No. _____

In The
Supreme Court of the United States

Mark Crawford et al., *Petitioners*

v.

United States Department of the Treasury et al., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Petition for a Writ of Certiorari

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December 2017

Questions Presented

In *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334 (2014), this Court unanimously rejected the Sixth Circuit's restrictive Article III standing rules and held that: (**i**) where "future injury" is at issue, it may be "'certainly impending'" *or* at "'substantial risk'" of occurring; (**ii**) where future injury is the risk of "enforcement of a law," neither violating a law nor an "enforcement action is ... a prerequisite to challenging the law"; and (**iii**) "a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a *credible threat of prosecution* thereunder.'" *Id.* at 2341-42 (emphasis added) (citations omitted). And *Roe v. Wade*, 410 U.S. 113, 125 (1973), held that persons denied services due to a law coercing third parties not to provide the service may challenge the law even though legal penalties apply only to providers.

The core issue is whether the Sixth Circuit erred by holding that Petitioners lack standing—and that amending their complaint won't fix standing—based on standing rules that violate *Driehaus*, *Roe*, and other precedents. This issue poses six sub-issues:

1. Whether the Sixth Circuit erred by substituting for *Driehaus*'s rule—that "certainly impending" future harm *or* a "substantial risk" thereof suffices, including "a credible threat of prosecution"—a Sixth Circuit rule that "the threat of prosecution 'must be *certainly impending*,'" with "a *certain* threat of prosecution."

2. Whether the Sixth Circuit erred by ignoring *Driehaus*'s rule—that where injury is the risk of "enforcement of a law," neither violating a law nor an "enforce-

ment action is ... a prerequisite to challenging the law"—and holding that Petitioners lack standing to challenge as unconstitutional provisions that they won't violate due to penalties.

3. Whether the Sixth Circuit erred by ignoring *Roe*'s rule—that third-party withholding of a service due to a law gives persons denied the service standing to challenge the law—and holding that persons denied financial services lack standing, despite evidence of the coercive effect of the challenged provisions, because the providers' actions are merely the "*voluntary and independent* action[]" of third parties.

4. Whether the Sixth Circuit erred by ignoring evidence in the Complaint of the coercive effect of the challenged provisions and of other injuries despite its duty, under *Warth v. Seldin*, 422 U.S. 490, 501 (1975), to "accept as true all material allegations ... and ... construe the complaint in favor of the complaining party."

5. Whether the Sixth Circuit erred by refusing to recognize a privacy interest in financial records under the conditions at issue here—including unreviewed, blanket, bulk-data collection of intimate details of the affairs of persons not suspected of wrongdoing to be shared with foreign governments in a climate of cyber insecurity—which conditions were not at issue when *United States v. Miller*, 425 U.S. 435 (1976), declined to recognize a financial-record privacy interest.

6. Whether the Sixth Circuit erred in not recognizing U.S. Senator Paul's standing to challenge International Governmental Agreements ("IGAs") implementing the Foreign Account Tax Compliance Act because he was denied the opportunity to vote on the IGAs, either as a part of "advice and consent" under Article II or as congressional-executive agreements.

Parties to the Proceeding Below

Plaintiffs-appellants below were: (**a**) Mark Crawford; (**b**) Senator Rand Paul, in his official capacity as a member of the United States Senate; (**c**) Roger Johnson; (**c**) Daniel Kuettel; (**d**) Stephen J. Kish; (**e**) Donna-Lane Nelson: and (**f**) L. Marc Zell.

Defendants-appellees below were: (**1**) United States Department of the Treasury; (**2**) United States Internal Revenue Service; and (**3**) United States Financial Crimes Enforcement Network.

Corporate Disclosure

No petitioner is incorporated.

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Petition

Petitioners request review of *Crawford v. United States Department of the Treasury*, 868 F.3d 438 (6th Cir. 2017). (App.1a.)

Opinions and Orders Below

The relevant opinions and orders below are:

Crawford v. United States Department of the Treasury, No. 3:15-cv-00250 (S.D. Ohio Sept. 29, 2015) (opinion and order denying preliminary injunction) (App.74a);

Crawford v. United States Department of the Treasury, No. 3:15-cv-00250, 2016 U.S. Dist. LEXIS 55395 (S.D. Ohio Apr. 25, 2016) (opinion and order dismissing case based on standing) (App.41a);

Crawford v. Unites States Department of the Treasury, 868 F.3d 438 (6th Cir. 2017) (opinion and decision below) (App.1a); and

Crawford v. United States Department of the Treasury, No. 16-3539 2017 U.S. App. LEXIS 19608 (6th Cir. Sept. 26, 2017) (order denying rehearing and rehearing en banc) (App.116a).

Jurisdiction

The Sixth Circuit filed the decision below, and entered judgment, on August 18, 2017, and it denied rehearing en banc on September 26, 2017. This Court has jurisdiction under 28 U.S.C. 1254(1).

Constitutional Provision at Issue

"The judicial power shall extend to all cases ... [and] controversies ...." U.S. Const. art. III, § 2.

Statement of the Case

Central to this case are injuries to Americans abroad caused by the coercion of the Foreign Account Tax Compliance Act ("FATCA") and Intergovernmental Agreements ("IGAs") purporting to implement FATCA. In their (proposed) Amended Complaint,[1] Petitioners recited findings of the *2014 FATCA Research Project*, by Democrats Abroad (App.178-83a), which research

> show[s] the intense impact FATCA is having on overseas Americans. Their financial accounts are being closed, their relationships with their non-American spouses are under strain, some Americans are denied promotion or partnership in business because of FATCA ... and some are planning or contemplating renouncing their US citizenship. Some have already done so.

