No. 16-3539

In the United States Court of Appeals
for the Sixth Circuit

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-Appellants

v.

United States Department of the Treasury, United States Internal Revenue Service, and **United States Financial Crimes Enforcement Network,**
Defendants-Appellees.

On Appeal from the
United States District Court for the Southern District of Ohio

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Brief of Plaintiffs-Appellants

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Corporate Disclosure

No Plaintiff is a corporation, so no Plaintiff has "any parent corporation [or] any publicly held corporation that owns 10% or more of its stock." FRAP 26.1(a). Per local rule, Plaintiffs also file separately a completed Disclosure of Corporate Affiliations and Financial Interests form. 6 Cir. R. 26.1.

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Statement in Support of Oral Argument

Plaintiffs request oral argument. 6 Cir. R. 34(a). This case involves many facts and plaintiffs, eight counts, and complex legal arguments. Moreover, it is a case of national import, with effects reaching far beyond the present Plaintiffs because the challenged provisions and agreements cause serious harm to myriad Americans. The opportunity for counsel to answer questions and clarify facts, issues, and arguments is essential to proper resolution of this appeal.

Jurisdictional Statement

The district court had subject-matter jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 2201-02 (Declaratory Judgment Act) because the case arises under the Treaty Clause, U.S. Const., art. II, § 2, cl. 2, and the Administrative Procedure Act, 5 U.S.C. 702. This Court has jurisdiction under 28 U.S.C. 1291 to review that court's Order (RE 42) ("Dismissal Order") and final Judgment (RE 43) granting Defendants' Motion to Dismiss (RE 26) and denying Plaintiffs' Motion for Leave to Amend (RE 32), entered April 26, 2016, disposing of all Plaintiffs' claims in this case. Plaintiffs timely noticed appeal on May 23, 2016. (RE 44.)

Statement of the Issues

Plaintiffs present two issues, FRAP 28(a)(5):

1. Whether the district court erred in holding that all Plaintiffs lack standing.

2. Whether the district court erred in denying leave to amend the Complaint to add plaintiffs, facts, and Intergovernmental Agreements as futile because it held that Plaintiffs lack standing even under the Amended Complaint.

Statement of the Case

A. Statement of Facts

This case challenges the Foreign Account Tax Compliance Act ("FATCA"), Intergovernmental Agreements ("IGAs") unilaterally negotiated by the U.S. Department of the Treasury ("Treasury Department") to supplant FATCA in signatory countries, and the Report of Foreign Bank and Financial Accounts ("FBAR") administered by the U.S. Financial Crimes Enforcement Network ("FinCEN"). These laws and agreements impose unique and discriminatory burdens on U.S. citizens living and working abroad.

FATCA

FATCA requires reporting by individuals and foreign financial institutions ("FFIs"). Individuals report foreign financial assets if the aggregate year-end value of all such assets exceeds $50,000 at tax-year end or $75,000 at any time during the tax year. 26 U.S.C. 6038D(a). Penalties for non-reporting are $10,000 for each failure and 40% of underpaid asset-related tax. *Id.* 6038D(d), 6662(j)(3). Reporting is annual on Form 8938. 26 C.F.R. 1.6038D-4(a)(11). For each foreign account, individuals report: FFI name and address; account number; maximum

value; account opening/closing; income, gain, loss, deduction, or credit and how reported to IRS; and which currency, exchange rate, and rate-source used to determine dollar value. Aggregate data is also required for all foreign accounts.

FFI's report detailed information on U.S.-person accounts to the IRS annually regardless of tax-evasion suspicion. 26 U.S.C. 1471(b). The "FFI Penalty" for failure to report is 30% of *any* payment to the FFI from U.S. sources. *Id.* 1471(a). Reporting is on Form 8966, including: account holders' name, address, and TIN; account number; value/balance; interest, and aggregate income less interest, dividends, and gross proceeds. *Id.* 1471(c)

Moreover, FATCA and the IGAs require FFIs to deduct and withhold a tax equal to 30 percent of any payments made to recalcitrant account holders ("FATCA Passthrough Penalty"). *See, e.g.*, 26 U.S.C. 1471(b)(1)(D); 26 C.F.R. 1.1471-4(a)(1), 1.1471-4T(b)(1). (*See also* Amended Complaint; RE 32-1, PageID# 480, ¶ 190 (challenged IGA provisions).) Recalcitrant account holders are persons who fail to provide (a) information sufficient to determine whether the account is a United States account to the foreign financial institution holding their account, (b) their name, address, or TIN to the foreign financial institution holding the account, or (c) who fails to provide waiver of a foreign law that would prevent the foreign financial institution from reporting the information to the IRS under FATCA. 26 U.S.C. 1471(d)(6).

IGAs

The Treasury Department and IRS have implemented FATCA by using regulations and unconstitutional IGAs. No IGA was submitted to the Senate for advice and consent, U.S. Const. art. II, § 2, or approved by Congress. Nor are the IGAs authorized by an Article II treaty. The IGAs are either Model 1 or Model 2.

Under Model 1, governments—including Canada, Czech Republic, Israel, France, and Denmark—collect information similar to that reported by FFIs under FATCA and report that information to the U.S. The U.S. agrees to treat such reporting as FATCA-compliant and not subject to the FFI Penalty.

Under Model 2, countries (e.g. Sweden) direct FFIs to register with IRS and comply with FATCA and exempt them from laws prohibiting such conduct. The U.S. treats this as FATCA-compliant and not subject to the FFI Penalty.

FBAR

FBAR annual reports to the IRS are required for persons with a financial interest or signatory authority over a bank, securities, or other foreign financial account aggregating over $10,000 during a calendar year. 31 U.S.C. 5314; 31 C.F.R. 1010.306(c), 1010.350(a). Required filers include U.S citizens and residents and corporations, partnerships, trusts, etc. 31 C.F.R. 1010.350(b). Reports are required on savings, depository, checking, securities, and "other financial accounts." *Id.* 1010.350(c). Persons have a financial interest in several circumstances, including

owning or holding legal title, being an agent or attorney, and owning over 50% of voting power, total value of equity, interest, or assets, or interest in profits. *Id.* 1010.350(e). This includes signatory authority. FBARs are filed separately from individuals' federal income tax returns by June 30 annually.

Nonfiling penalties are civil and criminal. 31 U.S.C. 5321(a), 5322. Non-willful violations have a civil penalty of $10,000 per unfiled report. *Id.* 5321(a)(5)(B)(i). The penalty may not imposed for non-willful violations for violations due to "reasonable cause" if the account balance was "properly reported." *Id.* 5321(b)(5)(B)(ii). Willful violations have a maximum penalty of $100,000 or 50% of the account balance at violation. *Id.* 5321(a)(5)(C)(i). "Reasonable cause" defense is unavailable for willful violations. *Id.* 5321(a)(5)(C)(ii). The maximum criminal penalty for FBAR violations is a $250,000 fine and five years imprisonment. *Id.* 5322(a).

Plaintiffs

Plaintiffs are individuals severely affected by the challenged provisions and agreements.[1] Plaintiffs have banking difficulties and familial problems caused by FATCA, IGAs, and/or FBAR. Plaintiffs suffer privacy-right violations because they do not want financial details of their accounts disclosed to the U.S. or foreign governments, as required by challenged provisions/IGAs. Plaintiffs would not dis-

[1] Senator Paul's unique harm is discussed separately. *See infra* Part I.F.

close or permit others, including FFIs and foreign governments,[2] to so disclose their private account information but for the fact that challenged provisions/IGAs require it. Plaintiffs reasonably fear that they, spouses, child, or funds in joint accounts will be subject to the unconstitutionally excessive fines imposed by the FBAR Penalty, 31 U.S.C. 5321 if they, spouses, or child willfully fail to file an FBAR report. (Amended Complaint, RE 32-1, PageID## 439-440, 443, 445, 447, 449, 451-452, 455-456, 458, 461.)[3] All Plaintiffs now suffer, and will continue to suffer, concrete and particularized injuries to legally protected interests, which injuries are caused by the challenged government actions and will be redressed by the requested relief. (*Id.*, PageID## 440, 441, 443, 445, 447, 450, 452, 456, 458, 462.) Plaintiffs have no adequate remedy at law and are suffering irreparable harm. (*Id.*)

Plaintiff Crawford

Mark Crawford, a U.S. citizen living in Albania and Dayton, Ohio, is founder and sole owner of Aksioner International Securities Brokerage in Albania. Until

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[2] In Lois Kuettel's case, she would also not permit her parents to disclose her private account information.

[3] Plaintiffs cite primarily to the Amended Complaint (RE 32-1) herein because it provides further verified facts and other challenges (but not counts) not in the Complaint (RE 1). The district court denied leave to amend the Complaint because it was "futile" since the court held that no Plaintiff has standing. But as shown herein, Plaintiffs do have standing, so leave to amend would not be futile, and the Amended Complaint should be the foundation of this case.

Summer 2015, it was the only licensed brokerage firm in Albania and an introductory broker, working with Saxo Bank in Denmark. The Saxo relationship does not allow Aksioner to accept U.S.-citizen clients in part because Saxo does not wish to assume resulting FATCA/IGA burdens. This has impacted Mark financially, forcing him to turn away prospective American clients in Albania. Aksioner has sent many applications to Saxo Bank throughout the years, but only *one* client was ever rejected. Ironically, that person was Mark. In April of 2012, Mark applied for a brokerage account with his own company and was denied by Saxo because he is a U.S. citizen. Saxo is governed by the Danish Model 1 IGA, so rather than reporting information about U.S. clients, Saxo turns away U.S. citizens. The aggregate value of Mark's foreign accounts has been greater than $10,000 in both 2014 and 2015, subjecting him to FBAR reporting. Mark filed the FBAR report each year but does not want to continue doing so because it violates his and his wife's privacy. (Amended Complaint, RE 32-1, PageID## 436-440.)

Plaintiff Paul

Rand Paul, United States Senator from Kentucky, has long opposed FATCA and the IGAs. (Amended Complaint, RE 32-1, PageID## 440-441.)

