

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

**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. )

Case No. 3:15-cv-250-TMR

**United States Department of the Treasury,** )  
**United States Internal Revenue Service, and** )  
**United States Financial Crimes Enforcement** )  
**Network,** )

Defendants. )

DEFENDANTS’ OPPOSITION TO PLAINTIFFS’ MOTION  
TO EXPEDITE MOTION FOR PRELIMINARY INJUNCTION

The defendants United States Department of the Treasury, United States Internal Revenue Service, and United States Financial Crimes Enforcement Network oppose plaintiffs’ motion for expedited review (Doc. No. 9) of their motion for preliminary injunction (Doc. No. 8), which was filed on July 22, 2015. Plaintiffs have asked that the defendants’ response to the motion for preliminary injunction be due within 14 days, *i.e.*, by August 5, 2015. The request (1) violates local rules, (2) is impractical, (3) is overbroad, and (4) is unsupported.

First, plaintiffs have not complied with Local Rule 65.1(a), requiring them to notify defendants of the date and time for an informal preliminary conference with the Court, nor have they certified service of their preliminary injunction motion in accordance with Local Rule 65.1(b). Defendants request that the Court order that plaintiffs (a) follow the procedure for scheduling the informal preliminary conference and (b) make a proper certification of service.

Second, a 14-day response time is impractical for the government in light of the number and complexity of issues raised in plaintiffs' filings. This case involves multiple constitutional challenges to multiple significant statutory and regulatory provisions. The plaintiffs are U.S. Senator Rand Paul (in his official capacity) and six current and former U.S. citizens who presently are living abroad. On July 14, plaintiffs filed an eight-count complaint seeking declaratory and injunctive relief based on the alleged unconstitutionality of the Foreign Accounts Tax Compliance Act (FATCA); its implementing intergovernmental agreements (IGAs) reached by the Treasury Department and several other countries; and the Report of Foreign Bank and Financial Accounts (FBAR) requirements. Doc. No. 1. Plaintiffs claim that jurisdiction exists under the Declaratory Judgment Act and the Administrative Procedure Act. *Id.* ¶ 11.

Count One of the complaint asserts that the IGAs are unconstitutional because they fall outside the executive branch's independent power and should have been submitted to Congress for approval. Count Two adds that the IGAs are unconstitutional because they are inconsistent with the FATCA statute. Count Three says that additional reporting requirements for foreign bank accounts (*see, e.g.*, 26 C.F.R. § 1.6038D-4T) deny U.S. citizens living abroad the equal protection of the laws under the Fifth Amendment. Count Four states that the 30% withholding tax imposed on U.S.-sourced payments to foreign financial institutions (FFIs) that fail to comply with FATCA, *see* 26 U.S.C. § 1471(a), violates the Eighth Amendment's prohibition on "excessive fines." Counts Five and Six, respectively, argue that two other laws also violate the Excessive Fines Clause: the 30% tax that FFIs must withhold and deduct from passthrough payments to recalcitrant account holders, *see* 26 U.S.C. § 1471(b)(1)(D), (d)(6), and the penalty for the willful failure to file an FBAR, 31 U.S.C. § 5321(b)(5)(C)(i). Count Seven concerns the purported Fourth Amendment violation stemming from FATCA's information reporting

requirements. *See* 26 U.S.C. § 1471(c)(1). Finally, Count Eight complains that the IGAs' reporting requirements also run afoul of the Fourth Amendment.

Defendants are entitled to 60 days from the date of service to serve a response to the complaint. Fed. R. Civ. P. 12(a)(2). Defendants will likely need all 60 days in this case, if not more, because responding will require soliciting the views and recommendations of several government agencies and components on the multitude of claims summarized above. Against this backdrop, plaintiffs have filed a motion for preliminary injunction that requests "preliminary injunctive relief on all counts set forth in their complaint." Doc. No. 8. Considering that the motion for preliminary injunction is essentially a motion for summary judgment on the entire complaint, plaintiffs' request to shorten the defendants' response time to a mere 14 days is unworkable. Defendants should not be forced to rush to formulate a response to all of the issues raised in the complaint without being allotted the standard timeframe for doing so. Rather, defendants request that their response to the motion for preliminary injunction be due no earlier than the date that their response to the complaint is also due.

Third, the request for expedited briefing on the entire motion for preliminary injunction is overbroad because the only justification that plaintiffs give for their request is based on the IGA reporting requirements that they challenge in Count Eight. Plaintiffs write that three of the individual plaintiffs who "live in and maintain their private bank accounts in the Czech Republic, Canada, and Israel respectively" may have their "private financial account information for calendar year 2014 . . . reported to the IRS no later than, but possibly before, September 30, 2015 by the governments of Canada, Czech Republic, and Israel on behalf of Plaintiffs' financial institutions in each country respectively." Doc. No. 9 at 1. They allege that the three individual plaintiffs would be "irreparably harmed by the disclosure of their private information if this

Court is unable to fully consider and resolve Plaintiffs' Motion for Preliminary Injunction as soon as possible." *Id.* at 2. Even if this were all true, the reasonable approach would be to expedite only the portion of the motion for preliminary injunction that concerns Count Eight and to allow the defendants more time to respond to the balance of the claims in this case.

Finally, the plaintiffs' allegation that they will suffer irreparable harm from the September 30 disclosure of their foreign bank account information is unsupported and contrary to law. The Supreme Court has recognized that there is a "lack of any legitimate expectation of privacy concerning the information kept in bank records." *Miller v. United States*, 425 U.S. 435, 442 (1976). Moreover, even if the information is disclosed, that does not moot defendants' claim because in the event that the plaintiffs eventually prevail on the merits, the Court can still craft at least a partial remedy by ordering the government to make no use of the information. *See United States v. A.S. Holdings Group, LLC*, 521 Fed. Appx. 405, 407 n.1 (6th Cir. 2013) (noting, in IRS summons-enforcement litigation, the courts' "power to effectuate a partial remedy by ordering the Government to destroy or return any and all copies' of the seized documents." (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992))).

Respectfully submitted,

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Certificate of Service

I certify that on July 24, 2015, a copy of the foregoing Defendants' Opposition to Plaintiffs' Motion to Expedite Motion for Preliminary Injunction was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

/s/ Edward J. Murphy  
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