Democrats Abroad, *FATCA: Affecting Everyday Americans Every Day* at 3 (Sept. 2014) ("Democrats Abroad Study").[2]

Notably, the Democrats Abroad Study said these

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[1] Given the dismissal for lack of standing below, the adequacy of the Verified Complaint and the proposed Verified Amended Complaint are at issue, so both are in the Appendix ("App."). Petitioners cite the latter because denial of leave to amend (as "futile") was erroneous and the Amended Complaint provides the fullest statement of facts that must be accepted as true, with all inferences to Petitioners. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

[2] *Available through* http://www.democratsabroad.org/fatca_research_affecting_everyday_americans_every_day *and at* https://www.finance.senate.gov/imo/media/doc/Att%202%20Democrats%20Abroad%202014%20FATCA%20Research%20Report1.pdf.

injuries were *caused by* FATCA, and were not the result of mere independent decisions by foreign financial institutions ("FFIs"), which must be accepted as true, as must the statements of Petitioners that they were denied banking services by FFIs *because of* FATCA/IGAs. *Warth*, 422 U.S. at 501. Based on these and other injuries, Petitioners challenged FATCA, applicable IGAs, and the Report of Foreign Bank and Financial Accounts ("FBAR").

FATCA.[3] FATCA was supposed to fight tax evasion by Americans not reporting assets in FFIs. But FATCA causes harms described in the Democrats Abroad Study, including banking-service denial and disclosure of information Americans would not otherwise disclose. FATCA forces FFIs—under a significant noncompliance penalty—to search out and report on U.S. account holders. Because of this penalty and staggering compliance costs, many FFIs refuse, or close, U.S. accounts.

FATCA mandates individual and FFI reporting. Individuals report foreign assets aggregating over $50,000 on the last tax-year day or $75,000 any time during the tax year (doubled for married persons filing jointly), 26 U.S.C. 6038D(a), though the Secretary allows those abroad to report at $200,000 and $300,000, respectively (all doubled for joint filers). Foreign financial assets must be reported to the IRS, with the following information: FFI's name and address; account number; taxable-year maximum value; account opening/closing; amount of tax-year income, gain, loss, deduction, or credit and reporting details; and information about currency and exchange rate. 26 U.S.C.

[3] FATCA is codified at 26 U.S.C. 1471-74, 6038D, and other scattered sections of Title 26.

6038D(c); 26 C.F.R. 1.6038D-4(a). Form 8938 also requires aggregate amount of interest, dividends, royalties, other income, gains, losses, deductions, and credits for the foregoing. Non-reporters are subject to a $10,000 penalty for each report failure and 40% of the amount of any underpaid tax related to the asset. 26 U.S.C. 6038D(d), 6662(j)(3).

FFIs annually report detailed information on U.S. accounts to the IRS, whether or not tax evasion is suspected. 26 U.S.C. 1471(b). The report (Form 8966) includes: name, address, and TIN of account holders; account numbers; account balance or value; and gross receipts and withdrawals or payments. 26 U.S.C. 1471(c)(1); 26 C.F.R. 1.1471-4(d)(3)(ii). Form 8966 additionally requires FFIs to report calendar-year aggregate gross amounts of all income paid or credited to an account for the calendar year less any interest, dividends, and gross proceeds. Noncompliant FFIs are subject to a penalty of 30% of the amount of any payment originating from sources within the U.S. ("FFI Penalty"). 26 U.S.C. 1471(a).

Estimates for implementing FATCA by large banks are approximately $100 million each and around $8 billion systemwide. Robert W. Wood, *FATCA Carries Fat Price Tag*, Forbes, Nov. 30, 2011, https://www.forbes.com/sites/robertwood/2011/11/30/fatca-carries-fat-price-tag/#65511b484ae9. Twenty-seven percent of surveyed financial institutions estimated their 2015 compliance cost to be from $100,000 to $1 million. Thomson Reuters, *Thomson Reuters survey indicates FATCA compliance to cost more than anticipated*, Nov. 12, 2014, https://tax.thomsonreuters.com/press-room/press-release/thomson-reuters-survey-indicates-fatca-compliance-cost-anticipated/. So FATCA causes many

FFIs to decline services to Americans abroad. The Democrats Abroad Study found that 22.5% of Americans abroad attempting to open savings or retirement accounts and 10% of those attempting to open checking accounts could not. *Id.* at 6. About a million Americans abroad (a sixth) had bank accounts closed due to FATCA. 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/ ("Hughes").

FATCA burdens harm personal relationships, Democrats Abroad Study at 7-9, with 20.8% separating accounts (or considering it) from non-American spouses, *id.* at 7, and 2.4% separating or divorcing (or considering those) due to FATCA's reporting requirements, *id.* The Study says some relinquished U.S. citizenship to avoid FATCA's burdens (as did some Petitioners).

For standing purposes here, the allegations that these harms were caused by FATCA and implementing IGAs must be accepted as true, along with any inferences favorable to Petitioners, so the courts below could not properly say rejections of U.S. accounts were mere independent third-party decisions "for some other reasons" (App.30a) nowhere in evidence

IGAs. The Treasury Department and IRS implemented FATCA by regulations and IGAs with foreign nations. No IGA was authorized by existing treaty, and none was submitted to the Senate for the advice and consent required for treaties, U.S. Const. art. II, § 2, cl. 2, or approved in both houses of Congress, though this was required. (App.227a (Count 1).) Model 1 IGAs require foreign governments to collect and report FATCA-required information to the IRS. In Model 2 IGAs, foreign governments agree to direct covered FFIs

to register with the IRS and comply with (some) FATCA obligations. Under both models, the U.S. treats the country as FATCA-compliant and not subject to FATCA's 30% FFI Penalty.

FBAR. The Report of Foreign Bank and Financial Accounts ("FBAR") must be filed annually with the IRS by persons (including individuals, corporations, trusts, etc.) with a financial interest in, or signatory authority over, a bank, securities, or other financial account in a foreign country aggregating over $10,000. 31 U.S.C. 5314; 31 C.F.R. 1010.306(c), 1010.350(a).

Reportable accounts include savings accounts, depository accounts, checking accounts, securities accounts, etc. 31 C.F.R. 1010.350(c). Persons have financial interests in reportable accounts in several circumstances, e.g., when they own or hold legal title to the account, when they are agent or attorney for the account, or when they own over 50% of the voting power, total value of equity, interest, or assets, or interest in profits. 31 C.F.R. 1010.350(e). Persons have signature authority over accounts when they have "authority ... (alone or in conjunction) 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." 31 C.F.R. 1010.350(f)(1).

