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

Mark Crawford, *et al.*,	)	Case No. 3:15-cv-250-TMR
	)	
Plaintiffs,	)	District Judge Thomas M. Rose
	)	
v.	)	
	)	
U.S. Department of the Treasury, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

Respectfully submitted,

CAROLINE D. CIRAOLO
Acting Assistant Attorney General
U.S. Department of Justice, Tax Division

/s/ Edward J. Murphy
EDWARD J. MURPHY
JORDAN A. KONIG
Trial Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 55, Ben Franklin Station
Washington, D.C. 20044
(202) 307-6064 (Murphy)
(202) 305-7917 (Konig)
Fax: (202) 514-5238
Edward.J.Murphy@usdoj.gov
Jordan.A.Konig@usdoj.gov

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REPLY MEMORANDUM

This lawsuit seeks injunctive and declaratory relief based on the alleged unconstitutionality of the Foreign Accounts Tax Compliance Act (FATCA) and its regulations, the intergovernmental agreements (IGAs) implementing FATCA with Canada, the Czech Republic, Israel, and Switzerland, and the Report of Foreign Bank Account (FBAR) requirements. Defendants United States Department of Treasury, United States Internal Revenue Service, and United States Financial Crimes Enforcement Network (collectively "Defendants" or "Government") have moved to dismiss this suit under Fed. R. Civ. P. 12(b)(1) and/or 12(b)(6). Docs. 26, 27. Plaintiffs have opposed the motion. Doc. 37. The motion should be granted because the plaintiffs have failed to establish subject matter jurisdiction and their complaint fails to state a claim upon which relief can be granted.

This reply brief begins by mentioning two matters that have arisen since the filing of the Government's opening brief—the Court's denial of plaintiffs' motion for preliminary injunction and plaintiffs' motion to amend the complaint—and explains why the procedural posture of the case supports dismissal. Next, this brief discusses subject matter jurisdiction, focusing on why plaintiffs' standing arguments lack merit and also responding to plaintiffs' assertions regarding the Anti-Injunction Act and the ripeness of their Eighth Amendment claims. Finally, the brief concludes with a short review of the Rule 12(b)(6) deficiencies on which plaintiffs have not offered any new analysis and which thus require no further elaboration.

I. The Procedural Posture of the Case Supports Dismissal

A. The Court Should Grant the Motion to Dismiss for the Same Reasons Stated in Its Decision Denying the Motion for Preliminary Injunction

Plaintiffs' 30-page opposition brief (*see* Doc. 37) fails to mention that the Court denied their motion for preliminary injunction ("PI Motion") on September 29, 2015. Doc. 30 ("PI Decision"). The PI Decision found that plaintiffs' claims were almost entirely barred due to

plaintiffs' lack of standing. *Id.* at 10-23. In fact, the Court ruled that of the seven plaintiffs, "[t]he only Plaintiff to have standing" was Daniel "Kuettel, who is limited to claims concerning the FBAR requirement present in Count Three and Count Six." *Id*. at 23 (PageID #404).[1] The PI Decision explained that a preliminary injunction would not issue as to those counts because the Fifth and Eighth Amendment claims were meritless. *Id*. at 24-30 (Fifth Amendment, PageID #405-411) and 30-36 (Eighth Amendment, PageID #412-418).

The Government's motion to dismiss again argues that plaintiffs lack standing. Doc. 27 at 3-9 (PageID #326-332). "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). This is the same standard for determining whether a plaintiff has standing to seek a preliminary injunction. *Planned Parenthood Cincinnati Region v. Taft*, 337 F. Supp. 2d 1040, 1044 (S.D. Ohio 2004), *vacated in part on other grounds*, 444 F.3d 502 (6th Cir. 2006) ("When a court considers whether a plaintiff has standing to request a preliminary injunction or whether a plaintiff has standing pursuant to a motion to dismiss, . . . standing is determined by analyzing the material allegations in the complaint, which must be accepted as true."); *Okpalobi v. Foster*, 190 F.3d 337, 350 (5th Cir. 1999); *see also Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 706 (6th Cir. 2015) ("When considering whether pleadings make out a justiciable case for want of standing, our analysis must be confined to the four corners of the complaint.").

Because the applicable legal standard and the allegations in the Complaint remain the same, the Court should dismiss for lack of subject matter jurisdiction based on the same analysis

[1] The Court stated that the Government conceded that Mr. Kuettel had standing to challenge the FBAR requirements in Counts 3 and 6. PI Decision at 18 (PageID #399). The Government wishes to clarify that it did not make such a concession in its PI opposition brief; rather, it argued that Mr. Kuettel lacks standing for all counts. Doc. 16 at 15-17 (PageID #216-18).

set forth in the PI Decision regarding why plaintiffs lack standing. Even to the limited extent the PI Decision found Mr. Kuettel had standing to bring Counts 3 and 6, those counts should be dismissed because the Court's analyses of the Fifth and Eighth Amendments are correct and compel the result that those counts fail to state a claim. Plaintiffs have made no showing of why the Court should reconsider its PI Decision, instead proceeding as if the PI Decision never happened.

