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

Mark Crawford, **Senator Rand Paul**, in his official capacity as a member of the United States Senate, **Roger Johnson**, **Daniel Kuettel**, **Stephen J. Kish**, **Donna-Lane Nelson**, and **L. Marc Zell**, *Plaintiffs*,	
v.	**Civil Case No. 3:15-cv-00250-TMR**
United States Department of the Treasury, **United States Internal Revenue Service**, and **United States Financial Crimes Enforcement Network**, *Defendants*.	Judge Thomas M. Rose

Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss

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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. Further, there are only four types of international agreements available to the Executive Branch, and the Government agrees that the IGAs are executive agreements.

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The reporting requirements violate the equal-protection rights of Americans living abroad as to their "local bank accounts," narrowly defined to mean those used for daily living activities. The local bank accounts of Americans in America are not subject to the reporting requirements imposed on the local bank accounts of Americans living abroad. The Government's justification is that such reporting is an important tool for tax collection, but it already has many effective tools for such tax collection without the challenged provisions. 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 that 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 balances 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.

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The challenged penalties are in fact penalties because, given compliance, no tax would result. The 30% rate is not "remedial" because U.S. citizens are otherwise subject to their usual tax rate, which is lower for most people. And Plaintiffs could not get the Government's suggested refund without complying with provisions with which they do not want to comply. The government suggests this is a facial challenge and penalties might not be excessive, but Plaintiffs explain how challenged provisions unconstitutionally affect them. And an excessive-fines claim turns on a proportionality test. As applied to the sort of ordinary citizens here at bar, FATCA and FBAR penalties are unconstitutional.

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I. Introduction

On September 15, 2015, the Government filed a Motion to Dismiss and accompanying Memorandum in Support of said Motion (Doc. Nos. 26, 27.) The Government argued the following:

A. The Suit Should Be Dismissed for Lack of Subject Matter Jurisdiction; and

B. The Complaint Fails to State a Claim upon Which Relief Can Be Granted.

(Memorandum in Support of Defendants' Motion to Dismiss, Doc. No. 27, PageID 324.) Plaintiffs now timely file their response in Opposition to Defendants' Motion to Dismiss.

On October 30, 2015, Plaintiffs' filed a Motion for Leave to File Amended Verified Complaint for Declaratory and Injunctive Relief (Doc. No. 32) ("Amendment Motion"). Plaintiffs' amended complaint addresses certain Government standing arguments. Federal Rules of Civil Procedure instruct that "[t]he Court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). But the Government, instead of not objecting to the Amendment Motion then filing a new dismissal motion, opposed the amended complaint and asked for dismissal. (Doc. No. 34, PageID 509.)

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 Amendment Motion, which the Government did not oppose. (Doc. No. 33.)[1] In a November 24, 2015 Notation Order, this Court gave Plaintiffs until December 30, 2015 to file an opposition to the current motion to dismiss (which would only be needed in the

[1] Plaintiffs were also granted two motions for extra time in opposing the present motion to dismiss. (Doc. Nos. 28, 31.)

event the Amendment Motion is denied).

While Plaintiffs now file said Opposition to Defendants' Motion to Dismiss, Plaintiffs maintain that dismissal should only be considered on full, final briefing on dismissal based on the amended complaint. Doing what the Government asks—denying leave and granting dismissal—would harm Plaintiffs. The Government wants this Court to dismiss this case without allowing the amendment. So Plaintiffs are forced here to file an opposition to the current dismissal motion without the benefit of the changes in their amended complaint (including three new plaintiffs and new verified facts) that respond to Government arguments about standing. So if this Court were to dismiss this case in this manner, an appellate court would be faced with an appeal claiming error as to both the denial of the Amendment Motion 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.

II. This Suit Is Justiciable

A. Plaintiffs Have Standing

The Government argues that Plaintiffs lack standing because they do not have a cognizable injury. (Doc. No. 27, PageID 326-328.) However, Plaintiffs do have standing because they are suffering ongoing and threatened concrete injuries to protected interests caused by challenged provisions, of which they are the object, and the requested relief will redress those injuries. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).[2]

[2] Because at least one plaintiff has standing for each claim, others' standing need not be considered. *McConnell v. FEC*, 540 U.S. 93, 233 (2003) (collecting cases) (standing of intervening McCain-Feingold sponsors not decided because FEC had standing). That governs here, including as to the standing of plaintiffs Paul, Kuettel, and Nelson. However, briefly note that the Government contests Sen. Paul's standing based on a case that dealt with the constitutionality of a statute passed by a majority of Congress (Doc. No. 27, PageID 330-332),

