In the United States District Court
For the Southern District of Ohio
Western 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. **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 **ORAL ARGUMENT REQUESTED**

Plaintiffs' Preliminary-Injunction Reply

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Plaintiffs have standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Americans living abroad were the specific objects of FATCA, the IGAs, and FBAR. Those provisions cause unique and discriminatory injuries on Americans living abroad. Plaintiffs are among those affected, and requested relief will redress their injuries. A central burden is financial disclosure that Plaintiffs do not want, which gives them standing to challenge provisions (including IGAs) disclosing that information, along with the FFI Penalty that penalizes FFIs for not complying with challenged provisions. A related burden is that many FFIs don't want American's accounts. These burdens are the direct result of the challenged provisions. Plaintiffs have standing to challenge the Passthrough Penalty, which directly targets persons like Plaintiffs who wish to retain their privacy. Plaintiff Zell in particular has not provided requested information to FFIs and fears he will become subject to this provision. Plaintiffs have standing to challenge the FBAR requirement's Willfulness Penalty; in particular Plaintiff Zell wants to establish a savings account for his minor daughter who will be subject to that penalty because she will know of the FBAR requirement but be unable to file an FBAR. The lack of a current enforcement action does not eliminate standing. *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341-46 (2014). Because at least one plaintiff has standing for each claim, the Court need not decide the standing of each. *See McConnell v. FEC*, 540 U.S. 93, 233 (2003).

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The Anti-Injunction Act ("AIA"), 26 U.S.C. 7421(a), does not prohibit an injunction, even though challenged provisions involve taxation. The analysis and holdings of *Direct Marketing Association v. Brohl*, 135 S.Ct. 1124 (2015), makes clear that the AIA does not apply here for several reasons, including especially that "information gathering" is a phase prior to "assessment" and "collection" and so not subject to a statute barring injunctions against assessment and collection. *Id.* at 1127-33

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meaningful standards and aptitude to evaluate the claims against the IGAs because federal courts routinely review provisions for constitutional and statutory authority. The IGAs are "final" for APA purposes because legal consequences flow from them.

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Only four types of international agreements exist, and the Government agrees that the IGAs are executive agreements.

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Whatever the scope of Executive authority, it does not reach tax agreements falling squarely within Congress's power "[t]o lay and collect taxes" under Article I. FATCA was enacted under this taxing authority, and the express purpose of the IGAs is to relieve FFIs from complying with FATCA and substitute a scheme for FATCA that ignores Congress's vital choices in FATCA.

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FATCA does not authorize the IGAs because the IGAs are in conflict with FATCA as to two vital choices that Congress made. First, FATCA required FFIs to establish a relationship with, and report information directly to, the IRS. The IGAs override this. Second, FATCA required FFIs to attempt to get a waiver from an account holder of any privacy protections in the jurisdiction where he lives. The IGAs override this. Thus, FATCA does not authorize the IGAs. Rather, the IGAs were passed for convenience (and perhaps political expediency), but such reasons do not provide statutory authority for the IGAs.

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The IGAs alter Congress's two vital choices. First, congress chose to have FFIs establish a relationship with, and report directly to, the IRS. Second, FATCA required FFIs to attempt to get a waiver from an account holder of any privacy protections in the jurisdiction where he lives. The IGAs override both choices that Congress made in balancing vital interests in privacy and consent against administrative inconvenience. These vital differences show that FATCA does not authorize the IGAs. The Government does not dispute the vital differences, but argues instead that FATCA authorized doing them in 26 U.S.C. 1471(b)(2)(B). While that provision authorizes some minor fitting as to FATCA's tailoring, it does not authorize the IGAs themselves, which are contrary to Congress's two vital choices described above. Because the IGAs are not authorized by FATCA, they are *sole* executive agreements, but they are unconstitutional on that ground because the Constitution does not authorize the president to override choices of Congress in the exercise of Congress's authority over the taxing power.

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The Government says Plaintiffs have no expectation of privacy in bank records under *United States v. Miller*, 425 U.S. 435, 442 (1976). That holding applies only to a search (i) targeting a suspected wrongdoer and (ii) with some judicial process. *Miller* does not apply to "blanket reporting," *id.* at 444 n.6, without judicial process, *id.*: "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.'" The bulk-data collection without judicial oversight that is at issue in the present case is not covered by *Miller*. So people *do* have a reasonable expectation of privacy in their bank accounts against blanket reporting without judicial oversight under challenged provisions. And there is a "search" under such provisions because their purpose is to get FFIs to *search* accounts, on behalf of the U.S. and foreign governments under coercive penalties, to find and report on people. So the reporting requirements violate the Fourth Amendment.

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The reporting requirements violate the equal-protection rights of Americans living abroad as to their "local bank accounts," narrowly defined to mean those used for daily

living activities. The local bank accounts of Americans in America are not subject to the reporting requirements imposed on the local bank accounts of Americans living abroad. The Government's justification is that such reporting is an important tool for tax collection, but it already has many effective tools for such tax collection without the challenged provisions, and the IRS's Taxpayer Advocate Service warns that FATCA compliance costs are expected to equal or exceed additional revenue collected. The real reason for the heightened reporting requirements is convenience, as the Government acknowledges, but that is not a cognizable justification for violating constitutional rights.

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Plaintiffs may challenge the FFI Penalty because it causes FFIs to search out and report the information that Plaintiffs do not want reported. Plaintiffs' claims are ripe. Because they do not want their information disclosed now, their challenges to provisions resulting in such disclosure are ripe. Regarding the Passthrough Penalty, they do not want to comply with provisions now that would trigger the Passthrough Penalty, making their challenge ripe. Plaintiff Zell has declined to respond to FFI information requests, making his challenge ripe. Regarding the FBAR penalty, Plaintiff Kuettel wants to open and contribute to an account now, but his daughter is too young to file FBARs, so that claim is ripe. The challenged penalties are in fact penalties because, given compliance, no tax would result. The 30% rate is not "remedial" because U.S. citizens are otherwise subject to their usual tax rate, which is lower for most people. And Plaintiffs could not get the Government's suggested refund without complying with provisions with which they do not want to comply. The government suggests this is a facial challenge and penalties might not be excessive as to, e.g., terrorists, but Plaintiffs explain how challenged provisions unconstitutionally affect them. And an excessive-fines claim turns on a proportionality test that doesn't get into such things as whether one is a terrorist. If Congress wants to target terrorists with high penalties, it should do so narrowly, not so as to reach ordinary folks.

II. Plaintiffs Will Suffer Irreparable Harm.. 31

Plaintiffs showed irreparable in the opening Memorandum, including the fact that mandated disclosure they oppose will occur absent a preliminary injunction and Plaintiff Kuettel's "continued chill on his right to open a college savings account." Rather than showing that these are not irreparable harms, the Government argues standing and the merits of the claims (and ripeness for the Eighth Amendment claims). So Plaintiffs have irreparable harm absent requested relief.

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The government recites combating "tax evasion ... money laundering or terrorist financing." But plaintiffs are ordinary people abroad seeking freedom from FATCA-caused problems with local financial institutions, living-expense accounts, mortgages, setting up and contributing to a daughter's account, and so on. They do not want either disclo-

sure of their private information or denial of necessary banking services because they are Americans. The gulf between the Government's and Plaintiffs' interest shows not only the poor tailoring of challenged provisions but also that the balance of harms and the public interest tilt in Plaintiffs' favor. The public interest analysis primarily addresses the impact on non-parties, and it is always in the public interest to enforce the Constitution. The Government points to estimated tax recovery from FATCA and the success of a non-FATCA voluntary compliance program, then says an injunction would hinder progress and cost tax revenue because challenged provisions "are valuable tools." But it has become clear that a cost-benefit analysis (not even counting the *human* toll) works against FATCA. The cited voluntary program was before FATCA, and the Government still has that and other valuable tools. And there have arisen new public-interest concerns with all that mandatory reporting involving foreign governments being done in digital form and being the object of cyber thieves, at a time when the IRS itself has had taxpayer information taken by hackers. The balance and public interest favor an injunction.

Conclusion. 36

Argument

A great gulf separates the Government's asserted interests from Plaintiffs'. The government recites combating "tax evasion ... money laundering or terrorist financing." (Doc. No. 16, PageID 246.) But plaintiffs are ordinary people abroad seeking freedom from FATCA-caused problems with local financial institutions, living-expense accounts, mortgages, setting up and contributing to a daughter's account, and so on. Plaintiffs are not alone. An extensive, careful survey,

> 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). That great gulf shows FATCA's poor tailoring.[1] A scalpel was needed, not FATCA's sledgehammer.

But relief is at hand because the Constitution provides vital protections, balanced to protect ordinary people's rights even at the risk of missing an occasional scofflaw.[2] "When Congress finds that a problem exists, we must give that finding due deference; but Congress may not

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[1] *See* www.democratsabroad.org group/fbarfatca/democrats-abroad-publishes-fatca-research-fatca-affecting-everyday-americans-every (Report, along with Executive Summary and Datapack).