> 32. . . . [B]ecause the Treasury Department and IRS have refused to abide by the constitutional framework for concluding international agreements, Senator Paul has been denied the opportunity to exercise his constitutional right as a member of the U.S. Senate to vote against the FATCA IGAs.
>
> 33. Senator Paul would vote against the FATCA IGAs if the Executive

> Branch submitted them to the Senate for advice and consent under Article II or to the Congress as a whole for approval as congressional-executive agreements.
>
> 34. Senator Paul now suffers, and will continue to suffer, the concrete and particularized injury of not being able to vote against the FATCA IGAs, which injury was caused by the unconstitutional and illegal action creating the IGAs, and which injury will be redressed by the IGAs being held beyond constitutional and statutory authority.

(*Id.*)

Plaintiff Johnson

Roger G. Johnson, a U.S. citizen residing in the Czech Republic, is married to proposed Plaintiff Katerina Johnson with whom he shared joint accounts before FATCA. FATCA forced them to significantly alter their financial affairs because Katerina strongly objected to having her financial affairs disclosed to the U.S. After consulting with their tax advisor, who strongly recommended that they separate their assets, Roger and his wife decided to legally separate all of their jointly owned assets to protect his wife's privacy. As a result, Roger no longer has any ownership interest in his home, rental properties, or his wife's company. They are now forced to maintain completely separate bank accounts to protect her privacy. They would reverse the legal separation of their assets and financial affairs if they were not required to be reported under FATCA and the Czech IGA. The aggregate value of Roger's foreign accounts has been over $75,000 in 2014 and 2015, subjecting him to FATCA and FBAR reporting. (Amended Complaint, RE 32-1,

PageID## 441-443.)

Proposed Plaintiff JUDr. Katerina Johnson

JUDr. Katerina Johnson, a citizen and resident of the Czech Republic, is the wife of Plaintiff Roger Johnson. Katerina strongly objects to having her personal financial affairs disclosed to the U.S under FATCA. As a non-US citizen, she believes this is a gross invasion of her privacy. Because of this invasion, the couple was forced to legally separate their jointly owned assets to protect her interests as a non-U.S. citizen. Now, Katerina's husband no longer has any ownership interest in their home, rental properties, or her company, and they are forced to maintain completely separate bank accounts to protect her privacy. Katerina feels that as a Czech citizen she should not have to disclose her private financial information to the U.S., nor should she have to separate jointly held assets to prevent that disclosure. She would like to maintain a normal relationship with her husband and desires that both have access to their finances. Katerina and Roger would reverse the legal separation of their assets and financial affairs if they were not required to be reported under FATCA/IGA. (Amended Complaint, RE 32-1, PageID## 443-445.)

Plaintiff Kish

Stephen J. Kish, Ph.D. is a citizen of the United States of America and a Canadian citizen and resident. Stephen and his Canadian wife maintain a joint Toronto account used for daily financial needs. But FATCA has caused some discord be-

tween the two because she strongly opposes the disclosure of her personal financial information from their joint bank account to the U.S. The aggregate value of Stephen's foreign accounts was over $10,000 in 2014 and 2015, subjecting him to FBAR reporting. (Amended Complaint, RE 32-1, PageID## 445-447.)

Plaintiff Kuettel

Daniel Kuettel is a citizen and resident of Switzerland and a former U.S. citizen. His wife is a dual Swiss-Philippine citizen. Daniel renounced his U.S. citizenship in 2012 because of difficulties caused by FATCA and the IGA. Many Swiss banks are unwilling to accept American clients because of FATCA/IGA burdens. (*See* Amended Complaint, RE 32-1, Ex. 2 (bank explaining that it cannot accept U.S.-citizens because compliance with FATCA/IGA is too difficult and costly).) This has caused many to consider renouncing U.S. citizenship. Daniel made several inquiries at Swiss banks attempting to find one that would refinance his mortgage prior to renouncing his citizenship. At the time, bank policies towards U.S. citizens were not made public and upon inquiry, U.S. citizens were generally rejected, or rejected months later. He contacted both the U.S. Veterans Administration and the U.S. Department of Housing and Urban Development for assistance, but both agencies declined, saying they don't assist in obtaining mortgages to Americans abroad. Left with few options, Daniel renounced his U.S. citizenship so his family could continue the life they had built in Switzerland. Daniel was able to

refinance his home with a Swiss bank shortly thereafter and learned that he would not have been able to do so had he not renounced. Daniel will always consider himself an American but felt renunciation was the only real option for his family.

Daniel currently maintains a college savings account for his daughter in his own name at PostFinance bank in Switzerland but would like to transfer ownership of the account to her. Having the account in her name would offer several advantages such as better interest rates and discounts for local businesses. The account currently has a balance over $10,000. If the account were in his daughter's name, Daniel would transfer the full balance to her and would make monthly deposits of $200 to the account for the foreseeable future. But Daniel will refrain from transferring ownership of the college savings account to her because he reasonably fears that he, his daughter, or the funds in the account will be subject to the unconstitutionally excessive fines of $100,000 or 50% of the balance of the account imposed by 31 U.S.C. 5321 if the IRS determines that his daughter has "willfully" failed to file an FBAR for the account. According to FinCEN's FBAR filing instructions, U.S.-citizen children are required to file FBAR reports for foreign accounts. FinCEN, BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114) 6 (2014), http://www.fincen.gov/forms/files/FBAR%20Line%20Item%20Filing%20Instructions.pdf. Where children are incapable, FinCEN requires parents to file on their behalf. *Id.*

Daniel's daughter is incapable of reporting because she is ten years old. Daniel objects to filing an FBAR report because he is not a U.S. citizen and does not want to violate his daughter's privacy. Daniel's wife has told him that she too objects to filing an FBAR for his daughter's account and would not violate Lois' privacy to do so. Daniel's daughter cannot avoid FBAR reporting by renouncing U.S. citizenship because she is too young. (Amended Complaint, RE 32-1, PageID## 447-450.)

Proposed Plaintiff Lois Kuettel

Lois Kuettel is a triple U.S.-Swiss-Philippine citizen residing in Switzerland with parents Daniel and Jodethe. In 2011, Daniel opened a Swiss account at for Lois so she could save money received from the government and other sources.[4] Daniel registered her as a Swiss citizen to open a local savings account. But because of FATCA in 2012, banks required the declaration of non-Swiss citizenship. Daniel knew Lois was to young to file FBAR reports and did not want to violate her privacy by filing for her, so he closed the account and reopened it under his name to avoid such reporting and disclosure.

In 2015, Lois expressed an interest in having a bank account in her name once again. So Daniel went to many banks inquiring about opening a savings account in

[4] In Switzerland, parents can receive 200 CHF each month to help with the cost of raising a child. Lois' parents have chosen to give the majority of this money to Lois so that she can save for future expenses, including her education.

her name. Most banks rejected this request on the grounds of her U.S. citizenship and the consequent need to comply with FATCA /IGA. The banks said they would accept her as a client once she renounced her U.S. citizenship. Daniel wants to transfer ownership of the current account to her and place it in her name. Having the account in her name would offer several advantages, such as better interest rates and discounts for local businesses. The account currently has a balance over $10,000. If the account were in Lois's name, Daniel would make monthly deposits of $200 to the account for the foreseeable future. But Daniel will not transfer ownership to Lois because he reasonably fears that she or her account funds will be subject to the unconstitutionally excessive fines of $100,000 or 50% of the balance of the account imposed by 31 U.S.C. 5321 if the IRS determines she "willfully" fails to file the FBAR report. Lois is incapable of complying with this reporting requirement because she is only ten years old and cannot shoulder such an obligation. Her father objects to filing an FBAR because he is not a U.S. citizen and does not want to violate her privacy. Her mother objects to filing an FBAR for Lois and would not so violate Lois's privacy.

Lois cannot avoid the FBAR reporting by renouncing U.S. citizenship because she is too young. She desires to have an account in her name in order to save money for future expenses and her education. However, she is unable to do so because of FATCA/IGA. Banks have been unwilling to open an account in her name

due to her U.S. citizenship, and the PostFinance account, currently in Daniel's name, cannot be transferred to her without opening her up to unreasonable FBAR fines.(Amended Complaint, RE 32-1, PageID## 450-452.)

Plaintiff Nelson

Donna-Lane Nelson is a Swiss and former U.S. citizen, residing in Switzerland and France. Her husband is proposed Plaintiff Richard Adams. After FATCA's enactment, her local Swiss bank, UBS, said she would be unable to open a new account if she ever closed her existing one because she was an American. She also knew of many accounts of U.S. citizens that had been closed because of the person's ties to the U.S. and because of FATCA/IGAs. She worried that her account would be closed and that she would be unable to open another with her U.S. citizenship. Fearing she would eventually be unable to bank in her residence country, she relinquished U.S. citizenship. That decision was difficult, but she felt she must choose between access local financial services or U.S. citizenship. After renunciation, she approached a local Swiss bank and was offered investment opportunities that were not available to her as an American.

Donna-Lane and her husband have joint personal accounts at BNP Paribas. Because her partner is a U.S. citizen, their joint accounts are subject to the requirements of the Swiss IGA, French IGA, FATCA, and FBAR. Donna-Lane has been required to prove to BNP Paribas that she is not a U.S. citizen and has had her pri-

vate financial account information disclosed to the U.S. despite not being a U.S. citizen.

In May 2015, she was contacted by UBS in Switzerland and made to explain why she was sending $300 to the U.S. each month. She said the money was for her daughter to build an emergency fund. Donna-Lane was allowed to keep her account open because the bank accepted her explanation. Her other bank, Raiffeisen, has asked her to come to their office to explain her prior U.S. citizenship three years after having renounced her citizenship. She resents having to provide these explanations and the threats implied by these requests which appear to be prompted by FATCA. The aggregate value of Donna-Lane's joint foreign accounts was over $10,000 in 2014, subjecting her and her husband to FBAR reporting for that year. (Amended Complaint, RE 32-1, PageID## 453-456.)

