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Memorandum

To: Whom It May Concern
From: James Bopp, Jr. & Richard E. Coleson
Date: August 22, 2017
Re: Sixth Circuit Decision in *Crawford v. Department of Treasury*

On August 18, 2017, the U.S. Court of Appeals for the Sixth Circuit released its Opinion (docket no. 48)[1] in *Crawford v. Department of Treasury* (Case No. 16-3539). The Opinion ("Op.") held that no plaintiff has standing[2] in this case. This memo briefly explains what we believe are two key errors in the court's analysis.

Preliminarily, note that the Sixth Circuit has been employing a very restrictive view of standing, and continues that approach here. But recently, the U.S. Supreme Court rejected the Sixth Circuit's approach in *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334 (2014) ("*SBA*"). We believe that the Sixth Circuit's holding in *Crawford* continues the restrictive approach the Supreme Court rejected in *SBA*.

The first key error relates to the court's failure to follow *SBA* in stating the standing requirement. As the court recognized, *SBA* recognized standing where there is "an intention to engage in a course of conduct arguably affected with a constitutional interest and . . . there exists a credible threat of prosecution thereunder." Op. 18 (quotation marks omitted) (quoting *SBA*, 134 S.Ct. at 2342 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979))). So a "credible threat of prosecution" suffices, which, under *SBA*, exists where a statute proscribes activity one has done or intends to do and there is no evidence the statute is no longer enforced.

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[1] The clerk previously released the Opinion as docket no. 39-2, which was incorrect (as that number had already been assigned on the docket). On August 21, the clerk circulated the Opinion (along with a letter and the Judgment) as docket no. 48, which is the correct number.

[2] Standing is a legal concept based on the constitutional requirement of a "case or controversy" for federal courts to have jurisdiction. A plaintiff must show actual harm, traceable to the government action at issue, and redressable by court action.

Yet the Sixth Circuit combined *SBA* with an *older* case to change that standard. It combined the older opinion in *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138 (2013), with *SBA* to make this test: "there must be a *certain* threat of prosecution." Op. at 18 (emphasis in original). Now, *Clapper* did say that "'*certainly impending*" prosecution was required. Op. at 18 (emphasis in original) (quoting *Clapper*, 133 S.Ct. at 1147). But *SBA* came *after* the *Clapper* opinion and it cited the older *Babbitt* standard as sufficient, i.e., "credible threat of prosecution." So there was no warrant for the Sixth Circuit to reject *SBA* and substitute for "credible threat" a standard requiring "a *certain* threat," Op. at 18 (emphasis in the original), in this reformulation of the rule and in the Sixth Circuit's application of standing rules.

In applying its standing requirement to Mr. Zell's standing, the Sixth Circuit recited the credible-threat standard (the test *SBA* used), Op. at 27, but plainly relied on its certain-threat interpretation (from *Clapper*) of SBA's test, having already held that credible threat *means* certain threat, *id.* at 18.

So the Sixth Circuit held that even though Zell "'is not currently complying with' the FBAR," *id.* at 27 (citation omitted), that did not suffice for standing, i.e., there was no certain threat. The Sixth Circuit said "Zell has not alleged any facts that would show a credible threat of enforcement against him." *Id.* But under *SBA*'s credible-threat standard, enforcement is credible if one violates a law (or intends action that would be in violation of that law). *SBA* noted that enforcement proceedings under the state law provision at issue there "are not rare" and that the government "ha[d] not disavowed enforcement." 134 S.Ct. at 2345. *SBA* for this point quoted, and relied on, a case that held that "'[t]he 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 the burden here to show that it has disavowed enforcement or that Zell will not be prosecuted. And where the government has not done so, the enforcement threat is real and suffices for a preenforcement challenge. So it appears that the Sixth Circuit is resisting *SBA* and using overly restrictive standing rules.

