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.	Case No. 3:15-cv-250-TMR District Judge Thomas M. Rose

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendants U.S. Department of Treasury, Internal Revenue Service, and Financial Crimes Enforcement Network (collectively "Defendants" or "Government") submit this memorandum in opposition to plaintiffs' motion for preliminary injunction (Doc. No. 8).

Respectfully submitted,

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MEMORANDUM IN SUPPORT

Plaintiffs seek an extraordinary order that would halt enforcement of several duly enacted statutory provisions, along with associated regulations and implementing international agreements, aimed at curbing offshore tax evasion. The challenged laws are essential to tax enforcement, and the injuries that plaintiffs allege they have suffered as a result of such laws are self-inflicted, speculative, or even illusory. Plaintiffs' claims for relief fail for lack of Article III standing, are jurisdictionally barred by the Anti-Injunction Act, and are meritless as a matter of well-established constitutional law. The preliminary injunction should be denied because plaintiffs have no likelihood of success on the merits and have no irreparable injury—certainly none to outweigh the great harm that the Government, and public interest in general, would suffer if enforcement of these laws were enjoined.

I. Description of FATCA, IGA, and FBAR Provisions Plaintiffs Seek to Enjoin

A. The FATCA Statute and Regulations

Congress passed the Foreign Accounts Tax Compliance Act (FATCA) in 2010 to improve compliance with tax laws by U.S. taxpayers holding foreign accounts. FATCA accomplishes this goal through two forms of information reporting: (1) by foreign financial institutions (FFIs) about financial accounts held by U.S. taxpayers or foreign entities in which U.S. taxpayers hold a substantial ownership interest; and, (2) by U.S. taxpayers about their interests in certain foreign financial accounts and offshore assets.

1. FFI Reporting Under FATCA

FFI reporting, codified at 26 U.S.C. § 1471, encourages FFIs to disclose information on U.S. taxpayer accounts. If the FFI does not, then a 30% withholding tax may apply to U.S.-

sourced payments paid to the non-reporting FFI.[1] A 30% withholding tax may also apply to FFI account holders who refuse to identify themselves as U.S. taxpayers.

Specifically, § 1471(a) states that, "[i]n the case of any withholdable payment to a foreign financial institution which does not meet the requirements of subsection (b) [specifying reporting criteria], the withholding agent with respect to such payment shall deduct and withhold from such payment a tax equal to 30 percent of the amount of such payment." Section 1471(b)(1) then provides that, "[t]he 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 [of the Treasury] under which such institution agrees" to make certain information disclosures and "to deduct and withhold a tax equal to 30 percent of . . . [a]ny passthru payment which is made by such institution to a recalcitrant account holder or another foreign financial institution which does not meet the requirements of this subsection[.]" § 1471(b)(1)(D)(i); *see also* § 1471(d)(7) (defining "passthru payment"). A "recalcitrant account holder" is one who "[f]ails to comply with reasonable requests for information" that is either information an FFI needs to determine if the account is a U.S. account (§ 1471(b)(1)(A)) or basic information like the account holder's name, address, and taxpayer identification number (§ 1471(c)(1)(A)). Section 1471(c)(1) specifies the "information required to be reported on U.S. accounts," including "account balance or value." § 1471(c)(1)(C). Plaintiffs seek a preliminary injunction against enforcement of § 1471(a), (b)(1)(D), (c)(1), and (c)(1)(C). Prayer for Relief (part O).

Section 1471(b)(2), "Financial Institutions Deemed to Meet Requirements in Certain Cases," provides that an FFI "may be treated by the Secretary as meeting the requirements of this subsection if … such institution is a member of a class of institutions with respect to which the

[1] Although the statute refers to FFI "reporting requirements," reporting is not mandated. An FFI may decline to report and instead pay 30% withholding. *See* Part V.D.1, *infra*. For convenience, we use the "requirements" terminology in this brief.

Secretary has determined that the application of this section is not necessary to carry out the purposes of this section." That means that an FFI that is treated this way is not subject to the enumerated reporting criteria in § 1471(b)(1). Among the FFI reporting rules that the Secretary has statutory authority to exempt FFIs from is that the FFI "attempt to obtain a valid and effective waiver" of foreign nondisclosure laws from each account holder and that the FFI "close such account . . . if a waiver . . . is not obtained from each such holder within a reasonable period of time." § 1471(b)(1)(F).[2] The Secretary's exemption of an FFI under § 1471(b)(2) also means that the FFI no longer has to make the "report" described in § 1471(c)(1) because that "report" is based on "[t]he agreement described in subsection (b)" that an exempt FFI does not need to have in place to avoid withholding. Furthermore, the FATCA statute provides that, "[t]he Secretary shall prescribe such regulations or other guidance as may be necessary or appropriate to carry out the purposes of, and prevent the avoidance of, this chapter," *i.e.*, §§ 1471-74. 26 U.S.C. § 1474(f). The intergovernmental agreements (IGAs), described *infra*, stem from the Secretary's exercise of the statutory discretion afforded by §§ 1471(b)(2) and 1474(f).

Plaintiffs also seek to enjoin enforcement of regulatory provisions that essentially restate the requirements of § 1471. The "[g]eneral rule of withholding" under § 1471(a) is largely reiterated by 26 C.F.R. § 1.1471-2T(a)(1), which plaintiffs target. Prayer for Relief (part R). Plaintiffs seek to enjoin enforcement of 26 C.F.R. §§ 1.1471-4(a)(1), 1.1471-4(d), and 1.1471-4(d)(3)(ii), which repeat the content of § 1471(b) and (c). Prayer for Relief (part S). In addition, plaintiffs seek an injunction against 26 C.F.R. § 1.1471-4T(b)(1), which addresses the 30% withholding tax for recalcitrant account holders established by the statute. Prayer for Relief (part T). Plaintiffs even seek to enjoin the IRS's use of Form 8966, "FATCA Report," the form on which FFIs make disclosures under § 1471(c). *See* 26 C.F.R. § 1.1471-4(d)(3)(v); Prayer for

[2] Intergovernmental agreements (IGAs) make this irrelevant because consent is no longer a legal impediment under foreign law. *See* Part I.B, *infra*. But § 1471(b) still applies in non-IGA jurisdictions.

Relief (part V). In plaintiffs' view, these FATCA regulations "primarily elaborate on the [] requirements of the statutory provisions and clarify the statutory requirements." Complaint ¶ 95(a). Plaintiffs do not contend that the regulatory requirements are different from the FATCA statute in any material way, and this brief will not analyze the regulations separately.

2. Individual Reporting Under FATCA

Section 6038D of the Internal Revenue Code (26 U.S.C.) is a companion individual reporting requirement to go with § 1471's FFI reporting. Under § 6038D, individuals holding more than $50,000 of aggregate value[3] in "specified foreign financial assets" (§ 6038D(b)) must file a report with their annual tax returns (§ 6038D(a)) that provides, for each asset, *inter alia*, "[t]he maximum value of the asset during the taxable year." § 6038D(c)(4). Plaintiffs seek to enjoin this asset-value reporting requirement. Prayer for Relief (part P). Section 6038D(h) also provides that, "[t]he Secretary shall prescribe such regulations or other guidance as may be necessary or appropriate to carry out the purposes of this section . . . ." Plaintiffs seek to enjoin enforcement of the regulation that states this same reporting reporting requirement. 26 C.F.R. § 1.6038D-4(a)(5); *see* Prayer for Relief (part U). Plaintiffs target two other regulatory reporting requirements: whether a depository or custodial account was opened or closed during the taxable year (26 C.F.R. § 1.6038D-4(a)(6)); and "[t]he amount of any income, gain, loss, deduction, or credit recognized for the taxable year with respect to the reported specified foreign financial asset," (26 C.F.R. § 1.6038D-4(a)(8)). Prayer for Relief (part U).

3. FATCA Benefits the Public Interest

Following its passage by both houses of Congress, President Obama signed FATCA into law on March 18, 2010. Senator Carl Levin, a co-sponsor of the FATCA legislation, made a statement that same day in order "to inform the courts of our legislative intent." 156 Cong. Rec.

[3] Plaintiffs' avowed concern about reporting requirements affecting low-income taxpayers rings hollow in light of the $50,000 aggregate asset value threshold for individual FATCA reporting. *See* Complaint ¶ 6.

S1745-01 (2010). He described how, "[t]he Permanent Subcommittee on Investigations, which I chair, has spent years investigating offshore tax abuses which together cost the federal treasury an estimated $100 billion in lost tax revenues annually," and how those investigations led to the FATCA provisions that eventually became law. The passage of FATCA coincided with the inception of the IRS's Offshore Voluntary Disclosure Program (OVDP), which since 2009 has afforded U.S. taxpayers with previously undisclosed overseas assets the opportunity to disclose them and pay reduced penalties. The IRS reported that by 2014, the OVDP had collected $6.5 billion through voluntary disclosures from 45,000 participants. "IRS Offshore Voluntary Disclosure Efforts Produce $6.5 Billion; 45,000 Taxpayers Participate," available at http://www.irs.gov/uac/Newsroom/IRS-Offshore-Voluntary-Disclosure-Efforts-Produce-$6.5-Billion;-45,000-Taxpayers-Participate (last visited July 31, 2015). The success of the voluntary program has undoubtedly been enhanced by the existence of FATCA. Granting the injunctive relief requested by the plaintiffs would set back the progress in this area and cost the Treasury untold sums of tax revenue. Therefore, the public interest favors denying plaintiffs' motion.

B. The Canadian, Czech, Israeli, and Swiss IGAs

Once FATCA became law, the Government had to implement it, and doing so has required coordination with FFIs and foreign governments. To facilitate FATCA implementation, the United States has concluded over 70 intergovernmental agreements (IGAs) with foreign governments addressing the exchange of tax information. Plaintiffs seek to enjoin IGAs with Canada, the Czech Republic, Israel, and Switzerland in their entirety. Prayer for Relief (parts A, E, I, M). Alternatively, they seek to enjoin parts of those IGAs. Prayer for Relief (parts B-D, F-H, J-L, N). If this relief is granted, FATCA implementation will be far more difficult, if not impossible.

The Canadian, Czech and Israeli IGAs are similar because they are all "Model 1" IGAs,

whereas the Swiss IGA is a "Model 2" IGA. The key distinction is that under Model 1 IGAs, foreign governments agree to collect their FFIs' U.S. account information and to send it to the IRS, whereas under Model 2 IGAs, foreign governments agree to modify their laws to the extent necessary to enable their FFIs to report their U.S. account information directly to the IRS.

All four IGAs, in their preambulatory clauses, recognize the partner governments' mutual "desire to conclude an agreement to improve international tax compliance" or, in the case of Switzerland, a "desire to conclude an agreement to improve their cooperation in combating international tax evasion." IGA Preambles (first clause). All four IGAs mention the Tax Information Exchange Agreements (TIEAs) that the United States has with these four countries as part of preexisting treaties. IGA Preambles (second clause).[4] All four IGAs similarly note the need for "an intergovernmental approach to FATCA implementation" (or, in the Swiss case, "intergovernmental cooperation to facilitate FATCA implementation").

The three Model 1 IGAs (Canadian, Czech and Israeli) define "Obligations to Obtain and Exchange Information with Respect to Reportable Accounts" in Article 2. In addition to seeking to enjoin Article 2 in full (Prayer for Relief, parts B, F, and J), plaintiffs attack the agreement that IGA partners, with respect to each "U.S. Reportable Account" of its FFIs, will report, "in the case of any Depository Account, the total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period[.]" Canadian IGA Art. 2, § 2(a)(6); Czech IGA Art. 2, § 2(a)(6); Israeli IGA Art. 2, § 2(a)(6); *see* Prayer for Relief (parts C, G, K). If

[4] *See* Convention Between the United States and Canada with Respect to Taxes on Income and on Capital done at Washington on September 26, 1980 ("Canadian Convention"), Article XXVII; Convention between the United States of America and the Czech Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, done at Prague on September 16, 1993 ("Czech Convention"), Article 29; Convention between the Government of the United States of America and the Government of the State of Israel with Respect to Taxes on Income, done at Washington on November 20, 1975 ("Israeli Convention"), Article 29; and Convention between the United States and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, signed at Washington on October 2, 1996 ("Swiss Convention"), Article 26.