Proposed Plaintiff Richard Adams

Richard Adams is a U.S. citizen residing in Switzerland and husband of Plaintiff Nelson. The couple has joint business and personal accounts. However, like Donna-Lane before renouncing U.S. citizenship, Richard fears he will be unable to continue Swiss banking. He anticipates they will soon receive a bank letter closing the accounts due to U.S. citizenship and FATCA/ IGA, as he has seen happen to many U.S. citizens abroad. If their accounts are closed, the two will consider legally separating their assets so as not to infringe on his wife's privacy and banking

options. However, this is a course neither would like to take. Instead, they desire to maintain joint accounts as any other marital couple would. FATCA and the IGA endanger that desire. Separating their assets will also harm Richard financially. Not only will he not have any interest in their finances, properties, or business, he will likely have difficulty opening an account in his name as a U.S. citizen. Without an account, he will not have access to essential routine transactions like securing an apartment lease, a mobile phone contract, or paying bills. Richard also fears that without an account he will not be able to get a bank debit card or credit card which will cause considerable difficulty reserving airline tickets and hotel rooms for business-related travel. The aggregate value of their joint foreign accounts was over $10,000 in 2014, subjecting them to FBAR reporting for that year. (Amended Complaint, RE 32-1, PageID## 456-458.)

Plaintiff Zell

L. Marc Zell is a dual U.S.-Israeli citizen residing in Israel. He is a member of the bars of Maryland, D.C., Virginia, and Israel. He practices with an Israeli firm he co-founded, Zell, Aron & Co.. As an attorney, he has been approached several times during the last year by other Israeli-Americans wanting to renounce U.S. citizenship. The are concerned by the FATCA-imposed hardships. Many are U.S. citizens because they were born to Americans but in all other respects call Israel home and have not even been in the United States yet find themselves trapped by

FATCA by birth.

Marc and his firm, are frequently asked by clients to hold funds and foreign securities in trust. Because of FATCA, Marc and his firm have been required by their Israeli banking institutions to complete IRS withholding forms (either W-8BEN or W-8BEN-E) as a precondition for opening trust accounts for both U.S. and non-U.S. persons and entities. The Israeli banking officials have stated that they will require such submissions regardless of whether the beneficiary is a U.S. person (i.e. citizen or resident alien) because the trustee is or may be a U.S. person. As a result, the banks have required Marc and his firm to close the trust account in some cases, and in other instances the banks have refused to open the requested trust account.

In one case, Marc has been repeatedly requested by his firm's bank to transfer securities of a company registered on the Tel Aviv Stock Exchange (having a current fair market value in excess of $2.5 million) from the trust account. These securities which are required to be held in trust under Israeli financial regulations can only be held by a qualified Israeli financial institution. Yet, because of FATCA, the bank is demanding that Marc transfer the securities to another bank. This has trapped Marc in a "Catch 22" situation: he must hold the securities in an Israeli financial institution and is simultaneously being ordered to remove the securities because both he and the beneficiary are U. S. citizens.

There also have been instances recently where Israeli banks have required non-U.S. persons represented by Marc and his firm to fill out the IRS forms even though they have no connection with the U.S. When questioned about this practice, the banking officials have stated that the mere fact a U.S. person trustee or his law firm is acting as a fiduciary is reason enough to require non-U.S. person beneficiaries to disclose their identities and their assets to the United States. In a few such instances, the non-U.S. person beneficiary has terminated the attorney-client relationship with Marc and his law firm resulting in palpable financial loss in the form of lost fees to the firm and Marc.

FATCA has also impinged on the sanctity of the attorney-client relationship between Marc, his firm, and his clients. The compelled disclosure of the relationship through the filing of FATCA-based forms is in and of itself a violation of the attorney-client privilege and the principles of confidentiality that underlie the attorney-client relationship. Numerous clients have indicated to Zell and his firm that they consider the disclosure mandated by FATCA a gross violation of their constitutionally and legally protected right of privacy and have instructed Marc and his firm not to comply with the FATCA requirements. For this reason and for the other reasons mentioned above, Marc has decided not to comply with the FATCA disclosure requirements whenever that alternative exists. Marc holds funds in trust for one client at Israel Discount Bank. The bank has asked Marc to

provide information necessary to identify him and the client as U.S. persons subject to FATCA. The client has instructed Marc not to complete the forms seeking this information, and Marc has complied. He reasonably fears that he and/or the client will be classified as a recalcitrant account holder and subject to the unconstitutionally excessive FATCA Passthrough Penalty imposed under 26 U.S.C. 1471(b)(1)(D).

Marc also has two personal checking accounts at Israel Discount Bank that he uses to support his day-to-day financial needs. His bank asked him to provide additional information necessary to identify him as a U.S. citizen subject to FATCA. Marc has refused to complete these forms and reasonably fears that he will be classified as a recalcitrant account holder and subject to the unconstitutionally excessive FATCA Passthrough Penalty imposed under 26 U.S.C. 1471(b)(1)(D).

The aggregate value of Marc's foreign accounts was over $10,000 in 2014 and 2015, subjecting him to FBAR reporting. He also had signatory authority over accounts with an aggregate year-end balance of greater than $200,000 in 2014, which would subject him to FATCA individual reporting for that year. However, Marc is not currently complying with these demands. (Amended Complaint, RE 32-1, PageID## 458-462.)

Defendants

Treasury Department, IRS, and FinCEN ("the Government") administer and

enforce FATCA, IGAs, and FBAR.

Counts

Plaintiffs seek declaratory and injunctive relief on eight counts in the Complaint (RE 1) (and Amended Complaint (RE 32-1)).

- Count 1challenges IGAs as unconstitutional sole executive agreements. (Complaint, RE 1, PageID## 37-39.)
- Count 2 challenges IGAs as overriding FATCA. (PageID## 39-40.)
- Count 3 challenges "the heightened reporting requirements for foreign financial accounts [for] deny[ing] U.S. citizens living abroad the equal protection of the laws." (PageID## 40-42).)
- Count 4 challenges "the FATCA FFI Penalty [a]s unconstitutional under the Excessive Fines Clause." (PageID## 42-44.)
- Count 5 challenges "the FATCA Passthrough Penalty [a]s unconstitutional under the Excessive Fines Clause." (PageID## 44-45.)
- Count 6 challenges "the FBAR Willfulness Penalty [a]s unconstitutional under the Excessive Fines Clause." (PageID## 45-46.)
- Count 7 challenges "FATCA's information reporting requirements [as] unconstitutional under the Fourth Amendment." (PageID## 46-47.)
- Count 8 challenges "the IGA's information reporting requirements [as] unconstitutional under the Fourth Amendment." (PageID## 47-48.)

B. Proceedings Below

On July 14, 2015, Plaintiffs filed their Verified Complaint (RE 1), seeking declaratory and injunctive relief (PageID## 48-50). Plaintiffs moved for a preliminary Injunction. (RE 8 and 8-1.) The Government moved to dismiss. (RE 26 and 27.) The district court denied a preliminary injunction (RE 30 ("Preliminary-Injunction Denial")), holding, inter alia, that Plaintiffs lacked likely success on the merits because "[t]hey lack standing, as the harms they allege are remote and speculative harms, most of which would be caused by third parties, illusory, or self-inflicted. Plaintiffs' allegations also fail as a matter of law, as there is no constitutionally recognized right to privacy of bank records." (PageID# 417.) Plaintiffs moved for leave to file an Amended Complaint (RE 32 and 32-1) to "improve[] their arguments for standing and on the merits by addressing issues raised by this Court in its [Preliminary-Injunction Denial]. (RE 32, PageID# 425.) The Government opposed amendment. (RE 34.) Plaintiffs opposed dismissal (RE 37), and the Government replied (RE 38).

On April 26, 2016, the court issued its Dismissal Order, granting dismissal and denying amendment as "futile" because all Plaintiffs (including proposed ones) lack standing. (RE 42, PageID# 653.) Plaintiffs appeal the Dismissal Order (RE 42) and the Judgment in a Civil Action (RE 43).

Summary of the Argument

The district court held that no Plaintiff has standing for any of the eight counts (Dismissal Order, RE 42), even with added plaintiffs and facts in the proposed Amended Complaint (RE 32-1). The district court only decided a standing challenge under Rule 12(b)(1), so other asserted dismissal grounds are not addressed here. The challenge to subject matter jurisdiction was "facial" because the court decided no disputed facts, so the Court was required to construe the proposed Amended Complaint broadly, liberally, and as a whole, to accept all asserted facts as true, and to draw all reasonable inferences in favor of Plaintiffs. Review here is *de novo*. *See* Part I.A.

The district court held that the Plaintiffs challenging disclosure provisions have no privacy interest in records of their accounts (held by FFIs) under *United States v. Miller*, 425 U.S. 435, 442 (1976). (*See, e.g.*, Dismissal Order, RE 42, PageID# 646 (citing Preliminary-Injunction Order, RE 30, PageID## 403-404).) But *Miller* expressly stated that its holding did not apply to the sort of bulk-data-collection disclosure of persons not suspected of wrongdoing, without judicial oversight, that is at issue here. 425 U.S. at 444 n.6. And unlike *Miller*, the challenged provisions require disclosure to third parties, foreign governments, under Model 1 IGAs. This also raises numerous security-privacy concerns, based on reports of cyber-attacks specifically having to do with challenged provisions and

IRS. Model 1 IGAs replace Congress's restricted disclosure in FATCA, i.e., from FFIs to IRS, with disclosure to third-party foreign governments. Like the judicial oversight mandated by *Miller*, judicial oversight is mandated in such disclosure of financial records by *Los Angeles v. Patel*, 135 S.Ct. 2443, 2452 (2015). But there is no judicial oversight of the challenged provisions/IGAs. For these and more reasons, Plaintiffs do have a reasonable expectation of privacy in their financial records, which gives them standing to challenge provisions/IGAs requiring disclosure. *See* Part I.B.