Failure to file FBARs can bring civil and criminal penalties. 31 U.S.C. 5321(d). Civil penalties depend on willfulness. 31 U.S.C. 5321(a)(5). Non-willful violations have a maximum penalty of $10,000 for each unfiled report. 31 U.S.C. 5321(a)(5)(B)(i). This may not be imposed for non-willful violations due to "reasonable cause" and the account balance was "properly reported." 31 U.S.C. 5321(a)(5)(B)(ii). Willful violations

have a maximum penalty of $100,000 or 50% of the balance at the violation. 31 U.S.C. 5321(a)(5)(C)(i). The maximum criminal penalty is a $250,000 fine and five-year imprisonment. 31 U.S.C. 5322(a).

Plaintiffs. Petitioners, like those in the Democrats Abroad Study, are being injured by challenged provisions and IGAs, including by financial-service denial and familial problems—some renounced U.S. citizenship as a result.[4] Plaintiffs also suffer privacy-right violations because they don't want their finances disclosed to the U.S. and foreign governments, especially in the present cyber-theft climate. Plaintiffs would not disclose or permit others to so disclose their private information but for the challenged provisions, IGAs, and penalties for noncompliance. Plaintiffs reasonably fear that they, spouses, child, or funds in joint accounts will be subject to the unconstitutionally excessive fines imposed by the FBAR Penalty, 31 U.S.C. 5321, if they, spouses, or child willfully fail to file an FBAR report. Petitioners Crawford, Kuettel, and Zell are described next, with their injuries.[5]

Plaintiff Crawford. Mark Crawford, a U.S. citizen living in Albania and Ohio, is founder and sole owner of Aksioner International Securities Brokerage in Albania. Until Summer 2015, Aksioner was the only licensed brokerage firm in Albania and an introductory broker, working with Saxo Bank, Denmark. The Saxo relationship doesn't allow Aksioner to accept U.S.-citizen clients in part because Saxo does not wish to as-

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[4] Senator Paul's unique harm is discussed in Part VI.

[5] Though word limits preclude describing all Plaintiffs and injuries, those are in the (proposed) Amended Complaint. (App.185-214a.)

sume resulting FATCA/IGA burdens. This has impacted Mark financially, forcing him to turn away prospective American clients in Albania. 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 because he is a U.S. citizen. Saxo is governed by the Danish Model 1 IGA, so rather than reporting information about U.S. clients, Saxo turns away Americans. The aggregate value of Mark's foreign accounts has been greater than $10,000 in both 2014 and 2015, subjecting him to FBAR reporting. Mark filed the FBAR report each year but doesn't want to do so because it violates his and his wife's privacy. (App.185-89a.)

Plaintiff Kuettel. Daniel Kuettel is a Swiss citizen and resident. His wife is a Swiss-Philippine citizen. Daniel renounced his U.S. citizenship in 2012 because of difficulties caused by FATCA and the IGA. Many Swiss banks don't accept American clients because of FATCA/IGA burdens. This has caused many to consider renouncing U.S. citizenship. 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 public and, upon inquiry, U.S. citizens were generally rejected, or rejected months later. He contacted the U.S. Veterans Administration and U.S. Department of Housing and Urban Development for assistance, but both declined. Left with few options, Daniel renounced his U.S. citizenship so his family could continue the life they had built in Switzerland. 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 renunciation was the only real option for his family.

Daniel currently maintains a college savings account for his daughter in his own name at PostFinance bank in Switzerland but wants to transfer ownership to her, which would offer advantages such as better interest rates and discounts for local businesses. The account currently has a balance over $10,000. If the account were in his daughter's name, Daniel would transfer the full balance to her and make monthly deposits of $200 to the account for the foreseeable future. But Daniel will refrain from transferring ownership to her 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 "willfully" failed to file an FBAR for the account. According to FinCEN's FBAR filing instructions, U.S.-citizen children are required to file FBAR reports for foreign accounts. FinCEN, *BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114)* at 6 (2014). Where children are incapable, FinCEN requires parents to file on their behalf. *Id.* Daniel's daughter is incapable of reporting because she is a minor (ten years old when this case commenced). Daniel objects to filing an FBAR report 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's privacy to do so. Daniel's

daughter cannot avoid FBAR reporting by renouncing U.S. citizenship because she is too young.[6] (App.197-200a.)

Plaintiff Zell. L. Marc Zell is a U.S.-Israeli citizen residing in Israel. He is a member of the bars of Maryland, D.C., Virginia, and Israel. He practices with an Israeli firm he co-founded, Zell, Aron & Co. As an attorney, he was approached several times by other Israeli-Americans wanting to renounce U.S. citizenship. They are concerned by the FATCA/IGA-imposed hardships. Many are U.S. citizens because they were born to Americans but in all other respects call Israel home and have not even been in the United States, yet they find themselves trapped by FATCA by birth.

Clients frequently ask Marc and his firm 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 U.S. and non-U.S. persons and entities. Israeli banking officials said 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. So banks required Marc and his firm to close trust accounts in some cases, and in other instances banks have refused to open the requested trust account.

In one case, Marc was repeatedly requested by his firm's bank to transfer securities of a company registered on the Tel Aviv Stock Exchange (with current fair market value over $2.5 million) from the trust ac-

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[6] Daniel's daughter would have been added as a plaintiff in the Amended Complaint. (App.200-03a.)

count. 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 are U. S. citizens.

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 U.S. When questioned about this practice, the banking officials said 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 disclose 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.

FATCA has also impinged on the sanctity of the attorney-client relationship between Marc, his firm, and clients. 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. Numerous clients have advised 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 those men-

tioned above, Marc has decided not to comply with the FATCA disclosure requirements whenever that alternative exists. Marc holds funds in trust for one client at Israel Discount Bank. The bank asked Marc to provide information necessary to identify him and the client as U.S. persons subject to FATCA. The client 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).

Marc also has two personal checking accounts at Israel Discount Bank to support his day-to-day financial needs. His bank asked him to provide additional information necessary to identify him as a U.S. 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).

Marc's foreign accounts aggregated over $10,000 in 2014 and 2015, subjecting 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. (App.209-14a.)