Model 1 partner countries comply with Article 2 as well as the "Time and Manner of Exchange of Information" agreed to in Article 3 and other rules, then their reporting FFIs "shall be treated as complying with, and not subject to withholding under, section 1471," nor will they be required to withhold "with respect to an account held by a recalcitrant account holder" under § 1471. Canadian IGA Art. 4, §§ 1, 2; Czech IGA Art. 4 §§ 1, 2; Israeli IGA Art. 4, §§ 1, 2. This is consistent with the Treasury Secretary's power to deem FFIs to be in compliance with § 1471 if statutory purposes are met. 26 U.S.C. § 1471(b)(2)(B). The Israeli IGA is not yet in force. *See* Israeli IGA, Art. 10, § 1. However, the Treasury Secretary has exercised his discretion not to impose § 1471 withholding against Israeli FFIs or recalcitrant account holders.[5]

The Swiss IGA is different in that under Article 3—which plaintiffs seek to enjoin (Prayer for Relief, part N)—the Swiss government agrees to "direct all Reporting Swiss Financial Institutions" to report certain information directly to the IRS. Swiss IGA, Art. 3, § 1. Under Article 5—which plaintiffs also seek to enjoin (Prayer for Relief, part N)—the U.S. government "may make group requests . . . based on the aggregate information reported to the IRS pursuant to" Article 3. Swiss IGA Art. 5, § 1. "Such requests shall be made pursuant to Article 26 of the [Swiss] Convention, as amended by the Protocol," and, "such requests shall not be made prior to the entry into force of the Protocol[.]" Swiss IGA, Art. 5, § 2. The "Protocol" here is "the Protocol Amending the [Swiss] Convention that was signed at Washington on September 23, 2009." Swiss IGA, preamble (clause 3). That Protocol has not yet been approved by the Senate, and because of that, Article 5 of the Swiss IGA cannot yet be implemented.

C. The FBAR Requirements

The third body of law at issue in this case is the Report of Foreign Bank and Financial Account (FBAR) requirements. U.S. persons who hold a financial account in a foreign country

[5] *See* IRS Announcement 2014-38, "Update on Jurisdictions Treated as if They Had an IGA in Effect," available at http://www.irs.gov/irb/2014-51_IRB/ar09.html#d0e479 (last visited Aug. 9, 2015).

that exceeds $10,000 in aggregate value[6] must file an FBAR with the Treasury Department reporting the account. *See* 31 U.S.C. § 5314; 31 C.F.R. § 1010.350; 31 C.F.R. § 1010.306(c). The current FBAR form is FinCEN Form 114. The form has been due by June 30 of each year regarding accounts held during the previous calendar year. § 1010.306(c).[7] A person who fails to file a required FBAR may be assessed a civil monetary penalty. 31 U.S.C. § 5321(a)(5)(A). The amount of the penalty is capped at $10,000 unless the failure was willful.[8] *See* § 5321(a)(5)(B)(i), (C). A willful failure to file increases the maximum penalty to $100,000 or half the value in the account at the time of the violation, whichever is greater. § 5321(a)(5)(C). In either case, whether to impose the penalty and the amount of the penalty are committed to the Secretary's discretion. *See* § 5321(a)(5)(A) ("The Secretary of the Treasury may impose a civil money penalty[.]") & (a)(5)(B) ("[T]he amount of any civil penalty . . . shall not exceed" the statutory ceiling). Plaintiffs seek to enjoin enforcement of the willful FBAR penalty under § 5321(a)(5). Prayer for Relief, part Q. They also ask for an injunction against "the FBAR account-balance reporting requirement" of FinCen Form 114. Prayer for Relief, part W.

The information in the FBAR assists law enforcement and the IRS in identifying unreported taxable income of U.S. taxpayers that is held in foreign accounts as well as investigating money laundering and terrorism. Without the ability to enforce a heightened penalty for the willful failure to file an FBAR or to collect account-balance information, FBAR reporting would be significantly hindered. *See* Part V.C.2(b), *infra*.

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[6] Again, plaintiffs express concern over small-dollar accounts, which is divorced from the reality of a $10,000 FBAR reporting threshold. *See* Complaint ¶ 6 (discussing "balances of less than $10,000").

[7] On July 31, 2015, the President signed a law changing the due date of the form to April 15 beginning with the 2016 tax year. Pub. L. No. 114-41, § 2006(b)(11).

[8] Plaintiffs' description of FBAR as "a trap for the unprepared and the uninformed" (Complaint ¶ 10) ignores that only the *willful* FBAR penalty is at issue. An "unprepared and uninformed" person would, at worst, face a *non-willful* penalty and could raise a reasonable cause defense. 31 U.S.C. § 5321(a)(5)(B).

II. Legal Standard for Preliminary Injunctions

"A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Ohio State Conf. of NAACP v. Husted*, 43 F. Supp. 3d 808, 838 (S.D. Ohio 2014), *aff'd* 768 F.3d 524 (6th Cir. 2014) (quotation omitted); *see also Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). "[T]he proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion, for example[.]" *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). "[P]laintiff[s] seeking a preliminary injunction must establish that [they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008); *see also Platt v. Bd. of Comm'rs on Grievances and Disc. of Ohio S. Ct.*, 769 F.3d 447, 453-54 (6th Cir. 2014) (noting that a preliminary injunction is "extraordinary and drastic" (quotation omitted)).

III. Plaintiffs' Lack of Standing Precludes Preliminary Injunctive Relief

Plaintiffs' motion should be denied in its entirety, because each plaintiff lacks standing and therefore cannot show a likelihood of success on the merits or irreparable injury.

A. Requirements of Article III Standing

Federal courts may only decide actual cases or controversies. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). "One element of the case-or-controversy requirement" is that plaintiffs "must establish that they have standing to sue." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). The standing requirement protects the "time-honored concern about keeping the Judiciary's power within its proper constitutional sphere." *Id*. at 820. The "standing inquiry has been especially rigorous when reaching the merits of the dispute would force [a court] to decide whether an action taken by one of the other two branches of the Federal Government was

unconstitutional." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013).

> Standing contains three elements:
>
> > First, plaintiffs must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations and internal quotation omitted); *see also Coyne v. Am. Tobacco Co.*, 183 F.3d 488 (6th Cir. 1999).

A "threatened injury must be *certainly impending* to constitute injury in fact," and "'[a]llegations of *possible* future injury' are not sufficient." *Clapper*, 133 S. Ct at 1147 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)) (emphasis in original). Similarly, "a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74; *see also id*. at 577 (rejecting attempt "to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts"). Also, plaintiffs generally cannot establish standing indirectly when their injury is the result of "the independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976); *see also Lujan*, 504 U.S. at 560-61 (same); *Shearson v. Holder*, 725 F.3d 588, 592 (6th Cir. 2013) (same); *Ammex, Inc. v. United States*, 367 F.3d 530, 533 (6th Cir. 2004) (no standing to challenge excise tax assessed against third party, since "alleged injury . . . in the form of increased fuel costs was not occasioned by the Government").

Similarly, "a plaintiff must 'assert his own legal rights and interests, and cannot rest his

claim to relief on the legal rights or interests of third parties.'" *Coyne*, 183 F.3d at 494 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)); *see also United States v. Ovalle*, 136 F.3d 1092, 1100-01 (6th Cir. 1998); *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). The rare exception to this requirement arises where a plaintiff can "show that (1) it has suffered an injury in fact; (2) it has a close relationship to the third party; and (3) there is some hindrance to the third party's ability to protect his or her own interests." *Mount Elliott Cemetery Ass'n v. City of Troy*, 171 F.3d 398, 404 (6th Cir. 1999); *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281, 295 (6th Cir. 1998).

"A plaintiff bears the burden of demonstrating standing and must plead its components with specificity." *Coyne*, 183 F.3d at 494; *see also Lujan*, 504 U.S. at 561. A plaintiff "must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)). The Supreme Court has "always insisted on strict compliance with this jurisdictional standing requirement," *Raines*, 521 U.S. at 819. Moreover, "suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations are, even when premised on allegations of several instances of violations of law, rarely if ever appropriate for federal-court adjudication." *Lujan*, 504 U.S. at 568 (quotation omitted).

B. The Individual Plaintiffs' Allegations Do Not Establish Standing

None of the six individual plaintiffs meet the test for Article III standing (Senator Paul is addressed separately). That alone is a compelling basis for denial of the preliminary injunction. *See Kendrick v. Bland*, 894 F.2d 407 (Table), 1990 WL 4615 (6th Cir. 1990) (affirming denial of preliminary injunction for lack of standing); *Gorrasi v. Timmerman-Cooper*, 2011 WL 2489913 at *5 (S.D. Ohio June 21, 2011) (denying preliminary injunction for lack of standing). No plaintiff has alleged that he or she has suffered (or will imminently suffer) injury under the FATCA withholding tax: none is an FFI to which the tax under § 1471(a) applies, and none has

been assessed, or informed that IRS intends to assess, the recalcitrant account holder withholding tax imposed by § 1471(b). Moreover, all plaintiffs but Mr. Crawford live in jurisdictions where FFIs are not currently subject to the § 1471(b) withholding tax. No plaintiff has alleged that he or she is subject to § 6038D reporting due to an aggregate asset value exceeding $50,000 or FBAR reporting due to a bank account exceeding $10,000 in value. Their remarkably thin allegations of standing do not establish a live case or controversy and should instead result in dismissal.

1. Mark Crawford

Mr. Crawford states that he is a United States citizen who lives in Albania and maintains a residence in Dayton, Ohio. ¶ 13. The United States does not have a FATCA IGA with Albania, and Mr. Crawford does not allege that he has a bank account in any of the four countries whose IGAs are challenged in the complaint. That means that Mr. Crawford has no standing to assert the violations alleged in Counts 1, 2, or 8, which exclusively concern those four IGAs.[9]

Mr. Crawford seeks to invalidate FATCA and the FBAR requirements on three bases: (1) his brokerage firm cannot accept U.S. citizens—including Mr. Crawford himself—as clients, due to a relationship with a bank that has a policy against taking on American clients, *see* ¶ 21; (2) he does not want the "financial details of his accounts" disclosed to the U.S. government, *see* ¶ 23; and (3) he fears "unconstitutionally excessive fines imposed by 31 U.S.C. § 5321 if he wilfully fails to file an FBAR," *see* ¶ 24. He has no standing to raise these claims.

Although his bank's policy against taking U.S. citizens as clients and the denial of his application for a brokerage account may have "impacted Mark financially," ¶ 21, any such harm is not fairly traceable to an action by Defendants, which are not responsible for decisions that foreign banks make about whom to accept as clients. Mr. Crawford cannot establish standing

[9] It is questionable whether venue is proper in the Southern District of Ohio for the other plaintiffs' challenges to the IGAs because venue is based solely on Mr. Crawford's alleged residence in Dayton. If he lacks standing, then the other plaintiffs' claims may be subject to dismissal for improper venue.

indirectly when third parties are the more direct causes of his alleged injuries. *See Shearson*, 725 F.3d at 592. Moreover, his discomfort with complying with the disclosures required by FATCA, *see* ¶ 23, does not establish the concrete, particularized harm that confers standing to sue. *See, e.g.*, *Lujan*, 504 U.S. at 561 (requiring "concrete and particularized" and "actual or imminent" injury). Even if Mr. Crawford fears hypothetical "unconstitutionally excessive fines imposed by 31 U.S.C. § 5321 if he willfully fails to file an FBAR," ¶ 24, there is no allegation that he failed to file any FBAR that may have been required, much less that the Government has assessed an "excessive" FBAR penalty against him. Any harm that may come his way from imagined future events is purely speculative and cannot form the foundation for his lawsuit.

2. Roger Johnson

Mr. Johnson states that he is a U.S. citizen who resides in the Czech Republic. ¶ 31. He seeks to invalidate the Czech IGA, FATCA, and the FBAR reporting requirements because: (1) his wife, who is not a plaintiff, "strongly objected to having her financial affairs disclosed to the United States government," leading to the couple's voluntary[10] decision to separate their assets, *see* ¶ 35; (2) he does not want the financial details of his accounts disclosed, *see* ¶ 38; and (3) he fears "unconstitutionally excessive fines" if he willfully fails to file an FBAR, *see* ¶ 39. He lacks standing to assert these claims.