The district court held that the serious difficulties caused by the challenged provisions and agreements, such as difficulties in obtaining banking services and disruption of family financial affairs, are third-party actions not fairly traceable to governmental action. (*See, e.g.*, Dismissal Order, RE 42, PageID# 643 (citing Preliminary-Injunction Denial, RE 30, PageID# 396).) But Plaintiffs' recited harms, though indirect, are fairly traceable to government action under controlling authorities recognizing indirect harm caused by challenged provisions. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 124 (1973) (allowing Jane Roe to challenge law barring most abortions though it controlled abortionists, not women seeking abortion). And Plaintiffs are substantially likely to be free of the recited harms given requested relief. The district court erred by not accepting the allegation of the verified Amended Complaint as true and affording all reasonable inferences to Plain-

tiffs. For example, Plaintiff Crawford verified that but for the burdens of FATCA/IGA compliance, FFIs with which he dealt (one of which he owned) would not have denied him a brokerage account. The district court said this required speculation about the reasons for the denial. Accepting Crawford's assertions as true, affording him the reasonable inferences required, and considering the Complaint as a whole readily demonstrates that he has standing based on the causation of this harm. *See* Part I.C.

The harms Plaintiffs assert are not generalized grievances. Though their harms are shared by many Americans abroad, Plaintiffs have personal injury. *See* Part I.D.

The harms Plaintiffs assert are not those of third parties. The Amended Complaint adds new Plaintiffs about which this argument was raised, and Plaintiffs rely neither on third-party standing nor the harms of others. *See* Part I.E.

Senator Paul's injury is his inability to vote against the FATCA IGAs, either as part of advice and consent under Article II or under a submission to the Congress as a whole for approval as congressional-executive agreements. So his interest as a U.S. Senator is the constitutional power to *vote*—on bills, vetoes, and treaties. The district court held that he lacked standing under *Raines v. Byrd*, 521 U.S. 811 (1977). (Dismissal Order, PageID# 641.) But neither the holding nor analysis of *Raines* denies standing to Senator Paul for this asserted interest. For example,

there is no absolute line between "personal" and "official" harm. *See* Part I.F.

Plaintiffs have standing for all counts because, under the foregoing and further analysis as to each count, one or more of the Plaintiffs has standing for each claim. For example, because Plaintiffs have a privacy interest that is harmed by challenged provisions/agreements, and the harm is fairly traceable to government action and will be redressed by requested relief, they have standing to challenge all provisions/agreements compelling FFIs to disclose Plaintiffs' financial information. And where provisions, such as the FBAR Penalty, have not been enforced against them, they may bring preenforcement challenges and need not violate the laws to which they object and subject themselves to penalties before raising a challenge in defense. *See* Part I.G.

The district court denied leave to amend the complaint as "futile" because it held that no Plaintiff has standing. (Dismissal Order, RE 42, PageID# 653.) But Plaintiffs have standing, *see* Part I, so leave to amend was required, s*ee* Part II.

Argument

The district court held that Plaintiffs lack standing (even under the Amended Complaint (RE 32-1)) and so granted the dismissal motion (RE 26) and denied the motion to amend (RE 32) as futile. (Dismissal Order, RE 42, PageID# 653.)

Preliminarily, note that while the Government asserts interests in fighting tax evasion, money laundering, and terrorism, Plaintiffs are ordinary people abroad

seeking freedom from serious harms from challenged provisions and IGAs. Plaintiffs are not alone. An extensive, careful survey,

> show[s] the intense impact FATCA is having on overseas Americans. Their financial accounts are being closed, their relationships with their non-American spouses are under strain, some Americans are denied promotion or partnership in business because of FATCA . . . and some are planning or contemplating renouncing their US citizenship. Some have already done so.

Democrats Abroad, *FATCA: Affecting Everyday Americans Every Day* at 3 (Sept. 2014).[5] The challenged provisions and IGAs are poorly tailored. A scalpel was needed, not the sledgehammer used. The Constitution provides protections balanced to protect rights even at the risk of missing an occasional scofflaw.[6] "When Congress finds that a problem exists, . . . [it] may not choose an unconstitutional remedy." *Citizens United v. FEC*, 558 U.S. 310, 361 (2010). Nor may the Executive. The Government has other, successful tools to catch scofflaws without the unconstitutional, intrusive, bulk-data-collection approach of the challenged provisions and IGAs that so harm ordinary Americans.[7]

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

[6] FATCA gets only modest returns compared to huge compliance and human costs. (*See* Amended Complaint, RE 32-1, PageID## 429-431.)

[7] A Non-Prosecution Agreement between the U.S. Department of Justice and Swiss bank Zweiplus verifies that FFIs are actively dumping accounts of Americans abroad due to challenged provisions/IGAs. *See* http://www.justice.gov/opa/file/ 762271/download. The Agreement assessed a penalty of $1,089,000 for not reporting on 44 U.S.-related accounts, although

I. Plaintiffs Have Standing.[8]

As described above, most Plaintiffs suffer one or more specific harms: (i) invasion of privacy rights, (ii) difficulty in obtaining financial services, (iii) relationship disruption, and (iv) inability to open a daughter's college account.[9] Yet the district court held none has standing:

> [T]he Court finds that none of the Plaintiffs has standing . . . . No individual Plaintiff has suffered an invasion of a legally protected interest, which is concrete and particularized, and actual or imminent, not conjectural or hypothetical. Moreover, no alleged injury is fairly traceable to the actions of the Defendants, but rather, the actions of an independent third party. Finally, there are no allegations that it is likely that the alleged injury will be redressed by a favorable decision. *See Lujan*[*v. Defenders of Wildlife*], 504 U.S. [555,] 560-61 [(1992)]. In reaching these holdings, the Court analyzed the proposed Amended Verified Complaint, (doc. 32-1), which could not withstand Defendants' Motion to Dismiss, (doc. 26); therefore, the proposed amendments are futile.

> [s]ince Zweiplus opened in July of 2008, its formal policy has been to reject all clients who qualified as taxable under U.S. law. When Zweiplus acquired retail clients from [two other banks], the three banks agreed that no U.S. clients would be transferred [though, as it turned out, some actually were]. When the Bank later discovered clients who were in fact subject to U.S. taxation, the Bank sought to terminate the relationship with those clients.

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

[8] The district court dismissed based on standing, under Rule 12(b)(1), not reaching 12(b)(6) arguments. (RE 42, PageID## 638, 642, 653.) So Plaintiffs do not address other Government dismissal arguments (RE 26). For example, Plaintiffs do not address the Government's Anti-Injunction Act and ripeness arguments, though they addressed those below. (RE 37, PageID## 567-573.)

[9] Senator Paul's unique harm is discussed below. *See infra* Part I.F.

(Dismissal Order, RE 42, PageID# 653.) But Plaintiffs meet *Lujan*'s requirements to challenge provisions and IGAs that target them.[10] The district court erred in the key parts of its analysis because (i) Plaintiffs have injury to a cognizable privacy interest under the conditions at issue (Part I.B); (ii) Plaintiffs' harms are fairly traceable to government action and will be redressed by requested relief (Part I.C); (iii) Plaintiffs' harms are not generalized grievances (Part I.D); and (iv) the harms Plaintiffs assert are not those of third parties (Part I.E); Plaintiff Paul has standing (Part I.F); and one or more Plaintiffs have standing for all counts (Part I.G).

A. Standard of Review

Motions to dismiss for lack of subject-matter jurisdiction, under Rule 12(b)(1), are "facial" or "factual" attacks. *Cartright v. Garner*, 751 F.3d. 752, 759 (6th Cir. 2007). "A facial attack goes to the question of whether the plaintiff has alleged a basis for subject matter jurisdiction, and the court takes the allegation of the complaint as true for purposes of Rule 12(b)(1)." *Id.* "A factual attack challenges the factual existence of subject matter jurisdiction." *Id.* Here the district court did not decide conflicting factual claims, so this is a facial attack. Thus, the district court was required to "construe[] broadly and liberally" the complaint "as a whole" and

[10] *Cf. G & G Fire Sprinklers v. Bradshaw*, 156 F.3d 893, 899-901 (9th Cir. 1998) (subcontractor had standing, though indirectly affected by provision targeting subcontractors by regulating contractors, because provision *targeted* subcontractors), *judgment vacated on other grounds*, 526 U.S. 1061 (1999).

consider what may be "inferred" from pleaded facts. 5B Wright & Miller, Fed. Prac. & Proc. Civ. § 1350 (3d ed. Apr. 2016 update). *See also Citizens for a Strong Ohio v. Marsh*, 123 Fed. Appx. 630, 632-633 (6th Cir. 2005) (unpublished) ("draw all reasonable inferences in favor of the non-moving party."). *See also, e.g.*, *Long v. Shorebank Development Corp.*, 182 F.3d 548, 554 (7th Cir. 1999) ("reasonable inferences" go to plaintiff). Thus, the district court was required to take the allegations in the Complaint (RE 1) and proposed Amended Complaint (RE 32-1)—both verified—as true and to draw all reasonable inferences in Plaintiffs' favor. On appeal, this Court reviews such a dismissal and any "application of the law to the facts . . . *de novo*." *Cartwright*, 751 F.3d at 760.

B. Plaintiffs Have a Privacy Interest Under the Conditions at Issue.

Plaintiffs assert injury to a privacy interest in financial records under the conditions at issue here. (*See, e.g.*, Complaint, RE 1, Page ID# 12, ¶ 23 (Plaintiff Crawford objects to disclosure compelled by challenged provisions.); *see also id.* at Counts 3, 7, and 8.) The district court called Plaintiffs' strong objections to disclosure on constitutional grounds mere "discomfort with the alleged invasion of their privacy." (Dismissal Order, RE 42, PageID# 646.) The Dismissal Order cited the court's Preliminary-Injunction Denial (*id.*, citing RE 30, PageID## 403-404), where the court held that Plaintiffs lack a privacy interest:

Plaintiffs also contend that the existence of applicable statutory requirements

> and penalties might suffice for standing to challenge the unconstitutional provisions. [citations omitted] However, this only applies where petitioners have alleged "an intention to engage in a course of conduct arguably affected with a constitutional interest." *Susan B. Anthony List*[*v. Driehaus*], 134 S. Ct. [2334,] 23[4]2 [(2014)]. Plaintiffs here have not identified a constitutionally protected interest.
>
> 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*[*v. Maryland*], 442 U.S. [735,] 743-44 (1979) ("[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.").