[2] Plaintiffs' constitutional rights do not turn on cost-benefit analyses, but FATCA gets only marginal revenue returns compared to enormous compliance costs (in addition to the human costs). (*See* Doc. No. 1 at 2-4.) And as noted by William Byrnes, Executive Professor of Law and Associate Dean at Texas A&M School of Law, only about 1.7% of the 8.7 million overseas Americans were probably criminally evading tax in 2009 and .6% of them currently remain non-compliant, yet FATCA seriously burdens all:

> As of 2009, 125,000 to 150,000 U.S. taxpayers were probably criminally evading tax through offshore accounts. Their assets under management reasonably totaled $200 billion to $300 billion. In that the median non-compliant taxpayer had $12,748 tax understatement for the period 2003 through 2008, it is also likely that if 50,000 taxpayers currently remain non-compliant, with inflation and interest, another approximate $1.4 billion of tax revenue may be collected by 2020.
>
> Thus, from tools already at Treasury's disposal before FATCA, the period 2010-2020 will probably produce an annual average of approximately $250 million tax revenue, penalties and interest, excluding FBAR and FBAR like penalties on banks.

William Byrnes, *Is FATCA chasing a leprechaun and his pot of gold?*, Cayman Fin. Rev., Aug. 19, 2015, www.compasscayman.com/cfr/2015/08/19/Is-FATCA-chasing-a-leprechaun-and-his-pot-of-gold-/

choose an unconstitutional remedy." *Citizens United v. FEC*, 558 U.S. 310, 361 (2010). Nor may the Executive. The Government has other, successful tools to catch scofflaws without FATCA's bulk-data-collection approach that so unconstitutionally, so egregiously harms ordinary folks.[3]

I. Plaintiffs Have Likely Merits Success.

A. Plaintiffs Have Standing.

The Government contests standing. (Doc. No. 16, PageId 210-21.) As shown below, Plaintiffs have standing. But preliminarily Plaintiffs take exception to the Government's depiction of Plaintiff's very real injuries as "self-inflicted." (Doc. No. 16, PageID 202, 250.) Blaming FATCA's victims for trying to avoid FATCA's injuries, where possible, is wrong. Those injuries are unconstitutionally imposed and ought not be borne where they may be escaped.

Plaintiffs have standing because they are suffering ongoing and threatened concrete injuries to protected interests caused by challenged provisions (no defendant disavows enforcement), of which they are the object, and the requested relief will redress those injuries. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).[4] Americans with overseas accounts, such as Plaintiffs,

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[3] A just-published Non-Prosecution Agreement between the U.S. Department of Justice and Swiss bank Zweiplus verifies that foreign financial institutions ("FFIs") are actively dumping accounts held by Americans abroad due to challenged provisions. *See* http://www.justice.gov/opa/file/762271/download. In the Agreement, the DOJ assessed a penalty of $1,089,000 for not reporting on 44 U.S.-related accounts, despite the fact that

> [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., Exhibit A (Statement of Facts) at ¶ 12. Of the 250,000 accounts transferred to Zweiplus from the other two banks, 42 turned out to be U.S.-related accounts, and two other accounts were *not* U.S.-related accounts when opened by Zweiplus, but *became* so when the non-U.S.-citizen account holders moved to the United states. *Id.*, Exhibit A at ¶¶ 15-16. For these 44 accounts, Zweiplus lost $1,089,000.

[4] Because at least one plaintiff has standing for each claim, others' standing need not be considered. *McConnell v. FEC*, 540 U.S. 93, 233 (2003)(collecting cases)(standing of intervening McCain-Feingold sponsors not decided because FEC had standing). That governs here, including as to the standing of plaintiffs Paul, Kuettel, and Nelson. However, briefly note that the Government contests Sen. Paul's

were the specific *objects* of FATCA, the IGAs, and FBAR—based on the notion that some of them might be tax-evaders. Rather than narrowly targeting tax-evaders, challenged provisions *cause* unique and discriminatory *injuries*, directly and indirectly, on virtually all U.S. citizens living and working abroad. Plaintiffs are among those who are affected by the challenged provisions, and their injuries will be *redressed* if they receive requested relief because it will relieve oppressive burdens.

> A central burden is extensive financial disclosure that Plaintiffs do not want. Plaintiffs
>
> do[] not want the financial details of [their] accounts, including the account numbers, the account balances, and the gross receipts and withdrawals from the accounts, disclosed .... [They] would not disclose or permit others, including [their] bank, to disclose [their] private account information ... but for the fact that FATCA and FBAR require the disclosure.

(Doc. No. 1, PageID 12 (¶ 23), 15 (¶ 38), 17 (¶ 48), 23 (¶ 69), 27 (¶ 86).) This opposition to disclosure provides standing to challenge provisions (including IGAs) expressly *requiring* disclosure and provisions that directly or indirectly *penalize* entities for not providing disclosure, which disclosure is ongoing.[5] So Plaintiffs have standing to challenge FATCA, IGAs, and FBAR disclosure requirements, and they have standing to challenge the FFI Penalty (30% "tax" on payments to non-compliant FFIs (foreign financial institutions)) because those FFIs disclose account holders' information *because of* that penalty. A related burden is the fact that Plaintiffs (and many Americans abroad) regularly encounter FFIs that don't want American's accounts *because*

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standing based on a case that dealt with the constitutionality of a statute passed by a majority of Congress (Doc. No. 16, PageID 220-21), but the IGAs were neither submitted to nor voted on by Congress. Regarding Kuettel and Nelson, the Government relies (*id.*, PageID 215 n.11) on *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), which applies only to the Fourth Amendment and has a narrow holding, turning importantly on "connection with the United States," *id.* at 271, which connection Kuettel and Nelson have.

[5] Plaintiff Nelson"has had her private financial account information disclosed to the IRS and Treasury Department despite the fact that she is not a U.S. Citizen. (*Id.*, PageID 22-23 (¶ 67).) Plaintiff Zell has had banks seeking information about his and clients' accounts—and asking him to provide IRS withholding forms—based on FATCA requirements and without regard to account balance. (*Id.*, PageID 25-27 (¶¶ 79-85).)

of the hassle of complying with challenged provisions.[6] That is no mere third-party decision but is the direct result of the *challenged provisions*, which were by design *intended* to get rid of American's accounts in non-compliant FFIs.[7] That problem will be eliminated and Plaintiffs' complaint redressed if requested relief is granted.

FATCA's Passthrough Penalty (30% "tax" imposed on persons exercising their rights not to identify themselves as Americans citizens and to refuse to waive privacy protections under foreign law) directly targeted persons like Plaintiffs with foreign accounts to deter them from maintaining their privacy. It is imposed without regard to tax liability or whether an individual otherwise provides the information through required reports. Requested relief will redress these problems. As discussed above, Plaintiffs object to disclosure and also object to this penalty specifically designed to compel them to this disclosure, providing them standing. Plaintiff Zell holds funds in trust for a client at an Israeli bank, which sought information to identify Zell and the client as U.S. persons subject to FATCA, but Zell has not provided the requested information and reasonably fears that he and/or the client (who instructed non-compliance) will be deemed a recalcitrant account holder subject to the Passthrough Penalty. (Doc. No. 1, PageID 26-27 (¶ 84).) This is no mere third-party-decision problem because Zell has ethical obligations to his clients, with which he must comply, and because the challenged provisions are the real source of the problem. Zell also has not provided requested information that would identify him as an Ameri-

[6] Plaintiffs verify situations where FFIs don't want to deal with Americans, regardless of account amount, because the FFIs don't want the hassle of complying with FATCA rules, including monitoring account amounts. (*Id.*, PageID 11-12 (¶ 21), 19 (¶ 55), 22(¶ 65), 24-25 (¶¶ 78-80).) *See also* Democrats Abroad, *FATCA*, *supra* note 1 (indicating that this is a common problem for Americans abroad).

[7] The Government attempts to sidestep the direct effect of the *challenged provisions* by claiming that refusals of foreign FFIs to deal with Americans "is not fairly traceable to any action by Defendants" (Doc. No. 16, PageID 213), but foreign FFIs' refusal is directly traceable to the challenged provisions, the focus of this lawsuit, and Government defendants indicate no intent not to enforce the challenged provisions. Similarly, the argument that "FATCA does not legally compel people to transfer assets" (*id.*, PageID 214 n.10) ignores the direct *effect* of FATCA.

can citizen subject to FATCA on two personal accounts for day-to-day needs, and so reasonably fears he may be classified as a recalcitrant account holder and subject to this penalty. (*Id.*, PageID 27 (¶ 85).) The banks involved might be operating under the Israeli IGA and reporting information anyway, but if so and if the Israeli IGA falls in this litigation, then Zell would be directly under FATCA and so at risk of the Passthrough Penalty for personal and trust accounts.

The Government claims Plaintiffs may not challenge FATCA's individual-reporting requirement, 26 U.S.C. 6038D(a), because none "alleged an aggregate asset value exceeding $50,000." (Doc. No. 16, PageID 213.) But Plaintiffs verified that they do not want their financial affairs disclosed to the U.S. Government under FATCA, including this provision, the necessary implication of which is either that Plaintiffs are doing such disclosure and want to cease or that Plaintiffs have arranged their affairs so as to avoid such disclosure that would otherwise have occurred, either of which gives them standing. (*See, e.g.*, Doc. No. 1, PageID 12 (¶ 23), 14-15 (¶¶ 35, 37) (altered financial affairs to avoid disclosure), 15 (¶ 38).) Moreover, individuals may report otherwise qualifying accounts under that amount, are encouraged to do so,[8] and the Government has not said that it would refuse such reports.