B. Plaintiffs' Motion to Amend Should be Considered Concurrently with the Motion to Dismiss and Denied on Futility Grounds

To be sure, plaintiffs have moved to amend the complaint in an attempt to cure the standing deficiencies. Doc. 32 at 2 (PageID #425) (explaining that, "on October 1, 2015"—two days after the PI Decision—"Plaintiffs decided to file an amended complaint addressing certain standing and other issues raised by opposing counsel and the Court.").[2] The Court should now consider the plaintiffs' proposed amended complaint alongside the motion to dismiss.

When standing is contested in a motion to dismiss, "it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." *Warth*, 422 U.S. at 501-02. Plaintiffs have already supplied further particularized allegations that they deem supportive of standing by filing their proposed amended complaint as an attachment to their motion to amend. *See* Doc. 32-1.

The Government has opposed the motion to amend as futile because "the additional allegations do not create Article III standing for any of the existing or proposed new plaintiffs"

[2] The Fifth and Eighth Amendment claims in the proposed amended complaint remain the same, despite the ruling in the PI Decision that they are meritless. *Compare* Doc. 32-1 *with* Doc. 1.

and also because the proposed amended complaint is "subject to dismissal based on all of the other [non-standing] deficiencies discussed in the Government's motion to dismiss, none of which is remedied by the new allegations." Doc. 34 at 7-8 (PageID #515-16). If the Court agrees that the new allegations in the proposed amended complaint still fail to establish standing, then, consistent with *Warth*, the Court should deny the motion to amend and dismiss this action. *See Friends of Tims Ford v. Tenn. Valley Auth.*, 585 F.3d 955, 966 (6th Cir. 2009) (affirming dismissal for lack of standing where "the district court faithfully complied with the process outlined in *Warth*" by giving opportunity to bolster standing allegations prior to dismissing).

Notwithstanding the Supreme Court's guidance in *Warth*, plaintiffs "maintain that dismissal should only be considered on full, final briefing on dismissal based on the amended complaint," and they worry that "denying leave [to amend] and granting dismissal [] would harm" them. Doc. 37 at 2 (PageID #560). But the law is clear that leave to amend should be denied where a proposed amendment would be futile, and the purported procedural harms[3] alleged by the plaintiffs do not justify any relaxation of the applicable legal standard. In fact, plaintiffs' previously expressed concern that they could not adequately respond to the arguments raised in the Government's motion to dismiss in their 20-page reply to the United States' brief opposing the motion to amend (*see* Doc. 35 at 1-3, PageID #530-32) is moot now that plaintiffs have had the chance to file another 30 pages in opposition to the motion to dismiss.[4] Both the motion to dismiss and the motion to amend are now ready to be decided together.

[3] Plaintiffs identify two harms, neither of which should give the Court pause. First, in an appeal from a ruling for the Government on both motions, "an appellate court would be faced with an appeal claiming error as to both," as opposed to a single final adjudication. Doc. 37 at 2. But plaintiffs' interest in streamlining an appeal does not justify allowing a futile amendment. Second, if an appeal leads to a remand on both motions, they fear "wasted judicial resources" (*id.* at 2), yet the real waste will occur if they file a futile amendment and prolong a meritless lawsuit.

[4] The plaintiffs did not file a separate brief in support of their motion to amend (Doc. 32), even though the Government's motion to dismiss was already pending at that time.

II. The Suit Should Be Dismissed for Lack of Subject Matter Jurisdiction

A. Plaintiffs Have Failed to Establish Standing

Plaintiffs have not made the plaintiff-specific and provision-specific showing necessary to establish standing to pursue any of their claims. *See Fednav, Ltd. v. Chester*, 547 F.3d 607, 611 (6th Cir. 2008) ("[D]etermination of standing is both plaintiff- and provision-specific. That one plaintiff has standing to assert a particular claim does not mean that all of them do."); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("[O]ur standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press.").

Plaintiffs tacitly admit that not all plaintiffs have standing with regard to each claim by emphasizing the point that only "one plaintiff" needs to have "standing for each claim" and that once standing exists for one plaintiff, the "others' standing need not be considered." Doc. 37 at 7 n.2 (PageID #560). They specifically contend that this proposition "governs . . . as to the standing of plaintiffs Paul, Kuettel, and Nelson," the three plaintiffs with perhaps the most attenuated arguments for standing. *Id*. Neither Mr. Kuettel nor Ms. Nelson is a U.S. citizen. With respect to Senator Paul, who has not alleged that he owns any overseas accounts and instead asserts standing in his capacity as a legislator, the Court has already ruled that *Raines v. Byrd*, 521 U.S. 811 (1997), "bars Senator Paul's claims." PI Decision at 13 (PageID #394).[5] More broadly, none of the plaintiffs has established standing because the asserted injuries are based on a non-existent constitutional right to tax-related financial privacy and are too indirect, generalized, and speculative to be actionable.

