In the United States District Court for the
Southern District of Ohio
Western Division

Mark Crawford et al., *Plaintiffs*, *v.* **United States Department of the Treasury** et al., *Defendants*.	**Civil Case No. 3:15-cv-00250-TMR** Judge Thomas M. Rose

Plaintiffs' Reply Supporting Their Motion for Leave to Amend Complaint

Plaintiffs reply to the Government's Opposition (Doc. No. 34) to their Motion for Leave to Amend Complaint (Doc. No. 31). The Government (i) requests dismissal, incorporating by reference large portions of its dismissal motion, and (ii) claims that amendment would be futile. But (I) dismissal should only be considered on full, final briefing on dismissal based on the amended complaint; (II) any "futility" must be obvious (which is not the case here), with far-reaching analysis reserved for the dismissal-motion context, and (III) amendment would not be futile.

I. Dismissal Should Only Be Considered on Full, Final Briefing on Dismissal Based on the Amended Complaint.

Plaintiffs' amended complaint addresses certain Government standing arguments. But the Government, instead of not objecting to the amendment Motion then filing a new dismissal motion, opposes the amended complaint and asks for dismissal, relying on the incorporation by reference of extensive briefing from its dismissal motion. (Doc. No. 34, PageID 509, 527-28.) The Government's approach harms Plaintiffs in two ways, and it seriously inconveniences this Court.

First, in seeking dismissal in its Opposition the Government incorporates by reference large portions of its 30-page motion to dismiss though Plaintiffs have no memorandum opposing that

dismissal motion to incorporate by reference.[1] While Plaintiffs did some earlier briefing on some dismissal-motion arguments in their preliminary-injunction reply (Doc. No. 21), which they will incorporate by reference as applicable here, the Government's dismissal briefing was filed nearly a month after that reply and in light of that reply. So Plaintiffs have no briefing to incorporate by reference that is comparable to that which the Government incorporates by reference, and they are now limited by the time and space limits of a reply memorandum.[2] Vitally, all this incorporation by reference seriously inconveniences this Court, which must, to consider arguments, jump back and forth between multiple memoranda. For that reason alone, the Court should allow an amended complaint and require full briefing—without incorporation by reference—of any motion to dismiss so that all the arguments are together in one place.

Second, doing what the Government asks—denying leave and granting dismissal—also would harm Plaintiffs. The Government wants this Court to dismiss this case without allowing the motion to amend. So Plaintiffs would be forced to file an opposition to the current dismissal motion without the benefit of the changes in their amended complaint (including three new plain-

[1] Having decided to amend their complaint (which would moot the present dismissal motion, *see, e.g.*, *Yates v. Applied Performance Techs.*, 205 F.R.D. 497, 499 (S.D. Ohio 2002)), Plaintiffs sought leave to postpone their opposition to the present motion to dismiss until 30 days after this Court's ruling on the motion to amend, which the Government did not oppose. (Doc. No. 33.) In a November 24 Notation Order, this Court gave Plaintiffs until December 30 to file an opposition to the current motion to dismiss (which would only be needed in the event the present motion to amend is denied).

[2] While moving for extra pages and time for this reply might be an option, the Government did not seek extra pages for its opposition (choosing instead to incorporate by reference), and Plaintiffs are not assured of success for such a motion in light of two (granted) motions for extra time in opposing the motion to dismiss (Doc. Nos. 31, 33) and the Government's apparent intent to deprive Plaintiffs of an amended complaint. And extended multiple briefings on dismissal waste this Court's (and the parties') resources that should be focused on final, fair resolution of this case. So Plaintiffs believe the better course here is to comply with current time/space limits for a reply memorandum, incorporate by reference as possible (paralleling the Government's approach), and argue for full, regular briefing on a *later* motion to dismiss the amended complaint.

tiffs and new verified facts) that respond to Government arguments about standing. So if this Court were to dismiss this case in that manner, an appellate court would be faced with an appeal claiming error as to both the denial of the motion to amend and dismissal. Were that court to reverse on both claims, the parties and this Court would be back in the present situation except for wasted judicial resources. Given that possibility, allowing amendment now is preferable.

"The Court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Justice requires such leave here—not instead considering dismissal of the unamended complaint.

II. Any "Futility" Must Be Obvious, With "Far Reaching Analysis" Reserved for the Dismissal-Motion Context.

The Government argues that leave to amend should be denied because amending would be "futile." (Doc. No. 34, PageID 514-27.) But any finding of futility must be (A) based on obvious futility (B) under a less far-reaching analysis than that for an actual motion to dismiss.

(A) 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). This default policy necessarily requires that any futility exception be based on obvious futility.

That futility must be obvious is illustrated by the Government's own cited authorities. For example, the Government cites (Doc. No. 34, PageID 515) a magistrate judge's Order and Report and Recommendation in *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. But the amended complaint pleaded no facts showing "'[f]acial plausibility,'" i.e., "'factual content that allows the court to draw the reasonable inference that the [warden] is liable for the misconduct alleged.'" *Id.* at *1 (citations omitted). Without factual content

and given that 42 U.S.C. 1983 allows no vicarious liability, the court could draw no inference of facial plausibility. 2015 WL 1439347 at *4. So the magistrate judge recommended no leave to amend and that the case be dismissed based on the *already-fully-completed* briefing on the motion to dismiss. *Id.* at *3. The recommendation was adopted. 2015 WL 1439325 (S.D. Ohio March 27, 2015). (Of course, in the present case the motion to dismiss is *not* fully briefed.)[3]

(B) The analysis here must be less "far reaching" than that for an actual motion to dismiss, with Plaintiffs' burden thus lower: "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 amend. Accordingly, the Court declines to engage in a far reaching analysis pursuant to Fed. R. Civ. P. 12(b)(6) ...." *Smith v. Robbins & Myers*, 2012 WL 5845072 at *1 (S.D. Ohio Nov. 19, 2012). So Plaintiffs do not bear at this level the burden they will bear when they provide full briefing on a subsequent motion to dismiss.[4] Requiring otherwise would put the cart before the horse.

The Government wants Plaintiffs to meet a motion-to-dismiss standard of proof while arguing a motion for leave to amend, even before Plaintiffs have filed their opposition to the Government's motion to dismiss. That would be unjust, especially as the amended complaint addresses standing issues the Government asserted.

III. Amendment Would Not Be Futile.

Amendment would not be futile because key arguments on which the Government relies are

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[3] The requirement of *obvious* futility is also clear from *Thiokol Corp. v. Dept. of Treasury, State of Michigan*, 987 F.2d 376 (6th Cir. 1993), which upheld denial of leave to add a tax-refund claim under 42 U.S.C. 1983 because no recovery was possible as a matter of law. *Id.* at 383.

[4] The higher proof for the motion to dismiss is as follows, *id.*:

> To survive a motion to dismiss, a complaint must contain direct or inferential allegations with respect to all material elements required for recovery. *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 541 (6th Cir. 2007). The Court must accept plaintiff's well-pleaded factual allegations as true, and the allegations of the complaint must be at least plausible on their face. *Id.* at 541-542.

erroneous. The Government argues that amendment would be futile since dismissal is proper (i) because Plaintiffs lack standing and (ii) because of "all of the other deficiencies discussed in the Government's motion to dismiss." (Doc. No. 34, PageID 515-16.)[5] As can be discussed further in briefing on a motion to dismiss the amended complaint, this is erroneous. For now, Plaintiffs provide the following more limited response, focusing especially on two key standing elements in this case, i.e., (A) Plaintiffs' cognizable privacy interest and (B) the traceability of harms to governmental action. As will be seen, there is no futility here, let alone obvious futility.

A. Plaintiffs Have a Cognizable Privacy Interest Under the Conditions at Issue.

Central to Plaintiffs' harm is the violation of their privacy interest, especially by the account search and reporting requirements of FATCA and the IGAs. The Government says that there is no cognizable interest—framing the interest pejoratively as "the purported right to hide tax-related financial information from the Government" (Doc. No. 34, PageID 522)—and that thus Plaintiffs lack standing to challenge the search and reporting requirements.

While full briefing on this issue must await the complete and expanded briefing on a new motion to dismiss based on the amended complaint, Plaintiffs follow the Governments' lead and incorporate by reference prior briefing regarding their privacy interest including its preliminary-injunction memorandum (Doc. No. 8-1, PageId 156-59) and reply (Doc. No. 21, PageID 272-77,

[5] The Government does not incorporate by reference the page of its motion to dismiss that argues that Plaintiffs assert a mere "generalized grievance" (Doc. 27, PageID 328), so it apparently does not wish to argue that for present. Nonetheless, the fact that many are affected, as here, does not make for a generalized grievance, rather, "the plaintiff must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Warth v. Seldin*, 422 U.S. 490, 502 (1975). That is the case here. As the Ninth Circuit held, 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).

296-97). And next they highlight some reasons why they have a cognizable privacy interest.

Under FATCA, foreign financial institutions wanting to have U.S. account holders must search such accounts and report a broad range of information to the IRS. (Doc. 8-1, PageID 156.) The IGAs also require such institutions to search U.S. accounts and report similar information to the U.S. or their own government for passing on to the U.S. (*Id.*, PageID 156-57.)

Whether U.S. account holders have a privacy right in the those circumstances turns largely on different readings of *United States v. Miller*, 425 U.S. 435 (1976), which both sides cite. Because there are two possible readings of *Miller*, for present purposes it cannot be said that it is obvious that Plaintiffs lack standing because they have no privacy interest. *Miller* leaves the situation here as an open question, but provides guidance under which Plaintiffs have a strong argument that they in fact have a cognizable interest. That debate, briefly sketched next, has not been fully briefed and is not so obvious of resolution that it may fairly be said that amending the complaint would be obviously futile.

The Government's view (though only made here by incorporating by reference a dismissal brief to which Plaintiffs have not yet responded) is that *Miller* holds "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.'" (Doc. No. 27, PageID 352.)

But Plaintiffs' view is that this case fits solidly in the situation that *Miller* expressly said its holding did *not* reach and that there are solid reasons, based on *Miller*'s own language applicable to this sort of case, why a cognizable privacy right exists here. *Miller* would only stand for the Government's view with respect to a search targeted at an individual suspected of some wrong-doing 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 is exactly the sort of government activity that *Miller* expressly does *not* cover.[6] So people do reasonably expect privacy from the U.S. and foreign governments in their bank accounts under the situations at issue here, not expecting the bulk, blanket reporting of information under FATCA and IGAs without judicial oversight because lack of such oversight makes such searches "per se unreasonable: "[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." *Los Angeles v. Patel*, 135 S.Ct. 2443, 2452 (2015) (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 decisionmaker." *Id.* The Government attempted to distinguish *Patel* in its dismissal memorandum based on the different facts (by which most any case might be distinguished without affecting the transferable legal concept), but it does not

[6] 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. Such institutions get no chance for precompliance review before a neutral decisionmaker before reporting the sensitive information to the IRS and Treasury Department. 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 C.F.R. 1:1471-4(d)(3)(i); *see, e.g.*, Canadian IGA, art 2, § 1.

counter the controlling, transferable legal principle cited above in text. (Doc. No. 27, Page ID 353.)[7] So financial records held by financial institutions contain personal information protected by the Fourth Amendment and may only be subject to search after prior judicial approval or where the targets of the search are afforded an opportunity to have the search request reviewed by a neutral decisionmaker before complying.[8]

Now, those are two very different views on whether there is an interest. If standing turns on resolving that debate, the resolution should be based on full briefing of a new motion to dismiss, not on preliminary briefing. To decide the amendment is futile because there is no interest would be to decide a central issue of the case without full opportunity for arguing it.[9]

B. The Harm Plaintiffs Experience Is Fairly Traceable to Government Action.

The Government claims that two central harms Plaintiffs assert—(i) the bank-record searches and reporting and (ii) the problems in getting banking services for essential everyday-living accounts—are not traceable to government action so that Plaintiffs lack standing. Regarding the harm of unwanted searches and reporting described above, the Government argues that chal-

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[7] Moreover, waiving privacy in one area, e.g., providing information to a bank, doesn't waive it in other areas. *See Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1188 (8th Cir. 2000) ("Even information that is available to the general public in one form may pose a substantial threat to privacy if disclosed to the general public in an alternative form potentially subject to abuse."); *see also id.* (Referendum signers' "substantial privacy interest in [their] petition is not diminished by the fact that many individuals may have signed it in their business or entrepreneurial capacities."); *see also United States Dept. of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 770 (1989) ("[T]he fact that an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information.").

[8] The parties also differ over whether there is a "search," which has not yet been fully briefed. Plaintiffs incorporate by reference their preliminary argument on this issue in their preliminary-injunction reply. (Doc. No. 21, PageID 296-97.) As noted there, coercing foreign financial institutions to ferret out, i.e., search, and report is the very purpose of FATCA and the IGAs. This argument can be developed more fully on full briefing on a new motion to dismiss.

[9] Plaintiffs also incorporate by reference their preliminary standing arguments in their preliminary-injunction reply. (Doc. No. 21, PageID 272-77.)

lenged FATCA and IGA provisions do not actually make foreign financial institutions search and report. (*See, e.g.*, Doc. No. 27, PageID 352.) Regarding banking difficulties experienced by Plaintiffs (and myriad others, *see* Doc. No. 32-1, PageID 431-33 (discussing Democrats Abroad study)), the Government argues that these pervasive problems for Americans overseas are merely the result of third-party decisions. (*See, e.g.*, Doc. No. 34, PageID 521.)

The Government's arguments ignore the law on causation for standing purposes. While the following points of law may be more fully developed on full briefing on a new dismissal motion, a brief statement of the law suffices to show that indirect causation is enough for standing. For example, in *Warth v. Seldon*, the Supreme Court recognized that harm caused "indirectly" by a law is enough for standing. 422 U.S. 490, 504-05. It cited *Roe v. Wade*, 410 U.S. 113, 124 (1973), which allowed a pregnant woman to challenge a law forbidding doctors from doing abortions. That Texas law controlled doctors, not Jane Roe, but her indirect harm from the law regulating doctors was sufficient to give her standing.[10] 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). More cases could be cited, but these suffice for present purposes.

Regarding the unwanted searches and reporting, as noted above the Government argues that FATCA and the IGAs regulate foreign financial institutions, not Plaintiffs, and FATCA and the IGAs do not *require* the institutions to do such activity. Of course there is a 30% penalty on *all* U.S. payments to the financial institution if it does not search out and report information on U.S. accounts. The very purpose of that penalty is to cause foreign financial institutions to search out

[10] 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).

and report information on U.S. accounts, so Plaintiffs (and myriad other Americans abroad) are clearly harmed, even if it might be deemed "indirectly," by FATCA and the IGAs.[11] They have standing just as Jane Roe did as a result of her harm that was caused indirectly.

Regarding banking difficulties suffered by Plaintiffs (and myriad others, as studied by Democrats Abroad), those are also fairly traceable to FATCA and the IGAs. Banks that don't want to either comply with FATCA and the IGAs or face the 30% penalty take the third option of closing down U.S. accounts when the effective date of FATCA or the IGAs approaches (because no bank would want to await the effective date and be caught in noncompliance due to the penalty). That is enough for causation as a harm caused indirectly.[12]

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[11] The Government argues that "the 30% FATCA withholding taxes are not currently being enforced against FFIs or their recalcitrant account holders in the Czech Republic (where Mr. Johnson lives) or Israel (where Mr. Zell lives)." (Doc. No. 34, PageID 519.) But that does not matter for purposes of standing (or the present motion) because Plaintiffs challenge the IGAs here and if those are held unconstitutional then the 30% stick strikes.

And the Government's recurrent assertion that no one has standing unless a law is actually being enforced against them at present is erroneous because it suffices for plaintiffs to show "some actual or threatened injury." *Virginia v. American Booksellers Ass'n*, 4834 U.S. 383, 392 (1988). *See also Heckler v. Mathews*, 465 U.S. 728, 736 (1984); *Warth*, 422 U.S. at 499. In fact, in *Susan B. Anthony List v. Driehaus*, the U.S. Supreme Court overturned a Sixth Circuit holding that the plaintiff lacked standing by reaffirming the correctness of preenforcement standing where a plaintiff plans to engage in "arguably proscribed" activity. 134 S.Ct. 2334, 2344 (2014). That controls here.

[12] The Government responds to Plaintiffs' addition of formal paragraphs asserting that Plaintiffs meet the harm-causation-redressability elements of standing with the assertion that "[t]hese paragraphs are entirely conclusory and cannot establish standing through a formulaic recitation of its legal elements." (Doc. 34, PageID 517.) Of course one cannot establish standing *solely* by asserting the elements of standing, but that is *not* all Plaintiffs do. Plaintiffs provide examples of how they and others have suffered difficulties in getting the banking services needed for everyday living accounts as a result of FATCA and the IGAs. For example, in addition to verifying their own problems with banking services in the Amended Verified Complaint with Exhibits 1 and 2 (Doc. No. 32-1), Plaintiffs point to the Democrats Abroad study, which documents banking, employment, business and other problems as a result of FATCA and the IGAs. (*Id.*, PageID 431-431-33.) And regarding the unwanted searches and reporting on U.S. accounts, Plaintiffs state that "[a]s of October 1, 2015, FFI's have begun reporting information under their respective IGAs (*Id.*, PageID 435), which they do because of FATCA and the IGAs. Finally, there are cases finding lack of standing because one or more of the standing elements was not *asserted*, so to be

For present purposes, the foregoing suffices to show both that Plaintiffs have standing and (crucially here) there is no obvious futility regarding standing on these two key points. These and other standing arguments can be more fully developed in new dismissal briefing.

C. Other Considerations, Including the AIA, Do Not Require Dismissal.

The Government adds an incorporation-by-reference argument that, even given standing, "the proposed amended complaint would still be subject to dismissal for the other reasons explained in the Government's brief in support of its motion to dismiss (Doc. No. 27), *none of which has been addressed by the plaintiffs*." (Doc. No. 34, PageID 527-28 (emphasis added).)

Of course Plaintiffs have not fully addressed all those arguments because it has not yet filed its memorandum opposing the dismissal motion. *See supra* at n.1. That is a central problem of what the Government does here by seeking a briefing advantage by incorporating by reference a brief for which Plaintiffs have no parallel brief. And the massive incorporation-by-reference approach seriously inconveniences the Court. So the Government's assertion—"none of which has been addressed by plaintiffs"—is a reason to *grant* leave to amend, deny the dismissal motion as moot, and allow full briefing on a motion to dismiss when the Government files another.

Moreover, Plaintiffs *have* addressed, albeit in only a preliminary manner, the Government's non-standing grounds for dismissal. So following the Government's example, Plaintiffs will incorporate by reference such briefing as they now have (with apologies to the Court for the inconvenience), and briefly outline some of the arguments on those issues below. This will show that no obvious futility justifies denying leave to amend.

(1) The Government claims that "the Anti-Injunction Act, 26 U.S.C. § 7421(a), bars plain-

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sure the Government makes no such argument, Plaintiffs plainly assert harm, caused by government action, that will be redressable by requested relief.

tiffs' claims." (Doc. No. 34, PageID 527, *citing* Doc. No. 27 "at 9-16.") Plaintiffs have addressed this AIA issue at length in their preliminary injunction reply memo (Doc. No. 21, PageID 277-83), which they incorporate by reference. Plaintiffs explained that examination of the holdings and analysis in *Direct Marketing Ass'n v. Brohl*, 135 S.Ct. 1124 (2015), readily reveals that the Government's effort to distinguish *Brohl* is unavailing. Plaintiffs explained that in *Brohl* the unanimous Supreme Court equated the Tax Injunction Act (TIA) with the AIA as to terms used and analysis. *Id.* at 1129. *Brohl* held that information collection (as in FATCA and the IGAs) is a preliminary phase before the "assessment" and "collection" phases (terms shared in, and governed by, TIA and AIA), and it expressly rejected a proposed broader reading that would sweep in information collection that equates to the broader reading the Government proposes here. *Id.* at 1130-33. Plaintiffs also explained at length why the Government's argument that *Brohl* "does not foreclose a reading of the AIA that is broader" is erroneous and why *Brohl* may not be meaningfully distinguished factually. (Doc. No. 21, PageId 280-83.) Given Plaintiffs' extended refutation in their preliminary-injunction reply, the Government needed to argue here (and its in its incorporated dismissal motion) why Plaintiffs' prior refutation concerning AIA preclusion was wrong. But the Government's AIA argument continues to make the same argument about the controlling *Brohl* decision that it made before without refuting Plaintiffs' extended refutation of the Government's prior argument. (Doc. No. 27, PageID 336-38.) Instead, the Government relies on older cases purportedly showing that the Sixth Circuit interprets AIA broadly, though the contexts are not analogous (the most recent case cited prohibited enjoining an IRS *investigation*), then claims that those precedents remain binding precedent despite the unanimous Supreme Court holdings in *Brohl*. (*Id.*, PageID 334-37.) That is a remarkable, but clearly erroneous, argument that can be more fully addressed in full briefing on a new dismissal motion. But for present purposes, the

foregoing suffices to say that there is no obvious futility here.[13]

(2) The Government claims that "the Eighth Amendment claims are not ripe." (Doc. No. 34, PageID 527, *citing* Doc. No. 27 "at 16-19.") Plaintiffs can more fully address this on full briefing on a new dismissal motion, but for present they incorporate by reference their preliminary briefing. (Doc. No. 8-1, PageID 162-70; Doc. No. 21, PageID 272-77, 299-301.) At a minimum, there is no obvious futility evident here that might justify denying leave to amend.

(3) The Government claims that "the IGAs are a valid exercise of executive power." (Doc. No. 34, PageID 527, *citing* Doc. No. 27, PageID "at 19-26.") While Plaintiffs can address this further on full dismissal briefing, they have provided extensive preliminary briefing that they incorporate by reference. (Doc. No. 8-1, PageID 142-43, 147-56; Doc. No. 21, PageID 285-96.) As explained there, the IGAs are unconstitutional sole executive agreements, beyond the President's constitutional powers, not authorized by FATCA or preexisting treaties, and in fact inconsistent with FATCA. Accordingly, there is no obvious futility evident that might justify denying leave.

(4) The Government claims that "the equal protection claim fails as a matter of law." (Doc. No. 34, PageID 527, *citing* Doc. No. 27, PageID "at 26-27.") As with all of these incorporated arguments, Plaintiffs will be able to respond more fully in full briefing on a new dismissal motion, which is where such briefing should be done. For present, Plaintiffs incorporate by reference their prior preliminary briefing (Doc. No. 8-1, PageID 159-62; Doc. No. 298-99) and reaffirm that (i) Plaintiffs identified the class of people living abroad using "local bank accounts"

[13] While *Brohl* resolves that the AIA would not govern the reporting that Plaintiffs challenge herein, the Government's incorporation-by-reference argument (Doc. No. 34, PageID 527) also sweeps in its dismissal-motion argument that the 30% withholding penalties in FATCA's § 1471are really taxes that come within the AIA. Plaintiffs can brief this more fully on full dismissal-motion briefing, but for present they incorporate by reference their preliminary arguments showing why these are penalties, not taxes. (*See* Doc. No. 8-1, PageID 7-8, 162-70; Doc. 21, PageID 299-01.)

(narrowly defined) and (ii) the local bank accounts of those persons are treated differently than the local bank accounts of persons not living abroad, though both are similarly situated with regard to their need for local bank accounts. For present purposes, there is no obvious futility here justifying denial of leave to amend.

(5) The Government claims that "the Eighth Amendment claims are meritless." (Doc. No. 34, PageID 527, *citing* Doc. No. 27 "at 27-28.") Plaintiffs can more fully address this on full briefing on a new dismissal motion, but for present they incorporate by reference their preliminary briefing. (Doc. No. 8-1, PageID 162-70; Doc. No. 21, PageID 272-77, 299-301.) At a minimum, there is no obvious futility evident here that might justify denying leave to amend.

(6) The Government claims that "the Fourth Amendment claims are baseless." (Doc. No. 34, Page ID 527, *citing* Doc. No. 27 "at 28-30.") While Plaintiffs can address this further on full dismissal briefing, they have provided some preliminary briefing that they incorporate by reference. (Doc. No. 8-1, PageID 156-59; Doc. No. 21, PageID 296-97.) Plaintiffs further note that the Government's argument primarily relies on the issues of whether there is a cognizable privacy interest and whether Plaintiffs' harms are fairly traceable to Government actions, which have been briefed above. *See supra* Part III.A & B. As with all of the Government's standing and incorporation-by-reference arguments, there is no obvious futility here justifying denial of the motion before the Court.

D. Plaintiffs Have Standing.

1. Plaintiff Mark Crawford

The Government argues that Mr. Crawford lacks standing because he has no ongoing injury and because the alleged injury is traceable to foreign banks, not action by the Defendants. (Doc. No. 34, PageID 520-521.) However, Mr. Crawford continues to be harmed by the forced disclo-

sure of his financial records. Mr. Crawford does not want the financial details of his accounts disclosed to the United States government, the IRS, the Treasury, or foreign governments, and he has a cognizable privacy interest in said accounts. *See supra* Part III.A. Financial records are subject to Fourth Amendment protections and may only be subject to search after prior judicial approval or where the targets are afforded an opportunity to have the search reviewed by a neutral decision maker. *Id.* Further, Mr. Crawford is also subject to banking difficulties which are fairly traceable to FATCA and the IGAs. *See supra* Part III.B. Were it not for FATCA, the IGAs, and the 30% withholding penalty, Mr. Crawford would not be subject to the harm he is currently forced to endure. This injury will be redressed by the challenged provisions and the IGAs being deemed unconstitutional.

2. Senator Rand Paul

The Government argues that Senator Paul lacks standing. (Doc. No. 34, PageID 521.) However, Senator Paul now suffers, and will continue to suffer, the concrete and particularized injury of not being able to vote against the FATCA IGAs. This injury was caused by the unconstitutional and illegal action creating the IGAs and will be redressed by the IGAs being held beyond constitutional and statutory authority.

3. Plaintiff Roger Johnson

The Government argues that Mr. Johnson lacks standing because FATCA reporting is not a cognizable injury to a legally protected interest. (Doc. No. 34, PageID 522.) However, Mr. Johnson continues to be harmed by the forced disclosure of his financial records. Mr. Johnson does not want the financial details of his accounts disclosed to the United States government, the IRS, the Treasury, or foreign governments, and he has a cognizable privacy interest in said accounts. *See supra* Part III.A. Financial records are subject to Fourth Amendment protections and may

only be subject to search after prior judicial approval or where the targets are afforded an opportunity to have the search reviewed by a neutral decision maker. *Id.* Further, Mr. Johnson is also subject to banking difficulties which are fairly traceable to FATCA and the IGAs. *See supra* Part III.B. Were it not for FATCA, the IGAs, and the 30% withholding penalty, Mr. Johnson would not be subject to the harm he is currently forced to endure. This injury will be redressed by the challenged provisions and the IGAs being deemed unconstitutional.

4. Plaintiff JUDr Katerina Johnson

The Government argues that JUDr. Johnson lacks standing because, as a foreign citizen, she does not have standing to sue for alleged violations of U.S. constitutional rights. (Doc. No. 34, PageID 523.) JUDr Johnson has standing to sue for violations of U.S. constitutional rights because she has developed "sufficient connection with this country to be considered part of that community" by marrying a U.S. citizen.[14] This marriage affords her the opportunity to obtain a green card, to live in the U.S., and the protections of the Fourth Amendment. This Fourth Amendment protection prevents her financial records from being searched without prior judicial approval or an opportunity to have the search reviewed by a neutral decision maker. *See supra* Part III.A. Further, the harm she has and continues to suffer is fairly traceable to FATCA and the IGAs. *See supra* Part III.B. Were it not for FATCA, the IGAs, and the 30% withholding tax, JUDr Johnson would not be forced to maintain separate accounts from her husband. This injury will be redressed by the challenged provisions and the IGAs being deemed unconstitutional.

[14] *See U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (citations omitted) which suggests "that 'the people' protected by the Fourth Amendment ... refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."

5. Plaintiff Stephen J. Kish

The Government argues that Mr. Kish lacks standing. (Doc. No. 34, PageID 524.) However, Mr. Kish continues to be harmed by the forced disclosure of his financial records. Mr. Kish does not want the financial details of his accounts disclosed to the United States government, the IRS, the Treasury, or foreign governments, and he has a cognizable privacy interest in said accounts. *See supra* Part III.A. Financial records are subject to Fourth Amendment protections and may only be subject to search after prior judicial approval or where the targets are afforded an opportunity to have the search reviewed by a neutral decision maker. *Id.* Further, Mr. Kish is also subject to banking difficulties which are fairly traceable to FATCA and the IGAs. *See supra* Part III.B. Were it not for FATCA, the IGAs, and the 30% withholding penalty, Mr. Kish would not be subject to the harm he is currently forced to endure. This injury will be redressed by the challenged provisions and the IGAs being deemed unconstitutional.

6. Plaintiff Daniel Kuettel

The Government argues that Mr. Kuettel lacks standing because he has no ongoing injury to himself and because he cannot sue on his daughter's behalf. (Doc. No. 34, PageID 524-525.) Mr. Kuettel, while no longer a U.S. citizen, continues to be harmed by actions fairly traceable to FATCA and the IGAs. *See supra* Part III.B. Were it not for FATCA, the IGAs, and the 30% withholding tax, Mr. Kuettel would be able to transfer ownership of the account to his daughter. *Id.* However, with the current situation, if he were to transfer ownership of the account to his daughter, it would be his responsibility to share information regarding that account.[15] This would force him to violate his daughter's legally protected interest in her financial records without judicial oversight. *See supra* Part III.A. This injury will be redressed by FATCA, FBAR, and the

[15] This is because his daughter is a minor, unable to submit FBAR reports herself.

IGAs being deemed unconstitutional.

7. Plaintiff Lois Kuettel

The Government argues that Lois Kuettel lacks standing because her alleged harm is traceable to bank policy, not action by the Defendants. (Doc. No. 34, PageID 525-526.) Lois Kuettel continues to experience harm and banking difficulties that is fairly traceable to FATCA and the IGAs. *See supra* Part III.B. Were it not for FATCA, the IGAs, and the 30% withholding tax, Lois Kuettel would be able to open an account in her name and would receive numerous benefits for doing so. This injury will be redressed by FATCA, FBAR, and the IGAs being deemed unconstitutional.[16]

8. Plaintiff Donna-Lane Nelson

The Government argues that Ms. Nelson lacks standing because her alleged harm stems from third party conduct not action by the Defendants. (Doc. No. 34, PageID 526.) However, while no longer a U.S. citizen, Ms. Nelson continues to experience banking difficulties because of her ties to the U.S.. These banking difficulties are fairly traceable to FATCA and the IGAs. *See supra* Part III.B. Were it not for FATCA, the IGAs, and the 30% withholding penalty, Ms. Nelson would not be subject to the banking difficulties she continues to experience. This injury will be redressed by the challenged provisions and the IGAs being deemed unconstitutional.

9. Plaintiff Richard Adams

The Government argues that Mr. Adams lacks standing because the alleged harm is remote, speculative, and traceable to foreign banks, not action by the Defendants. (Doc. No. 34, PageID

[16] The Government focuses on the fact that she is unable to employ an account with preferential interest rates as being traceable to bank policy. While Lois does suffer from this harm, the central harm here is that her father cannot transfer money to an account in her name without triggering FBAR requirements that she cannot fulfill. That central harm results from the FBAR reporting requirement and suffices to give her standing because it is fairly traceable to FBAR.

526-527.) However, Mr. Adams continues to be harmed by the forced disclosure of his financial records. Mr. Adams does not want the financial details of his accounts disclosed to the United States government, the IRS, the Treasury, or foreign governments, and he has a cognizable privacy interest in said accounts. *See supra* Part III.A. Financial records are subject to Fourth Amendment protections and may only be subject to search after prior judicial approval or where the targets are afforded an opportunity to have the search reviewed by a neutral decision maker. *Id.* Further, Mr. Adams is also subject to banking difficulties which are fairly traceable to FATCA and the IGAs. *See supra* Part III.B. Were it not for FATCA, the IGAs, and the 30% withholding penalty, Mr. Adams would not be subject to the harm he is currently forced to endure and would not have to consider legally separating his assets from his wife. This injury will be redressed by the challenged provisions and the IGAs being deemed unconstitutional.

10. Plaintiff L. Marc Zell

Government argues that Mr. Zell lacks standing. (Doc. No. 34, PageID 527.) However, Mr. Zell continues to be harmed by the forced disclosure of his financial records. Mr. Zell does not want the financial details of his accounts disclosed to the United States government, the IRS, the Treasury, or foreign governments, and he has a cognizable privacy interest in said accounts. *See supra* Part III.A. Financial records are subject to Fourth Amendment protections and may only be subject to search after prior judicial approval or where the targets are afforded an opportunity to have the search reviewed by a neutral decision maker. *Id.* Further, Mr. Zell is also subject to banking difficulties which are fairly traceable to FATCA and the IGAs. *See supra* Part III.B. Were it not for FATCA, the IGAs, and the 30% withholding penalty, Mr. Zell would not be subject to the harm he is currently forced to endure. This injury will be redressed by the challenged provisions and the IGAs being deemed unconstitutional.

Conclusion

For purposes of a motion to amend, the foregoing readily shows that amending the complaint would not be obviously futile. The complaint provides direct or inferential allegations with respect to all material elements required for recovery. *Weisbarth*, 499 F.3d at 541. The Court must accept plaintiff's well-pleaded factual allegations as true, and the allegations of the complaint are plausible on their face. *Id.* at 541-542. Rule 15(a)(2) provides that "a court should freely give leave [to amend a complaint] when justice so requires." Because justice requires that leave be granted, Plaintiffs ask the Court to grant the present motion for leave to amend the complaint (Doc. No. 32), order Plaintiffs to file their amended complaint (Doc. No. 32-1) forthwith, and dismiss as moot the Government's present motion to dismiss (Doc. No. 26).

Respectfully Submitted,

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Certificate of Service

I hereby certify that on December 7, 2015, the foregoing document was filed electronically using the Court's CM/ECF filing system. I certify that all participants in the case registered CM/ECF users and that service will be accomplished by the CM/ECF system. The following persons should be notified:

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