The Government claims Plaintiffs may not challenge the FBAR requirement's Willfulness Penalty, 31 U.S.C. 5321(b)(C)(i), because none alleged "a bank account exceeding $10,000 in value." (Doc. No. 16, PageID 213.) But Plaintiffs alleged that they reasonably feared they would be subject to the Willfulness Penalty for willful *failure* to file FBARs, indicating that they are filing FBARs. (Doc. No. 1, PageID 12 (¶ 24), 15-16 (¶ 39), 17 (¶ 49), 23 (¶ 70), 27 (¶ 87).) And

[8] A presumption encourages disclosure to prove assets are under $50,000, 26 U.S.C. 6038D(e):

> If–(1) the Secretary determines that an individual has an interest in one or more specified foreign financial assets, and (2) such individual does not provide sufficient information to demonstrate the aggregate value of such assets, then the aggregate value of such assets shall be treated as being in excess of $50,000 ... for purposes of assessing the penalties imposed under this section.

the Government *conversely* argues that "there is no allegation that [Plaintiff] failed to file any FBAR" (Doc. No. 16, PageID 214) and fails to assert that Plaintiffs are *not* filing FBARS, both of which vitiate its argument about the $10,000 trigger. The FBAR report is a trap for the unprepared, uninformed, unwary, imposing this excessive penalty on those who know of the need to file the report but for some reason fail to get it done, so all Plaintiffs to whom it applies reasonably fear it will be imposed on them. And Plaintiff Kuettel alleges that he is *personally* harmed because of his inability to establish and contribute to a college-savings account in his U.S.-citizen daughter's name that would exceed $10,000 because she would know of the need to file an FBAR but could not because she is too young (and both parents, neither a U.S. citizen, object to filing it for their U.S.-Citizen daughter). (Doc. No. 1, PageID 19-20.) Because the daughter would know of the need to file an FBAR, but cannot, there is a reasonable fear that her failure to file would be deemed willful and the Willfulness Penalty imposed. (*Id.*) Thus, her father's investment in her future college expenses would be consumed by a penalty, requiring replacement for her education.

Any notion that Plaintiffs lack standing because the Government has no enforcement action against them (*see* Doc. No. 16, PageID 212-13) fails because the mere existence of applicable statutory requirements and penalties suffices for standing to challenge the unconstitutional provisions. *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341-46 (2014); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)). And even were the Government to disavow enforcement against Plaintiffs—which it does *not* do—such disavowal would not eliminate standing where the applicable statutory requirement and penalty exist. *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient

litigating position would be entirely inappropriate.").

Plaintiffs rely on *no* third-party standing, though they provide information about relevant third parties to demonstrate how FATCA negatively affects their lives and relationships. Rather, they rely on their own interests, especially the constitutionally protected interest in not disclosing information they do not want to disclose. And Plaintiffs are not alone. FATCA is harmfully "affecting everyday Americans every day." *See supra* note 1.

B. The Anti-Injunction Act Does Not Bar Claims.

The Government claims (Doc. 16, PageID 221-28) that the Anti-Injunction Act ("AIA"), 26 U.S.C. 7421(a), bars a preliminary injunction. Not so, which is especially clear after the controlling holding and analysis in *Direct Marketing Association v. Brohl*, 135 S.Ct. 1124 (2015) (unanimous). Examination of *Brohl*'s holdings and analysis readily reveals that the Government's effort to distinguish *Brohl* (Doc. No. 16, PageID 225-26) is unavailing.[9]

Brohl held that the analogous "Tax Injunction Act, which provides that federal district courts 'shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law,' 28 U.S.C. § 1341, [does not] bar[] a suit to enjoin the enforcement of this law." 135 S.Ct. at 1127. *Brohl* addressed a Colorado effort to collect more sales/use tax by mandating that non-Colorado retailers send notices to purchasers (about paying such taxes) and requiring "noncollecting retailers ... [to] send a statement to [Colorado] listing the names of their Colorado customers, their known addresses, and the total amount each Colorado customer paid for Colorado purchases in the prior calendar year." *Id.* at 1128. The federal district court "enjoined enforcement of the notice and reporting requirements," *id.* at 1129, but the Tenth Circuit reversed on the basis

[9] Plaintiffs argue that provisions such as the 30% "taxes" at issue in Count 4 (FATCA FFI Penalty) (Doc. No. 1, PageID 42) and Count 5 (FATCA Passthrough Penalty) (Doc. No. 1; PageID 44) are really penalties. The AIA would not apply to penalties, but for present purposes, assuming *arguendo* those penalties are taxes, the AIA still does not apply to them under *Brohl*.

that it lacked jurisdiction under the TIA because a successful merits challenge "'would limit, restrict, or hold back the state's chosen method of enforcing its tax laws and generating revenue,'" *id.* (citation omitted). In a unanimous Court opinion, the Supreme Court reversed. *Id.* at 1127. In doing so, it provided the controlling analysis for the present case.

First, *Brohl* equated the TIA with the AIA for construing the meaning of terms employed. *Brohl* said that in interpreting the TIA, the Court "looked to federal tax law as a guide," noting that the TIA "was modeled on the Anti-Injunction Act (AIA)," which "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.'" *Id.* at 1129 (quoting 26 U.S.C. 7421(a)).

Second, *Brohl* stated that TIA and AIA terms not only mean the same thing but refer to "discrete phases of the tax process," none of which includes information reports, *id.*:

> We assume that words used in both Acts are generally used in the same way, and we discern the meaning of the terms in the AIA by reference to the broader Tax Code. *Hibbs [v. Winn*, 542 U.S. 88,] 102-05 [(2004)] (KENNEDY, J., dissenting). Read in light of the Federal Tax Code at the time the TIA was enacted (as well as today), these three terms refer to discrete phases of the taxation process that do not include informational notices or private reports of information relevant to tax liability.

Third, *Brohl* specifically reiterated that none of the terms or phases apply to "information gathering," which is at issue here: "the Federal Tax Code has long treated information gathering as a phase of tax administration procedure that occurs before assessment, levy, or collection." *Id.*

Fourth, *Brohl* construed "assessment," which is included in both the TIA and the AIA, as "the next step in the process" (after "information gathering," *supra*), and as "refer[ing] to the official recording of a taxpayer's liability." *Id.* at 1130.[10]

Fifth, *Brohl* construed "collection," which is in both the TIA and the AIA, as "the act of ob-

[10] The Court next construed "levy," which is in the TIA but not the AIA, deciding that "under any ... definition[], 'levy' would be limited to an official government action, imposing, determining the amount of, or securing payment on a tax. *Id.*

taining payment of taxes due," *id.* (citation omitted), to "be understood narrowly as a step in the taxation process that occurs after a formal assessment. Consistent with this understanding, we have previously described it as part of the 'enforcement process ... that "assessment" sets in motion." *Id.* (quoting *Hibbs*, 542 U.S. at 102 n.4).

Sixth, *Brohl* applied these constructions to conclude that barring the enjoining of any tax "assessment" or "collection" (both used in the AIA) could not prevent an injunction of Colorado's tax-information-collection law: "So defined, these terms do not encompass Colorado's enforcement of its notice and reporting requirements." *Id.* at 1131.

Seventh, *Brohl* rejected the notion the TIA should apply because it may *help* with assessing and collecting taxes, which notion would violate the TIA's language and the jurisdictional rule:

> Enforcement of the notice and reporting requirements may improve Colorado's ability to assess and ultimately collect its sales and use taxes from consumers, but the TIA is not keyed to all activities that may improve a State's ability to assess and collect taxes. Such a rule would be inconsistent not only with the text of the statute, but also with our rule favoring clear boundaries in the interpretation of jurisdictional statutes. See *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). The TIA is keyed to the acts of assessment, levy, and collection themselves, and enforcement of the notice and reporting requirements is none of these.

Brohl, 135 S.Ct. at 1131.

Eighth, *Brohl* also rejected the notion that the reach of the TIA could be expanded by focusing on the word "restrain" in the TIA's command to "not enjoin, suspend or *restrain* the assessment, levy or collection of any tax." 28 U.S.C. 1341 (emphasis added). That was the approach of the Eighth Circuit, which *Brohl* described as follow:

> [T]he Court of Appeals concluded that the TIA bars any suit that would "limit, restrict, or hold back" the assessment, levy, or collection of state taxes. 735 F.3d [904], 913 [(2013)]. Because the notice and reporting requirements are intended to facilitate collection of taxes, the Court of Appeals reasoned that the relief Direct Marketing Association sought and received would "limit, restrict, or hold back" the Department's collection efforts. That was error.

Brohl, 135 S.Ct. at 1132. The Supreme Court noted that "'restrain' acts on a carefully selected

list of technical terms—'assessment, levy, collection'—not an all-encompassing term, like 'taxation.'" *Id.* The same is therefore true of the AIA's "*restraining* the assessment or collection of any tax," 26 U.S.C. 7421(a)(emphasis added), in which "restraining" modifies "assessment or collection," not "tax," with the same narrow reading required. "To give 'restrain' the broad meaning ... would ... defeat the precision of that list, as virtually any court action related to any phase of taxation might be said to 'hold back' 'collection.'" *Brohl*, 135 S.Ct. at 1132. And a broad reading of "restrain" would render the other statutory terms "mere surplusage," *id.*, be inconsistent with the term's roots in equity, *id.* at 1132-33, and not "consistent with the rule that '[j]urisdictional rules should be clear,'" *id.* at 1133 (citation omitted).

Brohl concluded: "Applying the correct definition, a suit cannot be understood to 'restrain' the 'assessment, levy or collection' of a state tax if it merely inhibits those activities." *Id.* Neither can "restraining the assessment or collection of any tax," 26 U.S.C. 7421(a), be understood to mean merely inhibiting those activities in the present case under the AIA.