Complaint. Petitioners filed a Verified Complaint (App.117a), and sought leave to file a Verified Amended Complaint (App.174a), seeking declaratory and injunctive relief on eight counts.

Count 1 challenges IGAs under the Administrative Procedure Act ("APA"), 5 U.S.C. 706, as agency action

beyond constitutional authority. Possible authority sources are the Treaty Clause, an act of Congress, an existing treaty, and the President's independent constitutional powers. The first three require congressional action, absent for the IGAs, making the IGAs sole executive agreements. But the President lacks power to impose taxes or specify their manner of collection, or any other power to enter into IGAs unilaterally, so the IGAs must be held unlawful and enforcement enjoined. (App.227a.)

Count 2 challenges IGAs under APA as unconstitutional sole executive agreements because they are inconsistent with and override FATCA, e.g., FATCA requires FFIs to report directly to the IRS, but Model 1 IGAs require reporting to foreign governments. And though FATCA requires FFIs to obtain waivers from U.S. persons of foreign laws barring FFI reporting of FATCA-required information, Model 2 IGAs require foreign governments to suspend such protective laws, depriving account holders of their waiver-refusal right. As Presidents lack power to conclude sole executive agreements that override FATCA, the IGAs must be held unlawful and enforcement enjoined. (App.230a.)

Count 3 challenges FATCA and IGA heightened reporting requirements under APA on Fifth Amendment equal-protection grounds. Whereas only the annual interest is reported on the everyday-living accounts of persons with domestic accounts, FATCA and IGAs require more information, *see supra at* 3-6, which isn't justified by any legitimate interest. (App.231a.)

Count 4 challenges FATCA's FFI Penalty,[7] without

[7] In FATCA, payments from U.S. sources to non-FATCA-compliant FFIs are subject to a 30% "tax," the "FFI Pen-

which FFIs wouldn't comply with FATCA and private information wouldn't be disclosed to the IRS. FFIs must implement costly compliance systems or decline U.S. accounts. The FFI Penalty is intended as a punishment and so is subject to the excessive-fines clause of U.S. Constitution's Eighth Amendment. The FFI Penalty coerces FFI compliance worldwide. As it is grossly disproportional to the gravity of the offence it seeks to punish, it should be declared unconstitutional and enforcement enjoined. (App.233a.)

Count 5 challenges FATCA's Passthrough Penalty[8] as unconstitutional under the Excessive Fines Clause. The Passthrough Penalty is designed to punish and so is subject to the Excessive Fines Clause. As it is grossly disproportionate to the gravity of the offense it seeks to punish, it should be declared unconstitutional and enforcement enjoined.

Count 6 challenges the FBAR Willfulness Penalty (for failure to file an FBAR) as unconstitutional under the Excessive Fines Clause. The Willfulness Penalty imposes a maximum penalty of $100,000 or 50% of the balance of an unreported account, whichever is greater. 31 U.S.C. 5321(b)(5)(C)(i). It is designed to punish and so is subject to the Excessive Fines Clause. As it is grossly disproportionate to the gravity of the offense it seeks to punish, it should be declared unconstitutional and enforcement enjoined. (App.235a.)

Count 7 challenges FATCA's information reporting

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alty." 26 U.S.C. 1471(a); 26 C.F.R. 1.1471-2T(a)(1). This penalty can be applied to any FFI anywhere.

[8] FATCA and IGAs require FFIs to "deduct and withhold a tax equal to 30 percent of" any payments made to recalcitrant account holders ("Passthrough Penalty").

requirements as unconstitutional under the Fourth Amendment, violated where "the Government, through 'unreviewed executive discretion,' [makes] 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 Association v. Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J. concurring)). Such indiscriminate searches may only be conducted, at minimum, after "invocation of the judicial process" because "the potential for abuse is particularly acute." *California Bankers Association*, 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) (for administrative searches "the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker."). FATCA makes no provision for judicial oversight of the searches of the private financial records of Americans by FFIs, so challenged provisions should be declared unconstitutional and enforcement enjoined. (App.237a.)

Count 8 challenges IGAs' information reporting requirements on the same grounds as Count 7, and the challenged provisions should be declared unconstitutional and enforcement enjoined. (App.239a.)

Proceedings. On July 14, 2015, Plaintiffs filed their Verified Complaint. Plaintiffs moved for a preliminary injunction. The Government moved to dismiss. The court denied a preliminary injunction, holding (inter alia) that Plaintiffs "lack standing, as the harms they allege are remote and speculative ..., most ...

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." (App.114a.) On April 26, 2016, the court ordered dismissal and denied a motion for leave to amend the complaint as "futile" because plaintiffs would yet lack standing. (App.41a.)

The Sixth Circuit filed the decision below and entered judgment, on August 18, 2017, affirming the district court's holding that plaintiffs lack standing and amending the complaint would be futile to fix that problem. (App.1a.) Specific details about the court's standing analysis are discussed below with the issues discussions, but they include tests that violate this Court's tests in *Driehaus*, 134 S.Ct. 2334, and *Roe*, 410 U.S. 113, along with the erroneous holding that one must violate a law to challenge it under the Declaratory Judgment Act and/or a constitutional provision.

On September 26, 2017, the Sixth Circuit denied Petitioners' en-banc-rehearing petition. (App.116a.)

The district court had jurisdiction under 28 U.S.C. 2201-02 (Declaratory Judgment Act), 1331 (federal question), and 1343(a) (civil rights)—because the case arises under the Treaty Clause, U.S. Const. art. II, § 2, cl.2, and makes Fourth, Fifth, and Eighth Amendment claims—as well as the Administrative Procedure Act ("APA"), 5 U.S.C. 702. The appellate court had jurisdiction under 28 U.S.C. 1291.

Reasons to Grant the Petition

I.
The Sixth Circuit's Future-Injury Standing Rule Conflicts with *Driehaus* and Creates Circuit Splits.

The first question is whether the Sixth Circuit erred by substituting for *Driehaus*'s rule—that "certainly impending" future harm *or* a "substantial risk" thereof suffices, including "a credible threat of prosecution," 134 S.Ct. at 2341-42 (emphasis added) (citations omitted)—a Sixth Circuit rule that "the threat of prosecution 'must be *certainly impending*,'" with "a *certain* threat of prosecution." (App.26a.)