The harm alleged by Mr. Johnson resulted from his wife's objections to FATCA and the voluntary choices that he made in response; this is not traceable to the Government. *See Simon*, 426 U.S. at 41-42. The Johnsons are free to reverse the separation of their assets at any time, regardless of FATCA, and the lack of legal compulsion defeats any claim to third-party standing. Mr. Johnson's personal discomfort with reporting requirements of American law does not support standing, as he does not allege any concrete constitutional injury. *See Lujan*, 504 U.S. at

[10] The complaint states that they were "forced" to do this (¶ 35), but FATCA does not legally compel people to transfer their assets or other property. That is the individual's personal choice.

561. Nor is the prospect of the hypothetical imposition of an excessive fine, if he willfully fails to file a required FBAR, in any way sufficient. *Clapper*, 133 S. Ct at 1147 ("Allegations of possible future injury" do not convey standing). Like Mr. Crawford, Mr. Johnson seeks an advisory opinion that future, hypothetical conduct by the Government would violate his constitutional rights. The Court cannot grant such relief.

3. Stephen J. Kish

Mr. Kish states that he is a dual citizen of the United States and Canada who lives in Toronto. ¶ 41. Like Mr. Johnson, Mr. Kish alleges that his wife "strongly opposes the disclosure of her personal financial information" under FATCA. ¶ 47. His wife, however, is not a plaintiff, and her personal objection to financial disclosure rules—which is not adequate to confer standing in any event—is irrelevant. He may not assert claims on her behalf. *See Coyne*, 183 F.3d at 494. That he has allegedly suffered some "discord" in his marriage, *see* ¶ 47, is too vague and indirect of a harm to establish standing. As explained above, reluctance to comply with the reporting requirements of American law, *see* ¶ 48, and theoretical "excessive fines" that would be imposed if he willfully violated the law, *see* ¶ 49, do not convey standing.

4. Daniel Kuettel

Mr. Kuettel states that he is a citizen of Switzerland who renounced[11] his U.S. citizenship in 2012. ¶ 51. He claims that he decided to renounce due to "difficulties caused by FATCA," and he complains that "many Swiss banks have been unwilling to accept American clients because of FATCA." ¶ 55. He blames this practice of the Swiss banks for his "mostly unsuccessful" efforts to obtain mortgage refinancing prior to his renunciation of citizenship. *Id*. The only ongoing injury that Mr. Kuettel alleges is related to a college savings account for his daughter that he maintains at a Swiss bank. *See* ¶ 56. Mr. Kuettel's daughter is ten years old, *see* ¶ 54, and is not a

[11] Mr. Kuettel and Ms. Nelson (*see infra*) may not have standing to claim constitutional violations because of their nonresident alien status. *See United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

plaintiff in this case.[12] Supposedly the account would receive "several advantages such as better interest rates and discounts for local businesses" if it were titled in her name, though these hypothetical advantages are not explained. ¶ 56. The Complaint states Mr. Kuettel would like to transfer ownership of the account to his daughter, but he will not do so out of a concern that she might in the future be subjected to willful FBAR penalties. ¶ 57.[13] Mr. Kuettel could obviate this concern by filing an FBAR for the account on his daughter's behalf, but he "objects" to doing that, as does his wife (who is also not a plaintiff). ¶ 57. His daughter is said to be too young to renounce her own U.S. citizenship. ¶ 57. To be clear, having renounced his own American citizenship, Mr. Kuettel now seeks relief from our courts based only on his daughter's purported ineligibility for preferable interest rates and local discounts. This does not confer legal standing.

None of the allegations regarding Mr. Kuettel states that he is presently being harmed by FATCA or the Swiss IGA, and neither FATCA nor the IGA apply to him as a non-U.S. citizen. *See* ¶¶ 51-58. His vague assertion of past harm because he was "mostly unsuccessful" in refinancing his mortgage due to FATCA does not convey standing. Any purported harm in that instance was due to actions of third-party foreign banks and is not traceable to Defendants. Regardless, having now renounced his American citizenship and obtained refinancing on terms he found acceptable, any past harm is not redressable here. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210-11 (1995) ("[T]he fact of past injury . . . does nothing to establish a real and immediate threat that he would again suffer similar injury in the future." (quotation omitted)). Mr. Kuettel is therefore limited to claims concerning the FBAR requirement, which is only present in Count 3 and Count 6. He has no standing to assert the other counts.

[12] Mr. Kuettel does not sue as representative for his daughter. *See* FED. R. CIV. P. 17. Nor has he alleged that his daughter faces any hindrance in pursuing her own legal rights through a guardian. *See Mount Elliott Cemetery Ass'n v. City of Troy*, 171 F.3d 398, 404 (6th Cir. 1999).

[13] The account balance is currently only about $8,400, which is below the $10,000 threshold for FBAR reporting. Mr. Kuettel claims that he would contribute additional funds to the account upon transferring it to his daughter that would bring it above the $10,000 mark. ¶ 56.

Mr. Kuettel also lacks standing to challenge the FBAR reporting requirements that might apply to his daughter. The reporting requirement would be hers, and any harm to the account is a detriment to her. Advantages his daughter might receive if Mr. Kuettel or his wife filed an FBAR on his daughter's behalf are based on a bank policy, not conduct of Defendants. The failure to reap those advantages is due to the Kuettel family's reluctance to comply with the FBAR requirements, not any action fairly traceable to the Government. In any event, Mr. Keuttel has not established standing to sue on behalf of his daughter. *See Ovalle*, 136 F.3d at 1100-01.

5. Donna-Lane Nelson

Ms. Nelson states that she is a citizen of Switzerland who has also renounced her U.S. citizenship. ¶ 59. She alleges that her Swiss bank "notified her that she would not be able to open a new account if she ever closed her existing one because she was an American. Fearing that she would eventually not be able to bank in the country where she lived, she decided to relinquish her U.S. citizenship." ¶ 65. After she renounced, a Swiss bank "offered investment opportunities that were not available to her as an American." *Id*. She "resents having to provide" certain "explanations" to Swiss banks that have requested information on her past U.S. citizenship and payments to her daughter, who lives in the United States, and she sees "threats implied by these requests which appear to be prompted by FATCA." ¶ 68. Like the other plaintiffs, Ms. Nelson does not want to disclose financial information to the Government, and she claims to fear willful FBAR penalties, even though no such penalty has been imposed—much less threatened—against her. ¶¶ 69, 70. Unlike the preceding plaintiffs, however, she adds that she fears the 30% withholding tax may be imposed against her "if her business partner," who is now her husband, and with whom she has joint accounts, "opts to become a recalcitrant account holder." ¶ 71.

All of Ms. Nelson's allegations of harm stem from third-party conduct and are not actionable against Defendants. Fear of hypothetical events that might have befallen her if she had

not renounced her U.S. citizenship does not constitute concrete harm sufficient to confer Article III standing either. Her claim "that she had to choose between having the ability to access local financial services where she lived or be a U.S. citizen" is refuted by her admission that UBS would have allowed her to continue banking in Switzerland as before, using her existing account, regardless of her citizenship. ¶ 65. In any case, discretionary decisions of a foreign bank do not create standing. If her business partner/husband causes Ms. Nelson to be subjected to FBAR penalties by his future conduct—which is entirely speculative—that will be his fault, and no claim will be actionable against Defendants. Having renounced her U.S. citizenship and without standing to assert these claims, Ms. Nelson cannot air her "resentment" of U.S. law in this Court.

6. **L. Marc Zell**

Mr. Zell states that he is a practicing attorney and a citizen of both the United States and Israel who lives in Israel. He alleges that: (1) he and his firm have been required by Israeli banking institutions to complete IRS withholding forms for individuals whose funds his firm holds in trust, regardless of whether the forms are legally required, causing certain clients to leave his firm, ¶¶ 79 & 81; (2) Israeli banks have required his firm to close accounts, refused to open others, and requested conduct contrary to banking regulations, ¶¶ 79-80; and, (3) the compelled disclosure of his fiduciary relationship with clients impinges on the attorney-client relationship, ¶ 82. On request of clients, who claim their rights are violated by FATCA, Mr. Zell "has decided not to comply with the FATCA disclosure requirements whenever that alternative exists." ¶ 83. He fears that the FATCA 30% withholding tax on passthru payments to recalcitrant account holders could be imposed due to his refusal to provide identifying information about a client to an Israeli bank. ¶ 84. He also has refused to provide information to his own bank and "fears that he will be classified as a recalcitrant account holder," ¶ 85. Like the other plaintiffs, he does not want his financial information disclosed, ¶ 86, and fears an FBAR penalty if the IRS

determines that he willfully failed to file an FBAR, ¶ 87.[14]

Like the others, Mr. Zell entirely lacks standing. The majority of his allegations concern conduct of Israeli banks and his belief that these actions have been unfair to him or his clients. But conduct of third parties (even if related to the banks' compliance with FATCA) does not confer standing to bring suit against Defendants. *See, e.g.*, *Ammex*, 367 F.3d at 533. Nor may Mr. Zell seek redress on behalf of third parties who have allegedly suffered harm, including unidentified clients. *See Warth*, 422 U.S. at 499. Those individuals are not the plaintiffs, thus alleged harm to them does not provide a basis for Mr. Zell to maintain this suit.

The contention that disclosure of the identity of clients for whom Mr. Zell holds funds in trust violates the attorney-client privilege is also without merit. He gives no concrete example of harm that has occurred or how he was harmed by disclosure of clients' identities. He cannot raise the attorney-client privilege on his clients' behalf, nor is the fact of representation privileged. *See In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d 49, 62 (7th Cir. 1980) ("[A]ttorney-client privilege belongs to the client alone[.]"); *United States v. Robinson*, 121 F.3d 971, 976 (5th Cir. 1997) ("The fact of representation . . . is generally not within the privilege."). It is the fiduciary relationship, not the attorney-client relationship, that is the basis for the reporting requirement.

The claims that Mr. Zell asserts on his own behalf fare no better. His compliance with a client's wish to avoid the FATCA reporting requirements potentially subjects the client—not Mr. Zell—to the risk of imposition of a 30% tax. *See* 26 U.S.C. § 1471(b)(1)(D). Mr. Zell himself has not been assessed a 30% withholding tax under FATCA, nor could he (or his clients) be because 30% withholding under § 1471 is not presently being imposed against Israeli FFIs or their recalcitrant account holders. Mr. Zell has not had a penalty imposed against him for any willful failure to file an FBAR either. He has therefore suffered no concrete and particularized

[14] Mr. Zell does not say whether he has filed FBARs for his personal accounts or not.

injury sufficient to convey standing. *See Lujan*, 504 U.S. at 560.

C. Senator Rand Paul Lacks Standing to Sue "in His Official Capacity"

Senator Paul seeks to base legal standing (Counts 1 and 2 only) on his role as a U.S. Senator, charged with the institutional task of advice and consent under the Constitution. He contends that the IGAs exceed the proper scope of Executive Branch power and should have been submitted for Senate approval. ¶¶ 28, 29. This claim of official capacity standing based on "abstract dilution of institutional legislative power" is foreclosed by Supreme Court precedent.

Senator Paul's argument that the Executive Branch is usurping Congress's powers by not submitting the IGAs for a vote—that he has a "right to vote"—is nothing more than a generalized claim that the Executive Branch is not acting in accordance with the law (and that he may remedy such violation in his official capacity as a senator). In *Raines v. Byrd*, several members of Congress challenged the constitutionality of the Line Item Veto Act of 1996, asserting that the statute infringed on their power as legislators. 521 U.S. at 816.[15] The Supreme Court held that they lacked Article III standing. It noted that their claim asserted "a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally." *Id*. at 821. Because the plaintiffs' "claim of standing [was] based on a loss of political power, not loss of any private right," their asserted injury was not "concrete" for the purposes of Article III standing. *Id*. *Raines* bars Senator Paul's claims. This is true even if he frames the conduct he challenges as a "usurpation" of congressional authority. *See Chenoweth v. Clinton*, 181 F.3d 112, 116 (D.C. Cir. 1999) (a claim of usurpation of congressional authority is not sufficient to satisfy the standing requirement); *see also Walker v. Cheney*, 230 F. Supp. 2d 51, 73 (D.D.C. 2002) ("the role of

[15] Senator Paul has not been authorized to sue on behalf of the Senate. This fact, while not dispositive, weighs against finding standing. *See Raines*, 521 U.S. at 829 ("We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action[.]").