[5] Plaintiffs try to distinguish *Raines* on the basis that it "dealt with the constitutionality of a statute passed by a majority of Congress" whereas "the IGAs were neither submitted to nor voted on by Congress," but they miss the broader commonality between *Raines* and Senator Paul's claims. Doc. 37 at 7 n.2 (PageID #560). Both theories of harm are rooted in "the abstract dilution of institutional legislative power" that the Supreme Court has found insufficient to confer standing. *Raines*, 521 U.S. at 826.

1. Plaintiffs Assert Standing Based on a Purported Constitutional Right to Privacy in Tax-Related Financial Information That Does Not Exist

Plaintiffs claim a "constitutionally protected interest in not disclosing information they do not want to disclose." Doc. 37 at 8 (PageID #566). But as the Court noted in the PI Decision, "there is no constitutionally recognized right to privacy of bank records." PI Decision at 36 (PageID #417). In fact, "Plaintiffs here have not identified a constitutionally protected interest" at all, and thus they do not meet the injury-in-fact requirement for Article III standing to mount this constitutional challenge. *Id*. at 23 (PageID #404); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (defining "injury in fact" as "invasion of a legally protected interest").

Not all harms are constitutional harms, and the Court's conclusion is consistent with well-established case law. *See Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 574-75 (6th Cir. 2002) ("The privacy interest one may have in one's personal finances and real estate holdings is far afield" from privacy concerns protected by Constitution); *see also Moore v. Wesbanco Bank*, 612 F. App'x 816, 822 (6th Cir. 2015) (claim that "financial records have long been found to be entitled to constitutional protection under the right to privacy" is "without merit"); *Aiken v. Hackett*, 281 F.3d 516, 519 (6th Cir. 2002) (affirming dismissal for lack of standing where plaintiffs "have not alleged an invasion of some interest that the law protects"); *Hahn v. Star Bank*, 190 F.3d 708, 714 (6th Cir. 1999) ("'[T]he Constitution does not encompass a general right to nondisclosure of private information.'" (quoting *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir.1981))).[6] There is no reason to rule differently now than in the PI Decision.

[6] *But cf. Kallstrom v. City of Columbus*, 136 F.3d 1055, 1064-65 (6th Cir. 1998) (police "officers have a fundamental constitutional interest in preventing the release of personal information contained in their personnel files"—including their families' home addresses—"where such disclosure creates a substantial risk of serious bodily harm," as in case of disclosure to drug conspiracy defendants). *Kallstrom* is, in a way, an exception that proves the rule by demonstrating the extreme facts that would be necessary in order for the harm from disclosure of personal information to reach the level of a constitutional violation.

Nonetheless, plaintiffs effectively ask the Court to reverse its prior ruling, arguing that "central to Plaintiffs' harm is the violation of their privacy interest." Doc. 37 at 8 (PageID #561). They contend that whether such an interest exists "turns largely on different readings of *United States v. Miller*, 425 U.S. 435 (1976)." *Id*. However, *Miller* unambiguously held that there is no Fourth Amendment privacy interest in bank records. Plaintiffs describe the "Government's view" as being "that *Miller* holds no 'reasonable expectation of privacy'[7] 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.'" Doc. 37 at 4 (PageID #562). This is not just a sentence from the Government's brief; it is a direct quotation from the *Miller* opinion, supporting its central holding. *See* Doc. 27 at 29 (PageID #352) (quoting 425 U.S. at 442). The Court quoted the same part of *Miller* in the PI Decision. Doc. 30 at 23 (PageID #404).

Miller is consistent with the Supreme Court's rejection of efforts to create "extensions of constitutional protections against" third-party disclosure of tax information to the Government, in recognition of the practical reality that the United States has "a system largely dependent upon honest self-reporting even to survive." *Couch v. United States*, 409 U.S. 322, 335-36 (1973) (rejecting Fourth and Fifth Amendment challenges to IRS summons demanding accountant turn over tax preparation materials). This statement in *Couch* remains as relevant now as it was 40 years ago. *See* Michael Hatfield, *Taxation and Surveillance: An Agenda*, 17 YALE JOURNAL L. & TECH 319, 331 (2015) (noting that a fundamental problem with the "current system of providing individual income tax-relevant information to the IRS" is that "a great many taxpayers do not

[7] The Government mistakenly used the phrase "reasonable expectation of privacy," when *Miller*, in fact, found that there is no "*legitimate* expectation of privacy concerning the information kept in bank records[.]" *Miller*, 425 U.S. at 442 (emphasis added). Case law since *Miller* uses "reasonable" and "legitimate" interchangeably. *See infra*.

comply with the system, causing a tremendous loss of tax revenue," but that this problem is "ameliorated to the extent that third parties provide information to the taxpayer (which tends to ease compliance) and the IRS (which tends to ensure compliance)."); *see also* Patricia Cohen, *If the I.R.S. Is Watching You, You'll Pay Up*, N.Y. TIMES, Jan. 5, 2016, at B1, available at http://www.nytimes.com/2016/01/05/business/economy/if-the-irs-is-watching-you-youll-pay-up.html?_r=0 (last visited January 14, 2016) (describing recent research showing the efficacy of third-party information reporting in improving voluntary tax compliance).