The foregoing examination of *Brohl*'s actual language, analysis, and holdings readily refutes the Government's suggestion that *Brohl* does not control because it "is both legally and factually distinguishable." (Doc. No. 16, PageID 225.)

Legally, the Government argues that *Brohl* "does not foreclose a reading of the AIA that is broader" because the AIA says "for the purpose of restraining" instead of just "restrain" (in the TIA), so that enjoining information collection may be barred by the AIA as "still *for the purpose* of restraining assessment or collection." (*Id.*, PageID 226.) But "for the purpose" language is inherently vague, as the Supreme Court held famously in construing "for the purpose of influencing" in *Buckley v. Valeo*, 424 U.S. 1 (1976), to require express words of advocacy of a clearly identified candidate, *id.* at 77-82. To rely on such vague language here is to reject *Brohl*'s re-

quirement of a bright-line jurisdictional statute. 135 S.Ct. at 1133. And under *Brohl*'s equation of language between the TIA and the AIA, *id.* at 1129, the statutes say essentially the same thing; the TIA commands courts not to "restrain" and the AIA commands courts not to maintain suits "for the purpose of restraining." Reading "for the purpose of" as somehow changing this essential equation of language is to reject the Supreme Court's just-asserted statement: "We assume that words used in both Acts are generally used the same way," *Id.* at 1129.

Factually, the Government makes an argument entirely inconsistent with the foregoing legal analysis. It correctly notes that *Brohl* holds that "'the question .... is whether the relief to some degree stops "assessment, levy or collection," not whether it merely inhibits them.'" (Doc. No. 16, PageID 226. (quoting 135 S.Ct. at 1133).) But then the Government makes this inconsistent claim: "Unlike in *Brohl*, an injunction of the information-reporting provisions here would halt the assessment and collection process because the Government lacks the alternative means to obtain the same information." (*Id.*). That argument doesn't work for four reasons.

First, it flies in the face of *Brohl*'s holding that information collection is a phase *before* assessment and collection, so that enjoining information collection does not violate the TIA and hence also the AIA (the two being interpreted alike). *See supra* at 8. Thus, *whether or not* the government has alternative means of information collection, the TIA and AIA do not prohibit an injunction against that preliminary phase of information collection.

Second, the Government is simply wrong to say that the lack of this information would in any way "halt the assessment and collection" of taxes. As *Brohl* held, "assessment" and "collection" are well-defined terms of art, *see supra* at 8-9, and neither assessment or collection would be halted by an injunction that does not order the Government to cease assessment or collection, but rather would halt information collection, as in *Brohl*.

Third, *Brohl* expressly rejected the notion that the TIA could reach merely *helping* (in any way) the carefully defined terms "assessment" and "collection." *See supra* at 9. Yet that "help" theory is exactly what the Government attempts to resurrect here. That the challenged provisions might somehow help the Government with assessment and collection does not bring it within the AIA.

Fourth, though it does not matter (based on the just-discussed, matter-of-law holdings of *Brohl*), the Government's statement that it "lacks alternative means to obtain the same information" (Doc. No. 16, PageID 226) is wrong. It is wrong because the Government does have alternative means to get taxpayer information (and of enforcement). For example, Plaintiffs do not challenge filing their individual tax returns, and our tax system is primarily based on such voluntary compliance (and treating Americans abroad with local, every-day-living accounts differently from those living here would violate equal protection). So the Government can get the same or substantially similar information without the challenged provisions. (And it *might* constitutionally be able to collect further information by means of provisions more in the nature of the scalpel than the sledgehammer.) Moreover, the Government's assertion fails in light of the fact that absent the present provisions it would still enjoy the full collection of enforcement tools that it used to win the famous case against UBS, which was one of the events that led to passage of FATCA. *See, e.g.*, Zweiplus Non-Prosecution Agreement, *supra* note 3, Exhibit A (Statement of Facts) at ¶ 10. So the Government's representations that it is helpless without the challenged provisions is just wrong, though it doesn't matter for present purposes because the AIA only stops injunctions against "assessment" and "collection," not things that might help assessment and collection.[11] *Brohl*'s legal analysis is what counts, and it clearly controls here. The AIA does not

[11] The Government suggests that a concurrence by Justice Ginsburg might control the legal analysis (Doc. 16, PageID 226), but of course she joined the unanimous Court opinion, which controls as de-

foreclose injunctive relief here.

C. The Claims Brought Under the APA Are Proper.

The Government claims that "review of the statutes and IGAs is not available" under the Administrative Procedure Act ("APA"), 5 U.S.C. 702. (Doc. No. 16, PageID 228.) But (i) Plaintiffs challenge the statutes on *constitutional* grounds, and (ii) the IGAs *are* reviewable under APA.

Plaintiffs challenge no *statutes* under APA. Count 3 challenges statutes and IGAs, as applied to "U.S. citizens living in a foreign country," on equal-protection grounds. (Doc. No. 1, PageID 40-42.) But Count 3 recites *both* the Fifth Amendment and APA as bases (*id.*, PageID 40-41 (¶¶ 125-26)), with only the constitutional challenge applying to the statutes (*id.*, PageID 42 (¶ 130)). Elsewhere where statutes are challenged, they are also challenged on constitutional bases. (*Id.*, Page ID 42 (Count 4), 44 (Count 5), 45 (Count 6), 46 (Count 7), 47 (Count 8).)

The *IGAs*—used by the Treasury Department to circumvent FATCA's more cumbersome requirements in favor of the agency's preferred regulatory scheme—are subject to APA review because they are executive agreements and because the Government can, and has, deemed certain "classes" in compliance with FATCA. The Government acknowledges they are "executive agreements" (Doc. No. 16, PageID 228), as Plaintiffs assert (*see* Doc. 8-1, PageID 147-49; *see also infra* Part I.D), but says APA review is improper for three reasons (essentially arguing that the IGAs are *unreviewable*).

First, the Government says an APA claim is improper where "agency action is committed to agency discretion by law.'" (Doc. No. 16, PageID 229 (quoting 5 U.S.C. 701(a)(2)).) The Gov-

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scribed in text. But even her comment, to the effect that there might be a different question if a taxpayer tried to enjoin his own reporting obligations, does not arise here because Plaintiffs do not challenge FBAR and income-tax reporting and filing. There is no "different question" here based on the fact that this case "is brought by taxpayer-plaintiffs" (*id.*) because the AIA question is whether success in this case would restrain tax assessment or collection (all narrowly defined terms in *Brohl*) and it does not.

ernment argues that "[t]he decision to enter into executive agreements and the contents of those agreements are discretionary and committed to the executive branch under the Constitution." (*Id.*) But that argument assumes that the Government has already won on the merits of this challenge because Plaintiffs challenge the IGAs as "unconstitutional sole executive agreements because they exceed the scope of the President's independent constitutional powers" (Doc. No. 1, PageID 37 (Count 1)), and as "unconstitutional sole executive agreements because they override FATCA" (*id.*, Page ID 39 (Count 2)). Plaintiffs argue extensively that the President lacks such constitutional or statutory authority (Doc. No. 8-1, PageID 147-56), which arguments need not be repeated here because the Government does not here refute them.

Second, the Government argues that the APA should not apply because "there is no meaningful standard by which the decisions in the IGAs could be evaluated." (Doc. No. 16, PageID 229.) But as just discussed, there are meaningful standards in the U.S. Constitution and FATCA, against which the IGAs may be measured and under which the IGAs should be enjoined. Relatedly, the Government claims the Court lacks "aptitude" to measure the IGAs against the Constitution and FATCA (*id.*), but that is not so because federal courts regularly consider such matters.

Third, the Government argues that the agency action here is not "final" in the sense that "'rights or obligations have been determined, or from which legal consequences will follow.'" (*Id.* at 34 (quoting *Bennet v. Spear*, 520 U.S. 154, 178 (1997)).) But the IGAs affect individuals and tell FFIs how to operate under FATCA. Though the IGAs may "establish obligations between countries" (*id.*), their object is persons with U.S.-related accounts, such as Plaintiffs, for whom legal consequences clearly follow from the IGAs. These consequences include especially the disclosure of information about their accounts that Plaintiffs do not want disclosed and the removal of their ability to decline to waive protections against such disclosure that is otherwise

provided by countries in which they have accounts. So claims brought under the APA are proper and not foreclosed.

Thus, neither standing, the AIA, nor the APA forecloses the present challenges. As shown next, Plaintiffs have likely merits success based on their claims.

D. IGAs Are Unconstitutional Sole Executive Agreements.

Plaintiffs explained that only four types of international agreements exist and that by default—because there was no congressional action on the IGAs—the IGAs must be sole executive agreements. (Doc. No. 8-1, PageID 147-48.) Plaintiffs then showed that (**1**) sole executive agreements are constitutionally limited, (**2**) they may not override a statute, and (**3**) the IGAs are beyond permitted authority and override FATCA. (Doc. No. 8-1, PageID 149-56.) The Government agrees that the IGAs are executive agreements (Doc. No. 16, PageID 228), but argues they are a valid exercise of executive power and comply with FATCA. (Doc. No. 16, PageID 230-34.) The Government is wrong.

(1) Sole Executive Agreements Are Limited to a Narrow Set of Powers.

Plaintiffs established that sole executive agreements are limited to a narrow set of powers exclusively within the President's independent constitutional authority, usually restricted to routine actions involving things like military matters, recognizing foreign states, or settling international claims. (Doc. No. 8-1, PageID 149-51.) But whatever the scope of constitutional authority, it does not extend to a power reserved to Congress, especially where Congress already legislated on the issue at hand. (*Id.*, PageID 151.)