Article III courts has not historically involved adjudication of disputes between Congress and the Executive Branch based on claimed injury to official authority or power.").

Nor can Senator Paul base his standing on a more generalized interest in "vindication of the rule of law." *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106 (1998); *see also Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) ("[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone[.]" (quotation omitted)). A legislator does not hold any legally protected interest in proper application of the law that is distinct from the interest held by every member of the public. Senator Paul thus fails to allege a particularized, legally cognizable injury by his claim that the Executive Branch is not adhering to the law. *See Campbell v. Clinton*, 203 F.3d 19, 22 (D.C. Cir. 2000) (Congressional plaintiffs do not "have standing anytime a President allegedly acts in excess of statutory authority").

Senator Paul has "not been singled out for specially unfavorable treatment." *Raines*, 521 U.S. at 821. All plaintiffs here, including Senator Paul, have an adequate remedy to challenge the reporting requirements and penalties that they oppose: they may work toward repeal of the laws through the legislative process. *Id*. Of course, FATCA, the IGAs, and the FBAR requirements are not exempt from constitutional challenge, but they must be challenged by an individual who has suffered a judicially cognizable injury. *Id.* The plaintiffs in this case do not qualify.

IV. The Preliminary Injunction Must Be Denied for Lack of Jurisdiction

A. The Anti-Injunction Act Bars Plaintiffs' Claims

Plaintiffs seek a preliminary injunction preventing the Government, during the course of this proceeding, from (1) collecting the 30% withholding taxes established in § 1471, and (2) receiving, pursuant to the IGAs, the FATCA statute, and the FATCA regulations, information regarding U.S. taxpayers' foreign accounts that is used in assessing and collecting tax. Both components of the requested relief are barred by the Anti-Injunction Act (AIA), 26 U.S.C.

§ 7421(a), 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, whether or not such person is the person against whom such tax was assessed."[16] The Court should not enter a preliminary injunction in a case where jurisdiction is lacking. *See RYO Mach., LLC v. U.S. Dep't of Treas.*, 696 F.3d 467 (6th Cir. 2012) (vacating preliminary injunction and remanding with instructions to dismiss for lack of jurisdiction due to application of AIA); *see also Munaf v. Geren*, 553 U.S. 674, 690-91 (2008) (lack of jurisdiction warrants dismissal on appeal of preliminary injunction).

1. The 30% FATCA Withholding Taxes Cannot Be Enjoined

Counts 4 and 5 assert that "Defendants should be enjoined from enforcing" the 30% withholding taxes against non-reporting FFIs and recalcitrant account holders provided in § 1471. Complaint ¶¶ 140, 145. Despite plaintiffs' effort to portray § 1471 taxes as "penalties," they are, in fact, taxes, and this suit is plainly for the purpose of restraining their assessment or collection. *See United States v. Am. Friends Serv. Comm.*, 419 U.S. 7, 10 (1974) ("The District Court's injunction against the collection of the tax by withholding enjoins the collection of the tax, and is therefore contrary to the express language of the Anti-Injunction Act.").

The statute uses the word "tax," § 1471(a), (b)(1)(D), and Congress's decision to label something a "tax" rather than a "penalty" is "significant." *Nat'l Fed. of Ind. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012). "It is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress's choice of label on that question." *Id*. at 2594; *see also Hotze v. Burwell*, 784 F.3d 984, 999 (5th Cir. 2015) ("Congress has chosen to label the employer mandate as a 'tax,' not a 'penalty.' Thus, 'guided by Congress's choice of

[16] Section 7421(a) includes a list of statutory exceptions, none of which is applicable here. The Supreme Court has provided an additional exception to the Anti-Injunction Act where it is clear that there are no circumstances under which the United States will ultimately prevail and the taxpayer seeking the injunction can demonstrate that the government's collection activities will irreparably harm the taxpayer. *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1 (1962). Plaintiffs have not alleged in their motion for preliminary injunction that they can meet that standard, nor can they.

label,' and finding no compelling evidence that Congress meant for the AIA not to apply, we hold that the plaintiffs' challenge to the employer mandate is barred by the AIA." (quoting *NFIB*, 132 S. Ct. at 2594)).

Plaintiffs' view that the "tax" is really a "penalty" is contrary to the statute's text and is only supported by two stray quotations: Senator Levin's description of the 30% FFI withholding as a "sanction" in a letter to the IRS Commissioner, and an Acting Assistant Treasury Secretary's statement in a 2012 speech that FFI withholding is "not intended to raise revenue." Doc. 8-1 at 25 (PageID 163). But the Supreme Court long ago abandoned the distinction between a revenue tax and a regulatory tax because "[e]very tax is in some measure regulatory. . . . [A] tax is not any the less a tax because it has a regulatory effect[.]" *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937); *see also United States v. Sanchez*, 340 U.S. 42, 44 (1950) ("The principle applies even though the revenue obtained is obviously negligible, or the revenue purpose of the tax may be secondary[.]" (citations omitted)). That the tax in § 1471 is meant, at least in part, to encourage compliance with FATCA reporting, does not convert the tax into a penalty. In fact, the tax can be seen as purely remedial based on the 30% rate being the same tax rate that is imposed on all fixed or determinable annual or periodic income paid from a U.S. source to a non-resident alien. 26 U.S.C. §§ 1441(a), (b); *see* Part V.C.2(a), *infra*.

2. Information Reporting Under FATCA, the IGAs, and the FBAR Cannot Be Enjoined

Even if the Court accepts plaintiffs' contention that § 1471 withholding taxes are substantively "penalties" (*i.e.*, that despite being denominated as taxes, they are punitive in operation), they are imposed with the intention of furthering the ultimate assessment and collection of tax, and therefore § 7421(a) prohibits any injunction against their enforcement. *See* Complaint ¶ 137 (admitting the 30% FFI withholding tax is intended to encourage FFIs to "comply with FATCA"); *see also* Sen. Levin statement, *supra* (explaining that the 30% FFI

withholding tax was enacted to combat $100 billion tax loss from non-compliance by overseas FFIs and their account holders). The AIA "has been interpreted broadly to encompass almost all premature interference with the assessment or collection of any federal tax." *RYO Mach.*, 696 F.3d at 471. Such a broad construction of the statute sweeps into its scope not only the withholding taxes in § 1471 but also information-reporting rules of FATCA, the IGAs, and the FBAR requirements, which plaintiffs attack in the balance of their Complaint.

In *RYO Machine*, the Sixth Circuit explained that, "[r]egardless of how the claim is labelled, the effect of an injunction" must be examined and courts must consider "the ultimate deleterious effect such relief would have on the Government's taxing ability." 696 F.3d at 471 (citing *Int'l Lotto Fund v. Virginia State Lottery Dep't*, 20 F.3d 589, 591 (4th Cir. 1992)). "'To hold otherwise would enable ingenious counsel to so frame complaints as to frustrate the policy or purpose behind the Anti-Injunction Statute.'" *Tollerson v. Comm'r*, No. CIV. A. H-91-2762, 1993 WL 174884 at *5 (S.D. Tex. Mar. 4, 1993) (quoting *Blech v. United States*, 595 F.2d 462, 466 (9th Cir. 1979)). There is no ingenious framing of the Complaint here; plaintiffs admit the IGAs "are fundamentally international agreements concerning taxation and the collection of taxes." Complaint ¶ 114. This admission brings the IGAs within the AIA's scope and should lead to the same outcome—dismissal—with regard to plaintiffs' challenges to the FATCA disclosure requirements that the IGAs implement and the similar FBAR disclosure rules. *See* Doc. No. 8-1 at 15-16 (PageID 153-54) ("The IGAs are agreements to collect taxes in substance and in effect. Their express purpose is to . . . facilitate the U.S. government's tax collection efforts.").[17]

[17] The holding of *RYO Machine* is consistent with earlier Sixth Circuit cases holding that, "[w]hile the primary purpose of the [AIA] is to permit the IRS to assess and collect taxes without interference, it 'is equally applicable to activities which are intended to or may culminate in the assessment and collection of taxes.'" *Young v. Burks*, 849 F.2d 610 (Table), 1988 WL 62396 at *2 (6th Cir. June 21, 1988) (quoting *Dickens v. United States*, 671 F.2d 969, 971 (6th Cir. 1982)); *Dickens*, 671 F.2d at 971 ("A suit designed to prohibit the use of information to calculate an assessment is a suit designed 'for the purpose of restraining' an assessment[.]"). The Sixth Circuit recently reaffirmed that where "investigation may lead (continued...)

Well-established Sixth Circuit law mandates that the IRS's information-gathering efforts under FATCA, the IGAs, and the FBAR provisions must be allowed to proceed without interference from the plaintiffs or this Court. After all, the AIA's principal purpose is "the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference[.]'" *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736-37 (1974) (quoting *Enochs* 370 U.S. at 7). Plaintiffs may allege that the information reporting violates their privacy, but they "can argue the merits of their claim when, and if, the IRS assesses taxes against them based upon the allegedly illegally seized materials." *Shifman v. IRS*, 103 F.3d 130 (Table), 1996 WL 721787 at *2 (6th Cir. Dec. 13, 1996).

The Supreme Court's recent decision in *Direct Marketing Association v. Brohl*, 135 S. Ct. 1124 (2015), is not to the contrary. In that case, the Supreme Court held that a trade association's challenge to Colorado's law requiring information reporting by retailers that do not collect sales or use taxes was not barred by the Tax Injunction Act (TIA), 28 U.S.C. § 1341. With text that is similar, but not identical, to the AIA, the TIA provides that, "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The Supreme Court concluded that enjoining the state-law information-reporting requirement, by itself, would not sufficiently "restrain" tax assessment, levy or collection to come within TIA's prohibition.

The *Brohl* decision is both legally and factually distinguishable from the instant case. Legally, it does not foreclose a reading of the AIA that is broader than the Supreme Court's reading of the TIA. The AIA broadly prohibits any "suit *for the purpose* of restraining the assessment or collection of any tax . . . in any court," § 7421(a) (emphasis added), whereas the

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(… continued)
to the assessment and collection of taxes" the AIA "prohibits an injunction against the IRS's continued investigation." *Daulton v. United States*, 76 F. App'x 652, 654 (6th Cir. 2013).

TIA merely prohibits rulings by the U.S. district courts that directly "enjoin, suspend or restrain" the "assessment, levy or collection" of state taxes, § 1341. An injunction against information reporting mandated by federal tax law, while perhaps not *directly* enjoining the assessment or collection of tax, is still *for the purpose* of restraining assessment or collection. And as a limitation on waivers of sovereign immunity—as opposed to just a restriction, like TIA, on what relief a court may order—the AIA should be read in such a way that any ambiguity must be resolved by finding that a suit cannot be maintained. *See Portsmouth Ambulance Co. v. United States*, 756 F.3d 494, 498 (6th Cir. 2014) ("[A]ll waivers of federal sovereign immunity . . . must be strictly construed in favor of the United States[.]" (quotation omitted)).

Factually, as Justice Thomas's majority opinion in *Brohl* explained, "the question—at least for negative injunctions—is whether the relief to some degree stops 'assessment, levy or collection,' not whether it merely inhibits them." 135 S. Ct. at 1133. Unlike in *Brohl*, an injunction of the information-reporting provisions here would halt the assessment and collection process because the Government lacks alternative means to obtain the same information. For example, the Government cannot serve a summons on a taxpayer residing in a foreign country and would face difficulties serving a foreign bank without a U.S. presence. Moreover, as Justice Ginsburg noted in her *Brohl* concurrence, "[a] different question would be posed, however, by a suit to enjoin reporting obligations imposed on a taxpayer or tax collector, e.g., an employer or an in-state retailer, litigation in lieu of a direct challenge to an 'assessment,' 'levy,' or 'collection.'" 135 S. Ct. at 1136. That "different question" is raised in the present suit, which is brought by taxpayer-plaintiffs, not a third-party trade association.