(Preliminary-Injunction Denial, RE 30, PageID# 404.)[11] So the court held: "No individual Plaintiff has suffered an invasion of a legally protected interest . . . ." (Dismissal Order, RE 42, PageID# 653.) The court is in error because Plaintiffs have a cognizable interest under the conditions at issue.[12]

Whether U.S. account holders have a privacy right under these circumstances

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[11] The court recognized that reasonable persons *do* expect privacy in bank records absent a warrant. (PageID# 404 n.3 ("Here, the Supreme Court's estimation of what a reasonable person might expect appears to be diverging from reality.").)

[12] At a minimum, Plaintiffs' concerns in this context are "*arguably* affected with a constitutional interest." *Driehaus*, 134 S.Ct. at 2342 (emphasis added) (citation omitted). *Driehaus* held that "because petitioner's intended future conduct concerns political speech, it is *certainly* 'affected with a constitutional interest.'" *Id.* at 2344 (emphasis added) (citation omitted). But *Driehause* recites that "arguably" suffices for standing to bring a preenforcement challenge. *Id.* at 2342. And here *Miller* clearly indicated that it was not excluding a privacy right under the conditions at issue here. *See infra* at 32-34. So "arguably" applies full force and Plaintiffs have standing for a preenforcement challenge.

turns largely on a proper understanding of *Miller*, 425 U.S. 435, on which the district court relied for the proposition that there is no reasonable expectation of privacy in financial records voluntarily provided to third parties. (Preliminary-Injunction Denial, RE 30, PageID# 404, quoting *Miller*, 425 U.S. at 442, 440.) But this case fits solidly in the situation that *Miller* expressly said its holding did *not* reach. There are sound reasons why a cognizable privacy interest exists here, based on *Miller*'s own applicable language. *Miller* would only stand for the court's view with respect to a search targeted at an individual suspected of some wrongdoing and where some judicial process attaches (in *Miller* it was a subpoena duces tecum, 435 U.S. at 436). *Miller* expressly says that it does *not* apply its holding to "blanket reporting," *id.* at 444 n.6, or to such bulk data collection with no judicial process: "We are not confronted with a situation in which the Government, through 'unreviewed executive discretion,' has made a wide-ranging inquiry that unnecessarily 'touch(es) upon intimate areas of an individual's personal affairs.'" *Id.* (quoting *California Bankers Ass'n. v. Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring)). The unreviewed, blanket, bulk-data collection at issue here—requiring disclosure of intimate areas of Plaintiffs personal affairs, not only to the Government but also to *foreign* governments—is exactly the sort of government activity that *Miller* expressly does *not* cover and which its reasoning indicates requires recognizing a privacy right.

Regarding compelled disclosure to foreign governments, Model 1 IGAs[13] require such governments to mandate FFIs to search U.S.-related accounts and report the bulk-data-collection results to the foreign government, which then forwards it to the U.S.[14] This raises further privacy violation for two reasons.

First, the Government is compelling bulk-data-collection information to *third parties*, which is unlike cases the district court recites, which cases have to do with U.S. officials collecting narrowly targeted data themselves on persons specifically suspected of wrongdoing and with judicial oversight. The public reasonably believes it has a privacy right against the government compelling disclosure of individuals' private financial affairs to third parties, especially under these circumstances. That is evidenced by the fact that Americans' tax returns may not be disclosed by the Government to third parties and by the fact that Americans not overseas (without foreign accounts) do not have the government compelling their financial institutions to report their financial information to third parties.

Second, the Government is compelling the production of bulk-data-collection information of Plaintiffs (and others so situated) to *foreign governments* that may

[13] The challenged IGAs are Type 1, except for the Model-2 Swiss IGA.

[14] By contrast, the FATCA *statute* requires FFIs to send the bulk-collection financial information on U.S.-related accounts directly to the IRS. Which indicates both Congress's intent not to allow such disclosure of private financial information to foreign governments and the fact the IGAs are beyond the authority of FATCA. (*See* Amended Complaint, RE 32-1, PageID## 475-476.)

have even less *security* for information than does our federal government—and no IGA mandates security standards for all this digital bulk data on Americans' accounts. Persons known to have substantial financial holdings are always at increased risk of extortion, kidnaping for ransom, identity theft, and the like, and in many countries one's holdings need not be large for disclosure to put one at increased risk. Even apart from such risk, mere disclosure of one's personal information to third parties is a harm cognizable in its own right.

Such harms are no mere speculation. In a 2014 notice, "IRS Warns Financial Institutions of Scams Designed to Steal FATCA-Related Account Data," the IRS "issued a fraud alert for international financial institutions complying with . . . FATCA[]. Scam artists posing as the IRS have fraudulently solicited financial institutions seeking account holder identity and financial account information." *See* http://www.irs.gov/uac/Newsroom/IRS-Warns-Financial-Institutions-of-Scams-Designed-to-Steal-FATCA-Related-Account-Data. In a 2013 report by the Treasury Inspector General for Tax Administration, titled "Foreign Account Tax Compliance Act: Improvements Are Needed to Strengthen Systems Development Controls for the Foreign Financial Institution Registration System," the Inspector General recommended, inter alia, that

> the Chief Technology Officer should ensure that adequate program management controls are in place and consistently followed to allow the IRS to accomplish its FATCA goals and objectives. Finally, the Chief Technology

> Officer should ensure that all system requirements documentation includes the requirements being tested and all security requirements, and that corresponding test cases are identified and sufficiently traced, managed, and tested.

See https://www.treasury.gov/tigta/auditreports/2013reports/201320118fr.html#toc. Scam artists are reportedly actively attempting to access FATCA data held by FFIs:

> Scam artists posing as the IRS have fraudulently solicited financial institutions seeking account holder identities as well as financial account information. Financial institutions directly registered to comply with FATCA, and those in jurisdictions that are treated as having an IGA in effect to implement the FATCA provisions through their home governments, have already been approached by parties impersonating themselves as the IRS. The IRS now has reports of incidents from various countries and continents. . . . I believe it is just a matter of time before personal information mandated by the FATCA reporting rules will be compromised in a data breach.

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

Taxpayer information was recently stolen from the IRS itself because the IRS has not prevented hacking of its *own* systems and theft of taxpayer information. *See* Jada F. Smith, *Cyberattack Exposes I.R.S. Tax Returns*, N.Y. Times, May 26,

2015, http://www.nytimes.com/2015/05/27/business/breach-exposes-irs-tax-returns.html. But at least the IRS has the *possibility* of minimizing cyber-theft in its own systems with proactive steps. *But see* Lisa Rein, *IRS failed to address computer security weaknesses, making attack on 104,000 taxpayers more likely, watchdog says*, Washington Post, June 2, 2015, http://www. washingtonpost.com/blogs/federal-eye/wp/2015/06/02/irs-has-not-done-everything-it-can-to-protect-its-computer-networks-from-hackers-watchdog-says/.[15] Whether the IGAs are beyond FATCA statutory authority must await full merits briefing, but the security vulnerabilities were part Congress's balancing of individuals' vital interests in privacy and consent against administrative convenience in FATCA. In an era when hacking of government databases runs rampant, with no end in sight, Congress provided a system whereby Americans' identifying and financial information (allowing them to be the victims of the theft of their identity and accounts) is exposed to few parties by requiring direct reporting to the IRS. The IGAs instead involve many FFIs reporting to foreign governments over which the U.S. Government lacks sufficient control to prevent information loss, either through insider information release or hacking. And Congress may well have wanted the IRS to

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

have *direct* relationships with FFIs, as required by FATCA, precisely so the IRS *could* have some educational and supervisory role to help protect against data theft. But the IGAs replace Congress's choice with the Executive's.[16]

Further, "[t]he Court has repeatedly held that searches conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge], are per se unreasonable . . . subject only to a few specifically established and well delineated exceptions." *Patel*, 135 S.Ct. at 2452 (internal quotation marks omitted, citations omitted). At a minimum, the Fourth Amendment requires that "the subject of the search . . . be afforded an opportunity to obtain precompliance review before a neutral decision maker." *Id.*[17]

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[16] FATCA also provided that Americans should have a right to consent to disclosure under FATCA when local laws abroad provide privacy, requiring some notice (in an attempt to get a waiver) before their data is bulk-collected and sent to the U.S.—all of which is less convenient for the Government but is Congress's choice. Of course, non-consenting persons' accounts might be shut down, but the waiver option would give them notice that their data was about to be disclosed and an opportunity to arrange their financial affairs differently to protect their privacy if desired (or an opportunity for litigation if desired). Those vital differences between FATCA and the IGAs indicate that the IGAs aren't supported by FATCA. Rather, they are beyond statutory authority.

[17] Of course, the facts differ between this case and those of *Miller* and *Patel*, but the controlling constitutional principles in text do not, so those cases control here. The district court also quoted *Smith* for the proposition that "'a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.'" (Preliminary-Injunction Denial, RE 30, PageID#404 (quoting 442 U.S. at 743-44).) But *Miller* and *Patel* are more on point and recent. Over strong dissents, *Smith* held that evidence of dialing information from a "pen register" installed by the phone company, at police request but without warrant, was admissible because the Court would recognize no privacy interest in phone numbers pro-

FATCA and the IGAs provide for no judicial oversight of those searches. Such searches are not limited to information on accounts of persons for whom a legitimate law enforcement authority has found probable cause of wrongdoing and obtained a subpoena authorizing the search. There is no chance for precompliance review before a neutral decision maker before compelled searches and reporting of sensitive information occurs. FATCA and the IGAs compel compliance for institutions wanting to have U.S. account holders by imposing a 30% penalty (on *all* U.S. funds flowing to the financial institution) for noncompliance. 26 U.S.C. 1471(a); *see, e.g.*, Canadian IGA, art. 2, § 1.