The Government attempts to portray executive power broadly, reciting authority in broad terms without attention to the necessary limits. (Doc. No. 16, PageID 230-33.) But it does not refute the point that Presidential authority may not invade the Legislative constitutional domain.

(2) Sole Executive Agreements May Not Override a Statute Passed by Congress.

Plaintiffs established that sole executive agreements cannot override acts of Congress in the exercise of its constitutional authority, otherwise the President could unilaterally delegate Congress's legislative powers to himself and nullify any duly enacted laws he finds disagreeable. (Doc. No. 8-1, PageID 151-53.) The Government does not dispute this point.

(3) The IGAs Are Unconstitutional Because Tax Agreements Are Not Within the President's Independent Constitutional Authority and Cannot Override FATCA.

Plaintiffs established that, whatever the scope of Executive authority, it does not reach tax agreements falling squarely within Congress's power "[t]o lay and collect [t]axes" under Article I. The express purpose of the IGAs is to relieve foreign financial institutions of the burdens of complying with FATCA and facilitate the U.S. government's tax collection efforts. Undoubtedly the information sought by the IGAs is tax related, as it is comparable to that defined as tax "return information." (Doc. 8-1, PageID 153-54.) Moreover, Plaintiffs demonstrated that the IGAs directly contradict FATCA, which balances important interests in privacy and consent against administrative convenience. (*Id.*, PageID 155-56.)

The Government agrees that the IGAs and the bulk-data-collection information they require are tax related. In fact the Government argues (unsuccessfully) that the IGAs are *so* tax related that the AIA forecloses an injunction because IGA information helps to assess and collect taxes. But here the Government insists that the IGAs don't invade congressional taxing power[12] because

[12] As noted above, the Government's approach generally is to speak broadly about presidential powers, but at one point it does address in a limited fashion the fact that taxing authority lies with Congress, not the President, when it argues that "[t]he IGAs do not 'impose' any taxes (Complaint ¶ 113); rather, they facilitate [FATCA]." (Doc. No. 16, PageID 232.) What the cited paragraph of the Complaint actually said was that "[t]he President ... lacks an independent power to impose taxes or specify the manner of their collection or any other power which would grant him the power to enter the IGAs unilaterally" (citation omitted). So Plaintiffs did not argue that the IGAs "impose" any tax. And it is evident that the Government's central argument is that FATCA authorizes the IGAs.

the IGAs are (a) authorized by FATCA, (b) authorized by preexisting tax treaties, and (c) consistent with FATCA. (Doc. No. 16, PageID 230-35.) These arguments are answered in turn.

(a) FATCA Does Not Authorize the IGAs.

The Government mentions certain cases finding that *some* statutes authorized *some* executive agreements, then points to certain FATCA language it says implies such authority, and then argues that anyway Congress has acquiesced in tax-information-exchange agreements ("TIEAs"). (Doc. No. 16, PageID 232-33.)

But the relevant question for present is whether *FATCA* authorizes the *IGAs*, and especially whether the IGAs are contrary to FATCA (meaning FATCA could *not* have authorized these IGAs), which latter question is addressed below in Part I.D(3)(c). On the question of whether FATCA authorizes the IGAs, the Government only points to "§ 1471(b)(2)," which as the Government puts it, "delegates authority to the Secretary to determine that it is not necessary to apply all the § 1471 rules to particular classes of FFIs." (Doc. No. 16, PageID 232.) That provision for limited exemptions to FATCA (based for example on perceived low risk of the problems targeted by FATCA or perhaps on preexisting agreements) is discussed further below in Part I.D(3)(c), but for present purposes it suffices to note that a limited authority to make certain exemptions to FATCA provisions is not authority for wholesale *replacement* of FATCA's provisions by IGAs.

The Government's key theme in justifying the IGAs is that "some legislation 'requires, or fairly implies, the need for an agreement in order to execute the legislation.'" (Doc. No. 16, PageID 231 (quoting Restatement (Third) of Foreign Relations Law, § 303, cmt. e).) But that does not apply here because FATCA already had all the details worked out, especially in requiring direct reporting by FFIs to the IRS. There was no need for IGAs to bypass this direct reporting requirement and FATCA could function without the IGAs. The IGAs were enacted because it

was more convenient to get foreign governments involved (and perhaps for some political expediency), but convenience (or expediency) does not provide *statutory* justification to bypass FATCA's requirements or provide constitutional justification for the IGAs. And if there were convenience or political-expediency problems with FATCA, it was not the executive branch's prerogative to replace FATCA's scheme with the IGA scheme. Rather, Congress had to provide any "fix" that might be needed. But Congress already considered and weighed many competing factors in striking the balance it did in FATCA, all of which is discussed further below with the further demonstration that the IGAs are actually inconsistent with FATCA.

(b) Preexisting Treaties Do Not Authorize the IGAs.

The Government asserts that the IGAs are supported by preexisting tax treaties approved by the Senate because those treaties are recited in the IGAs' preambles. (Doc. No. 16, PageID 234.) That is all of the Government's argument: the treaties support the IGAs because the IGAs cite them. The Government also drops a footnote asserting that "a preexisting tax treaty is not necessary for an IGA to be valid." (*Id.*, PageID 234 n.25.) Earlier, the Government explained that "[a]ll four IGAs mention the Tax Information Exchange Agreements (TIEAs) that the United States has with those four countries are part of preexisting treaties." (Doc. No. 16, PageID 207.)

But those treaties don't support the IGAs. First, mere recitation of a treaty does not mean the treaty actually supports the IGA. Even an unwarranted sole executive agreement would likely recite some authority as justification.

Second, the Government makes no effort to show how any treaty supports the IGAs, which seems a tacit admission that it has no argument. (Its apparent *Barquero* argument made elsewhere is addressed below as item five.)

Third, this lack of any attempted demonstration may be explained by the fact that FATCA

clearly overrides existing tax treaties. *See, e.g.*, Allison Christians, *IRS claims statutory authority for FATCA agreements where no such authority exists*, July 4, 2014, http://taxpol.blogspot.com/2014/07/irs-claims-statutory-authority-for.html; *see also* Allison Christians, *Why FATCA Is A Tax Treaty Override*, January 21, 2013, http://www.lexisnexis.com/legalnewsroom/tax-law/b/fatcacentral/archive/2013/01/21/why-fatca-is-a-tax-treaty-override.aspx.

Fourth, the Government's position that the IGAs do not depend on support from the TIEAs (Doc. No. 16, PageID 234 n.25) indicates that the IGAs really are not supported by the TIEAs.

Fifth, the Government's earlier argument based on *Barquero v. United States*, 18 F.3d 1311 (5th Cir. 1994), does not warrant the Government's reliance. As the Government notes, that case upheld a TIEA with Mexico because of statutory authority. (Doc. No. 16, PageID 232.) *Barquero* decided that Congress expressly authorizes the Government to make TIEAs with Carribean basin countries under 26 U.S.C. §§ 274 and 927. From this, the Government implies that Congress implicitly authorized TIEAs with any country, and since IGAs are like TIEAs (in which Congress has acquiesced), Congress acquiesces to IGAs with any country. But there are problems with the Government's *Barquero* argument. *Barquero* relied on 26 U.S.C. 927, which was repealed in 2000 (as the Government acknowledges (Doc. No. 16, PageID 233 n.24, making unsupported claims about continuing congressional intent despite the repeal)); FATCA did not revive § 927's language; and no court has ruled on the Government's equation of IGAs with TIEAs or congressional acquiescence in IGAs, which are foundational to the whole *Barquero* argument.[13]

Any argument that Congress has acquiesced in FATCA is wrong for ignoring both its recent enactment and political reality. FATCA was enacted in 2010 by a Democrat-controlled Congress

[13] *Barquero* reviewed the constitutionality of an executive agreement (as have many courts), indicating that the Government is in error when it claims that this case involves a nonjusticiable political question. (Doc. No. 16, PageID 229 19.)

and under the Obama Administration that continues in power today. FATCA received little scrutiny and was tacked on to unrelated legislation as a purported budget compensation item. In November 2010 elections, Republicans won sufficient seats to control the House (starting in 2011). In November 2014 elections Republicans won sufficient Senate seats to take control of the Senate (starting in 2015). In January 2014, the Republican National Committee adopted a resolution, proposed by Republicans Overseas (https://www.facebook.com/republicansoverseas), calling for the repeal of FATCA. *See* https://cdn.gop.com/docs/RESOLUTION-TO-REPEAL-THE-FOREIGN-ACCOUNT-TAX-COMPLIANCE-ACT-FATCA.pdf (resolution).[14] But even with control of Congress, Republicans must overcome an anticipated presidential veto if they vote to repeal FATCA. So congressional acquiescence is not a viable argument regarding FATCA.[15]

In sum, the Government has not made the case that the IGAs are supported by TIEAs, and there is in fact no such support. So the IGAs are not authorized by preexisting treaties.

(c) The IGAs Are Inconsistent with FATCA, Making them Unconstitutional.

Plaintiffs explained that the IGAs directly contradict FATCA, especially on two key points. First, FATCA requires FFIs to report U.S. citizen account holders' tax return information directly to the IRS. But the IGAs permit FFIs to report this information to their home governments, relieving them of the burden of individual registration with and reporting to the IRS. (Doc. No. 8-1, PageID 155). Second, FATCA requires FFIs to attempt to get a waiver from the account holder of local laws providing privacy protection from such disclosure. But the IGAs circumvent this by using foreign governments to collect the information and nullifying foreign laws protecting such

[14] The two-page resolution succinctly summarizes the broad-spectrum problems caused by FATCA.