3. Plaintiffs' Asserted Jurisdictional Statutes Do Not Override the AIA

Courts lack jurisdiction over claims that are barred by the AIA because sovereign immunity is not waived. *See RYO Mach.*, 696 F.3d at 4470 ("[T]he district court's exercise of

jurisdiction was barred by the Anti-Injunction Act."); *Hotze*, 784 F.3d at 996. The federal-question statute, 28 U.S.C. § 1331, is jurisdictional only and does not waive sovereign immunity. *See Morris, v. United States*, 540 F. App'x 477, 483 (6th Cir. 2013). Plaintiffs' attempted invocation of the Court's jurisdiction under the Declaratory Judgment Act (DJA), 28 U.S.C. § 2201, and the Administrative Procedure Act (APA), 5 U.S.C. § 702—plaintiffs' alleged grounds for waiving sovereign immunity—do not avoid dismissal. *See* Complaint ¶ 11.

"[T]he Declaratory Judgment Act does not enlarge the jurisdiction of the federal courts; it is procedural only." *Vaden v. Discover Bank*, 556 U.S. 49, 70 n.19 (2009) (quotation omitted); *see also Hamdi ex rel. Hamdi v. Napolitano*, 620 F.3d 615, 623 n.7 (6th Cir. 2010) (noting that the DJA "does not *provide* subject-matter jurisdiction"). In other words, "the availability of declaratory relief presupposes the existence of a judicially remediable right." *C&E Servs., Inc. of Wash. v. D.C. Water & Sewer Auth.*, 310 F.3d 197, 201 (D.C. Cir. 2002) (internal quotation and alteration omitted). The operation of the AIA in this case, as outlined above, means that plaintiffs have not asserted any judicially remediable right. Moreover, the DJA creates a remedy "except with respect to Federal taxes," 28 U.S.C. § 2201(a), and this exception to the DJA is at least as extensive as the AIA. *See Ecclesiastical Order of the ISM of AM, Inc. v. IRS*, 725 F.2d 398, 402 (6th Cir. 1984) ("The federal tax exception to the Declaratory Judgment Act is at least as broad as the Anti-Injunction Act." (quoting *Bob Jones*, 416 U.S. 725, 732 n.7 (1974))).

The APA is no help to plaintiffs either. *See Hughes v. United States*, 953 F.2d 531, 537 (9th Cir. 1992) ("the limited waiver of 5 U.S.C. § 702 does not override the limitations of § 7421 and § 2201." (citing H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 12, reprinted in 1976 U.S.C.C.A.N. 6121, 6132-33)); *Fostvedt v. United States*, 978 F.2d 1201, 1203-04 (10th Cir. 1992) ("§ 702 of the APA does not override the limitations of the Anti-Injunction Act and the Declaratory Judgment Act."); *McCarty v. United States*, 929 F.2d 1085, 1088 (5th Cir. 1991)

("[A]lthough 5 U.S.C. § 702 provides a general waiver of sovereign immunity, it does not confer jurisdiction if a more specific statute bars the requested relief. The Anti-Injunction Act, 26 U.S.C. § 7421(a), and the tax exception clause of the Declaratory Judgment Act, 28 U.S.C. § 2201, bar the relief sought [.]"); *see also We the People Found. v. United States*, 485 F.3d 140, 142 (D.C. Cir. 2007) (AIA barred a claim for injunctive relief notwithstanding § 702); § 702 ("Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground[.]").

Nor does the assertion of constitutional violations make any difference. *Alexander v. Americans United Inc.*, 416 U.S. 752, 759 (1974) ("[T]he constitutional nature of a taxpayer's claim . . . is of no consequence under the Anti-Injunction Act."). Accordingly, the AIA bars the relief requested, notwithstanding plaintiffs' claims regarding the DJA and APA.

B. The Statutes and IGAs Are Not Reviewable under the APA

Regardless of the AIA, APA review of the statutes and IGAs is not available. Under the APA, "a person[18] suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Only "final agency action for which there is no other adequate remedy in a court" is subject to review. 5 U.S.C. § 704. "'Agency action' is . . . 'the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.'" *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004) (quoting 5 U.S.C. § 551(13)).

Plaintiffs cannot challenge 26 U.S.C §§ 1471 and 6038D and 31 U.S.C § 5321 under the APA. Congressional actions are not subject to the APA. 5 U.S.C. §§ 551(1)(A) & 701(b)(1)(A).

The APA also provides no basis for setting aside executive agreements like the IGAs here. *See* Part V.A, *infra* (explaining legal status of IGAs as executive agreements). Judicial

[18] To the extent that Senator Paul, suing "in his official capacity," claims to be acting on behalf of the entire Senate, he is not a "person" under the APA. *See* 5 U.S.C. § 551(2).

review is not available when "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The decision to enter into executive agreements and the contents of those agreements are discretionary and committed the executive branch under the Constitution. The APA exception applies when there is "no law to apply" or there is "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Here, there is no meaningful standard by which the decisions in the IGAs could be evaluated. The APA does not apply where the issues are inappropriate for judicial action. *See* 5 U.S.C. § 702(1); *see also Chicago & S. Air Lines v. Waterman S. S. Corp*., 333 U.S. 103, 111 (1948) ("the very nature of executive decisions as to foreign policy is political, not judicial. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."); *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 104 F.3d 1349, 1353 (D.C. Cir. 1997) ("By long-standing tradition, courts have been wary of second-guessing executive branch decisions involving complicated foreign policy matters."). Plaintiffs do not cite any case where a court reviewed an executive agreement under the APA.[19]

In addition, IGAs are not subject to APA review because they are not "final." For agency action to be final, "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quotation omitted). The IGAs establish obligations between countries and do not directly impose obligations on individuals. They confer no rights or put no obligations on any "person" that could be suffering a legal wrong cognizable under the APA. *See* 5 U.S.C. § 706; *see also Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Engr's*, 335 F.3d 607, 619 (7th

[19] The dispute regarding the proper scope of executive power to make international agreements without express congressional approval is arguably a nonjusticiable political question. *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Rehnquist, J., concurring in judgment).

Cir. 2003) (APA does not apply to actions that do not "impose new legal requirements on regulated parties" or "alter in any way the legal regime to which" plaintiffs are subject).

V. Plaintiffs' Constitutional Claims Fall Far Short of Entitling Them to Preliminary Injunctive Relief

Even if plaintiffs could clear the standing and jurisdictional hurdles above, they would not meet the exacting standard for a preliminary injunction. They are unlikely to succeed on the merits of their constitutional claims, they have established no likelihood of irreparable injury without preliminary injunctive relief, and they have failed to show that the balance of equities and public interest requires such a drastic remedy. They certainly have not made a persuasive case that an injunction is needed immediately.

A. The IGAs Are a Valid Exercise of Executive Power (Counts 1 and 2)

1. The IGAs Are Permitted Under the President's Constitutional Authority and By Statute (Count 1)[20]

The Supreme Court has consistently recognized the authority of the President to conclude international agreements without the advice and consent of the Senate where the President's own constitutional authority, authority derived from Congressional action, or some combination of them, provide support for the President's actions. *See Weinberger v. Rossi*, 456 U.S. 25, 30 n.6 (1982) ("[T]he president may enter into certain binding agreements with foreign nations without complying with the formalities required by the Treaty Clause of the Constitution[.]"); *Dames & Moore v. Regan*, 453 U.S. 654, 682-83 (1981); *Belmont v. United States*, 301 U.S. 324, 330-31 (1937); *B. Altman & Co. v. United States*, 224 U.S. 583, 601 (1912).

Presidential authority to make executive agreements is consistent with the president's wide-ranging power over foreign policy-making in general. *See Zivotofsky v. Kerry*, 135 S. Ct.

[20] The following analysis is consistent with the written answers to Senator Paul's questions submitted by Robert Stack, Deputy Assistant Secretary (International Tax Affairs) in conjunction with an April 29, 2014 hearing of the Senate Foreign Relations Committee. *See* Senate Exec. Rept. 113-7 at 84, available at https://www.congress.gov/congressional-report/113th-congress/executive-report/7/1.

2076 (2015); *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 414 (2003); *United States v. Curtiss-Wright*, 299 U.S. 304, 320 (1936). These agreements require no further approval by Congress. *Garamendi*, 539 U.S. at 415.

Moreover, "When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress." *Dames & Moore*, 453 U.S. at 668 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)); *Treaties and Other Int'l Agreements: The Role of the U.S. Senate*, 106th Cong., 2d Sess., S. Prt. 106-71 (2001), at 79 ("Congress has enacted statutes providing authority in advance for the President to negotiate with other nations . . . This authority may be explicit, or . . . implied[.]").[21]

Congress's "enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to 'invite' 'measures on independent presidential responsibility[.]'" *Dames & Moore*, 453 U.S. at 678 (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)). That is, some legislation "requires, or fairly implies, the need for an agreement in order to execute the legislation." Restatement (Third) of Foreign Relations Law, § 303, cmt. e.

[21] Plaintiffs cite *Sec. Pac. Nat'l Bank v. Gov't & State of Iran*, 513 F. Supp. 864, 872 (C.D. Cal. 1981), arguing that, "executive agreements are only valid insofar as they fall within the President's independent constitutional powers," Doc. No. 8-1 at 11 (PageID 149), but that case allows that the president can also "enter into executive agreements . . . pursuant to valid statutory delegations of authority." They also cite *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953). In that case, the court concluded that an executive agreement conflicted with a statute and invalidated the agreement on that basis. *Id*. at 658. By contrast, the agreements at issue here are authorized by, and in furtherance of the purposes of, applicable statutes. *Capps* has been read by some to imply that an executive agreement can never concern matters that are within Congress's Article I powers. *See id.* at 659; *see also* Doc. 8-1 at 13 (PageID 151) (citing *Capps* for this proposition). This reading of *Capps*, however, has been criticized for taking "the narrowest view of the President's power" in a way that "does not accord with the practice either before or since . . . . If the President cannot make agreements on any matter on which Congress could legislate, there could be no executive agreements with domestic legal consequences." Louis Henkin, *Foreign Affairs and the Constitution* 181 (1972). The Fourth Circuit's implication in this regard was not adopted by the Supreme Court when it affirmed, *see* 348 U.S. 296 (1955), and more recent Supreme Court authority like *Dames & Moore* is to the contrary.

Agreements are allowed "where there is no contrary indication of legislative intent and when there is a history of congressional acquiescence[.]" *Dames & Moore*, 453 U.S. at 678-79; *see also Haig v. Agee*, 453 U.S. 280, 291 (1981) ("[I]n the areas of foreign policy and national security . . . congressional silence is not to be equated with congressional disapproval.").

Contrary to Plaintiffs' belief, the executive agreements at issue here in no way "usurp" Congress's power "to lay and collect taxes." Doc. No. 8-1 at 15 (PageID 153). The IGAs do not "impose" any taxes (Complaint ¶ 113); rather, they facilitate the implementation of tax rules previously enacted by Congress. And the IGAs are authorized both expressly and impliedly. Congress passed legislation that "permits the disclosure of a tax return or return information to a competent authority of a foreign government which has an income tax or gift and estate tax convention, or other convention or *bilateral agreement* relating to the exchange of tax information, with the United States[.]"[22] *See* 26 U.S.C. § 6103(k)(4) (emphasis added).[23] Moreover, § 1471(b)(2) delegates authority to the Secretary to determine that it is not necessary to apply all the § 1471 rules to particular classes of FFIs.

Federal courts have found statutory authorization to enter similar executive agreements. In *Barquero v. United States*, 18 F.3d 1311 (5th Cir. 1994), the Fifth Circuit, reading 26 U.S.C. § 274(h)(6)(C) in conjunction with 26 U.S.C. 927(e)(3), upheld the tax information exchange agreement (TIEA) with Mexico as constitutional because Congress had expressly authorized it.