The second key error of the Sixth Circuit involves its interpretation of the sort of harm recognized as sufficient for standing in *Roe v. Wade*, 410 U.S. 113 (1973). *Roe* involved a Texas law banning abortion in most circumstances, but penalties for violation only applied to abortionists, not women seeking abortion. Yet Jane Roe, who was not an abortionist, had standing to challenge the law since doctors would not perform an abortion she said she wanted because of the existence of the law. 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 . . . ." Op. at 21 (quoting *Bennet v. Spear*, 520 U.S. 154, 169 (1977)). Of course, the

abortionists could have actually performed abortions and suffered the penalties if they chose, so the abortion provision was coercive more than determinative. In the present case—based on the experience of Plaintiffs and numerous others identified in a Democrats Abroad study—foreign financial institutions ("FFIs") are declining to provide financial services to Americans abroad because of the burdens and coercive effect of FATCA and the IGAs, which together impose burdensome requirements and a substantial penalty for noncompliance—unless FFIs comply by not serving Americans. That is clearly coercive and should suffice for standing.

Yet the Sixth Circuit attempts to evade *Roe* by a curious analysis that tries to evade the central concept, i.e., coercive effect gives standing, by substituting what may be called an "options" analysis. It sets it up this way:

> 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.

Op. at 20-21.[3] It then says that here there is a third option, Op. at 21, which is irrelevant but to which we shall turn shortly.

But first we must stop and consider what the court is doing, which is erroneous. The analysis of *Roe* doesn't turn on how many options are available, nor does this case, so it cannot be distinguished on that basis. *Roe* stands for the legal doctrine that coercion against a third party gives a person affected by that coercion standing to challenge the law causing the coercion even if the burdens and/or penalties of the law don't directly apply to the person asserting standing. So just as coercion against abortionists gives standing to women denied abortion by those abortionists because of the coercion, also coercion against FFIs gives standing to persons denied financial services by those FFIs because of the coercion. That is a straightforward standing doctrine that has nothing to do with how many options are available. The *number* of options is a red herring unless it somehow mitigates this coercion, which is not the case with the court's argument.

The third option the court identifies is this: "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." Op. at 21 (emphasis in original). The court says some of the harms identified were

[3] Plaintiffs actually argued the parallel of coercive effect giving standing, not the number of options. In actuality, abortionists had the third option of ignoring the law, performing, abortions and hoping for non-enforcement. And if one wants to speculate as to number of options, doctors could also choose to change professions, country, state and so on, just as women seeking abortions could go to another state.

"*above and beyond* FATCA and the IGAs." *Id.* (emphasis in original). That is true, e.g., FFIs began implementing IGAs even before they were officially in effect, but even that was *because* of FATCA and the IGAs. If IGAs are coming into effect, an FFI begins implementing the policies it will be required to implement as it phases in the compliance because waiting until the last minute will yield non-compliance and the dreaded penalties. And sweeping broadly to capture persons and accounts is necessary to avoid those dreaded penalties. But even without the above-and-beyond effects, fully traceable to FATCA and the IGAs, the burdens and penalties of FATCA and the IGAs provide sufficient coercive effect to give standing to persons denied services because of the burdens and dangers of complying with those provisions. So the above-and-beyond argument doesn't really work.

Moreover, there is a fundamental disconnect in two parts of the court's analysis. It's premise is that FFIs can "*do* business with United States persons," Op. at 21 (emphasis added), but it later says the FFI may "choos[e] *not to do* business with certain individuals, whether to protect their own interest in FATCA compliance of for some other reason," *id.* (emphasis added) (citing Saxo Bank rejecting U.S.-person accounts). So an FFI's third option seems to be *doing* business . . . by choosing *not to do* business, which the court identifies as an above-and-beyond choice. But of course the FFIs are rejecting U.S. persons because of FATCA and the IGAs, as experienced by numerous persons around the world.

Finally, in developing its third-option argument, the court said 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." Op. 21 n.8. But FFIs are closing accounts to avoid filing the paperwork (which is the result of severe, imposed monitoring obligations, not just paper-shuffling) both to avoid the burdens of compliance and the severe penalty for failure to achieve full compliance. So this two-options versus three-options arguments fails to come to grip with the real issue of coercions that gives standing. If instead of banning most abortions, Texas had imposed on doctors such draconian burdens of monitoring and reporting on women seeking abortion that doctors were turning women seeking abortion away because of the compliance burdens, coupled with severe penalties for failure to fully comply, women would have had standing to challenge those laws too.

In sum, we believe the Sixth Circuit erred on these two key points. And its analysis conflicts with fundamental standing principles established in the controlling Supreme Court cases of *SBA* and *Roe*.