The Sixth Circuit's rule conflicts with *Driehaus*, as discussed next. And it creates circuit splits. *See infra* at 19.

Though the Sixth Circuit quoted *Driehaus*'s "credible threat" rule (App.26a), it held that "to amount to a 'credible threat'" "the threat of prosecution 'must be *certainly impending*.'" (App.26a (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)).) But *Driehaus* quoted *Clapper* for a broader rule: "An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a '"substantial risk' that the harm will occur.'" *Driehaus*, 134 S.Ct. at 2341 (quoting 568 U.S. at 414 n.5). And a "credible threat of prosecution" suffices for preenforcement challenges. *Id.* at 2342.

Though the Sixth Circuit quoted *Driehaus*'s language about "alleging 'an intention to engage in a course of conduct affected with a constitutional interest'" (App.26a (quoting 134 S.Ct. at 2342 (citation omit-

ted)), the Sixth Circuit held that "there must be a *substantial probability* that the plaintiff will engage in conduct ...." (App.26a (emphasis in original).) And instead of simply reciting *Driehaus*'s rule, it created its own hybrid rule:

> Putting ... *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 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.

(App.26a (emphasis in original).) This formulation conflicts with *Driehaus*, reasserting what *Driehaus* rejected—too-narrow standing rules.

The difference affects this case. In applying its test to Plaintiff Zell, though the panel recited *Driehaus*'s credible-threat standard, it plainly required its *certain*-threat interpretation, holding that though Zell "'is not currently complying with' the FBAR" (App.38a (citation omitted)), he lacks standing to challenge FBAR because he "has not alleged any facts that would show a credible threat of enforcement against him." (App. 38a.*)* But under *Driehaus*'s credible-threat standard, enforcement is credible if one violates a law. *Driehaus* noted that enforcement proceedings under the provision at issue "are not rare" and the government "has not disavowed enforcement." 134 S.Ct. at 2345. *Driehaus* stated: "'The government has not argued to this Court that plaintiffs will not be prosecuted if they do what they say they wish to do.'" *Id.* (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16 (2010)). So

the *Government* had to prove it disavowed enforcement or Zell will not be prosecuted. It didn't. The enforcement threat is credible. Zell has standing.

Moreover, the Sixth Circuit's substitution of its own tests for this Court's tests in *Driehaus* creates splits with the Seventh, Ninth, Tenth, and Eleventh Circuits, which have followed *Driehaus*'s credible-threat-of-prosecution test for preenforcement challenges. The Seventh Circuit cited *Driehaus*'s "'substantial risk'" test and held this would be satisfied for "future injury" by ""'a credible threat of prosecution.'"" *Six Star Holdings v. City of Milwaukee*, 821 F.3d 795, 802 (7th Cir. 2016) (citations omitted). The Ninth Circuit likewise cited *Driehaus* for the credible-threat-of-prosecution test for preenforcement challenges. *Real v. City of Long Beach*, 852 F.3d 929, 935 (9th Cir. 2017). The Tenth Circuit cited *Driehaus* for a "certainly impending" test, but held this would be satisfied for a preenforcement challenge by the credible-threat-of-enforcement test. *Colorado Outfitters Association v. Hickenlooper*, 823 F.3d 537, 544-45 (10th Cir. 2016). The Eleventh Circuit quoted *Driehaus* for the credible-threat-of-enforcement test for preenforcement challenges. *Wollschlaeger v. Governor*, 848 F.3d 1293, 1304 (2017). These circuits followed *Driehaus*. The Sixth Circuit's test doesn't.

Whether the Sixth Circuit erred in adopting a narrower standing rule than this Court has established is an important federal question that this Court should accept for review because standing rules apply broadly and the duty of lower courts to follow this Court's holdings should be reaffirmed.

II.
The Sixth Circuit's Requirement that Plaintiffs Violate Provisions to Have Standing Conflicts with *Driehaus*.

The second question is whether the Sixth Circuit erred by ignoring *Driehaus*'s rule—that where injury is the risk of "enforcement of a law," neither violating a law nor an "enforcement action is ... a prerequisite to challenging the law"—and holding that Petitioners lack standing to challenge as unconstitutional provisions that they will not violate due to penalties.

For this Court's rule, *Driehaus* cited a First Amendment case, 134 S.Ct. at 2342 (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)), and a patent case under the Declaratory Judgment Act, *id.* (quoting *MedImmune v. Genetech*, 549 U.S. 118, 128-29 (2007)). The present case involves both constitutional challenges and the Declaratory Judgment Act, so no one was required to violate a law to have standing.

Plaintiff Zell verified that he has not complied with FBAR's requirements, as the Sixth Circuit acknowledged (App.38a), and numerous Petitioners verified that they don't *want* to file FBAR reports, believing them unconstitutional, and wouldn't file them if not required. (*See, e.g.*, App.188a.) Both situations suffice for standing because *Driehaus*'s "course of conduct'" includes not just a stated intent to violate but also an intent to not comply given judicial relief. For example, *Driehaus* said that in *Steffel*, 415 U.S. 452, Steffel "stated his *desire* to continue handbilling," *Driehaus*, 134 S.Ct. at 2342 (emphasis added), not that he intended to engage in that course of conduct absent requested relief. Under *Driehaus* it suffices for standing

to challenge provisions as unconstitutional if one would not comply with them but for penalties. Yet, the Sixth Circuit held that Plaintiffs challenging FBAR who said they do not want to file FBARs, but have not said they will violate the FBAR requirement, lack standing to challenge FBAR, which violates the requirement for constitutional cases.

Regarding Petitioners' Declaratory Judgment Act challenges, "where threatened action by *government* is concerned," and "the threat-eliminating behavior was effectively coerced," i.e., where persons avoid actions they would otherwise do to avoid penalties, they have standing to avoid "[t]he dilemma posed by that coercion—putting the challenger to the choice between abandoning his rights or risking prosecution" because that is a "'dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate.'" *MedImmune*, 549 U.S. at 129 (emphasis in original; citation omitted). So Petitioners may not be denied standing for not violating challenged provisions.

