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** Judge Thomas M. Rose **REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO EXPEDITE MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs moved for expedited review of their Motion for Preliminary Injunction (Doc. No. 8) on July 22. Defendants filed their response (Doc. No. 10) on July 24. Plaintiffs now timely reply.

Plaintiffs' request to expedite consideration of their preliminary injunction motion will not prejudice Defendants. Plaintiffs originally filed and served their preliminary injunction motion on July 14, the same day they filed their verified complaint. (Doc. No. 2.) That motion was identical to the preliminary injunction motion filed eight days later on July 22 and now pending before this Court. (*Compare* Doc. No's. 8 and 8-1 *with* Doc No's. 2 and 2-1.) Thus, as a practical matter, shortening Defendants' time to respond to Plaintiffs' pending preliminary injunction motion (Doc. 8) by one week will not prejudice Defendants' ability to respond because they will still have had a full twenty-one days to review and consider the substance of Plaintiffs' motion under the expedited scenario—the same amount of time they would have under a nonexpedited briefing schedule, S.D. Ohio Civ. R. 7.2(a)(2). In fact, Plaintiffs would be the only party disadvantaged by the granting of the motion to expedite as they will have one less

week to respond to Defendants' arguments.[1]

If the Court decides not to grant Plaintiffs' motion to expedite consideration of the preliminary injunction, it should nevertheless decline Defendants' request to extend Defendants time to respond to the motion to sixty days—the deadline for the response to the complaint (PageID 181). Defendants have offered only speculation that they will not be able to obtain "the views and recommendations of the various government agencies and components" in time to meet the twenty-one day response deadline provided under the rules. (PageID 181.) They have offered no evidence demonstrating that they have even attempted to obtain the necessary input from the relevant government entities, and they have not explained why they need nearly three times the amount of time to respond to the preliminary injunction motion rather than some lesser amount of time. (*See* Page ID 181.) Moreover, given that Plaintiffs' challenges to the relevant statutes, regulations, and international agreements comprise pure questions of constitutional law, it seems likely that many issues raised by this lawsuit will not require extensive input from other government entities.

Defendants argue that Plaintiffs' motion to expedite is overbroad because they say that the grounds for expediting the preliminary injunction motion apply only to the claims asserted in Count 8. (PageID 181.) This is not correct. The harm faced by Plaintiffs Johnson, Kish, and Zell (i.e., disclosure of their private financial account information) can be averted by a favorable decision from this Court on Counts 1, 2, 3, 4, and 8. A favorable decision on Counts 1 or 2 would render the intergovernmental agreements ("IGAs") unenforceable and eliminate the obligation of the Canadian, Czech, and Israeli governments to disclose Plaintiffs' account

[1] S.D. Ohio Civ. R. 7.2(a)(2) normally allows parties fourteen days to file a reply memorandum.

information to the IRS. (Doc. No. 1 ¶¶ 117, 123.) A favorable decision on Counts 3 or 8 would effectuate a similar result by rendering the information sharing provisions of the IGAs inoperable. (Doc. No. 1 ¶¶ 130, 161.) A favorable decision on Count 4 would likely stop disclosure of Plaintiffs' account information as well by removing the penalty imposed on banks for noncompliance with FATCA. (Doc. No. 1 ¶ 137.) Accordingly, the request to expedite the entirety of the preliminary injunction is not overbroad because the harm posed by the impending disclosure deadline puts a majority of Plaintiffs' claims at issue. Moreover, the remaining counts share common legal and factual underpinnings as those at issue such that consideration of all claims together will promote more efficient use of the parties' and this Court's resources. Counts 5 and 6, like Count 4, turn entirely on the Excessive Fines Clause, which itself entails a narrow body of law. (Doc. No. 1 ¶¶ 141–150.) Count 7 advances the same legal argument as Count 8 and challenges substantially similar legal provisions. (Doc. No. 1 ¶¶ 151–156.) Separating the claims would likely lead to duplicative legal arguments and analysis and could require the Court to decide issues unnecessarily as the remedies for some claims overlap others.

Defendants also argue that Plaintiffs will not suffer irreparable harm from the September 30 disclosure of their account information because they assert that Plaintiffs lack a legitimate expectation of privacy in their bank records under the Fourth Amendment and because the Court can "craft at least a partial remedy" to reverse the disclosure of Plaintiffs' information. (PageID 182.) First, whether Plaintiffs' bank records are protected under the Fourth Amendment has no bearing on whether Plaintiffs stand to be harmed by the disclosure of their account information.[2] The Fourth Amendment is not the standard for testing whether disclosure of information is

[2] Plaintiffs have not conceded that they do have a legitimate expectation of privacy in their bank records. (*See* Doc. No. 1 ¶¶ 151–161.)

harmful; instead, it is concerned with the procedures the government must use to obtain information about citizens. *See* U.S. Const. amend. IV. Plaintiffs are undoubtedly harmed by the disclosure of their otherwise private and secure financial account information, even if the information is not entitled to the heightened protections afforded by the Fourth Amendment. Second, a partial order prohibiting Defendants from making use of information unconstitutionally disclosed to them cannot protect Plaintiffs from actions Defendants may take in the intervening time between disclosure and the granting of any remedy. But, the partial remedy offered by Defendants—an order prohibiting Defendants from using the information—cannot erase the mental impressions and conclusions drawn by Defendants' staff in reviewing the information and cannot undue any actions spurred by, but not dependant upon, the disclosed information.

Finally, Defendants argue that Plaintiffs' have not complied with S.D. Ohio Civ. R. 65.1(a) or (b) in filing their preliminary injunction motion (Doc. No. 8). Defendants are mistaken, and their objections are improperly raised. Plaintiffs' counsel, Justin McAdam, did contact Judge Rose's office to schedule an informal conference for their preliminary injunction motion on July 22, just prior to filing the motion, in compliance with S.D. Ohio Civ. R. 65.1(a). Judge Rose's staff informed Mr. McAdam that Judge Rose typically does not hold an informal conference for preliminary injunction motions and that no conference would be scheduled for Plaintiffs' motion in this instance. Plaintiffs also have complied with S.D. Ohio Civ. R. 65.1(b) as they filed, with their preliminary injunction motion, a certificate of service certifying that copies of the motion would be served on all Defendants via Federal Express overnight delivery (PageID 138, 174). Moreover, Defendants' objections relating to S.D. Ohio Civ. R. 65.1 are not properly raised in response to Plaintiffs' motion to expedite the motion for preliminary injunction

(Doc. No. 10) as the objections relate specifically to Plaintiffs' preliminary injunction motion (Doc. No. 8) and not to Plaintiffs' motion to expedite that motion (Doc. No. 9). Such objections should be raised in Defendants' response to the preliminary injunction motion.

Dated: July 27, 2015

Respectfully Submitted,

s/ Justin L. McAdam

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*Pro hac vice application granted July 15, 2015.

Certificate of Service

I hereby certify that the foregoing document was filed electronically using the Court's CM/ECF filing system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. The following persons should be notified:

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s/ Justin L. McAdam