comply with all obligations under FATCA and (2) to exempt such FFIs from any Swiss laws that would prohibit or otherwise criminalize such conduct. *Id.* art. 3, § 1, art. 4. The U.S. government has agreed to treat each Swiss FFI that complies with the Swiss IGA as complying with FATCA and not subject to withholding under section 1471(a). *Id.* art. 6.

FBAR

150. The Report of Foreign Bank and Financial Accounts ("FBAR") must be filed annually with the IRS by persons who have a financial interest or signatory authority over a bank, securities, or other financial account in a foreign country with an aggregate value of more than $10,000 at any time during the calendar year. 31 U.S.C. § 5314; 31 C.F.R. §§ 1010.306(c), 1010.350(a).

151. Persons required to file include citizens and residents of the United States as well as other entities such as corporations, partnerships, trusts, etc. 31 C.F.R. § 1010.350(b). Reportable accounts include bank accounts like savings, depository, and checking accounts as well as securities accounts and "other financial accounts." *Id.* § 1010.350(c). A person can have a financial interest in a reportable account in several

circumstances, including when a person owns or holds legal title to a reportable account, when they are the agent or attorney with respect to the account, and when they own more than 50% of the voting power, total value of equity, interest, or assets, or interest in profits. *Id.* § 1010.350(e). A person has signature authority over a reportable account when the person has "authority ... (alone or in conjunction with another) to control the disposition of money, funds or other assets held in a financial account by direct communication (whether in writing or otherwise) to the person with whom the financial account is maintained." *Id.* § 1010.350(f)(1).

152. The FBAR must be filed separately from an individual's regular federal income tax return by June 30 of each year. FinCEN, BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114) 8 (2014), http://www.fincen.gov/forms/files/FBAR%20Line%20Item %20Filing%20Instructions.pdf. The filing deadline cannot be extended. *Id.*

153. Failure to file the FBAR can bring both civil and criminal penalties. 31 U.S.C. § 5321(d). Civil penalties vary depending on whether the failure to file was willful. *Id.* § 5321(b)(5). For non-willful violations, the maximum penalty is $10,000 for each unfiled report. *Id.* § 5321(b)(5)(B)(i). The penalty may not imposed for non-willful violations if the violation was due to "reasonable cause" and the account balance was "properly reported." *Id.* § 5321(b)(5)(B)(ii). For willful violations, the maximum penalty is $100,000 or 50% of the balance of the account at the time of the violation. *Id.* § 5321(b)(5)(C)(i). The "reasonable cause" defense is unavailable for willful violations. *Id.* § 5321(b)(5)(C)(ii).

The maximum criminal penalty for FBAR violations is a $250,000 fine and five years imprisonment. *Id.* § 5322(a).

Count 1
The IGAs are Unconstitutional Sole Executive Agreements Because they Exceed the Scope of the President's Independent Constitutional Powers

154. Plaintiffs reallege and incorporate by reference all allegations in preceding paragraphs.

155. Under section 706 of the Administrative Procedure Act ("APA"), a court must "hold unlawful and set aside agency action ... found to be – ... (B) contrary to constitutional right, power, privilege, or immunity [and] ... (D) without observance of procedure required by law." 5 U.S.C. § 706.

156. There are four recognized sources of authority for the Executive Branch to make international agreements: (1) the Treaty Clause, (2) an act of Congress, (3) an existing treaty, and (4) the President's independent constitutional powers. Restatement (Third) of Foreign Relations Law § 303 (1987). These four sources give rise to four types of international agreements: (1) Article II treaties, (2) congressional-executive agreements, (3) treaty-based agreements, and (4) sole executive agreements. John E. Nowak & Ronald D. Rotunda, Treatise on Const. L. § 6.8(a).

157. The Executive Branch has long accepted this framework. *See* 11 Foreign Affairs Manual ("FAM") §§ 723.2-1, 723.2-2, 723.2-2(A), 723.2-2(B), 723.2-2(C) (2006), available at http://www.state.gov/documents/organization/88317.pdf.

158. Each of the first three types of agreements re-

quire action by at least one chamber of Congress. Treaties must be ratified by two-thirds of the Senators present. U.S. Const. art. II, § 2, cl. 2. Congressional-executive agreements must be authorized or approved by a majority vote in both Houses like ordinary legislation. Restatement (Third) of Foreign Relations Law § 303. Treaty-based agreements must be made pursuant to authorization contained in an existing Article II treaty. Nowak & Rotunda, *supra* § 6.8(a).

159. Only the fourth type of agreement—sole executive agreements—can be brought into force, if at all, without congressional action. *Id.*; 11 FAM § 723.2-2(C). They are "reserved for agreements made solely on the basis of the constitutional authority of the President." 11 FAM § 723.2-2; *accord United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 658–59 (4th Cir. 1953), *aff'd*, 348 U.S. 296, 75 S. Ct. 326, 99 L. Ed. 329 (1955).

160. The Executive Branch has identified possible sources of the President's independent power to make international agreements as including "(1) The President's authority as Chief Executive to represent the nation in foreign affairs; (2) The President's authority to receive ambassadors and other public ministers, and to recognize foreign governments; (3) The President's authority as 'Commander-in-Chief'; and (4) The President's authority to "take care that the laws be faithfully executed." *See id.* § 723.2-2(C).

161. The President, however, lacks an independent power to impose taxes or specify the manner of their collection or any other power which would grant him the power to enter the IGAs unilaterally. *See generally* U.S. Const. art. II (reserving taxing power exclusively to Congress).

162. The Canadian, Czech, Israeli, French, Danish

and Swiss IGAs (collectively "the IGAs") are fundamentally international agreements concerning taxation and the collection of taxes.

163. None of the IGAs have received Senate or congressional approval nor are they pursuant to any authorization contained in any Article II treaty. The IGAs have not been submitted to the Senate for advice and consent. U.S. Dep't of State, Treaties Pending in the Senate (updated as of April 27, 2015), http://www.state.gov/s/l/treaty/pending/index.htm (last visited Oct 22, 2015). Furthermore, while FATCA authorizes the Treasury Department to adopt regulations and "other guidance," it does not authorize the making of international agreements like the IGAs. *See* 26 U.S.C. § 1474(f). Finally, there is no valid treaty that otherwise authorizes the IGAs. Allison Christians, *The Dubious Legal Pedigree of IGAs (and Why it Matters)*, 69 Tax Notes Int'l 565, 567 (2013) (The "IGAs are not treaty-based agreements.").

164. The President, therefore, lacks the power to conclude the IGAs as sole executive agreements because their subject matter lies outside his constitutional powers.

165. Accordingly, the IGAs must be held unlawful and set aside under section 706 of the APA. The Treasury and the IRS have acted contrary to the President's constitutional power to make international agreements and without observance of the procedure for adopting international agreements required by the Constitution. Defendants should be enjoined from enforcing them.

Count 2
The IGAs are Unconstitutional Sole Executive Agreements Because They Override FATCA

166. Plaintiffs reallege and incorporate by reference all allegations in preceding paragraphs.

167. Under section 706 of the Administrative Procedure Act ("APA"), a court must "hold unlawful and set aside agency action ... found to be – ... (B) contrary to constitutional right, power, privilege, or immunity [and] ... (D) without observance of procedure required by law." 5 U.S.C. § 706.

168. Sole executive agreements may not be "inconsistent with legislation enacted by the Congress in the exercise of its constitutional authority." 11 FAM § 732.2-2(C); *accord Guy W. Capps*, 204 F.2d at 658–600; *Swearingen v. United States*, 565 F. Supp. 1019 (D. Colo. 1983).

169. The IGAs establish a different regulatory scheme than the one mandated by FATCA. The Model 1 IGAs, for example, exempt covered FFIs from the statutory requirement that FFIs report account information directly to the Treasury Department, 26 U.S.C. § 1471(b)(1)(C), and instead allow such FFIs to report the account information to their national governments, *see e.g.*, Canadian IGA, Art. 2, § 2. The Model 2 IGAs, for example, exempt covered FFIs from the obligation "to obtain a valid and effective waiver" of any foreign law that would prevent the reporting of information required by FATCA, 26 U.S.C. § 1471(b)(1)(F)(i), and instead obligates the foreign government to suspend such laws with respect to FATCA reporting by covered FFIs, *see e.g.*, Canadian IGA, *supra*, Art. 2, § 2. This deprives account holders of their right under the statute to refuse a waiver.

170. The President, therefore, lacks the power to conclude the IGAs as sole executive agreements because they override a duly enacted statute.

171. Accordingly, the IGAs must be held unlawful and set aside under section 706 of the APA. The Treasury and the IRS have acted contrary to the President's constitutional power to make international agreements and without observance of the procedure for adopting treaties required by the Constitution. Defendants should be enjoined from enforcing them.

Count 3

The Heightened Reporting Requirements for Foreign Financial Accounts Deny U.S. Citizens Living Abroad the Equal Protection of the Laws

172. Plaintiffs reallege and incorporate by reference all allegations in preceding paragraphs.

173. Under section 706 of the Administrative Procedure Act ("APA"), a court must "hold unlawful and set aside agency action . . . found to be – . . . (B) contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706.

174. The Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V. The Due Process Clause of the Fifth Amendment includes a guarantee of equal protection equivalent to that expressly provided for under the Equal Protection Clause of the Fourteenth Amendment. "An equal protection claim against the federal government is analyzed under the Due Process Clause of the Fifth Amendment." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995); *United States v. Ovalle*, 136 F.3d 1092,

1095 (6th Cir. 1998). Thus, the federal government may not "deny to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, § 1.

175. The only financial information reported to the IRS about domestic accounts is the amount of interest paid to the accounts during a calendar year, 26 U.S.C. §§ 6049(a), (b); 26 C.F.R. §§ 1.6049-4(a)(1), 1.6049-4T(b)(1). For a foreign account, the information reported to the IRS includes not only the interest paid to the account, 26 USC § 1471(c)(1)(C); 26 C.F.R. §§ 1.1471-4(d)(3)(ii), -4(d)(4)(iv); Canadian IGA, art. 2, § 2(a)(6); Czech IGA, art. 2, § 2(a)(6); Israeli IGA, art. 2, § 2(a)(6); French IGA, art. 2, § 2(a)(6); Danish IGA, art. 2, § 2(a)(6); Swiss IGA, arts. 3, 5, but also the amount of any income, gain, loss, deduction, or credit recognized on the account, 26 C.F.R. § 1.6038D-4(a)(8), whether the account was opened or closed during the year, *id.* § 1.6038D-4(a)(6), and the balance of the account, 26 USC §§ 1471(c)(1)(C), 6038D(c)(4); 26 CFR §§ 1.1471-4(d)(3)(ii), 1.6038D-4(a)(5); Canadian IGA, art. 2, § 2(a)(4); Czech IGA, art. 2, § 2(a)(4); Israeli IGA, art. 2, § 2(a)(4); French IGA, art. 2, § 2(a)(4); Danish IGA, art. 2, § 2(a)(4); Swiss IGA, arts. 3, 5; FinCEN, BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114) 15 (June 2014), http://www.fincen.gov/forms/files/ FBAR%20Line%20Item%20Filing%20Instructions.pdf. Comparable information is not required to be disclosed regarding domestic accounts of U.S. citizens.

176. The result is that U.S. citizens living in a foreign country are treated differently than U.S. citizens living in the United States.

177. The federal government has no legitimate interest in knowing the amount of any income, gain, loss, deduction, or credit recognized on a foreign account, whether a foreign account was opened or closed during the year, or the balance of a foreign account. The fact that the local bank accounts of citizens living abroad are not held in the United States bears no rational relationship to any legitimate state interest the federal government might have in prying into the private affairs of citizens living abroad.

178. Accordingly, 26 U.S.C. §§ 1471(c)(1)(C), 6038D(c)(4), 26 C.F.R. §§ 1.1471-4(d)(3)(ii), 1.6038D-4(a)(5), 1.6038D-4(a)(6), 1.6038D-4(a)(8), Canadian IGA, art. 2, § 2(a)(4); Czech IGA, art. 2, § 2(a)(4); French IGA, art. 2, § 2(a)(4); Danish IGA, art. 2, § 2(a)(4); Israeli IGA, art. 2, § 2(a)(4); Swiss IGA, arts. 3, 5; and the FBAR account-balance reporting requirement, FinCEN, BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114) 15 (June 2014), http://www.fincen.gov/forms/files/FBAR%20Line%20Item%20Filing%20Instructions.pdf, are unconstitutional, and Defendants should be enjoined from enforcing them.

Count 4
The FATCA FFI Penalty is Unconstitutional under the Excessive Fines Clause

179. Plaintiffs reallege and incorporate by reference all allegations in preceding paragraphs.

180. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

181. The Excessive Fines Clause is not limited only

to fines that are criminal in nature but extends to civil fines as well. *Austin v. United States*, 509 U.S. 602, 610 (1993). A fine is subject to the Excessive Fines Clause if one of the purposes of the fine is punishment. *Id.*; *United States v. Bajakajian*, 524 U.S. 321, 328 (1998). Fines calibrated for retributive or deterrent purposes are considered to be for the purpose of punishment. *Austin*, 509 U.S. at 610.

182. To withstand constitutionality, fines governed by the Excessive Fines Clause must not be "excessive." U.S. Const. amend. VIII. The "touchstone" of the excessiveness analysis is "principle of proportionality," requiring a comparison of the amount of the fine and the gravity of offense. *Bajakajian*, 524 U.S. at 334. A fine violates the Eighth Amendment when the fine is grossly disproportional to the gravity of the offense. *Id.*.

183. The Supreme Court has identified three "general criteria" to guide the determination of whether a fine is grossly disproportionate: (1) "the degree the defendant's reprehensibility or culpability"; (2) "the relationship between the penalty and the harm to the victim caused by the defendant's actions"; and (3) "the sanctions imposed in other cases for comparable misconduct." *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 434–35 (2001).

184. Under FATCA, payments from U.S. sources to foreign financial institutions not compliant with FATCA are subject to a 30% "tax" (hereinafter the FATCA "FFI Penalty"). 26 U.S.C. § 1471(a); 26 C.F.R. § 1.1471-2T(a)(1). This penalty can be applied to any financial institution anywhere in the world if an institution fails to comply with FATCA.

185. Without the FFI Penalty, foreign financial institutions likely would not comply with FATCA and

Plaintiffs' private financial information would not be disclosed to the United States government. The penalty leaves foreign financial institutions no meaningful alternative but to implement costly compliance systems and comply with FATCA.

186. The FFI Penalty is intended as punishment and is therefore subject to the Excessive Fines Clause. *Austin*, 509 U.S. at 610. The penalty is used as a hammer to coerce compliance by foreign financial institutions everywhere in the world, whether or not they fall within the regulatory jurisdiction of the United States.

187. The FFI Penalty is grossly disproportional to the gravity of the offense it seeks to punish and is therefore unconstitutional. *Bajakajian*, 524 U.S. at 334.

188. Accordingly, 26 U.S.C. § 1471(a) and 26 C.F.R. § 1.1471-2T(a)(1) should be declared unconstitutional, and Defendants should be enjoined from enforcing them.

Count 5

The FATCA Passthrough Penalty is Unconstitutional under the Excessive Fines Clause

189. Plaintiffs reallege and incorporate by reference all allegations in preceding paragraphs.

190. FATCA and the IGAs require foreign financial institutions to "deduct and withhold a tax equal to 30 percent of" any payments made to recalcitrant account holders (hereinafter the FATCA "Passthrough Penalty"). 26 U.S.C. § 1471(b)(1)(D); 26 C.F.R. §§ 1.1471-4(a)(1), 1.1471-4T(b)(1); Canadian IGA, art. 4, § 2; Czech IGA, art. 4, § 2; Israeli IGA, art. 4, § 2; French IGA, art. 4, § 2; Danish IGA, art. 4, § 2; Swiss IGA, art. 3. Recalcitrant account holders are persons who

fail to provide (a) information sufficient to determine whether the account is a United States account to the foreign financial institution holding their account, (b) their name, address, or TIN to the foreign financial institution holding the account, or (c) who fails to provide waiver of a foreign law that would prevent the foreign financial institution from reporting the information to the IRS under FATCA. *Id.* § 1471(d)(6).

191. The Passthrough Penalty is designed to punish and is therefore subject to the Excessive Fines Clause. *Austin*, 509 U.S. at 610.

192. The Passthrough Penalty is grossly disproportionate to the gravity of the offense and is therefore unconstitutional. *Bajakajian*, 524 U.S. at 334.

193. Accordingly, 26 U.S.C. § 1471(b)(1)(D); 26 C.F.R. §§ 1.1471-4(a)(1), 1.1471-4T(b)(1); and Canadian IGA, art. 4, § 2; Czech IGA, art. 4, § 2; Israeli IGA, art. 4, § 2; French IGA, art. 4, § 2; Danish IGA, art. 4, § 2; Swiss IGA, art. 3. should be declared unconstitutional, and Defendants should be enjoined from enforcing them.

Count 6

The FBAR Willfullness Penalty is Unconstitutional under the Excessive Fines Clause

194. Plaintiffs reallege and incorporate by reference all allegations in preceding paragraphs.

195. Section 5321 of the United States Code imposes a maximum penalty of $100,000 or 50% of the balance of the account at the time of the violation, whichever is greater, for failures to file an FBAR as required by section 5314 (hereinafter the FBAR "Willfulness Penalty"). 31 U.S.C. § 5321(b)(5)(C)(i).

196. The Willfulness Penalty is designed to punish

and is therefore subject to the Excessive Fines Clause. *Austin*, 509 U.S. at 610.

197. The Willfulness Penalty is grossly disproportionate to the gravity of the offense and is therefore unconstitutional. *Bajakajian*, 524 U.S. at 334.

198. Accordingly, 31 U.S.C. § 5321(a)(5)(C) should be declared unconstitutional, and Defendants should be enjoined from enforcing them.

Count 7
FATCA's Information Reporting Requirements are Unconstitutional under the Fourth Amendment

199. Plaintiffs reallege and incorporate by reference all allegations in preceding paragraphs.

200. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

201. The Amendment is violated in where "the Government, through 'unreviewed executive discretion,' [is permitted to make] a wide-ranging inquiry that unnecessarily 'touch(es) upon intimate areas of an individual's personal affairs.'" *U.S. v. Miller*, 425 U.S. 435, 444 n.6 (1976) (quoting *California Bankers Assn. v. Shultz*, 416 U.S. 21, at 78-79 (1974) (Powell, J., concurring)). Such indiscriminate searches may only be conducted, at a minimum, after some "invocation of the judicial process" because "the potential for abuse is particularly acute." *California Bankers Assn.*, 416 U.S.

at 79 (Powell, J., concurring); *see also*, *Miller* 425 U.S. at 444 n.6 (distinguishing situation where "the Government has exercised its powers through narrowly directed subpoenas Duces tecum subject to the legal restraints attendant to such process"); *Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015) (holding that, for administrative searches, "the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker.").

202. FATCA requires foreign financial institutions to report a broad range of information about the accounts of United States account holders to the United States government, including:

(a) the name, address, and TIN of the account holder;
(b) the account number;
(c) the average calendar year or year-end balance or value of the account;
(d) the aggregate gross amount of interest paid or credited to the account during the year; and
(e) the aggregate gross amount of all income paid or credited to an account for the calendar year less any interest, dividends, and gross proceeds.

26 U.S.C. § 1471(c)(1); 26 C.F.R. § 1.1471-4(d)(3)(ii); IRS, Instructions for Form 8966 at 10, http://www.irs.gov/pub/irs-pdf/i8966.pdf.

203. FATCA makes no provision for judicial oversight of the searches of the private financial records of American citizens held by foreign financial institutions in violation of the Fourth Amendment.

204. Accordingly, FATCA's information reporting provisions—26 U.S.C. § 1471(c)(1); 26 C.F.R. § 1.1471-4(d); and the FATCA aggregate gross income reporting requirement of Form 8966, IRS, Instructions for Form

8966 at 10, http://www.irs.gov/pub/ irs-pdf/i8966.pdf—should be declared unconstitutional, and Defendants should be enjoined from enforcing them.

Count 8

The IGAs' Information Reporting Requirements are Unconstitutional under the Fourth Amendment

205. Plaintiffs reallege and incorporate by reference all allegations in preceding paragraphs.

206. Under section 706 of the Administrative Procedure Act ("APA"), a court must "hold unlawful and set aside agency action . . . found to be – . . . (B) contrary to constitutional right, power, privilege, or immunity [and] . . . (D) without observance of procedure required by law." 5 U.S.C. § 706.

207. The IGAs require foreign financial institutions and their governments to report a broad range of information about the accounts of United States account holders to the United States government, including:

(a) the name, address, and U.S. TIN of each U.S. account holder;
(b) the account number of each U.S. account holder;
(c) the name and identifying number of the foreign financial institution maintaining the account;
(d) the calendar year-end balance of the account; and
(e) the total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period.

Canadian IGA, art. 2, § 2; Czech IGA, art. 2, § 2; Israeli IGA, art. 2, § 2; French IGA, art. 2, § 2; Danish IGA, art. 2, § 2; Swiss IGA, arts. 3, 5.

208. The IGAs make no provision for judicial over-

sight of the searches of the private financial records of American citizens held by foreign financial institutions in violation of the Fourth Amendment.

209. Accordingly, the information reporting provisions of the IGAs—Canadian IGA, art. 2; Czech IGA, art. 2; Israeli IGA, art. 2; French IGA, art. 2; Danish IGA, art. 2; Swiss IGA, arts. 3, 5—should be declared unconstitutional, and Defendants should be enjoined from enforcing them.

Prayer for Relief

A. Plaintiffs ask this Court to declare unconstitutional and enjoin Defendants from enforcing the following:

B. "Agreement Between the Government of the United States of America and the Government of Canada to Improve International Tax Compliance through Enhanced Exchange of Information under the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital", U.S.-Can., Feb. 5, 2014, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Canada-2-5-2014.pdf (Canadian IGA);

B. Canadian IGA, art. 2;

C. Canadian IGA, art. 2, § 2(a)(4);

D. Canadian IGA, art. 4, § 2;

E. "Agreement between the United States of America and the Czech Republic to Improve International Tax Compliance and with Respect to the United States Information and Reporting Provisions Commonly Known as the Foreign Account Tax Compliance Act", U.S.-Czech Rep., Aug. 4,

2014, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Czech-Republic-8-4-2-14.pdf (Czech IGA);

F. Czech IGA, art. 2;
G. Czech IGA, art. 2, § 2(a)(4);
H. Czech IGA, art. 4, § 2;
I. "Agreement between the Government of the United States of America and the Government of the State of Israel to Improve International Tax Compliance and to Implement FATCA", U.S.-Isr., Jun. 30, 2014, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Israel-6-30-2014.pdf (Israeli IGA);
J. Israeli IGA, art. 2;
K. Israeli IGA, art. 2, § 2(a)(4);
L. Israeli IGA, art. 4, § 2;
M. "Agreement between the government of the United States of America and the government of the French Republic to Improve International Tax Compliance and to Implement FATCA", U.S.-Fr., Nov. 14, 2013, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/BilateralAgreementUSFranceImplementFATCA.pdf (FrenchIGA)
N. French IGA, art. 2;
O. French IGA, art. 2, § 2(a)(4);
P. French IGA, art. 4, § 2;
Q. "Agreement between the Government of the United States of America and the Government of the Kingdom of Denmark to Improve International Tax Compliance and to Implement

FATCA", U.S.-Den., Nov. 19, 2012, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Denmark-11-19-2012.pdf (Danish IGA)

R. Danish IGA, art. 2;

S. Danish IGA, art. 2, § 2(a)(4);

T. Danish IGA, art. 4, § 2;

U. "Agreement between the United States of America and Switzerland for Cooperation to Facilitate the Implementation of FATCA", U.S.-Switz., Feb. 14, 2013, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Switzerland-2-14-2013.pdf (Swiss IGA);

V. Swiss IGA, arts. 3, 5;

W. 26 U.S.C. §§ 1471(a), 1471(b)(1)(D), 1471(c)(1), 1471(c)(1)(c);

X. 26 U.S.C. § 6038D(c)(4);

Y. 31 U.S.C. § 5321(a)(5)(C);

Z. 26 C.F.R. §§ 1.1471-2T(a)(1);

AA. 26 C.F.R. §§ 1.1471-4(a)(1), 1.1471-4(d), 1.1471-4(d)(3)(ii);

BB. 26 C.F.R. §§ 1.1471-4T(b)(1);

CC. 26 C.F.R. §§ 1.6038D-4(a)(5), 1.6038D-4(a)(6), 1.6038D-4(a)(8);

DD. the FATCA aggregate gross income reporting requirement of Form 8966, IRS, Instructions for Form 8966 at 10, http://www.irs.gov/pub/irs-pdf/i8966.pdf; and

EE. the FBAR account-balance reporting requirement articulated at FinCEN, BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114) 15 (June 2014), http://www.fincen.

gov/forms/files/FBAR%20Line%20Item%20Filing %20Instructions.pdf.

FF. Plaintiffs also seek an injunction requiring all Defendants to cease using and to expunge all information about foreign account holders and their accounts received pursuant to any FATCA, FBAR, or IGA reporting, including from individuals, foreign governments, or foreign financial institutions.

GG. Grant any and all other relief this Court deems just and equitable.

Dated: October 30, 2015

Respectfully Submitted,

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