Moreover, waiver of privacy in one area, e.g., by providing information to one's bank, does not waive privacy in other areas. *See Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1188 (8th Cir. 2000) ("Even information that is available to the general public in one form may pose a substantial threat to privacy if disclosed to the general public in an alternative form potentially subject to abuse."); *see also id*. (Referendum signers' "substantial privacy interest in [their] petition is not diminished by the fact that many individuals may have signed it in their business or entrepreneurial capacities."); *see also United States Dept. of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 770 (1989) ("[T]he

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vided to the phone company for dialing purposes. Of course, no pen register of phone numbers is involved here, but rather the bulk data collection that *Miller* said was not subject to its holding.

fact that an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information."). So the fact that Americans overseas have provided essential information to FFIs for local bank accounts necessary for everyday Americans in everyday living does not mean that they have waived their privacy as to the blanket, bulk-data collection imposed by the challenged provisions and IGAs, and especially not as to foreign governments.

Thus, people *do* have a reasonable expectation of privacy from the U.S. and foreign governments in their bank accounts under the situations at issue here. They reasonably do not expect the bulk, blanket reporting of information under challenged provisions and IGAs, including to foreign governments, without any hint of wrongdoing and without judicial oversight, the lack of which makes such searches "per se unreasonable."[18] So Plaintiffs have a cognizable privacy interest.

Plaintiffs' privacy interest and opposition to disclosure provide standing to challenge provisions and IGAs that (i) expressly *require* disclosure and/or (ii) directly or indirectly *penalize* entities for not providing disclosure, which disclosure is ongoing.[19] So Plaintiffs have standing to challenge disclosure requirements

[18] *See also supra* note 11 (study showing actual public expectation).

[19] Plaintiff Nelson "has had her private financial account information disclosed to the IRS and Treasury Department despite the fact that she is not a U.S. Citizen." (Complaint, RE 1, PageID## 22-23 (¶ 67).) Plaintiff Zell has had banks seeking information about his and clients' accounts—and asking him to provide IRS with-

imposed by FATCA, IGAs, and FBAR, and they have standing to challenge the FFI Penalty (30% "tax" on payments to non-compliant FFIs) since FFIs disclose account holders' information *because of* that penalty. And Plaintiffs have standing to challenge FATCA's Passthrough Penalty (30% "tax" imposed on persons exercising their rights not to identify themselves as Americans citizens and to refuse to waive privacy protections under foreign law), which directly targeted persons like Plaintiffs with foreign accounts to deter them from maintaining their privacy. It is imposed without regard to tax liability or whether an individual otherwise provides the information through required reports.

C. Plaintiffs' Harms Are Fairly Traceable to Government Action, and Requested Relief Will Redress Those Harms.

The district court said that because Plaintiffs harms, particularly problems in getting banking services for essential everyday-living accounts,[20] are not fairly traceable to government action, Plaintiffs lack standing to challenge provisions motivating FFIs not to provide services to Americans abroad. (*See, e.g.*, Dismissal

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holding forms—based on FATCA requirements and without regard to account balance. (*Id.*, PageID## 25-27 (¶¶ 79-85).)

[20] Plaintiffs verify situations where FFIs don't want U.S.-related accounts due to FATCA/IGA burdens, including monitoring account amounts. (Complaint, RE 1, PageID## 11-12 (¶ 21), 19 (¶ 55), 22(¶ 65), 24-25 (¶¶ 78-80)); *see also* Amended Complaint, RE 32-1, PageID## 448, 491-493 (¶ 73 & Ex. 2 (bank declined business because of FATCA/IGA burdens).) *See also* Democrats Abroad study, *supra* at 26 (common problem). *See also supra* note 7 (Non-Prosecution Agreement reveals bank policy of dumping U.S.-related accounts because of FATCA/IGA burdens).

Order, RE 42, PageID# 643 (citing Preliminary-Injunction Denial, RE 30, PageID# 396).)[21]

Preliminarily, note that the court speaks of traceability to the Defendants as if Plaintiffs were limiting their challenge to actions by those three governmental entities alone. But though those entities have enforcement/administrative authority, suing them is the proper way to challenge provisions and agreements enacted by the government. *See, e.g.*, *McCutcheon v. FEC*, 134 S.Ct. 1434 (2014) (suing FEC to attack statute). So the argument is not that, e.g., the IRS persuaded some bank to deny services to Plaintiffs Crawford or Kuettel, but that FFIs don't accept Americans' accounts because of FATCA/IGA burdens. Where a provision/agreement harms a person by causing FFIs to deny services (or by disrupting marital joint

[21] Elsewhere, the district court also explained its no-direct-harm finding thus:

> The basis for the Court's previous finding for lack of standing was due to no individual plaintiffs alleging they suffered or was about to suffer injury under the FATCA withholding tax. (Doc. 30, at 14.) Neither were any plaintiffs an FFI to which the tax under § 1471 applies nor were they assessed the tax. (*Id.*) No plaintiffs had even been informed that the IRS intends to assess the recalcitrant account holder withholding tax imposed by § 1471(b). (*Id.* at 14-15.) Moreover, all Plaintiffs, but Crawford, live in jurisdictions where FFIs are not currently subject to the § 1471(b) withholding tax.

(Dismissal Order, RE 42, PageID# 642.) But FATCA motivates FFIs to either comply or withhold financial services from U.S. citizens abroad by the FFI Penalty. And though IGAs supplant FATCA in some jurisdictions, if Plaintiffs succeed in their challenge to the IGAs, then FATCA provisions are at issue. So Plaintiffs are harmed without being FFIs. Moreover, one need not violate the law and suffer enforcement action and penalties in order to bring a preenforcement challenge as here. *See, e.g.*, *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)).

accounts or the ability to open an account in a minor's name), that harm is fairly traceable to the government responsible for the provision/agreement.

The law on causation for standing recognizes such indirect harm. For example, in *Warth v. Seldon*, 422 U.S. 490 (1975), the Supreme Court recognized that harm caused "indirectly" by a law is enough for standing, *id.* at 504-05. It cited *Roe*, 410 U.S. at 124, which allowed a pregnant woman to challenge a law forbidding doctors from doing abortions. That Texas law controlled doctors, not Roe, but her indirect harm from the law regulating doctors was sufficient to give her standing.[22] Even where an injury might be avoidable, and thus arguably self-inflicted, standing remains where the government action "remains a contributing factor." *Natural Resources Defense Counsel v. U.S. Food and Drug Admin.*, 710 F.3d 71, 84-85 (2d Cir. 2013).

The district court acknowledges *Warth* but says that although the amended complaint "does identify that Plaintiff Crawford was unsuccessful in his attempt to obtain a brokerage account, the causation of such harm is dependent on speculation of possible third party action by the Court." (Dismissal Order, RE 42, PageID# 644.) And it held that granting relief would not result in a "substantial probability" that Crawford would get that account given relief sought, but rather

[22] This Circuit recognizes that indirect harm suffices for standing. *See, e.g.*, *Grizell v. City of Columbia, Div. of Police*, 461 F.3d 711, 717-18 (6th Cir. 2006); *Lambert v. Hartman*, 517 F.3d 433, 438-39 (6th Cir. 2008).

this would require "speculation as to the general practices and policies of Saxo Bank, if Plaintiff Crawford meets the criteria of the Saxo Bank's general practices and policies for a brokerage account, and any other aspects of Saxo Bank's application process that fall squarely within their discretion." (*Id.*)

The district court thus erred by not accepting the allegations of the verified Amended Complaint as true and affording the inferences to which Plaintiffs are entitled under dismissal motions. A required reading of the Amended Complaint as a whole reveals that Plaintiffs provide evidence of a widespread problem of FFIs denying services because of FATCA/IGAs, including evidence from the Democrats Abroad study and other specific examples. (RE 32-1, PageID## 431-432 (¶ 6).) Plaintiff Daniel Kuettel verified, with specific bank correspondence as an exhibit (stating that an account had been denied because of FATCA burdens), that many Swiss banks deny accounts to U.S. citizens because of the burdens of FATCA, and that he had difficulties in getting banking services as a result, which problems disappeared when he renounced his U.S. citizenship. (*Id.*, PageID## 448-449 (¶¶ 73-74), 491-493 (Ex. 2).) This evidentiary background, coupled with the fact that Plaintiffs have argued from the beginning that they experience banking difficulties that result from FATCA/IGAs, creates the necessary inference that Crawford is verifying the same problem and that it is true.

But there is more direct evidence, because Crawford verifies specific facts that

counter the court's asserted inability to know whether accounts are denied because of FATCA/IGA burdens:

> 22. Mark is the founder and sole owner of Aksioner International Securities Brokerage . . . in . . . Albania. . . . [Aksioner] . . . work[s] with Saxo Bank in . . . Denmark. The Saxo relationship would not allow Aksioner to accept clients who are U.S. citizens in part because the bank does not wish to assume the burdens that would be foisted on it by FATCA if it were to accept U.S. citizens. This has impacted Mark financially, forcing him to turn away prospective American clients living in Albania who come to him for brokerage services.
>
> 23. Aksioner has sent many applications to Saxo Bank throughout the years, but only *one* client was ever rejected. Ironically, that person was Mark. In April of 2012, Mark applied for a brokerage account with his own company and was denied by Saxo Bank in Copenhagen, Denmark because he is a U.S. citizen. Saxo Bank is governed by Danish law which has a Model 1 IGA, therefore, rather than reporting information about U.S. clients, Saxo Bank is turning away U.S. citizens like Mark.

(Amended Complaint, RE 32-1, PageID## 438-439 (emphasis in original).) From this, it is clear that Aksioner and Saxo do not accept U.S.-citizen accounts because of FATCA/IGA burdens. And both rejected Crawford's application for a brokerage account because of FATCA/IGA burdens. The district court was required to accept these statements as true, with any reasonable inferences going to Crawford, and doing so requires no "speculation" to determine that Crawford was rejected because of FATCA/IGA burdens, not for some unknown reason. And these verified facts readily reveal that there was a "substantial probability" that Crawford would have received a brokerage account but for FATCA/IGA burdens because the reason he was rejected was because of those burdens. That cause being re-

moved, he would have gotten the account. This is credible because he is Aksioner's owner and maintains a relationship of sufficient trust and standing with Saxo that enables Saxo to accept non-U.S.-citizen accounts from Aksioner. So to say that there might be some other reason than the verified one for the account denial is itself speculation. And it violates the duty to accept stated facts as true and afford all reasonable inferences to Plaintiffs. Moreover, the banking difficulties recited by other Plaintiffs are similarly credible, accepting statements as true, affording reasonable inferences to Plaintiffs, and reading the Amended Complaint as a whole.