The PI Decision followed the indisputable holding of *Miller* that has been cited several times by the Sixth Circuit. *See United States v. Warshak*, 631 F.3d 266, 287 (6th Cir. 2010) ("In *Miller*, the Supreme Court held that a bank depositor does not have a reasonable expectation of privacy in the contents of bank records, checks, and deposit slips."); *Guest v. Leis*, 255 F.3d 325, 335-36 (6th Cir. 2001) ("A bank customer, for instance, does not have a legitimate expectation of privacy in the information that he or she has conveyed to the bank; by placing the information under control of a third party, the customer assumes the risk that the bank will convey the information to the government." (citing *Miller*)); *Am. Motors Corp. v. F.T.C.*, 601 F.2d 1329, 1338 (6th Cir. 1979). Notably, in *United States v. Sturman*, 951 F.2d 1466, 1483-84 (6th Cir. 1991), the Sixth Circuit rejected the argument that "Switzerland's strict banking secrecy laws" gave Sturman "a reasonable expectation of privacy" in his bank records because "[n]o such right of privacy in banking records is recognized in the United States."

By contrast, "Plaintiffs' view" of *Miller*—which has not been adopted by any court—would sharply limit its holding by ignoring its central precept. Plaintiffs arrive at this skewed interpretation of *Miller* by taking footnote 6 in the opinion out of context and selectively quoting from it. *See* Doc. 37 at 9 (PageID #562). The full text of footnote 6 is:

Respondent does not contend that the subpoenas infringed upon his First

> Amendment rights. There was no blanket reporting requirement of the sort we addressed in *Buckley v. Valeo*, 424 U.S. 1, at 60-84, 96 S.Ct. 612, at 654, 46 L.Ed.2d 659, at 711 (1976), nor any allegation of an improper inquiry into protected associational activities of the sort presented in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975).
>
> We are not confronted with a situation in which the Government, through "unreviewed executive discretion," has made a wide-ranging inquiry that unnecessarily "touch(es) upon intimate areas of an individual's personal affairs." *California Bankers Assn. v. Shultz*, 416 U.S., at 78-79, 94 S.Ct., at 1526, 39 L.Ed.2d, at 850 (Powell, J., concurring). Here the Government has exercised its powers through narrowly directed subpoenas Duces tecum subject to the legal restraints attendant to such process. *See* Part IV, *Infra*.

The first sentence signals that footnote 6 is addressing the possibility of a First Amendment violation only, and plaintiffs in the instant case do not allege a First Amendment violation (unlike *Buckley* and *Eastland*). Justice Powell, writing for the *Miller* majority, then quotes his own concurrence in *Cal. Bankers*, in which he agreed with the majority in upholding the constitutionality of the Bank Secrecy Act (BSA) but wrote separately to "add a word concerning the Act's *domestic* reporting requirements." 416 U.S. 21, 78 (emphasis added). He expressed no misgivings about the BSA's *foreign* reporting requirements, which the majority in *Cal. Bankers* analyzed separately, and which are more analogous to the provisions challenged here.

With respect to the BSA's domestic reporting requirements, Justice Powell cautioned in his *Cal. Bankers* concurrence that, "[a] *significant extension* of the regulations' reporting requirements . . . would pose substantial and difficult constitutional questions for me" due to the potential disclosure of an account holder's First Amendment "activities, associations, and beliefs." *Id*. at 78-79 (emphasis added). The reporting requirements at issue here are comparable in scope to the BSA[8], though, and are not a "significant extension." They are most certainly not

[8] The FBAR requirements arise from the BSA itself, which was enacted in 1970. The foreign account-balance reporting requirement that plaintiffs challenge has existed in one form or another since 1970, *i.e.*, prior to the Supreme Court's decision in *Cal. Bankers* in 1974.

"blanket, bulk-data collection." Doc. 37 at 4 (PageID #562). In *United States v. Grubb*, 469 F. Supp. 991 (E.D. Pa. 1979), the court rejected a similar argument in denying a motion to suppress bank records. Grubb asserted a First Amendment violation, relying on *Miller* footnote 6, but the court found "no evidence that the inquiry here is related to anything other than improper financial dealings" nor any "effort to chill Grubb's right to political expression," much less "an inquiry into any 'intimate areas of an individual's personal affairs.'" *Id*. at 996 (quoting *Miller* and *Cal. Bankers*) Rather, the bank records in *Grubb* were "limited to the defendant's banking transactions and that subject matter is neither privileged nor protected under federal law." *Id.*

Much like *Grubb*, the plaintiffs here complain about the disclosure of the following account information under FATCA and the IGAs:

> (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.