[15] FATCA is not solely a Republican issue because it affects people abroad of all political affiliations, *see supra* note 1 (Democrats Abroad survey), and there is growing sentiment that FATCA needs repeal or repair, indicating that there is no acquiescence, congressional or public.

information and requiring notification to account holders. (*Id.*, PageID 155.) Those differences are significant and vital, revealing that the IGAs are inconsistent with FATCA.

FATCA represents Congress's balancing of individuals' vital interests in privacy and consent against administrative convenience. In an era when hacking of government databases runs rampant, with no end in sight, Congress provided a system whereby Americans' identifying and financial information (allowing them to be the victims of the theft of their identity and accounts) is exposed to few parties by requiring direct reporting to the IRS. The IGAs instead involve many FFIs reporting to foreign governments over which the U.S. Government lacks sufficient control to prevent information loss, either through insider information release or hacking. Of course, the IRS has not prevented hacking of its *own* systems, given recent theft of taxpayer information from the IRS. *See* Jada F. Smith, *Cyberattack Exposes I.R.S. Tax Returns*, N.Y. Times, May 26, 2015, http://www.nytimes.com/2015/05/27/business/breach-exposes-irs-tax-returns.html. But at least the IRS has the *possibility* of minimizing cyber-theft in its own systems with proactive steps. *See* Lisa Rein, *IRS failed to address computer security weaknesses, making attack on 104,000 taxpayers more likely, watchdog says*, Washington Post, June 2, 2015, http://www.washingtonpost.com/blogs/federal-eye/wp/2015/06/02/irs-has-not-done-everything-it-can-to-protect-its-computer-networks-from-hackers-watchdog-says/.[16] And Congress may well have wanted the IRS to have *direct* relationships with FFIs, as required by FATCA, precisely so the IRS *could* have some educational and supervisory role to help protect against data theft. But the IGAs replace Congress's choice with the Executive's.

FATCA also provided that Americans should have a right to consent to disclosure under

[16] An example of the vulnerability of taxpayer data is the requirement that all FBAR reports must be filed electronically as of July 1, 2013, *see* http://www.fincen.gov/forms/bsa_forms/, which may be filed in an unsecured PDF format with all of an individual's vital personal and financial information on one page, http://bsaefiling.fincen.treas.gov/NoRegFBARFiler.html, all ripe for cyber-plucking.

FATCA when local laws abroad provide privacy, requiring some notice (in an attempt to get a waiver) before their data is bulk-collected and sent of to the U.S. Government—all of which is less convenient for the Government but is Congress's choice. (Doc. 8-1, PageID 155.) Of course, non-consenting persons' accounts might be shut down, but the waiver option would give them notice that their data was about to be disclosed and an opportunity to arrange their financial affairs differently to protect their privacy if desired (or an opportunity for litigation if desired).

Those two vital differences between FATCA and the IGAs indicate that the IGAs aren't supported by FATCA. Rather, they are beyond statutory authority.

So how does the Government respond? (Doc. No. 16, PageID 234-35.) It mentions the two vital differences Plaintiffs identify, but then argues that "neither ... is an inconsistency at all." (PageID 234.) Now, the Government doesn't say there is no inconsistency because Plaintiffs are *wrong* about the two vital differences they identified between FATCA and the IGAs. Rather, the Government says there is no inconsistency because "the Secretary had discretionary power ...." (*Id.*) We shall return to that discretionary power shortly, but first it is important to pause and reflect on what the Government just did there in that argument.

What the Government did was a quick substitution of topics. The initial topic was two vital distinctions between FATCA and the IGAs that Plaintiffs identified. So if the Government responds that "neither ... is an inconsistency at all," the reader would expect the Government to be responding, on *that* topic, i.e., that there are *no* such vital discrepancies between FATCA and the IGAs (with an explanation of how Plaintiffs got it wrong). But the Government doesn't respond on that topic. Rather, the Government slips in its place *another* topic, namely, the topic of the Secretary's purported power to authorize such vital differences. Such prestidigitation is artful, and apparently necessary to the Government's argument, but the sleight-of-hand should be under-

stood as acknowledging that the two vital differences between FATCA and the IGAs *are* an inconsistency factually. And all the Government means by saying there is no inconsistency is that, despite the glaring differences between FATCA and the IGAs, those two vital distinctions are not inconsistent with the Government's view of the Secretary's power under FATCA.

To that power we now turn to see if what the Government says could be so. On the face of it, the Government's claim that the Secretary has power to abrogate Congress's choice on two such vital matters does not seem credible—why would Congress make important policy choices in how FATCA is to operate on these two vital points only to tell the Secretary to ignore those choices if desired? Has Congress ever done that? Not likely. And the Government points to no cases recognizing *that* kind of executive authority, express or implied. For that kind of abrogating power to exist, it would have to be very clear. (And even then it would seem an unconstitutional delegation of legislative-branch power to the executive branch.)

So what is the cited authority about and what does it actually say? The Government points to 26 U.S.C. 1471(b)(2)(B). (Doc. No. 16, PageID 234.) Section 1471 is titled "**Withholdable payments to foreign financial institutions**," which means it is about FATCA's authorization to withhold 30% of certain payments to noncompliant FFIs (as stated in § 1471(a)). That 30% FFI Penalty is the stick that gets FFIs to comply with the following requirements to identify and report on the accounts of Americans abroad as FATCA prescribes.

Next, subsection (b), titled "**Reporting requirements, etc.**," begins with the following statement: "**In general.**–The requirements of this subsection are met with respect to any foreign financial institution if an agreement is in effect *between such institution and the Secretary* under which the institution agrees [to itemized points about identifying United States accounts and reporting on them]" (emphasis added). So FATCA's general requirement is of an agreement be-

tween FFIs and the Secretary to identify and report on Americans with foreign accounts or else the 30% FFI Penalty hits the FFIs.

Subject to those more general provisions, subsection (b)(2), on which the Government relies, is as follows (emphasis added):

> (2) **Financial institutions deemed to meet requirements in certain cases.**–A foreign financial institution may be treated by the Secretary as meeting the requirements of this subsection if–
>
> (A) such institution–
>
> (i) complies with such procedures as the Secretary may prescribe to ensure that such institution does not maintain United States accounts, and
>
> (ii) meets such other requirements as the Secretary may prescribe with respect to accounts of other foreign financial institutions maintained by such institution, or
>
> (B) *such institution is a member of a class of institutions with respect to which the Secretary has determined that the application of this section is not necessary to carry out the purposes of this section*.

So an FFI may not get the 30% FFI Penalty and may be treated as compliant with the requirements of subsection (b) if (i) it assures the Government it has *no* United States accounts or (ii) the Secretary decides the FFI is in some "class" for which "the application of this section [§ 1471] is *not necessary to carry out the purposes of this section* [§ 1471] (emphasis added)."

That last italicized portion gets down to the real issue. The purposes of § 1471 are to make FFIs form a relationship with the IRS under which the FFIs monitor United States accounts and report on them to the IRS, all enforced with the stick of the 30% FFI Penalty held aloft and all for the overarching purpose of catching some tax scofflaws *by Congress's chosen means*. Congress recognized that cases might exist where these purposes could be carried out without the required relationship, identification, and reporting, such as where an FFI refuses U.S. accounts or where there is no risk of tax evasion. So it allowed a bit of discretion. But a bit of discretion to fine-tune tailoring is not authority to abrogate the two vital choices that Congress made, i.e., to generally go about pursuing scofflaws by means of a relationship between FFIs and the IRS, with notice

allowing people to opt out of reporting, even though it means their account may be closed or that they have to rearrange their financial affairs.

The Government argues that the Secretary has simply exercised statutory discretion by recognizing the IGAs as a "class" that need not comply with the relationship, monitoring, and reporting requirements of § 1471 "because the IGA enables Treasury to obtain the same information from foreign governments, making direct reporting by individual FFIs unnecessary." (Doc. No. 16, Page ID 234-35.) But two problems doom the argument.

First, a bit of discretion doesn't give the Government the authority to alter Congress's two vital choices or else the Executive has unconstitutionally been given the power to abrogate the choices of Congress.

Second, the Government does not recite that § 1471 gives it authority to set up the IGAs, only that, *given the existence of* the IGAs, the Secretary could deem them adequate to fulfill the purposes of § 1471. Section 1471 of course provides *no* authority for setting up IGAs; Congress had just set up, in § 1471 itself, how the Government was to get the desired information—by means of a certain relationship (between FFIs and the IRS), monitoring, and reporting. So while the Government (erroneously) says the Secretary had power to deem the IGAs sufficient for § 1471, those IGAs themselves were not authorized by § 1471. And nothing else in FATCA authorizes IGAs. So it is wrong to say that FATCA authorized either setting up IGAs or abrogating Congress's two choices in FATCA with an IGA theme. But it is right to say that the IGAs are inconsistent with FATCA, indeed abrogating the two vital congressional choices.

Given that the IGAs are neither authorized by FATCA, nor consistent with it, the IGAs are sole executive agreements. They rely *solely* on constitutional Presidential power. But that power does not extend to abrogating two vital policy choices made by Congress in FATCA—in the ex-

ercise of Congress's taxing authority given it under the Constitution—as to how the desired information was to be obtained. Therefore, because the IGAs are supported by neither treaty power, statutory power, nor Presidential power, they are unconstitutional.