Whether the requirements of this Court and the Declaratory Judgment Act—that plaintiffs need neither violate nor allege intent to violate challenged provisions—remain in effect and must be followed is an important federal question this Court should decide.

III.
The Sixth Circuit's Rejection of Indirect Injury Based on Coerced Third-Party Actions Conflicts with *Roe*.

The third question is whether the Sixth Circuit erred by not applying *Roe*'s rule—that third-party withholding of a service due to a law gives persons denied the service standing to challenge the law—and

holding that persons denied financial services lack standing, despite evidence of the coercive effect of the challenged provisions, because the providers' actions are merely "*voluntary and independent* actions" of third parties. (App.31a (emphasis in original).)

Roe, 410 U.S. 113, involved a law banning abortions by penalizing physicians doing them—not women seeking them. Jane Roe had standing to challenge the law because physicians wouldn't provide her an abortion. The Sixth Circuit acknowledged that she had standing because a "'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 ...." (App.31 (citation omitted).)

Here—based on the experience of Plaintiffs and others identified in the Democrats Abroad Study—FFIs are declining to provide financial services to Americans abroad because of the coercive effect of FATCA and the IGAs, which impose burdensome requirements and substantial penalties for noncompliance unless FFIs comply by not serving Americans. That coercion suffices for standing.

The Sixth Circuit attempts to evade *Roe* with a curious number-of-options analysis:

> 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.

(App.29.)[9] But, the court continues, there is a "third option available here and not in *Roe*." (App.29a.)

Of course the true third option is compliance by *bearing* FATCA/IGA burdens. But those burdens *coerce* FFIs to close and reject U.S. accounts, so standing remains.

Instead of that straightforward framing of a third option, the Sixth Circuit posits the following third option: "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," i.e., "gathering FATCA-compliance-related information from non-United States persons, or by choosing not do business with certain individuals, whether to protect their own interests in FATCA compliance or for some other reason" (App.30a), which the court deems "an injury that results from the third party's *voluntary and independent* actions or omissions." (App.31a (emphasis in original).) At least four errors are obvious.

First, the court errs regarding collecting information required by FATCA/IGAs "from non-U.S. persons." The court offers no detail but errs because, inter alia, where a U.S. and a non-U.S. person have a joint account, the non-U.S. person's information is required by FATCA/IGAs, and to search out U.S. accounts (to report them or eliminate them), FFIs must seek information from a wide range of persons. In fact, failure to find a few U.S. accounts (while trying to eliminate all) cost an FFI that sought to eliminate U.S. accounts a

[9] Plaintiffs didn't argue any particular number of options (the number being irrelevant), but that *Roe*'s standing doctrine applies because service denial is similarly coerced.

fortune,[10] so the stakes are high and FATCA/IGAs are coercive.

Second, the court errs with the analytical disconnect that FFIs can "*do* business with United States persons" by "choosing *not* to do business with certain individuals, whether to protect their own interest in FATCA compliance or for some other reason." (App.29-30a (emphasis added) (citing Saxo Bank as rejecting U.S. accounts).) *Doing* business by *not* doing business makes no sense.

Third, the court errs here by (i) rejecting as untrue Petitioners' allegations of coercion from FATCA/IGAs, (ii) speculating about "other reason[s]" not in evidence, and (iii) refusing to give all inferences to Plaintiffs, which violates its duty in considering dismissal mo-

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[10] A 2015 Non-Prosecution Agreement between the U.S. Department of Justice and Swiss bank Zweiplus proves that FFIs are actively dumping U.S. accounts due to FATCA/IGAs. *See* https://www.justice.gov/opa/file/762271/download. The Agreement assessed a penalty of $1,089,000 for not reporting on 44 U.S. accounts, though

> [s]ince Zweiplus opened in July of 2008, its formal policy has been to reject all clients who qualified as taxable under U.S. law. When Zweiplus acquired retail clients from [two other banks], the three banks agreed that no U.S. clients would be transferred [though, as it turned out, some actually were]. When the Bank later discovered clients who were in fact subject to U.S. taxation, the Bank sought to terminate the relationship with those clients.

Id. Of the 250,000 accounts transferred to Zweiplus from the banks, 42 turned out to be U.S. accounts, and two were *not* when opened by Zweiplus, but *became* so when the non-U.S. account holders moved to the United states. *Id.*

tions, as further addressed in Part IV, *infra*. For present purposes the court was required in the dismissal context to accept that FFIs reject U.S. accounts under coercion of FATCA/IGA burdens, as alleged by Petitioners and supported by the Democrats Abroad Study (and other evidence) recited in the complaints.

Fourth, the court errs by saying that the three options for an FFI ("the account holder[]") are "close your account, pay the penalty, or keep your account open while filing the required paperwork to do so." (App.29a n.8.) FFIs are not closing accounts over *mere paperwork*, but because of severe compliance burdens (including paperwork and *much* more) and severe penalties for noncompliance. *See supra* note 10.

So the courts' two-option versus three-option analysis fails to come to grips with the coercion that gives standing. If in *Roe* physicians were declining to do abortions because of the onerous burden of complying with state requirements to monitor and report on women seeking abortions, women would have had standing to challenge those laws.

Whether *Roe*'s standing doctrine should be followed here is an important federal question that this Court should accept for review because this standing issue has broad applicability and the duty to follow this Court's holdings should be reaffirmed.

IV.

The Sixth Circuit's Failure to Accept Allegations as True and Construe Inferences in Plaintiffs' Favor Conflicts with *Warth*.

The fourth question is whether the Sixth Circuit erred by ignoring evidence in the Complaint of the coercive effect of the challenged provisions and of other

injuries despite its duty, under *Warth*, 422 U.S. at 501, to "accept as true all material allegations ... and ... construe the complaint in favor of the complaining party."