[22] Plaintiffs express concern over the purported disclosure of their tax "return information," as defined in 26 U.S.C. § 6103, *see* Doc. No. 8-1 at 16 (PageID 154), but information that is in the hands of an FFI or foreign government falls outside the statutory definition, which only covers information "received by, recorded by, prepared by, furnished to, or collected by the Secretary." § 6103(b)(2)(A). FFIs and foreign governments are not violating § 6103 by complying with the IGAs. Moreover, the statutory exception in § 6103(k)(4) expressly permits the disclosure of such information via bilateral executive agreements.

[23] The 1988 amendment to § 6103(k)(4) specifically added the words "or bilateral agreement" after the words "or other convention," making clear that Congress intended to allow "bilateral agreements" of this kind that were not "conventions." *See* S. Rep. No. 100-445, 1988 U.S.C.C.A.N. 4515 at 4843-44.

18 F.3d at 1314-15.[24] The court also found "that these sections of the Code provide 'implicit approval' for the President's actions," and were "an 'invitation' for the President to enter into TIEAs[.]" 18 F.3d at 1315 (citing § 6103(k)(4) and quoting *Dames & Moore*, 453 U.S. at 678); *see also United States v. Walczak*, 783 F.2d 852, 856 (9th Cir. 1986) ("[S]ince Congress contemplated that agreements having to do with civil aviation would be negotiated by the executive branch, the agreement in question is among those which the President may conclude on his own authority."); *Owner-Operator Indep. Drivers Ass'n*, 724 F.3d. at 237-38 (executive agreement for the reciprocal recognition of commercial drivers' licenses permitted under the Secretary of Transportation's statutory authority to prescribe regulations on minimum standards for licenses); *B. Altman & Co.*, 224 U.S. at 601; *Weinberger*, 456 U.S. 25; *Lemnitzer v. Philippine Airlines, Inc.*, 52 F.3d 333 (table), 1995 WL 230404 (9th Cir. 1995); *Harris v. United States*, 768 F.2d 1240 (11th Cir. 1985).

Plaintiffs' claim that the IGAs are unconstitutional ignores this precedent. Like the executive agreements considered in *Barquero*, *Walzack*, and *Owner-Operator Independent Drivers Association*, the IGAs here are both expressly and impliedly authorized by statute, as explained above with respect to §§ 1471 and 6103(k)(4). Furthermore, "there is a history of congressional acquiescence," *Dames & Moore*, 453 U.S. at 678, in this area, with successive presidential administrations having entered into at least 30 TIEAs as executive agreements since 1983. Each of these agreements was reported to Congress pursuant to 1 U.S.C. § 112b, and Congress has not acted to contest or express objection to any of them.

[24] Section 927 was repealed in 2000 (along with all Foreign Sales Corporation rules previously codified at §§ 921-27) in order for the United States to comply with the rules of the World Trade Organization. *See* Pub. L. 106-519; House Report 106-845. The repeal was not intended to prevent the executive from negotiating future TIEAs. At least 10 TIEAs have been reached since 2000.

2. Bilateral Treaties Authorizing International Sharing of Tax Information Provide Further Support for the IGAs (Count 1)

The four IGAs at issue are also authorized by treaties previously approved by the Senate.[25] The preambles of all four IGAs refer to the Canadian Convention, Czech Convention, Israeli Convention, and Swiss Convention, respectively, as sources of authority. The Canadian, Czech, Israeli, and Swiss IGAs are all with countries with which the United States has preexisting tax treaties that already permit sharing between our governments of information of the kind contemplated under FATCA. These tax treaties provide an independent source of authority for the IGAs.

3. The IGAs Are Consistent with the FATCA Statute (Count 2)

Count 2 of the Complaint is based on the false premise that "the IGAs directly contradict" the FATCA statute and "establish a different regulatory scheme." Doc. No. 8-1 at 17 (PageID 155); Complaint ¶ 121. Plaintiffs list only two purported inconsistencies between the FATCA statute and IGAs, neither of which is an inconsistency at all. First, they complain that Model 1 IGAs (Canadian, Czech, and Israeli) "exempt covered FFIs from the statutory requirement that FFIs report account information directly to the Treasury Department, 26 U.S.C. § 1471(b)(1)(C), and instead allow such FFIs to report the account information to their national governments[.]" Complaint ¶ 121. This is a reporting requirement that the Secretary has discretionary power to waive, under § 1471(b)(2)(B), when the FFI "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." The Secretary has exercised this discretion to waive the requirement for all FFIs in Model 1 jurisdictions to report directly to Treasury, because the IGA enables Treasury to obtain the same information from foreign

[25] While the four IGAs are authorized by preexisting tax treaties, it is the Government's position that a preexisting tax treaty is not necessary for an IGA to be valid.

governments, making direct reporting by individual FFIs unnecessary.

Second, plaintiffs express dismay that Model 2 IGAs, like the one with Switzerland, "exempt covered FFIs from the obligation 'to obtain a valid and effective waiver' of any foreign law that would prevent the reporting of information required by FATCA, 26 U.S.C. § 1471(b)(1)(F)(i), and instead obligates the foreign government to suspend such laws with respect to FATCA reporting by covered FFIs[.]" Complaint ¶ 121. They bemoan that, "[t]his deprives account holders of their right under the statute to refuse a waiver." *Id*. However, they are misreading § 1471 and, by extension, what the IGA "exempts" FFIs from having to do. The obligation of the FFI under § 1471(b)(1)(F) is merely "*to attempt* to obtain a valid and effective waiver" from the account holder of foreign nondisclosure laws or else to close an account if a waiver is not obtained in a reasonable time. § 1471(b)(1)(F)(i), (ii) (emphasis added). That is, refusing a waiver results in the account being closed. This provision is only applicable when foreign law would (but for a waiver) prevent reporting of FATCA-required information. The statute does not create or enshrine foreign legal rights, nor do IGAs. Switzerland suspending laws that permit refusal of a waiver, in keeping with the IGA, is not inconsistent with § 1471. Whatever rights the plaintiffs may have under foreign laws (or may previously have had, pre-IGA), they are not a valid basis for a U.S. court to order relief against the Government.

In any event, as with the first alleged inconsistency, there is also no inconsistency here because § 1471(b)(2) expressly allows the Secretary to deem FFIs to be in compliance with § 1471(b)(1) regardless of whether they ever seek waivers from their clients under § 1471(b)(1)(F). The Secretary has exercised this statutory discretion, and as a result, the "waiver" provision in § 1471(b)(1)(F) does not apply to FFIs in IGA countries.

B. Plaintiffs Are Not Likely to Succeed on the Merits of Their Equal Protection Claim (Count 3)

In Count 3 of their complaint, plaintiffs contend that the "heightened reporting requirements" imposed by FATCA, the FBAR information-reporting requirements, and the Canadian, Swiss, Czech, and Israeli IGAs, violate the Fifth Amendment rights of "U.S. citizens living in a foreign country" and should be enjoined. *See* Complaint ¶¶ 124-130. "We begin, of course, with the presumption that the challenged statute"—FATCA—" is valid. Its wisdom is not the concern of the courts; if a challenged action does not violate the Constitution, it must be sustained[.]" *INS v. Chadha*, 426 U.S. 919, 944 (1983); *see also NFIB*, 132 S. Ct. at 2594 ("'[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895))).

Plaintiffs are unlikely to succeed on the merits of their claim that "U.S. citizens living in a foreign country are treated differently than U.S. citizens living in the United States," Complaint ¶ 128, without rational basis. A litigant may challenge federal government action under the Fifth Amendment's due process clause on the same grounds as a challenge to state action under the Fourteenth Amendment's equal protection clause. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *see also Buckley v. Valeo*, 424 U.S. 1, 93 (1976). "Under the Due Process Clause, if a statute has a reasonable relation to a proper legislative purpose, and [is] neither arbitrary nor discriminatory, the requirements of due process are satisfied." *Nebbia v. New York*, 291 U.S. 502, 537 (1934) (internal quotation marks and citations omitted). Likewise, under the Equal Protection Clause, a statute not directed at a suspect or quasi-suspect class must be upheld if it has a rational basis. *Clements v. Fashing*, 457 U.S. 957, 967 (1982) (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955)). As plaintiffs concede, *see* Doc. No. 8-1 at 23 (PageID 161), "U.S. citizens living in a foreign country" are not a suspect or semi-suspect class of people, so Defendants need only show that "the classification drawn by [a] statute is rationally related to

a legitimate state interest." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *see also Igartua de la Rosa v. United States*, 842 F. Supp. 607, 611 (D.P.R. 1994) (recognizing that a distinction drawn between U.S. citizens living abroad and U.S. citizens living within the United States does not implicate any suspect or semi-suspect class of people and is therefore evaluated under the "rational basis" test for Equal Protection purposes).

A court "will not overturn [government conduct] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [it] can only conclude that the [government's] actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *see also FCC v. Beach Commc'n, Inc.*, 508 U.S. 307, 313-14 (1993) (a statute subject to rational basis review must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."). A facial challenge, because of the extraordinary relief, requires a "heavy burden" and is "the most difficult challenge to mount successfully[.]" *United States v. Salerno*, 481 U.S. 739, 745 (1987).

1. The Asserted Classification Does Not Exist

Plaintiffs' equal protection claims fail immediately because the statutes, regulations, and executive agreements that they challenge simply do not make the classification they assert. None of the challenged provisions single out U.S. citizens living abroad. Instead, *all* Americans with specified foreign bank accounts or assets are subject to reporting requirements, no matter where they happen to live. To be clear, the provisions plaintiffs contend discriminate against "U.S. citizens living abroad" apply to all U.S. taxpayers, no matter their residence.[26]

FATCA requires FFIs to provide specified information about "United States Accounts."

[26] Plaintiffs argue that "[i]n practice, the increased reporting requirements for foreign financial accounts discriminate against U.S. citizens living abroad," *see* Doc. No. 8-1 at 22 (PageID 160), suggesting a claim of discrimination based on disparate impact. But it is well-settled that "mere disparate impact is insufficient to demonstrate an equal protection violation." *Copeland v. Machulis*, 57 F.3d 476, 481 (6th Cir. 1995); *see also Washington v. Davis*, 426 U.S. 229, 244-45 (1976).

See 26 U.S.C. § 1471(c)(1)(C). "United States Accounts" are defined in the statute as "any financial account which is held by one or more specified United States persons or United States owned foreign entities." 26 U.S.C. § 1471(d)(1)(A). Similarly, the individual reporting requirements of FATCA under § 6038D(c)(4) apply to "*any individual* who, during any taxable year, holds any interest in a specified foreign financial asset[.]" 26 U.S.C. § 6038D(a) (emphasis added). The Bank Secrecy Act, under which the FBAR reporting requirement arises, also applies to any taxpayer with a financial interest in, or signatory authority over, a foreign financial account exceeding certain monetary thresholds. *See* 31 U.S.C. § 5314; 31 C.F.R. §§ 1010.350 & 1010.306(c). The regulations challenged, too, simply do not make the classification plaintiffs challenge as irrational; they apply to all taxpayers holding certain foreign accounts or assets. *See* 26 C.F.R. § 1.1471-4(d)(3)(ii) (FFI reporting requirement regarding "accounts held by specified U.S. persons"); 26 C.F.R. § 1.6038D-4(a)(5), (6), & (8) (setting forth information to be reported in Statement of Specified Foreign Financial Assets). Neither do the IGAs distinguish between the residence of the account holders whose information must be reported.

Plaintiffs have not correctly identified the classification made by these laws. The most basic element of an equal protection claim is the existence of at least two classifications of persons treated differently under the law. *See Silver v. Franklin Twp. Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992). But plaintiffs fail to recognize that similarly situated persons to themselves—U.S. taxpayers living in the United States who hold foreign accounts—are not treated differently. In fact, the regulations under 26 C.F.R. § 1.6038D-2 provide for *higher* reporting threshold for U.S. citizens living abroad, recognizing that such individuals are likely to have significant foreign accounts in the ordinary course. For married individuals filing jointly, the filing threshold goes from $50,000 for U.S. residents to $150,000 for non-U.S. residents. To the extent that the law treats U.S. citizens living abroad unequally, it is in their favor insofar as

the reporting requirements for foreign accounts are actually less onerous.