E. Reporting Requirements Violate the Fourth Amendment.

Plaintiffs explained how the account reporting requirements of FATCA and the IGAs violate the Fourth Amendment, particularly because they require FFIs to report information about United States account holders without any judicial oversight of the searches of accounts necessary to that reporting. (Doc. No. 8-1, Page ID 18-21.)

The Government argues that these Fourth Amendment claims are "baseless" because "plaintiffs are not being searched, nor are the reporting requirements unreasonable." (Doc. No. 16, PageID 246.) The Government argues that FATCA and IGA reporting requirements are not searches because the challenged provisions only compel reporting by a tax penalty, the IGAs only require other governments to require reporting by their FFIs, and Plaintiffs have no reasonable expectation of privacy in bank records. (*Id.*, PageID 247-49.) The Government is wrong, for reasons already stated (Doc. No. 8-1, PageID 156-58) and the following points.

The Government argues that Plaintiffs have no expectation of privacy in bank records under *United States v. Miller*, 425 U.S. 435, 442 (1976). (Doc. No. 16, PageID 248.) But *Miller* stands only for that proposition with respect to a search targeted at an individual suspected of some wrongdoing and where some judicial process attaches (in *Miller* it was a subpoena duces tecum, 435 U.S. at 436). *Miller* expressly does not apply its holding to "blanket reporting," *id.* at 444 n.6, or to such bulk data collection with no judicial process, *id.*: "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 af-

fairs.'" The blanket, bulk-data collection at issue here is exactly the sort of government activity that *Miller* does *not* cover. So people *do* have a reasonable expectation of privacy in their bank accounts, not expecting the sort of blanket reporting of information under FATCA and the IGAs without judicial oversight. People do not expect bulk-collection of this sort of data unless there is judicial oversight because lack of such oversight makes such searches unreasonable per se.

Moreover, 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 id*. (Referendum signers' "substantial privacy interest in [their] petition is not diminished by the fact that many individuals may have signed it in their business or entrepreneurial capacities."); *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.").

The notion that no *search* of account holders' accounts occurs under FATCA and the IGA is erroneous. The whole purpose and function of FATCA and the IGAs is to get FFIs to *search* accounts, on behalf of the U.S. and foreign governments under coercive tax penalties, to ferret out persons subject to such reporting and to report their otherwise non-reportable information. The Government's concept of what is legally cognizable as a search is entirely too narrow. The challenged provisions do *require* such searches—by coercive tax penalties specifically designed to get FFIs to either quit holding American accounts or to submit to making the searches on behalf of the U.S. and other governments.

F. Reporting Requirements Violate Equal Protection for Americans Living Abroad.

Plaintiffs established that the heightened reporting requirements for foreign financial accounts deny U.S. citizens living abroad the equal protection of the laws. (Doc. No. 8-1, PageID 159-62.) The Government disputes this, but it is wrong for the reasons Plaintiffs already provided. Vitally, Plaintiffs identified the class of people living abroad using "local bank accounts," narrowly defined to mean those used for daily living activities (PageID 160 & n.5). The local bank accounts of Americans abroad are treated differently from the local bank accounts of Americans living in America. The Government ignores this central feature of the argument. As to justification for treating Americans abroad differently—though they are similarly situated in their need for local bank accounts for daily living and in their opposition to mass-data-collection on their accounts without judicial oversight—the Government's best argument is that heightened information collection by third parties "is an important tool used by the IRS to close the tax gap between taxes due and taxes paid." (Doc. No. 16, PageID 239.) But the Government already has sufficient tools without the heightened reporting requirements, which tools allowed it to famously discover the problems with UBS. *See supra* at 12. And the Government recites its great success with the Offshore Voluntary Disclosure Program (OVDP) in collecting taxes on undisclosed assets abroad, but that all occurred before and without FATCA's implementation. (Doc. No. 16, PageID 206.) The real basis for the heightened reporting requirements is Government convenience, as the Government acknowledges in reciting that without them defendants "'must subject themselves to time consuming and often times fruitless foreign legal process.'" (PageID 240 (citation omitted).) Government convenience is not a cognizable basis for violating citizens' rights. The heightened reporting requirements impose so many problems on ordinary Americans abroad in their ordinary activities, with so little real return for the enormous human and compli-

ance costs, that it cannot be deemed rational, given the flawed cost-benefits ratio, *see supra* note 2, the unforeseen every day burdens on everyday Americans abroad, *see supra* note 1, and the fact that for most Americans abroad their overseas credits exceed their tax liabilities. The FATCA scheme has turned out so badly that the IRS's Taxpayer Advocate Service has warned that FATCA compliance costs are expected to equal or exceed the amount of additional revenue that FATCA is projected to raise.[17]

G. The Challenged Penalties Violate the Excessive Fines Clause.

Plaintiffs explained how the FATCA FFI Penalty, the FATCA Passthrough Penalty, and the FBAR Willfulness Penalty violate the excessive fines clause. (Doc. No. 8-1, PageID 162-70.) The Government disputes this (Doc. No. 16, PageID 240-46), but is wrong for reasons Plaintiffs previously provided and the following responses.

First, the Government's central contention is that "these three Eighth Amendment claims are not ripe ... because no withholding or FBAR penalty has been imposed against any plaintiffs; indeed, the [FFI Penalty] will never be imposed against them because they are individuals, not FFIs." (Doc. No. 16, PageID 241.) Beginning with the last assertion, about the FFI Penalty, the Government's argument is not responsive to Plaintiffs' position. That position is that FFIs comply with the FATCA and IGA account-search and reporting requirements *because of* the FFI Penalty, so Plaintiffs have standing to challenge that provision. And because they don't want their information disclosed *right now*, the challenge is ripe now. Regarding the Passthrough Penalty, they want to *not* comply with the challenged provisions right now, which would trigger the penalty, so they have standing to challenge the provision and the challenge is now ripe. Moreover,

[17] Taxpayer Advocate Service, 2013 Annual Report to Congress, MSP #23 Reporting Requirements: The Foreign Account Tax Compliance Act Has the Potential to be Burdensome, Overly Broad, and Detrimental to Taxpayer Rights, p.6 (2013), http://www.taxpayeradvocate.irs. gov/2013-Annual-Report/downloads/REPORTING-REQUIREMENTS-The-Foreign-Account-Tax-Compliance-Act-Has-the.pdf.

Plaintiff Zell has actually declined to file FATCA-required forms, so that he "reasonably fears that he will be classified as a recalcitrant account holder and subject to the ... Passthrough Penalty ...." (Doc. No. 1, PageID 26-27 (¶¶ 84-85.) Regarding the FBAR report, Plaintiff Kuettel wants *right now* to establish an account for his minor daughter and contribute to it to a level where it would be reportable under FBAR, but his daughter is too young to file FBAR reports though she would be aware of the need, (*id.*, PageID 19-20 (¶¶ 56-57), so that claim is clearly ripe.

Second, the Government next relies on its argument that the challenged penalties are really taxes and are, in any event remedial. (Doc. No. 16, PageID 243-44.) That these are penalties is clearly explained in Plaintiffs opening Memorandum, and it seems self-evident because no "tax" is collected under these provisions unless a violation occurs. The Government argues that the 30% rate of the two FATCA penalties is "remedial because it is the same rate imposed" in another context (*id.*, PageID 244), but of course Plaintiffs who are U.S. citizens are otherwise subject to their usual tax rate, which is lower for most people. So the penalties are not remedial. And to get a refund, as the Government suggests (*id.*), Plaintiffs who want to retain their privacy by noncompliance with FATCA, i.e., be recalcitrant account holders, must relinquish that desired noncompliant status in order to get a refund.

Third, the Government argues that because no penalties have been imposed against them "plaintiffs appear to raise a facial challenge," so the traditional all-applications test stated earlier in *United States v. Salerno*, 481 U.S. 739 (1987), applies. Of course, plaintiffs have already explained why they have standing to challenge these penalties as applied to them. In particular, Plaintiff Kuettel wants to establish that college fund for his daughter without it being consumed by the FBAR penalty. That FBAR penalty is clearly overbroad and excessive as to that situation. But in any event excessive-fine analysis (as explained in Plaintiffs' Memorandum) involving a

generally-applicable penalty does not turn on who a plaintiff is, e.g., whether he is terrorist (Doc. No. 16, PageID 246), though it does turn on "proportionality" (Doc. No. 8-1, PageID 163). That proportionality analysis turns on (1) reprehensibility, (2) relationship between penalty and harm, and (3) sanctions for comparable conduct. (*Id.*). Those factors don't get into whether a generally-applicable penalty is unconstitutional as applied to an ordinary citizen but not a terrorist. In any event, as applied to the sort of ordinary citizens here at bar, and the vast majority of ordinary people identified in the Democrats Abroad survey, FATCA and FBAR penalties are unconstitutional. If Congress wanted to target terrorists with high penalties, it should target and confine its penalties to terrorists, not broadly target ordinary folks abroad.

II. Plaintiffs Will Suffer Irreparable Harm.

Plaintiffs explained their irreparable harm in considerable detail (Doc. No. 8-1, PageID 171-72), beginning with the key assertion that they "want to keep their financial account information private and do not want their account information shared with foreign governments, the IRS, or the Treasury Department." (*Id.*, PageID 171.) Then they asserted the obvious fact that if FATCA, the IGAs, and the listed challenged provisions are "allowed to remain in effect for the duration of this lawsuit, [they] will compel Plaintiffs' and the [FFIs] holding Plaintiffs' accounts to disclose Plaintiffs' account information." (*Id.*) And Plaintiffs identified Plaintiff Kuettel's "continued chill on his right to open a college savings account" as irreparable harm. (*Id.*)

The Government does not even address these harms directly, nor show that they are not irreparable harms. Instead, the Government argues that Plaintiffs lack standing to challenge the provisions that cause them the identified irreparable harms, along with arguments based on the merits of the claims (and ripeness for the Eighth Amendment claims). (Doc. No. 16, PageID 251.) So the Plaintiffs do have irreparable harm absent requested relief, particularly with regard to keeping

their financial information private, which the challenged provisions and IGAs require to be disclosed.

III. The Balance of Hardships and the Public Interest Favor Plaintiffs.

Considering the balance of harms and public interest returns us to where this Reply began. The government recites combating "tax evasion ... money laundering or terrorist financing." (Doc. No. 16, PageID 246.) But plaintiffs are ordinary people abroad seeking freedom from FATCA-caused problems with local financial institutions, living-expense accounts, mortgages, setting up and contributing to a daughter's account, and so on. Plaintiffs are not alone. The extensive survey done by Democrats Abroad,

> 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.

FATCA: Affecting Everyday Americans Every Day at 3 (Sept. 2014).

The great gulf between the Government's asserted interest in fighting "tax evaders, terrorists, and organized criminals," (Doc. No. 16, PageID 246) and the interests of Plaintiffs and the public in not having their private information disclosed, not being denied necessary banking services at FFIs because they are Americans, and so on shows not only that FATCA and the IGAs are poorly tailored to the asserted government interest but also that the balance of harms and the public interest tilt in Plaintiffs' favor. The Government needed to create a scalpel to carefully separate tax evaders, terrorists, and organized criminals from the general public—all in a manner consistent with constitutional rights and without burdening everyday Americans every day. Instead Congress created FATCA's sledgehammer, and the Government used FATCA as an excuse to create IGAs—sole executive agreements without constitutional or statutory justification—and both

FATCA and the IGAs impose serious and harmful effects on the privacy and everyday life of Americans living abroad needing everyday-living accounts.

As noted in Plaintiffs' opening Memorandum (Doc. No. 8-1, PageID 172), the public interest analysis primarily addresses the impact on non-parties, and it is always in the public interest to enforce the Constitution, and there is no public interest in enforcing unconstitutional provisions. (*Id.*) The Memorandum shows how injunctions against the IGAs and all challenged provisions are in the public interest. (*Id.*)

In its Opposition, the Government briefly addresses the public interest in two places. (Doc. No. 16, PageID 205, 251.) In the first, the Government points to a statement by FATCA co-sponsor Senator Levin that FATCA was targeted at "an estimated $100 billion in lost revenues annually." (Doc. No. 16, PageID 205-06.) Then the Government cites taxes recovered through "the IRS's Offshore Voluntary Disclosure Program (OVDP)" and asserts that "the success of the voluntary program has undoubtedly been enhanced by the existence of FATCA" and that the requested injunctive relief "would set back the progress in this area and cost the Treasury untold sums of tax revenue." (Doc. No. 16, PageID 206.) And in the second place where the Government argues the public interest, it asserts that "FATCA ..., the IGAs, and the FBAR requirements are valuable tools that encourage voluntary compliance with tax laws, combat tax evasion, and deter the use of foreign accounts to engage in criminal activity." (*Id.*, PageID 251). And because of this latter assertion, says the Government, "the balance of equities[] weighs heavily against the entry of a preliminary injunction." (*Id.*)

But things are not so simple and rosy as the Government portrays them. First, since Senator Levin' cited figure on estimated lost revenue, it has become clear that a cost-benefit analysis (not even counting the *human* toll) works against FATCA (though Plaintiffs' rights don't turn on a

cost-benefit analysis). *See supra* note 2. And FATCA may not be as helpful as IRS represents, as tax-professor Byrnes indicates in an August 24, 2015 post titled "IRS Isn't Confident FATCA Will Work?" *See* http://profwilliambyrnes.com/2015/08/24/irs-isnt-confident-fatca-will-work/.

Prof. Byrnes reacts to the following information, *id.*:

- The IRS might use a summons (presumably John Doe Summons) to obtain offshore credit card information to track and identify U.S. offshore account depositors through correspondent banks.
- The IRS may reinstitute a broker initiative to issues summons to brokers to identify U.S. beneficial owners of foreign corporations with U.S. brokerage accounts.

His reaction is as follows, *id.*:

> What this information indicates to me?
>
> (1) The IRS is not so certain that FATCA reporting will be effective to catch the non-compliant taxpayers.
>
> (2) The IRS estimates that many Americans with foreign accounts are noncompliant.
>
> Given that the IRS has forced billions in spending in four years to bring about FATCA compliance, I find it disturbing that it may not think it is working. Worse is that this tool was always at the IRS disposal, just like the credit card John Doe Summons, and it is a good tool. So why not ask for funding to use it back in 2009 instead of FATCA?
>
> It appears that the strategy for bringing non-compliant taxpayers into compliance is hodge podge, without thought to the ramifications of each, as a whole, and without addressing underlying problems, like taxpayer education and easy to file FBAR. At least Treasury modified the FBAR date to coincide with the 1040 filing date. But the forms are still uncoordinated with different questions, different filing procedures, different penalties. Just not good administration techniques.[18]

Second, as indicated in the above-quoted material, the IRS has other tools besides FATCA

[18] In a July 15, 2015 article, titled "Taxpayer Advocate–FATCA Imposes Unnecessary Burdens, Will Not Improve Compliance," http://lawprofessors.typepad.com/intfinlaw/2015/07/taxpayer-advocate-fatca-imposes-unnecessary-burdens-will-not-improve-compliance.html, Professor Byrnes lists as additional burdens associated with FATCA both increased tax-preparation fees and the increasing problem of persons living abroad who lack the required Social Security number getting an SSN (increasing the FATCA withholding burden and decreasing the chance of getting a credit or refund). He recites concerns of the National Taxpayer Advocate, in the 2013 Annual Report to Congress, over the broad sweep of FATCA and the compliance burdens it imposed on individuals and financial institutions." The cited Taxpayer Advocate report is available at http://www.taxpayeradvocate.irs.gov/Media/Default/Documents/2016-JRC/Area_of_Focus_4_Implementation_of_FATCA.pdf (emphasizing, among Taxpayer Rights Affected, "[t]he right to privacy").

and the IGAs, including the OVDP the Government celebrated above, and will continue to have those tools if challenged provisions are enjoined. So the tax-collection sky will not fall if the problematic provisions and IGAs that are challenged here cease to function.

Third, another problem has emerged since FATCA was enacted—cyber-theft of taxpayer data. In a September 24, 2014 notice titled "IRS Warns Financial Institutions of Scams Designed to Steal FATCA-Related Account Data," the IRS "issued a fraud alert for international financial institutions complying with the Foreign Account Tax Compliance Act (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 a September 27, 2013 report by the Treasury Inspector General for Tax Administration, titled "Foreign Account Tax Compliance Act: Improvements Are Needed to Strengthen Systems Development Controls for the Foreign Financial Institution Registration System," this Inspector General recommended, inter alia, that

> the Chief Technology Officer should ensure that adequate program management controls are in place and consistently followed to allow the IRS to accomplish its FATCA goals and objectives. Finally, the Chief Technology Officer should ensure that all system requirements documentation includes the requirements being tested and all security requirements, and that corresponding test cases are identified and sufficiently traced, managed, and tested.

See https://www.treasury.gov/tigta/auditreports/2013reports/201320118fr.html#toc. As discussed above, however, taxpayer information was recently stolen from the IRS. *See supra* at 21. And scam artists are reportedly actively attempting to access FATCA data held by FFIs:

> Scam artists posing as the IRS have fraudulently solicited financial institutions seeking account holder identities as well as financial account information. Financial institutions directly registered to comply with FATCA, and those in jurisdictions that are treated as having an IGA in effect to implement the FATCA provisions through their home governments, have already been approached by parties impersonating themselves as the IRS. The IRS now has reports of inci-

> dents from various countries and continents.... I believe it is just a matter of time before personal information mandated by the FATCA reporting rules will be compromised in a data breach.

Virginia La Torre Jeker, "Identity Protection Services After FATCA Security Breaches... IRS' Generosity Knows No Bounds!," Aug. 16, 2015, http://blogs.angloinfo.com/us-tax/2015/08/16/identity-protection-services-after-fatca-security-breaches-irs-generosity-knows-no-bounds/. With FATCA and IGAs forcing FFIs to search out and report sensitive identity and financial information on Americans abroad to foreign governments, all reported in digital format to the IRS, the risk of the theft of identities, information, and accounts must be factored into the balance-of-harms and public-interest calculation.

Finally, Plaintiffs object strongly to the Government's notion that its convenience in targeting scofflaws overrides the constitutional rights and other interests of everyday Americans every day. That is not how the Constitution works. And it is always in the public interest for the Constitution to be followed and unconstitutional provisions to be enjoined.

Conclusion

Plaintiffs are likely to succeed on the merits of their claims and have met the requirements for preliminary injunctive relief. For this reason, the Court should grant Plaintiffs' Motion for Preliminary Injunction (Doc. No. 8).

August 26, 2015

Respectfully Submitted,

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Certificate of Service

I hereby certify that on August 26, 2015, 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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