So the banking and joint-account difficulties suffered by Plaintiffs (and myriad others, as studied by Democrats Abroad), are fairly traceable to FATCA/IGAs. FFIs that do not want to comply with IGA burdens (or face the 30% FFI Penalty, where applicable), simply reject U.S. accounts. That is enough for causation as a harm caused indirectly. That is no mere third-party decision but is the direct result of the challenged provisions, which were by design *intended* to get rid of American's accounts in non-compliant FFIs. The problem of such rejected accounts (and other problems caused by challenged provisions/IGAs) will be eliminated and Plaintiffs' harms redressed if requested relief is granted.

The arguments that FATCA/IGAs regulate FFIs, not Plaintiffs, and that FATCA/IGAs do not *require* the search and disclosure of U.S.-related accounts,

fail to take account of how FATCA/IGAs operate to coerce compliance. The IGAs and the 30% FFI Penalty on *all* U.S. payments to the noncompliant financial institution compel them to search out and report information on U.S. accounts or eschew U.S.- related accounts. The very purpose of the challenged provisions/IGAs is to cause foreign financial institutions to search out and report information on U.S. accounts, or abandon such accounts, so Plaintiffs (and myriad other Americans abroad) are clearly harmed, even if it might be deemed "indirectly," by challenged provisions/IGAs. The *effect* of the challenged provisions and agreements makes Plaintiffs banking and other harms, e.g., the need to transfer funds to protect spouses, all fairly traceable to government action. So Plaintiffs have standing just as Jane Roe did as a result of her harm that was caused indirectly.

Finally, if Plaintiffs receive requested relief, their harms caused by the challenged provisions and agreements will be redressed. Harms to their privacy rights, ability to get financial services, and disruption of familial and professional financial arrangements that have been caused by the challenged provisions/agreements will be gone with the provisions/agreements. And Senator Paul's disruption of his constitutionally-mandated right to vote as a U.S. Senator will be redressed if the challenged IGAs are struck because they have not been subject to such a vote.

D. The Harms Plaintiffs Experience Are Not Generalized Grievances.

The district court mentions the rule that generalized grievances don't provide

standing (Dismissal Order, RE 42, PageID# 639), but does not expressly rely on that in the Dismissal Order.[23] Nonetheless, Plaintiffs harms are not a generalized grievance. According to the Democrats Abroad study, Plaintiffs with harms resulting from FATCA/IGAs are part of a large class. *See supra* at 26. But just because "it is an injury shared by a large class of other possible litigants," an injury is not a generalized grievance where plaintiffs have personal injury. *Warth*, 422 U.S. at 502. That is the case here regarding financial difficulties, privacy violations, and so on caused by challenged provisions/agreements. For example, though many persons might suffer from broad warrantless interception of communications (targeting terrorism), "the fact that a harm is widely shared does not necessarily render it a generalized grievance," and "although . . . claims arise from political conduct and in a context that has been highly politicized . . . [does not mean they are] political questions." *Jewel v. National Security Agency*, 673 F.3d 902, 909, 912-13 (9th Cir. 2011). Since Plaintiffs have actual, personal injuries to cognizable interests, their harms are not mere generalized grievances.

E. The Harms Plaintiffs Assert Are Not Those of Third Parties.

In response to arguments that Plaintiffs were asserting third-party claims, specifically addressing concerns by Mr. Johnson's and Mr. Kish's wives and Mr. Kuettel's daughter, Plaintiffs sought leave to amend to add new Plaintiffs. How-

[23] But it says something similar regarding Senator Paul. *See infra* Part I.F.

ever, Plaintiffs rely on *no* third-party standing, though they provide information about relevant third parties to demonstrate how FATCA negatively affects their lives and relationships. Rather, they rely on their own interests, especially the constitutionally protected interest in not disclosing information they do not want to disclose.

F. Senator Paul Has Standing to Challenge IGAs.

As set out above in quoted material from the Amended Complaint, *see supra* at 8, Senator Paul's concrete and particularized injury is straightforward, i.e., he is unable "to vote against the FATCA IGAs," either as part of "advice and consent under Article II" or under a submission "to the Congress as a whole for approval as congressional-executive agreements." (RE 32-1, PageID## 440-441.) So his interest as a U.S. Senator is the constitutional power under Article I, § 7, and Article II, § 2, to *vote*—on bills, vetoes, and treaties. The IGAs are unconstitutional sole executive agreements because they are not ratified treaties, congressional-executive agreements, or treaty-based agreements, but are beyond sole executive authority and FATCA authority. (*See, e.g.*, Pls.' Prelim. Inj. Mem., RE 8-1, PageID##147-156.) Consequently, the IGAs should be submitted for ratification as treaties, or at least for approval as congressional-executive agreements. Since they are not being submitted to vote, Senators are deprived of their constitutionally guaranteed right to vote. Conversely, FATCA, which *was* subject to votes, is being

supplanted by IGAs that are not authorized by FATCA, so FATCA is being effectively altered without Senators' votes.

The district court relies on *Raines*, 521 U.S. 811, in holding that Senator Paul lacks standing. (Dismissal Order, PageID# 641.) *Raines* involved four Senators and two Congressmen who challenged the Line-Item Veto Act. *Id.* at 814. But *Raines* was a challenge to a statute passed by Congress, while the IGAs are not being submitted to Congress. And a key factor in *Raines* was that "the Act has no effect on th[e] process" of voting for or against bills. *Id.* at 824. Here the voting process *is* affected because the IGAs are not being submitted for vote. So *Raines* does not control this case. And a core constitutional role of the (only one hundred) Senators is to serve as a check and balance on Executive power, which gives a Senator a special, non-generalized interest in getting the opportunity to exercise his or her constitutionally mandated vote for that very purpose. And *Raines* did not overrule *Coleman v. Miller*, 307 U.S. 433 (1939), which upheld the right of state legislators whose vote would otherwise be nullified to have standing to challenge the action that nullified their vote, *id.* at 438. Here a much greater problem is at issue because no Senator is getting a vote on the IGAs—an effect on the process. Further arguments applicable here are in the *Raines* dissents by Justices Stevens and Breyer. *Id.* at 835-843. For example, "the constitution does not drawn an absolute line between disputes involving a 'personal' and those involving an

'official' harm." *Id.* at 841 (Stevens, J., joined by Breyer, J., dissenting) (collecting cases). "*Coleman* itself involved injuries in the plaintiff legislators' official capacity." *Id.* And the majority conceded this by leaving open standing given "discriminatory" denial of the right to vote, which necessarily would be official-capacity harm. *Id.* So Senator Paul has standing to challenge the IGAs.[24]

G. Plaintiffs Have Standing for All Counts.

Based on the foregoing and reasons set out next, one or more Plaintiffs have standing for each Count in the Complaint and proposed Amended Complaint.[25] The counts are set out above with citations to the Complaint, *see supra* at 20, and are provided next with citations to the proposed Amended Complaint.

1. Count 1: The IGAs Are Unconstitutional Sole Executive Agreements Because They Exceed the Scope of the President's Independent Constitutional Powers.

Count 1challenges the IGAs as unconstitutional sole executive agreements. (RE 32-1, PageID## 473-475.) The IGAs are currently causing at least three harms to one or more Plaintiffs: (i) violations of their privacy rights, (ii) difficulties in obtaining financial services for daily living, and (iii) damage to professional and

[24] To the extent *Raines* might control in any way, which Plaintiffs dispute, *Raines* must be overruled to allow Senators to preserve their constitutional right to vote. This is especially true given recent executive actions, including the IGAs, beyond constitutional and statutory authority. Things have changed since *Raines*.

[25] Because at least one plaintiff has standing for each claim, others' standing need not be considered. *McConnell v. FEC*, 540 U.S. 93, 233 (2003) (collecting cases) (standing of intervenors not decided because FEC had standing).

familial relations. The district court found no privacy interest, which is erroneous. *See* Part I.B. The district court found that harms (ii) and (iii) are not traceable to governmental action, which is erroneous. *See* Part I.C. Nor are these harms generalized grievances or third-party harms. *See* Parts I.D-E. And the IGAs are causing the harm to Senator Paul of not being able to vote on them. *See* Part I.F. Moreover, Plaintiffs' harms will be redressed by requested relief as to this Count. *See* Part I.C. So Plaintiffs have standing for Count 1.

2. Count 2: The IGAs Are Unconstitutional Sole Executive Agreements Because They Override FATCA.

Count 2 challenges the IGAs as overriding FATCA and being beyond the authority of FATCA or any other statutory or prior-treaty authority. (PageID## 475-476.) Plaintiffs have standing for the reasons stated regarding Count 1.

3. Count 3: The Heightened Reporting Requirements for Foreign Financial Accounts Deny U.S. Citizens Living Abroad the Equal Protection of the Laws.

Count 3 challenges the heightened reporting requirements for foreign financial accounts for denying U.S. citizens living abroad the equal protection of the laws. (PageID## 476-478).) This applies to IGAs, FATCA, FBAR, and implementing provisions. (PageID# 478, ¶ 178.) So all Plaintiffs subject to the heightened reporting under those challenged provisions and agreements have standing for the reasons stated regarding Count 1.