2. Classification Based on Whether a Bank Account Is Held Domestically or Overseas Is Rationally Related to a Legitimate Governmental Interest

Even if the Court were to determine that the statutes challenged by Plaintiffs (and the associated regulations and IGAs) created a classification sufficient for rational basis review, the classifications made here are rationally related to a legitimate government interest.

The U.S. tax system is based in large part on voluntary compliance: taxpayers are expected to disclose their sources of income annually on their federal tax returns. The information reporting required by FATCA is intended to address the use of offshore accounts to facilitate tax evasion, and to strengthen the integrity of the voluntary compliance system by placing U.S. taxpayers that have access to offshore investment opportunities in an equal position with U.S. taxpayers that invest within the United States. Third party information reporting is an important tool used by the IRS to close the tax gap between taxes due and taxes paid. The knowledge that financial institutions will also be disclosing information about an account encourages individuals to properly disclose their income on their tax returns. *See* Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance,* 60 STAN. L. REV. 695, 711 (2007). U.S. taxpayers are subject to tax on their worldwide income, and their investments have become increasingly global in scope. Absent the FATCA reporting by FFIs, some U.S. taxpayers may attempt to evade U.S. tax by hiding money in offshore accounts where, prior to FATCA, they were not subject to automatic reporting to the IRS by FFIs. The information required to be reported, including payments made or credited to the account and the balance or value of the account is to assist the IRS in determining previously unreported income and the value of such information is based on experience from the DOJ prosecution of offshore tax evasion. *See* Senate Permanent Subcommittee on Investigations bipartisan report on "Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore

Accounts," February 26, 2014; s*ee also Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 29 (1974) ("when law enforcement personnel are confronted with the secret foreign bank account or the secret foreign financial institution they are placed in an impossible situation…they must subject themselves to time consuming and often times fruitless foreign legal process.").

The FBAR reporting requirements, likewise, have a rational basis. As the Supreme Court noted in *California Bankers*, when Congress enacted the Bank Secrecy Act (which provides the statutory basis for the FBAR), it "recognized that the use of financial institutions, both domestic and foreign, in furtherance of activities designed to evade the regulatory mechanism of the United States, had markedly increased." *Id*. at 38. The government has a legitimate interest in collecting information about foreign accounts, including account balances held by U.S. citizens, for the same reason that it requires reporting of information on U.S.-based accounts. The information assists law enforcement and the IRS, among other things, in identifying unreported taxable income of U.S. taxpayers that is held in foreign accounts. Without FBAR reporting, the government's efforts to track financial crime and tax evasion would be hampered. Congress, through FBAR reporting, attempted to complement domestic reporting on financial transactions. U.S. taxpayers who place their funds in foreign accounts cannot put themselves on a better footing than U.S. taxpayers who conduct their transactions stateside. FBAR reporting prevents individuals from trying to evade domestic regulation and provides a deterrent for those who would use foreign accounts to engage in criminal activity.

The distinctions made by FATCA, the FBAR reporting requirements, and the IGAs simply do not evidence, on their face, the type of discrimination that is "so unjustifiable as to be violative of due process." *Schneider v. Rusk*, 377 U.S. 163, 168 (1964).

C. Plaintiffs' Eighth Amendment Claims Should Be Dismissed (Counts, 4, 5 and 6)

Plaintiffs challenge the FATCA withholding taxes on FFIs and recalcitrant account

holders and the willful FBAR penalty under the Eighth Amendment's Excessive Fines Clause. However, these three Eighth Amendment claims are not ripe for adjudication because no withholding or FBAR penalty has been imposed against any of the plaintiffs; indeed, the 30% FFI withholding tax under § 1471(a) will never be imposed against them because they are individuals, not FFIs. Regardless, the plaintiffs' claims fail because they cannot show that the FATCA taxes and the willful FBAR penalties are grossly disproportional to the gravity of their (as yet unspecified) conduct. *See United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

1. The Eighth Amendment Challenges Are Not Ripe for Adjudication

"Ripeness is a justiciability doctrine designed to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements. Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all." *Ky. Press Ass'n v. Kentucky*, 454 F.3d 505, 509 (6th Cir. 2006) (citation and internal quotation marks omitted). The Sixth Circuit has listed three factors to be considered when deciding whether claims are ripe for adjudication: (1) the likelihood that the harm alleged by the plaintiffs will ever come to pass; (2) whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claim; and (3) the hardship to the parties if judicial relief is denied at this stage in the proceedings. *Id.*

Plaintiffs' Eighth Amendment challenges are not ripe under the *Kentucky Press Association* factors. First, it is not clear that any harm the plaintiffs contemplate will ever come to pass. With respect to the FATCA withholding tax in § 1471(b)(1), plaintiffs can request a credit or refund of a future withheld amount on their federal income tax returns. *See* 26 U.S.C § 1474(a); 26 C.F.R. § 1.1474-3. Several of the plaintiffs are U.S. citizens, so they must file federal income tax returns anyway. 26 C.F.R. § 1.6012-1(a)(1). Ms. Nelson and Mr. Kuettel, who renounced their U.S. citizenship, may also be required to file returns if they have U.S.-

source income. 26 C.F.R. § 1.6012-1(b)(1)(i). As for the willful FBAR penalty, whether it is imposed is entirely in IRS's discretion. *See* 31 U.S.C. § 5321(a)(5); 31 C.F.R. § 1010.810(g).

Second, the factual record is not sufficiently developed to weigh whether the FATCA withholding taxes or FBAR penalty is grossly disproportionate, and such a factual record cannot reasonably be developed here. An Eighth Amendment proportionality analysis is "guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the [penalty] imposed on other [offenders] in the same jurisdiction; and (iii) the [penalty] imposed for commission of the same [offense] in other jurisdictions." *Solem v. Helm*, 463 U.S. 277, 292 (1983) (Cruel and Unusual Punishments Clause analysis); *see also Bajakajian*, 524 U.S. at 336 (drawing Excessive Fines Clause standard from Cruel and Unusual Punishments Clause jurisprudence). The first factor requires review of the circumstances of the offense "in great detail." *Solem*, 463 U.S. at 290-91. Of course, there are no circumstances to review here because a FATCA tax or an FBAR penalty has not been imposed.[27] That is, a fact-specific determination of excessiveness is impossible where any wrongful conduct is hypothetical and divorced from concrete conduct by the defendants.

Finally, plaintiffs will not suffer appreciable hardship if the Court declines to hear their Eighth Amendment challenges. The Sixth Circuit has noted that, "[r]ipeness will not exist … when a plaintiff has suffered (or will immediately suffer) a small but legally cognizable injury, yet the benefits to adjudicating the dispute at some later time outweigh the hardship the plaintiff

[27] Circumstances to determine excessiveness might include: (1) why the withholding tax or willful FBAR penalty was imposed; (2) the plaintiffs' individual federal income tax situations, in order to determine whether the amounts withheld under § 1471 were used to pay income tax they owed and whether the FBAR penalty compensated for back taxes they owed but didn't pay; (3) whether the plaintiffs' conduct assisted other U.S. citizens in evading tax; (4) the plaintiffs' FBAR filing compliance; (5) whether the funds in the foreign account are connected to illegal activities (including but not limited to tax evasion); and (6) the source and likely use of the funds. *See United States v. Ely*, 468 F.3d 399, 403 (6th Cir. 2006) (listing factual considerations for Excessive Fines challenge to civil forfeiture); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972) (upholding forfeiture in part because it served as "reasonable form of liquidated damages" for violating customs laws).

will have to endure by waiting." *Airline Profs. Ass'n of Int'l Broth. of Teamsters, Local No. 1224 v. Airborne, Inc.*, 332 F.3d 983, 988 n.4 (6th Cir. 2003). Challenges to statutes are not ripe where delaying judicial review results in no real harm. *See Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 810-11 (2003). Once an amount is actually withheld from a payment, plaintiffs can (after properly exhausting administrative remedies) file a refund suit if the IRS improperly fails to refund the withholding. *See* 26 U.S.C. § 7422. And if an FBAR penalty is assessed against a plaintiff, that plaintiff may challenge the penalty at a later time. *See Moore v. United States*, No. C13-2063-RAJ, 2015 WL 1510007 at *12-*13 (W.D. Wash. Apr. 1, 2015) (rejecting Eighth Amendment challenge to non-willful FBAR penalty). At that point, the IRS will have developed its administrative record and decided what the penalty should be, and the case will be squarely presented for judicial consideration of any alleged excessiveness. But at present, plaintiffs have not established that their Eighth Amendment claims require immediate injunctive relief.

2. Plaintiffs' Facial Eighth Amendment Challenges Are Meritless

Because they have not alleged that any FATCA withholding taxes or willful FBAR penalties have actually been imposed against them, plaintiffs appear to raise a facial challenge to those exactions under the Excessive Fines Clause. To prevail, plaintiffs must show that the statutes are "unconstitutional in all of [their] applications," *City of Los Angeles v. Patel*, 135 S.Ct. 2443, 2451 (2015) (internal quotation omitted). They cannot meet this heavy burden. The FATCA taxes satisfy neither of the two *Bajakajian* factors: they are not fines, nor are they grossly disproportional. 524 U.S. at 334. The willful FBAR penalty, while arguably equivalent to a fine, is not grossly disproportional in all applications. Plaintiffs' facial attack thus fails.

a. The FATCA Withholding Taxes Are Taxes, Not Penalties, and Are Wholly Remedial in Any Event

The FATCA withholding taxes in § 1471(a) and § 1471(d)(1)(B) are taxes, not penalties. The Eighth Amendment applies to payments that "constitute punishment for an offense."

Bajakajian, 524 U.S. at 328. Neither taxes nor remedial fines are punishment for an offense, and thus are not subject to the Eighth Amendment. *See Austin v. United States*, 509 U.S. 602, 621-22 (1993) (a fine is not "punishment for an offense" if it serves a wholly remedial purpose).

The FATCA withholding tax rate of 30% is purely remedial because it is the same rate imposed on all fixed or determinable annual or periodic income paid from a U.S. source to a non-resident alien. 26 U.S.C. § 1441(a), (b). FATCA's withholding tax on FFIs effectively assumes that if an FFI refuses to disclose information to the IRS, all U.S.-sourced payments to its account holders may be subject to that rate of taxation. Similarly, FATCA's withholding tax on recalcitrant account holders under § 1471(b)(1)(D) merely extends the same withholding rate as § 1441 to accounts where the account holder refuses to be identified. The rate is effectively reduced if the FFI's country has a substantive tax treaty reducing the rate of tax on a particular payment, *see* 26 U.S.C. § 1474(b)(2)(A)(i), underlining that the FATCA withholdings are meant to collect tax, not to impose a punishment. Again, to the extent that one of the individual plaintiffs has money withheld over and above what is necessary to pay his or her federal income tax, the withholding is refundable. 26 U.S.C. § 1474; 26 C.F.R. §§ 1.1474-3, 1.1474-5. At least as to these plaintiffs, the FATCA withholding taxes serve the purely remedial purpose of protecting the fisc. *See Helvering v. Mitchell*, 303 U.S. 391, 400-01 (1938) (50% fraud penalty was remedial in nature because it was "provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation").

Nor is the magnitude of the withholding tax grossly disproportional, since it roughly approximates the presumed tax loss from FATCA non-compliance. Congress's determination that a 30% withholding tax rate was appropriate should be given substantial deference. *See, e.g.*, *United States v. Dobrowolski*, 406 F. App'x 11, 12-13 (6th Cir. 2010) (citing cases) (noting traditional deference given to legislative policy determinations). A penalty that is equal to, and

does not duplicate, the applicable tax rate on a given payment is proportional to the "offense" of failing to report information under FATCA—it certainly is not excessive in "all" applications. Therefore, plaintiffs' facial Eighth Amendment challenge to the § 1471 taxes should be rejected.

b. The Willful FBAR Penalty Does Not Facially Violate the Eighth Amendment

The willful FBAR penalty also survives a facial challenge because the maximum penalty will be constitutional in at least some circumstances. A maximum penalty fixed by Congress is due substantial deference from the courts. *See Bajakajian*, 524 U.S. at 336 ("[J]udgments about the appropriate punishment for an offense belong in the first instance to the legislature."); *see also United States v. 817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F.3d 1304, 1309 (11th Cir. 1999). Congress increased the maximum FBAR penalty to its present level in 2004.[28] *See* 31 U.S.C. § 5321(a)(5)(C). Congress chose this penalty range because FBAR reporting furthers an important law enforcement goal. The Senate Finance Committee explained:

> The Committee understands that the number of individuals involved in using offshore bank accounts to engage in abusive tax scams has grown significantly in recent years . . . . The Committee is concerned about this activity and believes that improving compliance with this reporting requirement is vitally important to sound tax administration, to combating terrorism, and to preventing the use of abusive tax schemes and scams.