Complaint ¶ 154; *see also* ¶ 159. None of these items touches upon any First Amendment concern, such as freedom of association or political expression. On the contrary, the reporting requirements are "narrowly directed," in the words of footnote 6, encompassing basic financial information that is helpful in ascertaining the correct tax and collecting it. The *Miller* footnote does not suggest that bank reporting requirements are somehow afforded Fourth Amendment protection as "searches" requiring judicial review either. *See* Part III, *infra*. As a result, plaintiffs' alternative "view" of the *Miller* opinion, and the purported constitutional right to privacy of their bank information that they attempt to glean from footnote 6, should be rejected.

2. Plaintiffs' Theory of Indirect Harm Does Not Establish Standing

Next, plaintiffs contend that they meet the requirement that their alleged injury is "fairly

traceable" to the Government, *see Lujan*, 504 U.S. at 560, because of "two central harms" that they claim to suffer as a result of the challenged provisions. Doc. 37 at 5 (PageID #563). The first is "the bank-record searches and reporting" (which are not "searches" at all, *see infra* Part III), and the second is "the problems in getting banking services." *Id*. To be clear, the Government does not argue that the information-reporting requirements themselves are not fairly traceable to the Government; however, standing is still lacking because information reporting is simply not the invasion of a constitutionally protected interest (as discussed above), and the alleged harm to financial privacy from information reporting is also a generalized grievance (discussed below). The traceability prong of the three-part Article III standing test in *Lujan* is only a problem for plaintiffs' second purported injury, which basically consists of [1] plaintiffs' feeling that their banks have unjustly inconvenienced them and [2] their suspicion that FATCA and the IGAs are to blame for their banks' actions.

Because any harm they have suffered in this regard is, at best, indirect, plaintiffs exaggerate by suggesting that "in *Warth v. Seldin*, the Supreme Court recognized that harm caused 'indirectly' by a law is enough for standing." *Id*. (citing 422 U.S. 490 at 504-05). The relevant part of the *Warth* opinion is actually far less helpful to plaintiffs:

> 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. *E.g.*, *Roe v. Wade*, 410 U.S. 113, 124, 93 S.Ct. 705, 712, 35 L.Ed.2d 147 (1973). 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.

422 U.S. 490 at 504-05. Plaintiffs' vague "problems in getting banking services" are not the kind of "specific harm" contemplated by *Warth*, nor are they a "harm that a constitutional provision or statute was intended to prevent."

While it is true that the Supreme Court has in some instances recognized that an actionable "injury may be indirect," this mere possibility does not override the requirement that, "the complaint must indicate that the injury is indeed fairly traceable to the defendant's acts or omissions." *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 261 (1977). In *Arlington Heights*, for example, the Supreme Court found that the plaintiff had standing where the claimed injury was "not dependent on speculation about the possible actions of third parties not before the court." *Id*. at 264. By contrast, plaintiffs here ask the Court to speculate that FATCA and/or the IGAs caused their banking difficulties. Such speculation is unwarranted. If some foreign banks choose to close U.S. accounts (outside the narrow circumstance described in § 1471(b)(1)(F)), or to impose other burdens on U.S. account holders not expressly required by U.S. law, that is "'the result of the independent action of some third party not before the court'" and fatal to plaintiffs' standing. *Klein v. U.S. Dep't of Energy*, 753 F.3d 576, 579 (6th Cir. 2014) (quoting *Lujan*, 504 U.S. at 561). Notably, the Sixth Circuit found standing lacking where it was "in the discretion" of a third-party supplier whether to pass along the cost of a tax (alleged to violate the Constitution's export clause) to a plaintiff in the form of higher prices. *See Ammex, Inc. v. United States*, 367 F.3d 530, 534 (6th Cir. 2004).

Plaintiffs' representation that the Sixth Circuit "recognizes that indirect harm suffices for standing" is misleading. Doc. 37 at 6 n.4. They cite two cases. The first is *Grizell v. City of Columbus Div. of Police*, 461 F.3d 711 (6th Cir. 2006), a case concerning alleged discriminatory promotion practices by a police department. *Grizell* did not involve imposition by government of a requirement on a third party that purportedly led to a plaintiff's injury. Rather, *Grizell* involved alleged government discrimination directly against its employees, making the case inapposite.

Plaintiffs' second case, *Lambert v. Hartman*, 517 F.3d 433 (6th Cir. 2008), is not on point either. It concerned Hamilton County's publication on its web site of the social security number

of an individual who had received a speeding ticket, after which that individual's identity was stolen by a third party who had obtained the information from the web site—a fact established in the identify thief's earlier criminal case. *Id*. at 437-38. Thus, despite the direct harm having been caused by a third party, the plaintiff had standing to sue the county based on indirect causation because the injury was still fairly traceable to the county's action without having to speculate about how the identity theft occurred. *Id*. Unlike in *Lambert*, the facts in our case require the Court to speculate regarding what caused the banks' alleged actions (which were discretionary in any event, *see Ammex*, *supra*), and therefore plaintiffs' "problems in getting banking services" are not fairly traceable to the Government. It is also worth noting that even though the plaintiff had standing in *Lambert*, the Court of Appeals affirmed the dismissal of plaintiff's constitutional claim based on "the Sixth Circuit's restrictive view of informational privacy." 517 F.3d at 441.

3. The Alleged Harm to Plaintiffs' Financial Privacy Caused by Information Reporting Is a Generalized Grievance

"[E]ven when the plaintiff has alleged redressable injury sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75 (1982) (quoting *Warth*, 422 U.S. at 499-500); *see also United States v. Hays*, 515 U.S. 737, 743 (1995) ("[W]e have repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power."); *ACLU v. NSA*, 493 F.3d 644, 675 (6th Cir. 2007) ("injury" should not be "abstract or conjectural, so as to avoid generalized grievances more appropriately addressed in the representative branches and the electoral process." (quotation omitted)); *Joelson v. United States*, 86 F.3d 1413, 1423 (6th Cir.

1996) ("Claims asserted by citizens regarding the proper application of the Constitution are 'generally available grievance[s] about government' and do not establish a personal injury-in-fact." (quoting *Lujan*, 504 U.S. at 573)).

Plaintiffs' claim that information reporting under FATCA, the IGAs, and the FBAR requirements causes widespread injury to financial privacy is a quintessential "generalized grievance" that is abstract, concerns numerous taxpayers with foreign financial assets, and is better left to the political sphere. In contending that theirs is not a "generalized grievance," plaintiffs merely say that the fact that the claim affects a large number of people does not necessarily make it one on which a suit cannot be brought. *See* Doc. 37 at 12 (PageID #565). But again, generalized grievances are "*abstract* questions of wide public significance," *Valley Forge*, *supra* (emphasis added), not just "questions of wide public significance" (which occasionally can support lawsuits like mass tort claims). *See Wyatt v. Municipality of Zainesville, Ohio*, No. 2:13-CV-00117, 2014 WL 934557 at *3 (S.D. Ohio Mar. 10, 2014) ("Where 'the harm at issue is not only widely shared, but is also of an abstract and indefinite nature,' a court is unlikely to find that a plaintiff has established an injury-in-fact for standing purposes." (quoting *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23 (1998))); *see also Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2015) ("Indeed, the instances in which the Supreme Court has labeled a plaintiff's claim a 'generalized grievance' 'invariably appear[ ] in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature—for example, harm to the common concern for obedience to law.'" (quoting *Akins*)). Such a broad and abstract proposition as that put forth by plaintiffs in this case therefore does not create standing.

4. The Lack of Imminent Harm Defeats Standing

Plaintiffs add that, "any notion that Plaintiffs lack standing because the Government has no enforcement action against them fails because the mere existence of applicable statutory

requirements and penalties suffices for standing to challenge the unconstitutional provisions." Doc. 37 at 14. But "the mere existence" of laws they do not wish to follow does not establish imminent harm sufficient to confer standing. *See Adult Video Ass'n v. U.S. Dep't of Justice*, 71 F.3d 563, 566 (6th Cir. 1995) ("A party must show a more immediate threat than the unsurprising proposition that the government generally tends to enforce its laws.").

For support, plaintiffs cite *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979). Doc. 37 at 9 (PageID #567). However, *Babbitt* only applies "[w]hen the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute," *id*. at 298-99, and plaintiffs do not meet this standard. Their preferred "course of conduct"—preventing their financial information from being reported to the Government—is not "arguably affected with a constitutional interest" because, as noted above, plaintiffs' claims rest on a purported constitutional right to financial privacy that does not exist. *See Jones v. Schneiderman*, 101 F. Supp. 3d 283, 289 n.4 (S.D.N.Y. 2015) ("[I]t is Plaintiffs' *conduct*, not their *claims*, that must be affected with a constitutional interest under *Babbitt* and its progeny." (emphasis in original)). Their statement that they "reasonably fear" that a willful FBAR penalty might be imposed against them, Doc. 37 at 8 (PageID #566), even though none has been, also falls short of establishing standing. *See Amnesty Int'l USA v. Clapper*, 667 F.3d 163, 183-84 (2d Cir. 2011) (rejecting as "error" the view that "plaintiffs may establish standing by showing merely that they possess a reasonable fear *of being subject to defendant's allegedly harmful conduct*.'" (quotation omitted) (emphasis in original)). Moreover, *Babbitt* "has been applied predominantly to First Amendment lawsuits seeking to enjoin the prospective application of statutory prohibitions to protected speech," and this case is not a First Amendment case. *Schneiderman*, 101 F. Supp. 3d at 289 n.4.

For these reasons, the Court has rightly rejected plaintiffs' same argument based on

Babbitt. *See* PI Decision at 23 (PageID #404). Rather, "[m]ore stringent requirements apply when litigants challenge a statute . . . which does not inhibit or 'chill' the expression of a constitutionally protected right," as is the case here. *Magaw*, 132 F.3d at 284-85. In that instance, a plaintiff "must instead establish that a prosecution is 'certainly impending,' or at least a 'substantial risk.'" *Schneiderman*, 101 F. Supp. 3d at 297 n.8 (quoting *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1147, 1150 n.5 (2013)). Without the prospect of immediate enforcement action, plaintiffs cannot meet this standard.

B. The Anti-Injunction Act Bars Plaintiffs' Claims

The Anti-Injunction Act (AIA), 26 U.S.C. § 7421(a), provides that, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." The Government argues that the AIA bars plaintiffs' complaint, and plaintiffs disagree based entirely on their overbroad reading of *Direct Marketing Association v. Brohl*, 135 S. Ct. 1124 (2015), a case that considered a different statute. In *Direct Marketing*, the Supreme Court held that the Tax Injunction Act (TIA), 28 U.S.C. § 1341, which directs that federal courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law," did not bar a suit to enjoin the enforcement of Colorado laws imposing notice-and-reporting requirements on out-of-state retailers designed to help the State collect sales and use taxes from its residents. 135 S. Ct. at 1131. The Supreme Court reasoned that the notice-and-reporting requirements are "information gathering" tools that are "distinct from" and "precede the steps of 'assessment' and 'collection.'" *Id*. at 1130-31.

Plaintiffs seek to enjoin the 30% withholding taxes in § 1471(a) and (b)(1)(D), which fall squarely within the category of suits barred by the AIA. *Direct Marketing* gives no reason to doubt that conclusion. Plaintiffs contest this, disputing even that the § 1471 withholding taxes

really "are taxes" rather than "penalties" (as plaintiffs insist on calling them),[9] and contending that even as taxes "the AIA still does not apply to them." Doc. 27 at 10 n.6 (PageID #568). But treating a suit to enjoin a tax (such as counts 4 and 5 of the Complaint) as something other than a "suit for the purpose of restraining the assessment or collection of any tax" would effectively write the AIA out of the U.S. Code. Plaintiffs claim their argument is correct under *Direct Marketing*, (*see* Doc. 37 at 10 n.6, PageID #568), yet in *Direct Marketing* non-reporting retailers were subject to a "penalty," not a tax, making *Direct Marketing* distinguishable on this point. 135 S. Ct. at 1128; *see Florida Bankers Ass'n v. U.S. Dep't of Treas.*, 799 F.3d 1065, 1069 (D.C. Cir. 2015) (distinguishing *Direct Marketing* on this basis). In any event, the plaintiff in *Direct Marketing* was a trade association, not a taxpayer that was subject to the reporting requirement, and Justice Ginsburg noted in concurrence that "a different question would be posed" if a retailer—who had the alternative of paying the penalty and suing for a refund—had brought a suit for injunctive relief. 135 S. Ct. at 1136. That "different question" is posed in the instant case, with plaintiffs able to sue for a refund of any FATCA taxes if and when they are imposed.

Additionally, the information-reporting provisions in FATCA, the IGAs, and the FBAR requirements cannot be enjoined under the AIA because to do so would have the effect of restraining assessment and collection of tax. The Government cited a long line of Sixth Circuit precedent supporting this view, *see* Doc. 27 at 11-12 (PageID #334-35), which plaintiffs dismiss out of hand, assuming that it was all silently overruled by *Direct Marketing* (*see* Doc. 37 at 14, PageID #572). But the AIA cases are distinguishable from *Direct Marketing* because the text of the TIA differs from the text of the AIA. As the Supreme Court noted in *Direct Marketing*, the

[9] Both § 1471 withholding taxes are referred to as a "tax" in the statutory text, which is "significant." *Nat'l Fed. of Ind. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012); *see* 26 U.S.C. § 1471(a), (b)(1)(D).

TIA's grouping of "restrain" with the words "enjoin" and "suspend" supports giving "restrain" in the TIA a narrow, secondary dictionary meaning (equivalent to "enjoin"), rather than its primary dictionary meaning of "to hold back" or "inhibit." 135 S. Ct. at 1132. By contrast, the AIA does not merely prohibit particular forms of relief from assessment or collection of taxes in particular situations, as does the TIA; rather, the AIA prohibits any "suit for the purpose of restraining the assessment or collection of any tax." The focus of the AIA is on the possible effects of the suit, and in describing what suits are barred, the word "restraining" stands alone in the AIA. These differences suggest that the AIA uses "restraining" in the broader sense, which is consistent with *Bob Jones Univ. v. Simon*, 416 U.S. 725, 731-32 (1974), *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 760-61 (1974), and many other cases holding that the AIA bars suits that "hold back" the assessment or collection of tax. The Supreme Court in *Direct Marketing* did not cite, let alone repudiate or overrule, the line of AIA cases recognizing the breadth of the AIA's reach. That line of cases bars the instant suit.

C. The Eighth Amendment Claims Are Not Ripe

The PI Decision found that "Plaintiffs' Eighth Amendment claims . . . are not ripe for adjudication because no withholding or FBAR penalty has been imposed against any plaintiff." PI Decision at 31 (PageID #412). Plaintiffs persist in arguing that their Eighth Amendment claims are ripe for adjudication "because they do not want their information disclosed *right now*" and because "they want to *not* comply with the challenged provisions right now." Doc. 37 at 14-15 (PageID #572-73) (emphasis in original). But the alleged immediate harm to plaintiffs' financial privacy from information reporting, and the desire not to participate in the information-reporting system, are not the relevant injuries for the Eighth Amendment counts. Rather, to bring a ripe claim based on the "excessive fines" clause, the injury must logically be the supposedly excessive fine itself, and no such fine is imminent. Plaintiffs do not address the three-part

ripeness test discussed in the Government's opening brief and the PI Decision. *See* Doc. 27 at 17-19 (PageID # 340-42) (citing *Ky. Press Ass'n v. Kentucky*, 454 F.3d 505, 509 (6th Cir. 2006)); PI Decision at 31-33 (PageID #412-14).

III. The Complaint Fails to State a Claim Upon Which Relief Can Be Granted

Plaintiffs' latest brief says almost nothing new with regard to any other issues. It copies nearly verbatim the part of their brief in support of the PI Motion in which they argued that the IGAs are unconstitutional. *Compare* Doc. 37 at 15-24 (PageID #573-82) *with* Doc. 8-1 at 9-18 (PageID #147-56). But as the Government has already explained, plaintiffs' argument both ignores the ample legal authority underpinning what the IGAs actually do and fundamentally misreads the FATCA statute. *See* Doc. 27 at 19-26 (PageID #342-49). We rest on our prior briefing on these issues and maintain that Counts 1 and 2 of the Complaint fail to state a claim.

The Court has also rejected the equal-protection claim (Count 3), finding that the statutes, regulations, and IGAs that plaintiffs challenge do not make the classification plaintiffs assert, that the real classification is rationally related to a legitimate government interest, and that mere disparate impact is insufficient to demonstrate an equal protection violation. PI Decision at 24-30 (PageID #405-11). Plaintiffs repeat the same equal-protection argument in their latest brief, copying almost verbatim from the brief in support of the PI Motion. *Compare* Doc. 37 at 24-27 (PageID #582-85) *with* Doc. 8-1 at 21-24 (PageID #159-62). The argument fails for the same reasons as before, and we rest on prior briefing. *See* Doc. 27 at 26-27 (PageID #349-50).

The Court also rejected plaintiffs' "excessive fines" argument (Counts 4-6), concluding that FATCA taxes are not penalties and that the maximum willful FBAR penalty is constitutional in at least some cases. PI Decision at 30-36 (PageID #411-17). Plaintiffs' argument in their latest brief is the same, *see* Doc. 37 at 27-28 (PageID #585-86), and it should be rejected for the same reasons as before. We rest on prior briefing. *See* Doc. 27 at 27-28 (PageID #350-51).

Finally, with respect to Counts 7 and 8, the Court concluded in the PI Decision that the Complaint's "Fourth Amendment counts are based on information reporting that does not violate the Constitution." PI Decision at 36 (PageID #417). This conclusion is correct and need not be revisited for reasons already set forth in Part II.A.1, *supra*.[10] Despite plaintiffs' repeated mislabeling of the information reporting at issue here as a "search" or "searches," *see* Doc. 37, such information reporting is simply not a "search" within the meaning of the Fourth Amendment. "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). As discussed above, it is well-settled that tax-related financial information is not subject to a reasonable expectation of privacy. Therefore, the disclosure of specific financial information by an FFI to the Government is not a Fourth Amendment search subject to judicial oversight. *Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015), considered only the reasonableness of "searches conducted outside the judicial process," not whether a Fourth Amendment search had occurred, and therefore plaintiffs' reliance on *Patel* is misplaced. *See* Doc. 37 at 4-5 (PageID #562-63).

IV. Conclusion

For the foregoing reasons, as well as the reasons discussed in our opening brief, the Government requests that the Court overrule plaintiffs' objection and grant the motion to dismiss this action for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

[10] In Fourth Amendment cases, standing often overlaps with the merits. *See United States v. Smith*, 263 F.3d 571, 581-82 (6th Cir. 2001) (reasonable expectation of privacy is comparable to standing in Fourth Amendment cases); *see also United States v. Jones*, 75 F. App'x 398, 400 (6th Cir. 2003) ("reasonable expectation of privacy" is "tantamount to 'standing' in other contexts").

Certificate of Service

I certify that on January 14, 2016, a copy of the foregoing Defendants' Reply to Plaintiffs' Opposition to Motion to Dismiss 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
Edward J. Murphy
U.S. Department of Justice, Tax Division