Motions to dismiss for lack of subject-matter jurisdiction, under Rule 12(b)(1), are "facial" or "factual" attacks. *Cartright v. Garner*, 751 F.3d. 752, 759 (6th Cir. 2007). "A facial attack goes to the question of whether the plaintiff has alleged a basis for subject matter jurisdiction, and the court takes the allegation of the complaint as true for purposes of Rule 12(b)(1)." *Id.* "A factual attack challenges the factual existence of subject matter jurisdiction." *Id.* Here the district court did not decide conflicting factual claims, so this is a facial attack. Thus, the courts below were supposed to "construe[] broadly and liberally" the complaint "as a whole" and consider what may be "inferred" from pleaded facts. 5B Wright & Miller, Fed. Prac. & Proc. Civ. § 1350 (3d ed. Apr. 2016 update). Complaints need only provide a "short and plain statement" regarding jurisdiction and claims, Fed. R. Civ. P. 8(a), and to survive dismissal motions, complaints need only have sufficient factual matter, accepted as true, to "'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted). Petitioners provided far more than was required.

Though the Sixth Circuit recited the duty to "accept as true all the material allegations in the Plaintiffs' complaints, and ... construe Plaintiffs' complaints in Plaintiffs' favor" (App.32a (citing *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969))), it didn't do as required.

For example, the Sixth Circuit held that the denial of financial services that Petitioners experienced from FFIs was not "traceable to the IGAs" (App.38a), was "[a]t best ... the second-order effects of governmental regulation on the market for international banking services" (App.37a), was purportedly "from FFI's voluntary choice to go above and beyond FATCA or an IGA" (App.30a), and "results from the third party's *voluntary and independent* actions or omissions (App.31a (emphasis in original)).

But Petitioners said denial of services by FFIs was *because* of FATCA/IGAs. For example, Plaintiff Mark Crawford verified that his brokerage firm (Aksioner) works with Saxo Bank (in Copenhagen, Denmark), which does "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." (App.181-82a.) And he verified that his own application for a brokerage account with Aksioner "was denied by Saxo Bank ... because he is a U.S. Citizen. Saxo bank is governed by Danish law which has a Model 1 IGA [and] rather than reporting information about U.S. clients, Saxo Bank is turning away U.S. citizens like Mark." (App.182a.) The Sixth Circuit was required to accept that as true. It didn't.

The Sixth Circuit also failed give Petitioners the benefit of reasonable inferences. The Amended Complaint recited numerous reports, including the Democrats Abroad Study, about the enormous costs and burdens of FATCA/IGAs on FFIs, about FFIs refusing banking services to Americans because of FATCA/IGAs, about other harms (relationships, citizenship, etc.) flowing from FATCA/IGAs, and about FFI's begin-

ning reporting under respective IGAs "as of October 1, 2015." (App.171-78a.) A necessary inference is that Petitioners' harms were also a result of FATCA/IGAs, as Petitioners verified. A necessary inference is that FFIs started implementing required policies and the necessary searches for U.S. accounts well before effective dates arrived. So when the Sixth Circuit says, e.g., that Israel's IGA was not in effect before August 2016 so Zell could suffer no harm from the IGA (App.34-35a), it failed to draw the required inference for Zell.

Whether this Court's requirement—that, in deciding dismissal motions, allegations are accepted as true and inferences go to plaintiffs—remains in effect and must be followed is an important federal question that this Court should accept for review.

V.

The Sixth Circuit's Failure to Recognize a Privacy Interest in Financial Records Conflicts with *Miller*.

The fifth question is whether the Sixth Circuit erred by refusing to recognize a privacy interest in financial records under the conditions at issue here—including unreviewed, blanket, bulk-data collection of intimate details of the affairs of persons not suspected of wrongdoing to be shared with foreign governments in a climate of cyber insecurity—which conditions were not at issue when *Miller*, 425 U.S. 435, declined to recognize a financial-record privacy interest.

Though the parties briefed at length the privacy interest in financial records *under the conditions at issue*, the Sixth Circuit summarily held: "There is no 'legally protected interest' in maintaining the privacy of one's bank records from government access."

(App.22a (citing *Miller*, 425 U.S. at 442; *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010)[11]).) That errs for three reasons.

First, *Miller* clarified that its holding was *context-specific* by saying it was *not* deciding that it applied to other contexts. 425 U.S. at 444 n.6. A context-specific analysis was required, but not done.

Second, three contexts that *Miller* said its holding didn't reach involved "blanket reporting," "improper inquiry into protected associational activities," and "the Government, through 'unreviewed executive discretion,' ... ma[king] a wide-ranging inquiry that unnecessarily 'touch(es) upon intimate areas of an individual's personal affairs,'" instead of "narrowly directed subpoenas duces tecum subject to the legal restraints attendant to such process." *Id.* (citation omitted). The present context involves blanket, wide-ranging data collection of intimate-personal-affairs details without probable cause, subpoena, or any judicial oversight—only "unreviewed executive discretion." *Id. Miller*'s exclusion of the contexts at issue here indicates a strong argument for a privacy interest in those contexts.

Third, *Miller* involved a challenge to judicially reviewable "narrowly directed subpoenas" with "the legal restraints attendant to such process." *Id.* The availability of judicial review was central to the decision, but there is no judicial oversight of the compelled disclosure at issue here. Judicial oversight is also mandated by *Patel*, 135 S.Ct. 2443, with "an opportunity to obtain precompliance review before a neutral decisionmaker," *id*. at 2446. FATCA/ IGAs provide for no judi-

[11] The Sixth Circuit case did not deal with the context-specific analysis required by *Miller*.

cial oversight of FFI's searches of U.S. accounts, and those searches are not limited to situations with probable cause of wrongdoing. No precompliance review before a neutral decisionmaker is permitted. And FATCA provided for notice by an attempt to get a waiver, of which Petitioners are denied by IGAs.

Moreover, inherent in privacy loss are financial and security risks, especially since FATCA required FFIs to report to the IRS while Model 1 IGAs[12] require such governments to mandate FFIs to search U.S. accounts and report results to *third parties*, i.e., *foreign governments*, which may have less security than the IRS.[13] The public has a reasonable expectation of privacy in this context. Americans' tax returns may not be disclosed by the Government to third parties. Americans without foreign accounts do not experience U.S.-compelled disclosure of their financial records to third parties. Americans are protected from such disclosure. *See, e.g.*, FDIC, *Privacy Rule Handbook*, https://www.fdic.gov/regulations/examinations/financialprivacy/ handbook/ ("The privacy rule governs when and how banks may share nonpublic personal information about consumers with nonaffiliated third parties. The rule embodies two principles—notice and opt out.").