S. Rep. 108-257, at 32 (2004) (explaining increase in maximum willful penalty and creation of new civil non-willful penalty). Indeed, FBARs are available not only to the IRS but also to a variety of law enforcement agencies investigating crimes like money laundering and terrorist financing. *See, e.g.*, Amendment to the Bank Secrecy Act Regulations–Reports of Foreign Financial Accounts, 75 Fed. Reg. 8844, 8844 (Feb. 26, 2010). Setting the maximum willful

[28] Contrary to the Plaintiffs' claim in ¶ 10 of the Complaint, IRS guidance issued on May 13, 2015, limits the FBAR penalty to 50% of the largest balance "[i]n most cases," and "[i]n no event will the total penalty amount exceed 100 percent" of the largest balance. *Interim Guidance for Report of Foreign Bank and Financial Accounts (FBAR) Penalties*, Attachment 1 at 1, 2, IRS Control No. SBSE-04-0515-0025 (May 13, 2015) (IRM §§ 4.26.16 and 4.26.17), *available at* http://www.irs.gov/pub/foia/ig/spder/SBSE-04-0515-0025%5B1%5D.pdf.

penalty as a substantial proportion of the account ensures that the willful penalty is not merely a cost of doing business for tax evaders, terrorists, and organized criminals.

In practice, courts have repeatedly endorsed substantial willful FBAR penalties, even where tax evasion, and not money laundering or terrorist financing, is at issue. For example, in *United States v. Williams*, 489 F. App'x 655 (4th Cir. 2012) and *United States v. McBride*, 908 F. Supp. 2d 1186, 1994 (D. Utah 2012), courts found that the imposition of multiple $100,000 penalties—the maximum then available under the FBAR reporting requirements—was warranted due to the egregious circumstances of the violations. And in *United States v. Warner*, — F.3d —, 2015 WL 4153651 (7th Cir. July 10, 2015), the Seventh Circuit noted the deterrent effect of a 50% willful FBAR penalty when considering a sentence for criminal tax evasion. In that case, the defendant pleaded guilty to evading taxes by hiding assets in a Swiss bank account; he also agreed to pay a willful FBAR penalty of $53.6 million, half the value in the account. *Id.* at *1. The Seventh Circuit explained that the FBAR penalty deterred other potential tax evaders, who might otherwise look at the sheer scale of Warner's evasion and the likelihood of being caught, and conclude that evasion was worth the risk. *See id.* at *12-*13.

A 50% willful FBAR penalty—the maximum permitted by statute—is severe. But given the ills it combats, it is an appropriate penalty in at least some circumstances. Accordingly, the Plaintiffs' facial challenge to it under the Eighth Amendment must fail.

D. Plaintiffs Fourth Amendment Claims Are Baseless (Counts 7 and 8)

Plaintiffs further argue in Counts 7 and 8 that the "account reporting requirements of FATCA and the IGAs" violate their Fourth Amendment right to be free from unreasonable searches. Doc. No. 8-1 at 18-21 (PageID 156-59). But plaintiffs are not being searched, nor are the reporting requirements unreasonable.

1. The FATCA and IGA Reporting Requirements Are Not "Searches"

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." A "search" occurs when the government obtains information by violating either a person's property rights or reasonable expectation of privacy. *See United States v. Jones*, 132 S. Ct. 945, 949-51 (2012) (government's installation of a GPS tracking device on a person's vehicle was a "search"); *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (use of drug-sniffing dog in the curtilage of house was "search"); *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979) (installation of "pen register" on "telephone company property" was not a "search"). Because "Fourth Amendment rights are personal in nature," any invasion of property or privacy is specific to the person making the claim: one cannot claim that he or she was harmed by the invasion of another's property or privacy. *Rakas v. Illinois*, 439 U.S. 128, 140 (1978).

Against this backdrop, plaintiffs allege in Counts 7 and 8 that FATCA and the IGAs have led to "searches of the private financial records of American citizens held by foreign financial institutions in violation of the Fourth Amendment." Complaint ¶¶ 155, 160. (They do not allege improper seizures.) Count 7 alleges that, "FATCA requires foreign financial institutions to report a broad range of information about the accounts of United States account holders to the United States government[.]" *Id*. ¶ 154. It seeks injunctive and declaratory relief with respect to "FATCA's information reporting provisions" in § 1471(c)(1) and its associated regulation, as well as "the FATCA aggregate gross income reporting requirement of Form 8966[.]" *Id*. ¶ 156. Count 8 similarly contends that, "IGAs require foreign financial institutions and their governments to report a broad range of information about the accounts of United States account holders to the United States government[.]" *Id*. ¶ 159. That count asks the Court to declare unconstitutional and to enjoin "the information reporting provisions of the IGAs[.]" *Id*. ¶ 161.

To begin with, plaintiffs' view that FATCA and the IGAs "require" information reporting by FFIs is a mischaracterization. *See* note 1, *supra*. Section 1471, along with its implementing regulations, does not actually require that FFIs do anything: it simply imposes a tax on FFIs that choose not to report certain information. *See NFIB*, 132 S. Ct. at 2600 ("[I]imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice."). Plaintiffs have pointed to no authority for the proposition that a choice between paying a tax and reporting information constitutes a "search" under the Fourth Amendment. Furthermore, the IGAs do not obligate reporting by FFIs; rather, they obligate the partner jurisdiction to require reporting by its FFIs. Thus, any obligation for IGA FFIs to report is imposed by foreign law, not U.S. law, and cannot be challenged here.

Even accepting plaintiffs' incorrect assertion that FATCA and the IGAs "require" FFIs to provide account information, the Complaint still fails to allege that any of plaintiffs' own property rights or privacy interests have been violated. *See Rakas*, 439 U.S. at 133-34 ("Fourth Amendment rights are personal rights which . . . may not be vicariously asserted."). Plaintiffs do not own their banks' records. The Supreme Court has held that depositors have no "reasonable expectation of privacy" in "information kept in bank records" because documents like "financial statements and deposit slips[] contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." *United States v. Miller*, 425 U.S. 435, 442 (1976); *see also id.* at 440 (noting that the depositor "can assert neither ownership nor possession" over the records at issue); *Smith*, 442 U.S. at 743-44 (1979) ("[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."). Thus in *Miller*, as here, there was no "search" within the meaning of the Fourth Amendment.

Plaintiffs' brief discussion of the case law (Doc. No. 8-1 at 19-20 (PageID 157-58)) does not address this issue. Their argument assumes that a reporting requirement directed at banks

constitutes a "search," and that the "search" is not of the bank but of the depositor. This assumption is wrong. *Miller* controls this case, and *Miller* forecloses any likelihood that plaintiffs will succeed on the merits of their claims or any chance of showing irreparable harm.

2. Information Reporting Under FATCA and the IGAs Is Reasonable

Moreover, if an FFI were a plaintiff in this lawsuit and claimed that FATCA or an IGA constituted a "search" of its property, the Fourth Amendment challenge would still fail because any search would be reasonable. In *Cal. Bankers*, the Supreme Court rejected a Fourth Amendment challenge—brought by banks as well as depositors—to the reporting requirements of the Bank Secrecy Act, a financial reporting regime with strong parallels to FATCA. *See* 416 U.S. at 59-67. Specifically, the Court in *Cal. Bankers* upheld both the Act's domestic reporting requirements, which require banks to report certain large or suspicious transactions, and the Act's foreign reporting requirements, which apply to individuals who internationally transport large amounts of monetary instruments or who maintain sufficiently large bank accounts in foreign countries. The Supreme Court, assuming these requirements constituted "searches" within the meaning of the Fourth Amendment, held that such searches were "reasonable." *Id*.

Plaintiffs' unreasonable-search argument (which, again, erroneously assumes there was a search in the first place) relies on the Supreme Court's recent decision in *Patel*, but *Patel* does not support their argument. *Patel* addresses when a search is reasonable, not whether a search occurred. *See Patel*, 135 S. Ct. at 2452-53 (holding police officers violate hotel owner's rights under Fourth Amendment by physically entering hotel and "demand[ing] to search the registry" without affording hotel owner any "opportunity to have a neutral decisionmaker review" the demand before "fac[ing] penalties for failing to comply"). Thus neither *Patel* nor *Cal. Bankers* is directly relevant to plaintiffs' Fourth Amendment claims, which fail because plaintiffs have no "ownership []or possession" of a bank's records, nor any "reasonable expectation of privacy"

with respect to "the information kept in bank records." *Miller*, 425 U.S. at 440, 442.

But even if the issue were whether the FATCA reporting requirement constitutes a reasonable search, *Cal. Bankers* is much closer to this case than *Patel*. In *Patel*, the regulation at issue allowed police officers to physically enter a business's premises, at any time, and immediately inspect records. In *Cal. Bankers* and this case, by contrast, the reporting mechanism is simply a periodic report that applies broadly to a whole class of regulated entities, *see* 26 U.S.C. § 1471(b)(1)(C), and certainly is not a search that involves law enforcement officers appearing on any business's premises and demanding that the owner produce records or "be arrested on the spot." *Patel*, 135 S. Ct. 2452. Unsurprisingly, then, the concerns driving the conclusion in *Patel*—that, without "opportunity for precompliance review," a physical, on-the-spot search might be "motivated by illicit purposes" or be used "as a pretext to harass business owners," *id*. at 2453, 2454—are simply not present here.

Taxing financial institutions that do not report information about depositors is not a "search" of depositors, nor would it be an "unreasonable search" in any event. Plaintiffs thus have no likelihood of success on the Fourth Amendment claims and cannot make the requisite showing of irreparable harm to justify preliminary injunctive relief.

VI. Conclusion

Plaintiffs fall far short of establishing that they are entitled to the extraordinary and drastic remedy of a preliminary injunction. They do not meet any of the four factors that courts examine in determining whether a preliminary injunction is appropriate.

First, plaintiffs are not likely to succeed on the merits. They lack standing, with their allegations of harm based on remote and speculative injury, most of which is caused by third parties, illusory, or self-inflicted. Their claims are also jurisdictionally barred by the operation of the Anti-Injunction Act. The statutes and IGAs are not subject to review under the

Administrative Procedure Act either. Even if plaintiffs could clear these substantial hurdles of standing and jurisdiction, their allegations still fail as a matter of well-established law.

Second, plaintiffs are not likely to suffer irreparable injury if a preliminary injunction is not granted. Their lack of standing means that they lack sufficiently concrete and particularized injury to sue in the first instance, much less injury that is so imminent and irreparably harmful as to justify preliminary injunctive relief. The absence of the irreparable injury is reinforced by the facts that: plaintiffs' challenge to the IGAs is contrary to well-established law that permits such executive agreements; their Fifth Amendment equal-protection allegation is based on a classification that does not exist under the law; their Eighth Amendment claims are not ripe, with no FATCA withholding or willful FBAR penalties having been imposed against them; and their Fourth Amendment counts are based on information reporting that does not even qualify as a "search" and is reasonable in any event.

Against the plaintiffs' meager showing of any injury at all, much less harm that could be construed as irreparable, the third factor, the balance of the equities, weighs heavily against the entry of a preliminary injunction. That is because the fourth factor, the public interest, is best served by keeping the statutory provisions at issue, as well as their implementing regulations and international agreements, in place and enforceable during the pendency of this lawsuit. The FATCA statute, 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. A preliminary injunction would harm these efforts and intrude upon the province of Congress and the President to determine how best to achieve these policy goals.

Accordingly, plaintiffs' motion for preliminary injunction should be denied.

/s/ Edward J. Murphy
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Certificate of Service

I certify that on August 12, 2015, a copy of the foregoing Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

/s/ Edward J. Murphy
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U.S. Department of Justice, Tax Division