4. Count 4: The FATCA FFI Penalty Is Unconstitutional Under the Excessive Fines Clause.

Count 4 challenges the FATCA FFI Penalty as unconstitutional for violating the Excessive Fines Clause. (PageID## 479-480.) Plaintiffs affected by FATCA have standing for the reasons stated regarding Count 1 because the FFI Penalty causes FFIs to either violate Plaintiffs' privacy rights or discontinue U.S.-related accounts. Where IGAs supplant FATCA, Plaintiffs may challenge the FFI Penalty because they challenge the IGAs and, upon the success of that challenge, FATCA's FFI Penalty is again active. Though Plaintiffs are not FFIs, and so not directly affected by the FFI Penalty, they are the target of the FFI Penalty and such indirect harm is cognizable. *See* Part I.C.[26] Moreover, Plaintiffs' harms will be redressed by requested relief as to this Count. *See* Part I.C. So Plaintiffs have standing for Count 4.

5. Count 5: The FATCA/IGA Passthrough Penalty Is Unconstitutional Under the Excessive Fines Clause.

Count 5 challenges the FATCA/IGA Passthrough Penalty as unconstitutional under the Excessive Fines Clause of the Eighth Amendment. (PageID## 480-481.) "FATCA and the IGAs require [FFIs] to 'deduct and withhold a tax equal to 30

[26] As stated in the Amended Complaint: "Without the FFI Penalty, [FFIs] likely would not comply with FATCA and Plaintiffs' private financial information would not be disclosed to the [U.S.]. The penalty leaves foreign financial institutions no meaningful alternative but to implement costly compliance systems and comply with FATCA." (PageID# 480, ¶ 185.)

percent of "any payments made to recalcitrant account holders.'" (PageID# 480, ¶ 190 (citing FATCA, regulation, and challenged IGAs).[27] Plaintiffs affected by FATCA/IGAs have standing for the reasons stated regarding Count 1 because the FFI Passthrough Penalty is designed to punish noncompliance by account holders. And Plaintiffs would like to be noncompliant because they are burdened by FATCA/IGAs, which they believe are unconstitutional, but cannot be recalcitrant because of the Passthrough Penalty.

Any notion that Plaintiffs lack standing to challenge any provision/IGA, including those here under the Excessive Fines Clause, because the Government has imposed no penalty or enforcement action against them fails because the mere existence of applicable statutory requirement and penalties suffices for standing to challenge the unconstitutional provisions. *See, e.g.*, *Driehaus*, 134 S.Ct. at 2341-46 (2014); *Babbitt*, 442 U.S. at 298 (quoting *Bolton*, 410 U.S. at 188). And even were the Government to disavow enforcement—which it does not—that would not eliminate standing where the applicable statutory requirement and penalty exist. *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988).

Moreover, Plaintiffs' harms will be redressed by requested relief as to this Count. *See* Part I.C. So Plaintiffs have standing for Count 5. Any notion that they must await being deemed a recalcitrant account holder is erroneous because one

[27] *See supra* at 3 ("recalcitrant account holders" explained).

need not await enforcement to challenge unconstitutional provisions/agreements. And Plaintiffs would become recalcitrant account holders but for the challenged provision/IGAs.

6. Count 6: The FBAR Willfulness Penalty Is Unconstitutional Under the Excessive Fines Clause.

Count 6 challenges the FBAR Willfulness Penalty as unconstitutional under the Excessive Fines Clause. (PageID## 481-482.) Plaintiffs have standing to challenge the FBAR penalty because it enforces a reporting requirement they believe is unconstitutional, *see* Count 3, and would therefore willfully not comply with but for the FBAR Willfulness Penalty.

Furthermore, Plaintiffs alleged that they reasonably fear that they will be subject to the Willfulness Penalty for willful failure to file FBARs, indicating that they are filing FBARs. The FBAR report is a trap for the unprepared, uninformed, unwary, imposing this excessive penalty on those who know of the report but for some reason fail to get it done. So all Plaintiffs to whom it applies reasonably fear it will be imposed on them. Plaintiff Kuettel alleges that he is personally harmed, as does his daughter, because of his inability to establish and contribute to a college-savings account in his U.S.-citizen daughter's name that would exceed $10,000 because she would know of the need to file an FBAR but could not because she is too young (and both parents, neither a U.S. citizen, object to filing it

for their daughter). (PageID## 449-452.) Because Lois Kuettel wold know of the need to file an FBAR but cannot, there is a reasonable fear that her failure to file would be deemed willful and the Willfulness Penalty imposed. Thus, her father's investment in her future college expenses would be consumed by a penalty, requiring replacement for her education.

Moreover, Plaintiffs' harms will be redressed by requested relief as to this Count. *See* Part I.C. Any notion that they must await a penalty or enforcement action is erroneous because one need not await enforcement to challenge unconstitutional provisions/agreements. And Plaintiffs would not file FBAR reports—and so become subject to this penalty—but for the challenged provision. So Plaintiffs have standing for Count 6.

7. FATCA's Information Reporting Requirements Are Unconstitutional Under the Fourth Amendment.

Count 7 challenges FATCA's information reporting requirements as unconstitutional under the Fourth Amendment. (PageID## 482-483.) FATCA requires FFIs to report information about U.S.-related account holders to the U.S., but FATCA makes no provision for judicial oversight of the searches required for such reporting in violation of the Fourth Amendment. Accordingly, Plaintiffs subject to FATCA reporting have standing to challenge the relevant provisions.

The district court's reason for denying standing as to Count 7 (or Count 8) is

not clearly articulated in either the Preliminary-Injunction Denial (RE 30) or the Dismissal Order (RE 42). Presumably it is included in the idea that these searches are conducted by third-party FFIs who are not "required" by FATCA/IGAs to conduct these ongoing searches and reporting. But such a non-traceability argument is dealt with above, *see* Part I.C, where it is noted that FFIs are compelled by the FFI Penalty and IGAs to either perform these searches and reporting or not accept U.S.-related accounts. So the action of these FFIs is attributable to the challenged provisions/IGAs, which readily provides standing.

8. The IGA's Information Reporting Requirements Are Unconstitutional Under the Fourth Amendment.

Count 8 challenges the IGA's information reporting requirements as unconstitutional under the Fourth Amendment. (PageID##484-485.) For the reasons stated in Count 7, Plaintiffs have standing for this challenge.

II. Plaintiffs Should Have Been Allowed to Amend the Complaint.

The district court erred by not granting leave to amend the Complaint. It held amendment futile because "none of the Plaintiffs has standing" and the Amended Complaint "could not withstand Defendants' Motion to Dismiss." (Dismissal Order, RE 42, PageID# 653.) But, Plaintiffs have standing, *see* Part I, and the court's analysis was erroneous. *See* Part II.B.

A. Standard of Review

Where, as here, leave to amend was denied "'because the amended pleading would not withstand a motion to dismiss, . . . the standard of review is *de novo*.'" *Colvin v. Caruso*, 605 F.3d 282, 294 (6th Cir. 2010) (citation omitted).

B. The Amendments Were Not Futile, and Plaintiffs Should Have Been Allowed to Develop Facts and Test Their Claims on the Merits.

The rule is that "leave to amend 'shall be freely given when justice so requires,'" which "mandate is to be heeded," so ordinarily "a plaintiff . . . ought to be afforded an opportunity to test his claims on the merits." *Forman v. Davis*, 371 U.S. 178, 182 (1962) (citation omitted). Leave to amend should only be denied "if the amendment is brought in bad faith, for dilatory purposes, results in undue delay or prejudice to the opposing party, or would be futile." *Smith v. Robbins & Myers*, 2012 WL 5845072 at *1 (S.D. Ohio Nov. 19, 2012) (citation omitted). While futility is present when an amendment could not withstand a motion to dismiss, "the question of sufficiency of the pleadings should be considered in the context of a motion to dismiss, not a response to a motion for leave to plead." *Id*. The court should not "engage in [the] far reaching analysis" required for a motion to dismiss. *See id*. So an amendment motion should be decided on obvious futility under a less-far-reaching analysis than that for an actual motion to dismiss.

An example of obvious futility exists in *Thiokol Corp. v. Dept. of Treasury,*

State of Michigan, 987 F.2d 376 (6th Cir. 1993). Plaintiffs brought an ERISA action challenging Michigan tax provisions. *Id.* at 377. Plaintiffs sought to amend to add a refund claim under 42 U.S.C. 1983. *Id*. at 382. The court denied leave because states cannot be sued under section 1983. *Id*. at 383.

The requirement of *obvious* futility is also clear from *Lowe v. Oppy*, 2015 WL 1439347 (S.D. Ohio Mar. 6, 2015). In *Lowe*, a *pro se* Rastafarian prisoner sued a warden on religious liberty grounds for allowing a guard to cut the prisoner's locks. *Id*. at *1. But the amended complaint failed basic pleading requirements and did not assert any facts necessary to support the claim. *Id.* at *3. Without factual content and given that 42 U.S.C. 1983 allows no vicarious liability, the court could draw no inference of facial plausibility. *Id*. at *4. So leave to amend was recommended, *id.* at *3, and adopted. 2015 WL 1439325 (S.D. Ohio March 27, 2015).

Here, Plaintiffs have standing. *See* Part I. So, their motion was certainly not *obviously* futile. The Amended Complaint addressed standing and other issues raised by the Government and the Court. The court should have analyzed the motion under a far-less-reaching analysis than the motion-to-dismiss standard used. Plaintiffs should have been allowed to test their claims on the merits.

Conclusion

This Court should reverse the district court' Dismissal Order (RE 42) and Judgment (RE 43) granting Defendants' Motion to Dismiss (RE 26) and denying Plaintiffs' Motion for Leave to Amend (RE 32).

Dated: July 5, 2016

Respectfully Submitted,

/s/ James Bopp, Jr.

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Certificate of Compliance with Rule 32(a)

This memorandum of law complies with FRAP 32(a)(7). It contains 13,934 words, as verified by the word count feature of WordPerfect X6, the word processor that created it.

/s/ James Bopp, Jr.

Certificate of Service

I hereby certify that on July 5, 2016, the foregoing document was filed electronically using the Court's CM/ECF filing system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. The following persons should be notified:

Richard Caldarone
U.S. Department of Justice
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/s/ James Bopp, Jr.

Addendum:
Designation of Relevant Lower Court Documents

Per 6 Cir. R. 30(g), Plaintiffs designate the following relevant documents: