IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Mark Crawford, **Senator Rand Paul**, in his official capacity as a member of the United States Senate, **Roger Johnson**, **Daniel Kuettel**, **Stephen J. Kish**, **Donna-Lane Nelson**, and **L. Marc Zell**, *Plaintiffs*, v. **United States Department of the Treasury**, **United States Internal Revenue Service**, and **United States Financial Crimes Enforcement Network**, *Defendants*.	**Civil Case No.** 15-250 **PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** **ORAL ARGUMENT REQUESTED**

Plaintiffs move for preliminary injunctive relief on all counts set forth in their complaint. Plaintiffs are likely to succeed on the merits of their claims and have met the other requirements for preliminary injunctive relief. For this reason, the Court should grant Plaintiffs' Motion for Preliminary Injunction by declaring unconstitutional and enjoining Defendants from enforcing the following:

A. Agreement Between the Government of the United States of America and the Government of Canada to Improve International Tax Compliance through Enhanced Exchange of Information under the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, U.S.-Can., Feb. 5, 2014, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Canada-2-5-2014.pdf (hereinafter "Canadian IGA");

B. Canadian IGA, art. 2;

C. Canadian IGA, art. 2, § 2(a)(6);

D. Canadian IGA, art. 4, § 2;

E. Agreement between the United States of America and the Czech Republic to Improve International Tax Compliance and with Respect to the United States Information and Reporting Provisions Commonly Known as the Foreign Account

Tax Compliance Act, U.S.-Czech Rep., Aug. 4, 2014, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Czech-Republic-8-4-2-14.pdf (hereinafter "Czech IGA");

F. Czech IGA, art. 2;

G. Czech IGA, art. 2, § 2(a)(6);

H. Czech IGA, art. 4, § 2;

I. Agreement between the Government of the United States of America and the Government of the State of Israel to Improve International Tax Compliance and to Implement FATCA, U.S.-Isr., Jun. 30, 2014, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Israel-6-30-2014.pdf (hereinafter "Israeli IGA");

J. Israeli IGA, art. 2;

K. Israeli IGA, art. 2, § 2(a)(6);

L. Israeli IGA, art. 4, § 2;

M. Agreement between the United States of America and Switzerland for Cooperation to Facilitate the Implementation of FATCA, U.S.-Switz., Feb. 14, 2013, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Switzerland-2-14-2013.pdf (hereinafter "Swiss IGA");

N. Swiss IGA, arts. 3, 5;

O. 26 U.S.C. §§ 1471(a), 1471(b)(1)(D), 1471(c)(1), 1471(c)(1)(C);

P. 26 U.S.C. § 6038D(c)(4);

Q. 31 U.S.C. § 5321(a)(5)(C);

R. 26 C.F.R. §§ 1.1471-2T(a)(1);

S. 26 C.F.R. §§ 1.1471-4(a)(1), 1.1471-4(d), 1.1471-4(d)(3)(ii);

T. 26 C.F.R. §§ 1.1471-4T(b)(1);

U. 26 C.F.R. §§ 1.6038D-4(a)(5), 1.6038D-4(a)(6), 1.6038D-4(a)(8);

V. the Foreign Account Tax Compliance Act's ("FATCA") aggregate gross income reporting requirement of Form 8966, IRS, Instructions for Form 8966 at 10, http://www.irs.gov/pub/irs-pdf/i8966.pdf; and

W. the Report of Foreign Bank and Financial Accounts' ("FBAR") account-balance reporting requirement articulated at FinCEN, BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114) 15 (June 2014), http://www.fincen.gov/forms/files/FBAR%20Line%20Item%20Filing %20Instructions.pdf.

Plaintiffs request oral argument in this case. The opportunity to hear all sides orally and allow them to respond to questions the court may have will better enable the court to reach a just result.

Dated: July 14, 2015

Respectfully Submitted,

s/ Joseph C. Krella

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Certificate of Service

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Mark Crawford, **Senator Rand Paul**, in his official capacity as a member of the United States Senate, **Roger Johnson**, **Daniel Kuettel**, **Stephen J. Kish**, **Donna-Lane Nelson**, and **L. Marc Zell**, *Plaintiffs*, v. **United States Department of the Treasury**, **United States Internal Revenue Service**, and **United States Financial Crimes Enforcement Network**, *Defendants*.	**Civil Case No.** 15-250 **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** **ORAL ARGUMENT REQUESTED**

Introduction

This case presents several challenges to the Foreign Account Tax Compliance Act ("FATCA"), the intergovernmental agreements ("IGAs") unilaterally negotiated by the United States Department of the Treasury ("Treasury Department") to supplant FATCA in the signatory countries, and the Report of Foreign Bank and Financial Accounts ("FBAR") administered by the United States Financial Crimes Enforcement Network ("FinCEN"). These laws and agreements impose unique and discriminatory burdens on U.S. citizens living and working abroad. For the reasons set forth in the pages that follow, the challenged provisions are unconstitutional and Defendants should be enjoined from enforcing them.

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Facts

The facts of this case are set out in Plaintiffs' Verified Complaint for Declaratory and Injunctive Relief, filed simultaneously with Plaintiffs' Motion for Preliminary Injunction and are incorporated here by reference. Fed. R. Civ. P. 10(c).

Standard of Review

To obtain a preliminary injunction, plaintiffs must establish (1) that they are likely to succeed on the merits of their claims, (2) that they are likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in their favor, and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Each of the four factors must "be balanced against one another and should not be considered prerequisites to the grant of a preliminary injunction." *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 690 (6th Cir. 2014) *cert. denied sub nom.*, 135 S. Ct. 950 (2015) (internal quotation marks omitted). "When the government is a party," the last two factors of the preliminary injunction analysis—the balance of hardships and the public interest—"merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir.) *cert. denied*, 134 S. Ct. 2877 (2014); *Marchwinski v. Howard*, 309 F.3d 330, 338 (6th Cir. 2002) *reh'g en banc granted, judgment vacated*, 319 F.3d 258 (6th Cir. 2003) *and on reh'g en banc*, 60 F. App'x 601 (6th Cir. 2003) (Concluding that "the third and fourth factors that comprise the preliminary injunction analysis are substantially identical" where a government is a party.)

Summary of Argument

Plaintiffs seek preliminary injunctive relief on all claims.

The first claim concerns the validity of the Canadian, Czech, Israeli, and Swiss IGAs used

by the Treasury Department to circumvent FATCA's more cumbersome requirements in favor of the agency's preferred regulatory scheme.[1] These agreements are unconstitutional. At the most fundamental level, the IGAs lack any constitutional basis. They have not been submitted to the Senate for its advice and consent under Article II, they have not been submitted to the Senate and the House for approval as congressional-executive agreements, and they have not been authorized by any treaty. They can stand, then, only as sole executive agreements and then only if they fall within the President's independent constitutional authority to make international agreements. But the power "To lay and collect Taxes" is expressly and exclusively reserved to Congress under Article I of the Constitution. The President lacks any independent authority over such matters. For this reason alone, the IGAs are unconstitutional. But they are also unconstitutional for another related reason. Sole executive agreements cannot contravene legislative enactments. *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 659 (4th Cir. 1953), *aff'd*, 348 U.S. 296, 75 S. Ct. 326, 99 L. Ed. 329 (1955). Yet, the IGAs do just that. They override FATCA by eliminating the requirement that foreign financial institutions register with the IRS directly under FATCA and by nullifying the right of individuals to refuse to waive foreign privacy laws that would otherwise prohibit their banks from disclosing their account information to the IRS. This second ground thus provides another independent reason that the

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[1] Canadian IGA, U.S.-Can., Feb. 5, 2014, available at http://www.treasury.gov/ resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Canada-2-5-2014.pdf (hereinafter "Canadian IGA"); Czech IGA, U.S.-Czech Rep., Aug. 4, 2014, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Czech-Republic-8-4-2-14.pdf (hereinafter "CzechIGA"); Israeli IGA, U.S.-Isr., Jun. 30, 2014, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Israel-6-30-2014.pdf (hereinafter "Israeli IGA"); Swiss IGA, U.S.-Switz., Feb. 14, 2013, available at http://www.treasury.gov/ resource-center/tax-policy/treaties/Documents/ FATCA-Agreement-Switzerland-2-14-2013.pdf (hereinafter "Swiss IGA").

IGAs are unconstitutional.

The second claim addresses the information reporting provisions imposed on foreign financial institutions by FATCA and the IGAs. These provisions permit the federal government to conduct wide-ranging, indiscriminate searches of the private financial records of American citizens held by foreign financial institutions without providing any opportunity for judicial oversight. Such unbridled discretion to pry into the private financial information of American citizens violates the Fourth Amendment. *U.S. v. Miller*, 425 U.S. 435, 444 n.6 (1976); *Los Angeles v. Patel*, No. 13-1175, 576 U.S. ___, slip op. at 9–10 (2015). Financial records held by financial institutions contain personal information protected by the Fourth Amendment and so 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. *Patel*, No.13-1175, slip op. at 9–10.

The third claim aims at the heightened reporting requirements for foreign bank accounts under FATCA, the IGAs, and the FBAR. These reporting requirements are unconstitutional to the extent that they require U.S. citizens living abroad to report more detailed information about their local bank accounts than U.S. citizens living in the United States. While the local bank accounts of citizens in the United States are only subject to reporting of the amount of interest paid to the accounts, the local bank accounts of citizens living abroad are subject to reporting of a much broader and more intrusive set of information. Citizens holding local bank accounts in foreign countries must report, or allow their bank to report, not only the amount of interest paid to their accounts but also the amount of any income, gain, loss, deduction, or credit recognized on the account; whether the account was opened or closed during the year; and the balance of the

account. This violates the core principle of equal protection guaranteed by the Fifth Amendment. The fact that the accounts of U.S. citizens living abroad are maintained at foreign financial institutions is not sufficient to justify the greater intrusion into their private financial affairs.

The three remaining claims address the constitutionality of three separate fines imposed by FATCA and the Bank Secrecy Act under the Excessive Fines Clause of the Eighth Amendment. Fines are subject to the Excessive Fines Clause when they are intended to punish, as opposed to remediate, the offender. *Austin v. United States*, 509 U.S. 602, 609–10 (1993). And, when such fines are grossly disproportional to the gravity of the offense, they are unconstitutional. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

The fourth claim, then, challenges the 30% "tax" imposed by FATCA on payments to foreign financial institutions from U.S. sources when these foreign institutions choose not to help the IRS pry into the bank accounts of their U.S. customers (the "FFI Penalty"). The 30% "tax" is not a tax at all but rather a penalty designed to accomplish indirectly through financial coercion what the U.S. government cannot mandate directly through regulation. It is imposed on noncompliant foreign financial institutions without regard to whether the institution even has American account holders suspected of tax evasion. FATCA does not criminalize or prohibit foreign financial institutions from choosing not to comply with its mandates. As a penalty, the 30% "tax" lacks all proportion to the harm posed by an institution's noncompliance. The IRS already receives the information it would otherwise receive from a noncompliant institution through an individual's tax return, FATCA report, and FBAR for any foreign accounts. The FATCA FFI Penalty is therefore unconstitutional under the Excessive Fines Clause.

Similarly, the fifth claim challenges the 30% "tax" imposed by FATCA on account

holders who exercise their rights under the statute not to identify themselves as American citizens to their banks and to refuse to waive privacy protections afforded their accounts by foreign law (the "Passthrough Penalty"). Like the "tax" on noncompliant foreign financial institutions, the "tax" on individual account holders is not a "tax" but a mechanism for deterring individuals from maintaining their privacy. The Passthrough Penalty ignores a citizen's actual tax liability altogehter. It is imposed regardless of whether the American account holder owes any taxes or has otherwise evaded any U.S. tax obligations. An account holder can dutifully and truthfully file their taxes, identify their foreign accounts to the IRS, and file their FATCA and FBAR reports each year and yet still be subjected to a 30% fine on all payments from their bank to their accounts. And, like the 30% FFI Penalty, the government loses only a source of information, not the information itself, as the same information must be reported to the IRS by the individual anyway. The FATCA Passthrough Penalty therefore is unconstitutional under the Eighth Amendment.

Finally, the sixth claim challenges the penalty imposed under the Bank Secrecy Act for "willful" failures to file an FBAR for foreign accounts, which tops out at the greater of $100,000 or 50% of the value of the unreported account (the "Willfulness Penalty"). There's no doubt that the Willfulness Penalty is designed to punish. It provides an elevated penalty for a failure to file based solely on the state of mind of the filer despite the fact that the underlying conduct remains the same. It is also plain that the maximum Willfulness Penalty is grossly out of proportion to the failure to file an FBAR as the only misconduct is a failure to file the report not a failure to report the account or pay taxes on the funds in the account. Like the FATCA penalties, the unreported information is reported elsewhere, at least in part, as part of the individual's tax return and on the

individual's FATCA report, if applicable. Moreover, the minimum fine under the Willfulness Penalty far exceeds the maximum criminal fine that can be imposed for the same conduct by twenty-fold. Accordingly, the Willfulness Penalty is unconstitutional under the Excessive Fines Clause.

Argument

I. Plaintiffs are Likely to Succeed on the Merits of their Claims

A. The IGAs are Unconstitutional Sole Executive Agreements

1. The IGAs are Sole Executive Agreements

There are four types of international agreements available to the Executive Branch: (1) treaties, (2) congressional-executive agreements, (3) treaty-based agreements, and (4) sole executive agreements. John E. Nowak & Ronald D. Rotunda, Treatise on Const. L. § 6.8(a); Restatement (Third) of Foreign Relations Law § 303. Each type derives from a different source of constitutional power. Treaties arise under Article II of the Constitution and require the President to obtain the "advice and consent" of two-thirds of the Senate. U.S. Const. art. II, § 2, cl. 2. Congressional-executive agreements arise under the concurrent constitutional powers of Congress and the President. Nowak & Rotunda, *supra* § 6.8(a). They either require a prior consent from Congress authorizing the President to conclude an agreement or must be approved by Congress after the fact. Nowak & Rotunda, *supra* § 6.8(a). Treaty-based agreements arise under an existing Article II treaty that authorizes the President to conclude additional agreements related to the treaty. *Id.* Sole executive agreements arise under the President's independent constitutional powers, such as the power as commander-in-chief of the armed forces or his power to receive foreign ambassadors and recognize foreign governments. *Id.* Such agreements involve

no action by Congress because they arise under powers exclusively reserved to the Executive Branch. *Id.*

The Executive Branch has long accepted these four types of agreements as the exclusive means for the President and his agencies to conclude international agreements. Since at least 1955, the Executive Branch, under the auspices of the U.S. State Department, has utilized the Circular 175 procedure to choose the form of a given international agreement (i.e., treaty, congressional-executive agreement, treaty-based agreement, sole executive agreement).[2] U.S. Dep't of State, Circular 175 Procedure, http://www.state.gov/s/l/treaty/c175/ (last visited July 6, 2015); *see also* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236, 1249 and n.32 (2008) (discussing the history and substance of the Circular 175 Procedure, which is the guidance document used by the U.S. State Department since 1955 for selecting the appropriate type of international agreement). The Circular 175 procedure identifies the four aforementioned types of agreements as the exclusive bases for concluding international agreements under the Constitution. 11 Foreign Affairs Manual ("FAM") §§ 732.2, 723.2-1, 723.2-2.

Each of the first three types of agreements (i.e., treaties, congressional-executive agreements, and treaty-based agreements) require action by at least one chamber of Congress. Only the fourth type of agreement—sole executive agreements—can be brought into force, if at all, without congressional action. 11 FAM § 723.2-2(C); Nowak & Rotunda, *supra* § 6.8(a). Treaties must receive the consent of two-thirds of the Senators present. U.S. Const. art. II, § 2, cl.

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[2] The Circular 175 procedure was originally contained in a department circular but has now been codified in the State Department's Foreign Affairs Manual in subchapter 720 of Volume 11. 11 Foreign Affairs Manual § 721.

2; 11 FAM § 723.2-1. Congressional-executive agreements must be authorized or approved by a majority vote in both houses of Congress like ordinary legislation. 11 FAM § 723.2-2(B); *see also* Nowak & Rotunda, *supra* § 6.8(a). And treaty-based agreements must be made pursuant to authorization contained in an existing Article II treaty. 11 FAM § 723.2-2(A); Nowak & Rotunda, *supra* § 6.8(a).

By default, the Canadian, Czech, Israeli, and Swiss IGAs (collectively "the IGAs") must be sole executive agreements. They have not been submitted to the Senate for advice and consent. U.S. Dep't of State, Treaties Pending in the Senate (updated as of April 27, 2015), http://www.state.gov/s/l/treaty/pending/index.htm (last visited July 6, 2015). Nor have they been authorized by Congress. FATCA authorizes the Treasury Department to adopt regulations and "other guidance," it does not authorize the making of international agreements like the IGAs. 26 U.S.C. § 1474(f). Finally, the IGAs are not authorized by an existing treaty. Allison Christians, *The Dubious Legal Pedigree of IGAs (and Why it Matters)*, 69 Tax Notes Int'l 565, 567 (2013) (The "IGAs are not treaty-based agreements.").

Accordingly, because the IGAs have not been authorized or approved by the Senate, Congress, or by a valid treaty, they must be stand or fall as sole executive agreements.

2. Sole Executive Agreements are Limited to a Narrow Set of Powers Exclusively Within the President's Independent Constitutional Authority

Sole executive agreements are only valid insofar as they fall within the President's independent constitutional powers. *Sec. Pac. Nat. Bank v. Gov't & State of Iran*, 513 F. Supp. 864, 872 (C.D. Cal. 1981); 11 FAM § 723.2-2(C) ("The term 'sole executive agreement' is appropriately reserved for agreements made solely on the basis of the constitutional authority of

the President."); Nowak & Rotunda, Treatise on Const. L. § 6.8(a) ("[T]he President may conclude an executive agreement based on his exclusive presidential powers."); Restatement (Third) of Foreign Relations Law § 303 ("[T]he President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution."). Of the these powers, generally four (and sometimes a fifth) is cited as authorizing some limited presidential power to make sole executive agreements:

A. the President's power as "Commander in Chief of the Army and Navy of the United States" (U.S. Const. art. 2, § 2, cl. 1);

B. the President's power to "receive Ambassadors and other public Ministers" (U.S. Const. art. 2, § 3);

C. the President's duty to "take Care that the Laws be faithfully executed" (U.S. Const. art. 2, § 3);

D. the President's "executive Power" (U.S. Const. art. 2, § 1, cl. 1); and

E. the President's power "to make Treaties" and "appoint Ambassadors" (U.S. Const. art. 2, § 2, cl. 2).

See 11 FAM 723.2-2(C) (listing the first four presidential powers as authority for sole executive agreements); Hannah Chang, *International Executive Agreements on Climate Change*, 35 Colum. J. Envtl. L. 337, 352 (2010) (same and listing the fifth power); Restatement (Third) of Foreign Relations Law § 303 cmt. g (1987) (same and listing the fifth power); Sharon G. Hyman, *Executive Agreements: Beyond Constitutional Limits?*, 11 Hofstra L. Rev. 805, 824 (1983) (same); Craig Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 Yale L.J. 345, 351–370 (1955) (same).

The contours of the President's powers are not clearly delineated, but it is clear that they are not unlimited. Oona A. Hathaway, *Presidential Power over International Law: Restoring the*

Balance, 119 Yale L.J. 140, 210 (2009) ("The President has the power to make international agreements entirely on his own inherent constitutional authority. Yet that power is not unlimited."). If interpreted too broadly, the President's powers could swallow whole the system of checks and balances achieved through the separation of powers. Michael D. Ramsey, *Executive Agreements and the (Non)treaty Power*, 77 N.C. L. Rev. 133, 144 (1998) ("the executive agreement power cannot be fully interchangeable with the Article II, Section 2 power: . . . for it would wholly remove the 'check' of Senate consent which the Framers struggled and compromised to write into the Constitution." (quotation marks omitted)); Hyman, *supra*, 11 Hofstra L. Rev. at 829 ("However, if each of the President's enumerated powers is read broadly enough, his power to conclude agreements solely on the basis of his independent constitutional powers becomes virtually limitless."). Accordingly, sole executive agreements are generally accepted when they concern military matters such as declaring war and armistice agreements, recognizing foreign states or governments, and settling international claims. Restatement (Third) of Foreign Relations Law § 303 cmt. g; Hannah Chang, *International Executive Agreements on Climate Change*, 35 Colum. J. Envtl. L. 337, 342 (2010). For this reason, only a small fraction of international agreements are generally concluded as sole executive agreements, Hathaway, 119 Yale L.J. at 212 (calculating that fewer than 10% of international agreements by the U.S. were concluded as sole executive agreements between 1989 and 2009), and, of those that are, "[t]he great majority. . . are of a routine character[,]" Restatement (Third) of Foreign Relations Law § 303 cmt. g.

But, whatever the outer limits of the President's power to conclude sole executive agreements, a power reserved to Congress cannot support a sole executive agreement,

particularly where Congress has already legislated on the issue at hand. *Guy W. Capps, Inc.*, 204 F.2d at 659. The President's "power is at its lowest ebb" when he "takes measures incompatible with the expressed or implied will of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952). And, in that instance, "he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.*

3. Sole Executive Agreements Cannot Override a Statute Passed by Congress

Sole executive agreements may not be "inconsistent with legislation enacted by the Congress in the exercise of its constitutional authority." 11 FAM § 732.2-2(C); *accord Guy W. Capps, Inc.*, 204 F.2d at 658 (holding a sole executive agreement to be void where it contravened a federal statute and relied on constitutional power expressly reserved to Congress); *Swearingen v. United States*, 565 F. Supp. 1019, 1021 (D. Colo. 1983) ("[E]xecutive agreements do not supersede prior inconsistent acts of Congress because, unlike treaties, they are not the 'supreme Law of the Land.'"); Restatement (Third) of Foreign Relations Law § 115 reporters' n. 5 ("[A]n executive agreement made by the President on a matter expressly within the constitutional authority of Congress, such as the regulation of commerce with foreign nations, is subject to the controlling authority of Congress and will not be given effect in the face of an inconsistent Congressional act"); Nowak & Rotunda, *supra* § 6.8(e) (Explaining that a sole executive agreement cannot override a prior act of Congress except perhaps when it rests wholly upon the President's independent powers).

Were it otherwise, the President could unilaterally delegate Congress's legislative powers to himself and nullify any duly enacted laws he finds disagreeable. *Guy W. Capps*, 204 F.2d at 658–60. The opposite rule—allowing the President to nullify statutes—would allow the President

to exercise power through international agreement that he could never exercise otherwise. As one scholar put it:

> [T]he President may not commit the United States to an international agreement on his own if he would be unable to carry out the obligations created by the agreement on his own in the absence of an agreement. Hence, the President cannot enter an agreement that requires the appropriation of funds or declares war without congressional approval of the agreement, because the President cannot take these actions in the absence of an agreement. The President may not use a sole executive agreement with another nation, in other words, to expand his powers beyond those granted to him in the Constitution.

Oona A. Hathaway, *supra*, 119 Yale L.J. at 212. As a practical matter, the opposite rule would allow the President to usurp Congress as the primary legislative body. It would create a horse race between the President and Congress, each striving to make the latest pronouncement of law on every contested matter. There can be no doubt that, under such a system, Congress would in all likelihood be relegated to the sidelines as the relative advantage in terms of speed and deftness lies with the President. And, even if Congress were able to keep up, it is unlikely that it could consistently secure a super-majority to override the President's veto.

Article I plainly sets out the law-making process and clearly limits the President's role to signing or objecting to bills passed by Congress. U.S. Const. art. I, § 7. As the Supreme Court put it:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

4. The IGAs are Unconstitutional because Tax Agreements are not within the President's Independent Constitutional Authority and cannot Override FATCA

For purposes of this case, this Court need not decide the scope of the President's power to make sole executive agreements because the agreements at issue here are tax agreements falling squarely within Congress's power "To lay and collect Taxes" under Article I.[3] The Canadian, Czech, Israeli, and Swiss IGAs (collectively "the IGAs") are fundamentally international agreements concerning the collection of taxes. The IGAs are agreements to collect taxes in substance and in effect. Their express purpose is to relieve foreign financial institutions of the burdens of complying with FATCA and facilite the U.S. government's tax collection efforts. Canadian IGA, *supra*, preamble; Czech IGA, *supra*, preamble; Israeli IGA, *supra*, preamble; Swiss IGA, *supra*, preamble. The IGAs require the Canadian, Czech, Israeli, and Swiss governments to collect financial information about U.S. citizens on behalf of the U.S. and relieve foreign financial institutions of the burdens of reporting the information directly to the IRS as mandated by Congress. Canadian IGA, *supra*, arts. 2, 4; Czech IGA, *supra*, arts. 2, 4; Israeli IGA, *supra*, arts. 2, 4; Swiss IGA, *supra*, art. 5. The Swiss IGA also enables Swiss financial institutions to provide financial information in compliance with FATCA contrary to Swiss law. Swiss IGA, *supra*, art. 4.

There can be no doubt that the information sought by the IGAs on U.S. citizens is tax related. Not only is the financial information at which the IGAs are targeted the information that FATCA mandates foreign financial institutions to report to the IRS, it fits comfortably within Congress's definition of tax "return information" under section 6103 of the Internal Revenue

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[3] The taxing power is committed to Congress alone, and the Constitution reserves no remainder for the President to act of his own accord. *See generally* U.S. Const. arts. I, II.

Code. The IGAs require foreign governments to provide return information concerning U.S. citizens including the taxpayer's name, address, account number, account balance, and the interest paid or credited to the account. *See, e.g.*, Canadian IGA, *supra*, art. 2, § 2(a). There, Congress defines tax "return information" as

> a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense.

26 U.S.C. § 6103(b)(2)(A).

What's more, the IGAs directly contradict the statute enacted by Congress. FATCA mandates that foreign financial institutions report the tax return information of their U.S. citizen account holders directly to the IRS using the FATCA Report (Form 8966). 26 U.S.C. § 1471(b)(1)(C); 26 C.F.R. §§ 1.1471-4(d)(3)(v), -4(d)(3)(vi). The IGA's, on the other hand, rewrite this requirement and permit foreign financial institutions to report a U.S. taxpayer's tax return information to their home government and relieve them of the burden of individual registration and reporting. *See, e.g.*, Canadian IGA, *supra*, arts. 2, 4; Swiss IGA, *supra*, art. 5. FATCA also requires each foreign financial institution "to attempt to obtain a valid and effective waiver" of any law that would "prevent the reporting" of any information required by FATCA "from each holder of [an] account." 26 U.S.C. § 1471(b)(1)(F)(i). The IGAs circumvent this requirement by (a) employing the foreign governments as the collecting agents of the U.S. tax authorities, *see, e.g.*, Canadian IGA, *supra*, arts. 2, 4, or (b) nullifying the foreign laws that

protect such information and necessitate notification to the account holder, *see* Swiss IGA*, supra*, art. 4.

The statute balances important interests of privacy and consent against administrative convenience. Congress has weighed those interests and struck the balance it believes is in the best interest of the public. It has decided that Americans' financial information should not be exposed to more parties than necessary by requiring direct reporting to the IRS by financial institutions. And it has determined that Americans should have the right to consent to disclosure under FATCA when the laws of the foreign country in which they conduct their financial affairs would lead them to expect privacy and non-disclosure. This may not be the balance most convenient for the Treasury Department and the IRS, but it is the choice that Congress has made, and the Executive Branch is bound to abide by it. The Treasury and IRS may not unilaterally rewrite FATCA to suit their preferences using sole executive agreements like the IGAs. *Guy W. Capps, Inc.*, 204 F.2d at 658; *Swearingen*, 565 F. Supp. at 1021.

Therefore, the Canadian, Czech, Israeli, and Swiss IGAs are unconstitutional sole executive agreements because they exceed the scope of the President's independent constitutional power to make international agreements and abrogate FATCA.[4]

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[4] This Court has authority to set aside the IGAs under section 706 of the Administrative Procedure Act ("APA"), which endows a court with power to "hold unlawful and set aside agency action . . . found to be – . . . (B) contrary to constitutional right, power, privilege, or immunity [and] . . . (D) without observance of procedure required by law." 5 U.S.C. § 706. As sole executive agreements, the IGAs constitute "agency action" within the meaning of section 706 of the APA. They may therefore be held unlawful and set aside because they are unconstitutional and were not adopted in accordance with the procedure set forth in the Constitution.

B. The Account Reporting Requirements of FATCA and the IGAs are Unconstitutional Under the Fourth Amendment

FATCA requires foreign financial institutions to report a broad range of information about the accounts of United States account holders to the United States government, including:

(a) the name, address, and TIN of the account holder;

(b) the account number;

(c) the average calendar year or year-end balance or value of the account;

(d) the aggregate gross amount of interest paid or credited to the account during the year; and

(e) the aggregate gross amount of all income paid or credited to an account for the calendar year less any interest, dividends, and gross proceeds.

26 U.S.C. § 1471(c)(1); 26 C.F.R. § 1.1471-4(d)(3)(ii); IRS, Instructions for Form 8966 at 10, http://www.irs.gov/pub/irs-pdf/i8966.pdf. The IGAs require foreign financial institutions to report similar information to the United States government directly or first to their domestic national government authority who then reports it to the United States on their behalf. Canadian IGA, *supra*, art. 2, § 2; Czech IGA, *supra*, art. 2, § 2; Israeli IGA, *supra*, art. 2, § 2; Swiss IGA, *supra*, arts. 3, 5. Neither scheme provides for any judicial oversight of these searches. The IRS and Treasury Department are not required to obtain a warrant or otherwise seek judicial approval to seize the account information of U.S. citizens. And foreign financial institutions are not afforded an opportunity to obtain precompliance review before a neutral decisionmaker before reporting the sensitive account information to the IRS and Treasury Department. Both FATCA and the IGAs simply mandate that foreign financial institutions report the specified account information of all of their U.S. account holders to the United States government or face a 30% penalty for noncompliance. 26 C.F.R. § 1.1471-4(d)(3)(i); *see, e.g.*, Canadian IGA, art. 2, § 1.

Such Orwellian surveillance of America's citizens is inimical to the fundamental notions of privacy enshrined in the Bill of Rights and violates the Fourth Amendment, which provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . ." U.S. Const., amend. IV. The Fourth Amendment is violated where, as here, "the Government, through 'unreviewed executive discretion,' [is permitted to make] a wide-ranging inquiry that unnecessarily 'touch(es) upon intimate areas of an individual's personal affairs.'" *Miller*, 425 U.S. at 444 n.6 (quoting *California Bankers Assn. v. Shultz*, 416 U.S. 21, at 78-79 (1974) (Powell, J., concurring)). In such instances, searches may only be conducted, at a minimum, after some "invocation of the judicial process" because "the potential for abuse is particularly acute." *California Bankers Assn.*, 416 U.S. at 79 (Powell, J., concurring); *see also*, *Miller* 425 U.S. at 444 n.6 (distinguishing situation where "the Government has exercised its powers through narrowly directed subpoenas Duces tecum subject to the legal restraints attendant to such process"). Indeed, "the 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*, No. 13-1175, slip op. at 9 (internal quotation marks 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.* at 10.

Here, the broad, unbridled authority granted to the federal government by FATCA and the IGAs to rove the sensitive financial information of American citizens and their banks runs contrary to the dictates of the Fourth Amendment. The compelled reporting of Americans'

private financial account information to the federal government by foreign financial institutions "touch[es] upon intimate areas of an individual's personal affairs" because "[f]inancial transactions can reveal much about a person's activities, associations, and beliefs." *California Bankers Assn.*, 416 U.S. at 78-79 (Powell, J., concurring). Such a "wide-ranging inquiry" of the private financial records of American citizens held by foreign financial institutions is "unnecessar[y]" as the federal government remains free to investigate any instances of suspected tax fraud or evasion and to search a suspect's bank records by obtaining a judicially authorized warrant. It is not necessary for the federal government to invade the privacy of every American citizen with a foreign account just because the government suspects that some small fraction of such persons may be violating the law. Laws permitting indiscriminate searching of private financial records belonging to private individuals and private financial institutions circumvents the very essence of the protections provided by the Fourth Amendment because such searches are per se unreasonable in the absence of prior approval from the judiciary. *Patel*, No. 13-1175, slip op. at 9. But, even if the searches authorized by FATCA and the IGAs could be readily exempted from the requirement to seek prior judicial approval, they would still fail constitutional scrutiny because they fail to afford Plaintiffs' financial institutions "an opportunity to obtain precompliance review before a neutral decisionmaker" before facing the 30% penalty imposed under section 1471(a) of Title 26 for noncompliance with the reporting requirements. *Id.* at 9–10.

Thus, however the searches authorized by FATCA and the IGAs are characterized, the information reporting provisions of FATCA—26 U.S.C. § 1471(c)(1); 26 C.F.R. § 1.1471-4(d); and IRS, Instructions for Form 8966 at 10, http://www.irs.gov/pub/ irs-pdf/i8966.pdf—and of the IGAs—Canadian IGA, *supra*, art. 2; Czech IGA, *supra*, art. 2; Israeli IGA, *supra*, art. 2; Swiss

IGA, *supra*, arts. 3, 5—are unconstitutional under the Fourth Amendment because they fail to provide any mechanism for judicial oversight.

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

The financial accounts of citizens living abroad are subject to more burdensome and extensive reporting, and by extension less privacy, than the local bank accounts of citizens living in the United States. The only financial information reported to the IRS about domestic accounts is the amount of interest paid to the accounts during a calendar year, 26 U.S.C. §§ 6049(a), (b); 26 C.F.R. §§ 1.6049-4(a)(1), 1.6049-4T(b)(1). But, for a foreign account, the information reported to the IRS includes not only the interest paid to the account, 26 USC § 1471(c)(1)(C); 26 C.F.R. §§ 1.1471-4(d)(3)(ii), -4(d)(4)(iv); Canadian IGA, art. 2, § 2(a)(4); Czech IGA, art. 2, § 2(a)(4); Israeli IGA, art. 2, § 2(a)(4); Swiss IGA, arts. 3, 5, but also the amount of any income, gain, loss, deduction, or credit recognized on the account, 26 C.F.R. § 1.6038D-4(a)(8), whether the account was opened or closed during the year, *id.* § 1.6038D-4(a)(6), and the balance of the account, 26 USC §§ 1471(c)(1)(C), 6038D(c)(4); 26 CFR §§ 1.1471-4(d)(3)(ii), 1.6038D-4(a)(5); Canadian IGA, art. 2, § 2(a)(6); Czech IGA, art. 2, § 2(a)(6); Israeli IGA, art. 2, § 2(a)(6); Swiss IGA, arts. 3, 5; FinCEN, BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114) 15 (June 2014), http://www.fincen.gov/forms/files/FBAR%20Line%20Item%20Filing%20Instructions.pdf.

In practice, the increased reporting requirements for foreign financial accounts discriminate against U.S. citizens living abroad. The foreign bank accounts of citizens living abroad are of a different character than the foreign bank accounts of citizens living in the United States. For citizens living abroad, their “foreign” bank accounts are nothing more than the

checking and savings accounts used for everyday, routine financial activity such as the payment of daily personal expenses (e.g., food, clothing, housing, fuel, utilities, etc.) and other recurring expenses necessary to support daily life in modern society (hereinafter "local bank accounts").[5] These local bank accounts, when held at a financial institution in the same country where the account holder resides, are wholly domestic for the U.S. citizen living abroad. And, as a matter of vertical and horizontal equity, situate the citizen living abroad in the same manner as the citizen living in the United States holding local bank accounts at American institutions. Thus, with respect to U.S. citizens living abroad holding local bank accounts, the heightened reporting requirements imposed by FATCA, the IGAs, and the FBAR violate the basic right to equal protection of the law guaranteed by the Fifth Amendment.[6]

The guiding principle of equal protection "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Equal protection requires the government to show that "the classification drawn by [a] statute is rationally related to a legitimate state interest." *Id.* at 440. Here, citizens living abroad and citizens living in the United States who have local bank accounts are similarly situated in all material respects. In each instance, the local bank accounts serve to support the

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[5] The term "local bank accounts" is not used here to refer to brokerage, retirement, or other similar accounts held primarily for the purpose of investment and earning a higher return on principal.

[6] The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V. The Supreme Court has held that this Clause includes a guarantee of equal protection equivalent to that expressly provided for under the Equal Protection Clause of the Fourteenth Amendment (i.e., a state may not "deny to any person within its jurisdiction the equal protection of the laws"). *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995); *United States v. Ovalle*, 136 F.3d 1092, 1095 (6th Cir. 1998) ("An equal protection claim against the federal government is analyzed under the Due Process Clause of the Fifth Amendment.").

day-to-day financial activities of the individuals. They are not established to evade taxes. And it is not reasonable to expect that U.S. citizens living abroad could make due without such local bank accounts. For, in this modern era where the basic day-to-day activities of life are becoming increasingly intertwined with the digital world, bank accounts can no longer be considered a luxury. Without bank accounts, a person cannot meaningfully access basic financial tools such as checks, debit cards, credit cards, electronic payment services, and direct deposit services. These tools are required to participate in many aspects of modern commerce.

The only difference between U.S. citizens living abroad and citizens living in the United States is their location. This difference, however, is of no consequence to the constitutional analysis. For both types of citizen, the local bank account serves the same purpose and has the same financial profile. The fact that the local bank accounts of citizens living abroad are not held in the United States bears no rational relationship to any legitimate state interest the federal government might have in prying into the private affairs of citizens living abroad. The government does not have a greater interest in knowing the account balances of U.S. citizens living abroad than it does in knowing the account balance of U.S. citizens living in the United States. Nor, for that matter, does it have a greater interest in any of the other information required to be disclosed only about accounts held in foreign countries.

Accordingly, 26 USC §§ 1471(c)(1)(C), 6038D(c)(4), 26 C.F.R. §§ 1.1471-4(d)(3)(ii), 1.6038D-4(a)(5), 1.6038D-4(a)(6), 1.6038D-4(a)(8), Canadian IGA, art. 2, § 2(a)(6); Czech IGA, art. 2, § 2(a)(6); Israeli IGA, art. 2, § 2(a)(6); Swiss IGA, arts. 3, 5; and the FBAR account-balance reporting requirement, FinCEN, BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114) 15 (June 2014),

http://www.fincen.gov/forms/files/ FBAR%20Line%20Item%20Filing%20Instructions.pdf, are unconstitutional.

D. The FATCA FFI Penalty is Unconstitutional under the Excessive Fines Clause

Under FATCA, payments from U.S. sources to foreign financial institutions not compliant with FATCA's dictates are subject to a 30% "tax" (the "FFI Penalty"). 26 U.S.C. § 1471(a); 26 C.F.R. § 1.1471-2T(a)(1). The FFI Penalty is FATCA's proverbial stick and is intended to force compliance with FATCA. Without it, foreign financial institutions would likely not comply with FATCA, and Plaintiffs' private financial information would not be disclosed to the United States government. The FFI Penalty is designed to punish noncompliant foreign financial institutions and is constitutionally excessive under the Eighth Amendment.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Plaintiffs challenge falls under the second clause of the Amendment—the Excessive Fines Clause—which "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *Austin*, 509 U.S. at 609–10. The Clause is not limited only to fines that are criminal in nature but extends to civil fines as well. *Id.* at 610. Its scope is determined by whether the fine at issue serves punitive, as opposed to remedial, purposes. *Id.*; *Bajakajian*, 524 U.S. at 328. Fines calibrated for retributive or deterrent purposes are considered to be for the purpose of punishment. *Austin*, 509 U.S. at 610. A fine may serve both punitive and remedial purposes and yet still be governed by the Excessive Fines Clause. *Bajakajian*, 524 U.S. at 329 n.4. The presence of a single punitive purpose is sufficient to bring a fine within the purview of the Excessive Fines Clause. *Id.*; *see also Austin*, 509 U.S. at 610 ("We need not exclude the

possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause.").

As the plain text of the Amendment indicates, fines governed by the Excessive Fines Clause must not be "excessive." U.S. Const. amend. VIII. The "touchstone" of the excessiveness analysis is the "principle of proportionality," requiring the amount of the fine to be contrasted with the gravity of offense. *Bajakajian*, 524 U.S. at 334. Fines that are grossly disproportionate to the gravity of the offense run afoul of the Eighth Amendment. *Id.* at 334. "In deciding whether that line has been crossed," the Supreme Court has identified three "general criteria" to guide the proportionality analysis: (1) "the degree the defendant's reprehensibility or culpability"; (2) "the relationship between the penalty and the harm to the victim caused by the defendant's actions"; and (3) "the sanctions imposed in other cases for comparable misconduct." *Cooper Indus., Inc. v. Leatherman Tool Grp.*, Inc., 532 U.S. 424, 434–35 (2001).

The FATCA FFI Penalty is subject to the Excessive Fines Clause as it is designed to punish noncompliant foreign financial institutions. U.S. Senator Carl Levin has characterized it as a "sanction," Letter from Senator Carl Levin to IRS Commissioner Douglas H. Shulman and Emily McMahon (Jan. 11, 2012), *available at* http://www.steptoe.com/publications/Levin.pdf, and the IRS has admitted that it is "not intended to raise revenue," Press Release, U.S. Dep't of the Treasury, Remarks by Acting Assistant Secretary Emily McMahon at the NY State Bar Association Annual Meeting (Jan. 25, 2012), http://www.treasury.gov/press-center/press-releases/Pages/tg1399.aspx. The FFI Penalty is designed to coerce foreign financial institutions to comply with FATCA by reporting information on their U.S. account holders. Thus, it is designed to deter noncompliance. This is enough to sweep the FFI Penalty within the ambit

of the Eighth Amendment. *See Austin*, 509 U.S. at 610 ("[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment[.]" (emphasis added) (internal quotation marks omitted)).

The punishment inflicted by the FFI Penalty—a 30% "tax" on payments from U.S. sources—is grossly disproportional to the gravity of the offense it seeks to punish. The FFI Penalty is poorly calibrated to the degree of a foreign financial institution's culpability or reprehensibility. The FFI Penalty is blind to the circumstances of individual institutions, asking only whether they have complied. It is imposed on all noncompliant foreign financial institutions regardless of whether the noncompliant institutions have American account holders. Moreover, the offense (i.e., noncompliance with FATCA) is not considered serious. FATCA does not prohibit noncompliance. *See id.* Foreign financial institutions remain free to ignore FATCA so long as they are willing to accept a substantially reduced amount from payments from U.S. sources. *See id.* Nor do noncompliant foreign financial institutions fall into the class of persons to whom FATCA is principally addressed—tax evaders. FATCA does not seek any information regarding the financial activities and U.S. tax liability of the foreign financial institutions themselves. It is concerned only with the U.S. account holders of such institutions who may be evading taxes.

The FFI Penalty also fails along the second proportionality factor. It bears no relation to the harm caused by a foreign financial institution's noncompliance. The only "victim" of a noncompliant foreign financial institution is the United States government. The harm, if any, is purely informational in nature and ultimately minimal. The government loses only a *source* for

the information, it does not lose the information altogether. Comparable information is reported to the IRS directly in three other ways: (1) individuals must report foreign accounts to the IRS annually on their tax return, IRS, U.S. Individual Income Tax Return, Form 1040, Schedule B (2014), available at http://www.irs.gov/pub/irs-pdf/f1040sb.pdf; (2) individuals must report foreign accounts if the aggregate value of all account is more than $10,000 at any time during the calendar year on the Report of Foreign Bank and Financial Accounts (FinCEN Form 114) ("FBAR"), FinCEN, BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114) 13–22 (June 2014), http://www.fincen.gov/forms/files/FBAR%20Line%20Item%20Filing%20Instructions.pdf; and (3), under section 6038D of FATCA, individuals must report accounts with more than $50,000 on the last day of the tax year or more than $75,000 at any other time during the tax year, IRS, Statement of Specified Foreign Financial Assets, Form 8938 (2014), http://www.irs.gov/pub/irs-pdf/f8938.pdf. And, if a foreign financial institution has no U.S. account holders, the U.S. government suffers no harm whatsoever.

Finally, there are no criminal penalties for foreign financial institutions that do not comply with FATCA and subject themselves to the FFI Penalty.

Accordingly, the FATCA FFI Penalty—26 U.S.C. § 1471(a); 26 C.F.R. § 1.1471-2T(a)(1)—is grossly disproportionate to the gravity of the offense and is unconstitutional under the Eighth Amendment.

E. The FATCA Passthrough Penalty is Unconstitutional under the Excessive Fines Clause

FATCA and the IGAs require foreign financial institutions to "deduct and withhold a tax equal to 30 percent of" any payments made to recalcitrant account holders (the "Passthrough

Penalty”). 26 U.S.C. § 1471(b)(1)(D); 26 C.F.R. §§ 1.1471-4(a)(1), 1.1471-4T(b)(1); Canadian IGA, art. 4, § 2; Czech IGA, art. 4, § 2; Israeli IGA, art. 4, § 2; Swiss IGA, art. 3. A person becomes a recalcitrant account holder if they 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) a waiver of a foreign law that would prevent the foreign financial institution from reporting the information to the IRS under FATCA. *Id.* § 1471(d)(6). This 30% “tax” serves to punish recalcitrant account holders for engaging in otherwise lawful actions and is constitutionally excessive under the Eighth Amendment.

The predominant purpose of the FATCA Passthrough Penalty is to punish recalcitrant account holders for failing to identify their private financial accounts. It is therefore subject to the Excessive Fines Clause. The penalty does not vary with a recalcitrant account holder’s tax liability. *See id.* § 1471(b)(1)(D). And it is not otherwise calibrated to the extent of harm caused to the government by the recalcitrant account holder’s refusal to provide identifying information relating to their account. *See id.* Instead, the FATCA Passthrough Penalty is deducted and withheld even if a recalcitrant account holder has disclosed all of their income to the IRS and paid all of their U.S. tax liability. *See id.* The penalty is intended only to deter persons from being recalcitrant account holders and therefore serves a punitive purpose, *Austin*, 509 U.S. at 610.

As a punitive measure, the FATCA Passthrough Penalty is grossly disproportionate to the gravity of the offense it seeks to deter. It targets only a failure to report information. To become subject to the penalty, a person need only refuse to provide either identifying information or a waiver of foreign privacy laws to the financial institutions holding their accounts, 26 U.S.C.

§ 1471(d)(6). Yet, the underlying activities (i.e., owning a foreign bank account, refusing to identify as a U.S. person to the financial institution holding the account, and refusing to waive certain foreign privacy laws that protect an account holder's financial information from disclosure) are not otherwise illegal. Indeed, FATCA does even not prohibit persons from being recalcitrant account holders. *See generally*, *id.* §§ 1471–1474. Nor do recalcitrant account holders fall into the class of persons to whom FATCA is principally addressed—tax evaders. A person can simultaneously report all their income and have satisfied all of their U.S. tax liability and be a recalcitrant account holder. The two are simply not related.

Second, the only "victim" of a recalcitrant account holder's refusal to provide identifying information or a waiver, if there is a "victim," is the U.S. government, which is deprived of the information that the account holder of a particular account at a particular foreign financial institution is a U.S. person. The foreign financial institutions themselves cannot be "victims" because they can avoid any penalties under FATCA by closing the recalcitrant account holder's account. 26 U.S.C. § 1471(b)(F)(ii). And any harm caused to the federal government by the loss of information is minimal because the information is not lost to the government. *See* 524 U.S. at 339 (discussing minimal harm caused to government by individual's failure to report cash being transported out of country). Comparable information is reported to the IRS directly in three other ways: (1) individuals must report foreign accounts to the IRS annually on their tax return, IRS, U.S. Individual Income Tax Return, Form 1040, Schedule B (2014), *available at* http://www.irs.gov/pub/irs-pdf/f1040sb.pdf; (2) individuals must report foreign accounts if the aggregate value of all account is more than $10,000 at any time during the calendar year on the Report of Foreign Bank and Financial Accounts (FinCEN Form 114) ("FBAR"), FinCEN, BSA

Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114) 13–22 (June 2014), http://www.fincen.gov/forms/files/FBAR%20Line%20Item%20Filing%20Instructions.pdf; and (3), under section 6038D of FATCA, individuals must report accounts with more than $50,000 on the last day of the tax year or more than $75,000 at any other time during the tax year, IRS, Statement of Specified Foreign Financial Assets, Form 8938 (2014), http://www.irs.gov/pub/irs-pdf/f8938.pdf.

Taken together, it is apparent that the conduct at issue—being a recalcitrant account holder—does not give rise to a level of reprehensibility or culpability sufficient to justify a 30% fine on all payments to the account holder's account. This conclusion is only buttressed by the fact that Congress has not assigned criminal penalties for being a recalcitrant account holder.

Accordingly, the FATCA Passthrough Penalty—26 U.S.C. § 1471(b)(1)(D); 26 C.F.R. §§ 1.1471-4(a)(1), 1.1471-4T(b)(1); Canadian IGA, art. 4, § 2; Czech IGA, art. 4, § 2; Israeli IGA, art. 4, § 2; Swiss IGA, art. 3.—is unconstitutional under the Eighth Amendment.

F. The FBAR Willfulness Penalty is Unconstitutional under the Excessive Fines Clause

Without question, the Excessive Fines Clause applies to the penalty imposed for willfully failing to file the Report of Foreign Bank and Financial Accounts ("FBAR") under 31 U.S.C. § 5321(a)(5)(C) (the "Willfulness Penalty"). The penalties imposed by section 5321 for failure to file the FBAR report are gradated according to the filer's state of mind. The base fine is $10,000 for each failure to file an FBAR report. *Id.* § 5321(a)(5)(B)(i). If the failure to file is due to "reasonable cause" and the account is "properly reported," the fine is reduced to $0. *Id.* § 5321(a)(5)(B)(ii). But, if the failure to file is "willful[ ]" the fine is increased to $100,000 or 50% of the balance of the unreported account, whichever is greatest. *Id.* § 5321(a)(5)(C)(i). Yet,

in each instance, the violation is the same—the filer has failed to file an FBAR report. *Id.* § 5321(a)(5)(A). This scheme of fines can only be explained as punishment. Its purpose is to deter violations by increasing the fines according to the filer's knowledge of the filing requirement and to impose greater retribution on those who are less innocent. If the scheme of fines for FBAR filing violations had been intended as remedial, the fines would be calibrated to the extent of harm caused by the unfiled FBAR report. The filer's intent has no bearing on the harm caused by the absent report. *Bajakajian*, 524 U.S. at 339. A negligent failure to file causes the same harm as a willful failure to file.

That the Willfulness Penalty is constitutionally excessive is equally certain. The *Bajakajian* case is particularly instructive here. There the Supreme Court had little trouble concluding that a fine of $357,144 for violating 31 U.S.C. § 5316(a)(1)(A) which requires a person to report that they are transporting more than $10,000 in cash outside the United States. 524 U.S. at 340. In striking down the fine, the Court was particularly motivated by the fact that the "crime was solely a reporting offense" and that the underlying transaction (i.e., international transport of currency) was permissible under the law. *Id.* at 337. The Court also focused on the lack of any harm caused by the failure to report. *Id.* at 339. According to the Court, the

> [f]ailure to report [the] currency affected only one party, the Government, and in a relatively minor way. There was no fraud on the United States, and [the failure] caused no loss to the public fisc. Had [the] crime gone undetected, the Government would have been deprived only of the information that $357,144 had left the country.

Id. Finally, in reaching its conclusion that such a fine was unconstitutionally excessive, the Court noted that the violator was not part of "the class of persons for whom the statute was principally designed: . . . a money launderer, a drug trafficker, or a tax evader," *id.* at 337–38, and also that the fine was "many orders of magnitude" greater than the $5,000 fine available under the

Sentencing Guidelines, *id.* at 338, 340.

The FBAR Willfulness Penalty, like the fine struck down in *Bajakajian*, targets a crime that is solely a reporting offense where the underlying activity (i.e., owning a foreign bank account) is patently legal. *See* 31 U.S.C. § 5321(a)(5)(C) (authorizing civil fines for violations of section 5314); 31 C.F.R. § 1010.350(a) (requiring FBAR report under section 5314). Moreover, the failure to file an FBAR report does not harm anyone except the U.S. government by depriving it of the information that the filer has a foreign bank account. But informational harm in this case is even more minor than that at issue in *Bajakajian* because here the foreign account required to be reported on the FBAR must be noted on the filer's annual tax return, *see, e.g.*, IRS Form 1040, Schedule B (2014), *available at* http://www.irs.gov/pub/irs-pdf/f1040sb.pdf. Nor does the mere failure to report an otherwise lawful account place the filer in "the class of persons for whom the statute is principally designed" because it is legal to have a foreign bank account. Moreover, the FBAR Willfulness Penalty is "many orders of magnitude" greater than the $5,000 maximum fine available under the Sentencing Guidelines, United States Sentencing Commission, Guidelines Manual §§ 2S1.3(a)(2), 5E1.2(c)(3) (categorizing a violation of 31 U.S.C. § 5314 as a level 6 offense which equates to a minimum fine of $500 and a maximum fine of $5,000). At a minimum, for an unreported $10,000 account, the FBAR Willfulness Penalty can reach $100,000 and is even higher for accounts with balances over $200,000. 31 U.S.C. § 5321(a)(5)(C)(i).

Accordingly, the FBAR Willfulness Penalty—31 U.S.C. § 5321(a)(5)(C)— is unconstitutional under the Eighth Amendment.

II. Plaintiffs will Suffer Irreparable Harm

Plaintiffs will suffer irreparable harm if the laws challenged here are not enjoined.

Plaintiffs want to keep their financial account information private and do not want their account information shared with foreign governments, the IRS, or the Treasury Department. (Compl. ¶¶ 23, 37–38, 48, 69, 86.) Yet both FATCA and the IGAs, if allowed to remain in force for the duration of this lawsuit, will compel Plaintiffs and the foreign financial institutions holding Plaintiffs' accounts to disclose Plaintiffs' account information. Specifically, section 6038D of FATCA and the FBAR will require Plaintiffs to disclose their account balances to the IRS and Treasury Department annually. 26 U.S.C. § 6038D(c)(4); FinCEN, BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114) 15. Similarly, section 1471 of FATCA will require Plaintiffs' financial institutions to disclose Plaintiffs' account balances to the IRS and Treasury Department annually. *Id.* § 1471(c)(1)(C). In addition, the IGAs will compel Plaintiffs' financial institutions to disclose not only Plaintiffs' account balances but also the existence of and location of their bank accounts, their account numbers, and the interest received to the accounts annually. Canadian IGA, *supra*, arts. 2, 4; Czech IGA, *supra*, arts. 2, 4; Israeli IGA, *supra*, arts. 2, 4; Swiss IGA, *supra*, arts. 3, 5. The disclosure of this information will cause irreparable harm to Plaintiffs. The insight gleaned from information about Plaintiffs' private financial affairs, once disclosed, cannot be unlearned.

In addition, Plaintiff Kuettel will suffer irreparable harm from the continued chill on his right to open a college savings account for his daughter without being subjected to the unconstitutional fines of $100,000 or more in the highly likely event that she does not file an FBAR. Each day that the unconstitutional penalties remain enforceable, Plaintiff Kuettel loses

the benefit of the advantages offered by a child's savings account such as better interest rates and discounts for local businesses. (Compl. ¶ 56–57.)

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

The public interest analysis "primarily addresses the impact on non-parties rather than parties." *Sammartano v. First Judicial Dist. Court, in & for Cnty. of Carson City*, 303 F.3d 959, 974 (9th Cir. 2002). Here, the public interest favors an injunction for all claims because there is no public interest in the enforcement of unconstitutional laws. *See G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."). Thus, because Plaintiffs have demonstrated that they are likely to succeed on the merits of their claims that the challenged laws are unconstitutional, the public interest favors an injunction. Even with an injunction, the government remains free to investigate tax evasion. The public's interest in the collection of lawfully imposed taxes will remain unrestrained.

Moreover, an injunction against the IGAs is in the public interest because an injunction will ensure that the financial account information of U.S. citizens, including those with accounts in Canada, Czech Republic, Israel, and Switzerland, are not subject to unwarranted disclosure to foreign governments, the IRS, and the Treasury Department. Such an injunction will also ensure that the financial accounts of citizens living abroad in those countries are accorded the same level of privacy as the accounts of citizens living in the United States and place American citizens living abroad on equal footing with American citizens living in the United States. An injunction against the FATCA Passthrough Penalty will ensure that the financial accounts of American citizens living abroad are afforded the same privacy protections under the domestic laws of the

jurisdiction in which they live as the citizens of those same jurisdictions. An injunction against the FBAR Willfulness Penalty is in the public interest because it will preserve the right of parents to provide funds for their children's future without fear that they, their children, or the account they provide for their children will be subject to unconstitutionally excessive penalties.

Conclusion

Plaintiffs are likely to succeed on the merits of their claims and have met the other requirements for preliminary injunctive relief. For this reason, the Court should grant Plaintiffs' Motion for Preliminary Injunction.

Dated: July 14, 2015

Respectfully Submitted,

s/ Joseph C. Krella

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Certificate of Service

I hereby certify that the foregoing document will be served as soon as the summons is available on the following persons by certified mail, return receipt requested:

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