Security harms from privacy loss are confirmed by a 2014 notice, "IRS Warns Financial Institutions of Scams Designed to Steal FATCA-Related Account Data," the IRS "issued a fraud alert for international

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[12] Challenged IGAs are Type 1, except for the Swiss IGA.

[13] FATCA's requirement that FFIs send the information directly to the IRS indicates Congress's intent not to allow such disclosure of private financial information to foreign governments and that IGAs are beyond FATCA's authority.

financial institutions complying with ... FATCA[]. Scam artists posing as the IRS have fraudulently solicited financial institutions seeking account holder identity and financial account information." *See* http://www.irs.gov/uac/Newsroom/IRS-Warns-Financial-Institutions-of-Scams-Designed-to-Steal-FATCA-Related-Account-Data. In briefing, Petitioners recited other such evidence, repeatable in merits briefing.

Furthermore, waiver of privacy in one area, e.g., by providing information to one's bank, does not waive privacy in other areas. *See Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1188 (8th Cir. 2000) ("Even information that is available to the general public in one form may pose a substantial threat to privacy if disclosed to the general public in an alternative form potentially subject to abuse."); *see also United States Dept. of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 770 (1989) ("[T]he fact that an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information."). So the fact that Americans provided essential information to FFIs for everyday-living accounts doesn't mean they waived privacy as to the blanket, bulk-data collection imposed by FATCA/IGAs, especially to foreign governments.

Thus, people *do* have a reasonable expectation of privacy from the U.S. and foreign governments in their bank accounts under the situations at issue here. They reasonably do not expect the bulk, blanket reporting of information under challenged provisions and IGAs, including to foreign governments, without any hint of wrongdoing and without judicial oversight, the lack of which makes such searches per se unreasonable. So Plaintiffs have a cognizable privacy interest.

Petitioners' privacy interest and opposition to disclosure provide standing to challenge provisions and IGAs that (i) expressly *require* disclosure and/or (ii) directly or indirectly *penalize* entities for not providing disclosure, which disclosure is ongoing. So Petitioners have standing to challenge disclosure requirements imposed by FATCA, IGAs, and FBAR, and they have standing to challenge the FFI Penalty (30% "tax" on payments to non-compliant FFIs) since FFIs disclose account holders' information *because of* that penalty. And Petitioners have standing to challenge FATCA's Passthrough Penalty (30% "tax" imposed on persons exercising their rights to not identify themselves as Americans and to refuse to waive foreign-law privacy protections). These provisions directly targeted persons like Petitioners with foreign accounts, to deter them from maintaining their privacy, and are imposed without regard to tax liability or whether individuals otherwise provide the information through required reports.

Whether Americans have a reasonable expectation of privacy in this context is an important federal question that this Court should accept for review.

VI.

Whether U.S. Senator Paul Has Standing to Challenge IGAs Based on Denial of His Right to Vote Is an Important Federal Question.

The sixth question is whether the Sixth Circuit erred in refusing to recognize the standing of U.S. Senator Rand Paul to challenge IGAs implementing FATCA because he was denied the opportunity *to vote* on the IGAs, as either "advice and consent" for treaties or a submission to Congress as congressional-executive

agreements. U.S. Const. art. I, § 7 and art. II, § 2.[14]

The Sixth Circuit cited *Raines v. Byrd*, 521 U.S. 811 (1977), in holding that Senator Paul's loss of his constitutional right to vote as a U.S. Senator is a "generalized grievance." (App.37a.) But neither *Raines*'s holding or analysis properly denies standing to Senator Paul for this injury to his unique interest.

Raines involved four Senators and two Congressmen who challenged the Line-Item Veto Act. 521 U.S. at 814. But *Raines* was a challenge to a statute passed by Congress, while the IGAs are not being submitted to Congress. And a key factor in *Raines* was that "the Act has no effect on th[e] process" of voting for or against bills. *Id.* at 824. Here the voting process *is* affected because IGAs are not submitted for vote. So *Raines* doesn't control. And a core constitutional role of the (merely one hundred) Senators is to check and balance Executive power, which gives a Senator a special, non-generalized interest in the opportunity to exercise the constitutionally mandated vote for that purpose. And *Raines* didn't overrule *Coleman v. Miller*, 307 U.S. 433 (1939), which upheld the standing of state legisla-

[14] The IGAs are unconstitutional sole executive agreements because they are not ratified treaties, congressional-executive agreements, or treaty-based agreements, but are beyond sole executive authority and FATCA authority. (*See* App.227-31a.) IGAs should be submitted for ratification as treaties or at least for approval as congressional-executive agreements. Since they are not being submitted to vote, Senators are deprived of their constitutionally guaranteed right to vote. Conversely, FATCA, which was subject to votes, is being supplanted by IGAs not authorized by FATCA, so FATCA is being effectively altered without Senators' votes.

tors whose vote would otherwise be nullified to challenge the action that nullified their vote, *id.* at 438. Here a much greater problem is at issue because no Senator is getting a vote on IGAs—an effect on the process. Further arguments applicable here are in the *Raines* dissents by Justices Stevens and Breyer. *Id.* at 835-843. For example, "the constitution does not drawn an absolute line between disputes involving a 'personal' and those involving an 'official' harm." *Id.* at 841 (Stevens, J., joined by Breyer, J., dissenting) (collecting cases). "*Coleman* itself involved injuries in the plaintiff legislators' official capacity." *Id.* And the majority conceded this by leaving open standing given "discriminatory" denial of the right to vote, which necessarily would be official-capacity harm. *Id.* So Senator Paul has standing to challenge the IGAs.[15]

Whether Senator Paul has standing is an important federal question this Court should accept for review.

Conclusion

For the foregoing reasons, this Court should grant this petition for a writ of certiorari.

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[15] Were *Raines* deemed controlling, it should be overruled to allow Senators to exercise their constitutional right and special role, especially given executive actions (e.g., IGAs) beyond constitutional and statutory authority.

Respectfully submitted,

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