1. Plaintiffs Have a Cognizable Privacy Interest under the Conditions at Issue

The Government alleges "the purported harm to financial privacy caused by the reporting requirements [under FATCA, the IGAs, and FBAR] is not a cognizable injury under the Constitution" (Doc. No. 27, PageID 328)—and thus Plaintiffs lack standing to challenge the search and reporting requirements. But central to Plaintiffs' harm is the violation of their privacy interest, especially by the account search and reporting requirements of FATCA and the IGAs. Plaintiffs

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

(Doc. No. 1, PageID 12 (¶ 23), 15 (¶ 38), 17 (¶ 48), 23 (¶ 69), 27 (¶ 86).) This opposition to disclosure provides standing to challenge provisions (including IGAs) expressly *requiring* disclosure and provisions that directly or indirectly *penalize* entities for not providing disclosure, which disclosure is ongoing.[3] 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. 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.

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. The

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but the IGAs were neither submitted to nor voted on by Congress.

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

Government's view 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. There are solid reasons, based on *Miller*'s own language applicable to this sort of case of 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 wrongdoing and where some judicial process attaches (in *Miller* it was a subpoena duces tecum, 435 U.S. at 436). *Miller* expressly says that it does *not* apply its holding to "blanket reporting," *id.* at 444 n.6, or to such bulk data collection with no judicial process: "We are not confronted with a situation in which the Government, through 'unreviewed executive discretion,' has made a wide-ranging inquiry that unnecessarily 'touch(es) upon intimate areas of an individual's personal affairs.'" *Id.* (quoting *California Bankers Ass'n. v. Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring)). The unreviewed, blanket, bulk-data collection at issue here is exactly the sort of government activity that *Miller* expressly does *not* cover. Further, "[t]he Court has repeatedly held that searches conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge], are per se unreasonable ... subject only to a few specifically established and well delineated exceptions." *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 decision maker." *Id.* The

Government attempted to distinguish *Patel* based on the different facts (by which most any case might be distinguished without affecting the transferable legal concept), but it does not counter the controlling, transferable legal principle cited above in text. (Doc. No. 27, Page ID 353.)

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 decision maker 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.

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." So Plaintiffs do have a cognizable injury to their privacy interests and thus have standing to challenge FATCA, IGAs, and FBAR disclosure requirements.

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

The Government claims that the 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. (Doc. No. 27, PageID 327-329.) Regarding the harm of unwanted searches and reporting described above, the Government argues that challenged FATCA and IGA provisions do not actually make foreign financial institutions search and report. (Doc. No. 27, PageID 352.) In regards to 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. (Doc No. 27, PageID 328-329.)

The Government's argument ignores the law on causation for standing purposes. 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.[4] 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).

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

[4] 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. 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 do not 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.

3. The Harm Plaintiffs Experience Is Not a Generalized Grievance

The Government also argues that "Plaintiffs' objections to financial disclosure requirements are a generalized grievance that do not meet the injury-in-fact requirement." (Doc No. 27, PageID 328.) However, 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).

4. The Harm Plaintiffs Assert Is Not the Harm of Third Parties

The Government argues that Plaintiffs cannot assert claims on behalf of third parties, specifically addressing concerns by Mr. Johnson and Mr. Kish's wives and Mr. Kuettel's daughter. (Doc. No. 27, PageID 329.) However, Plaintiffs rely on *no* third-party standing, though they provide information about relevant third parties to demonstrate how FATCA negatively affects their lives and relationships. Rather, they rely on their own interests, especially the constitutionally protected interest in not disclosing information they do not want to disclose. And Plaintiffs are not alone. FATCA is harmfully "affecting everyday Americans every day." Democrats Abroad, *FATCA: Affecting Everyday Americans Every Day* at 3 (Sept. 2014).

5. Plaintiffs Have Standing to Challenge the Excessive Fines Clause

The Government argues that Plaintiffs cannot challenge the "excessive fines" clause because none have alleged that they "failed to file a required FBAR." (Doc. No. 27, PageID 330.) But Plaintiffs alleged that they reasonably feared they would be subject to the Willfulness Penalty for willful *failure* to file FBARs, indicating that they are filing FBARs. (Doc. No. 1, PageID 12 (¶ 24), 15-16 (¶ 39), 17 (¶ 49), 23 (¶ 70), 27 (¶ 87).) The FBAR report is a trap for the unprepared, uninformed, unwary, imposing this excessive penalty on those who know of the need to file the report but for some reason fail to get it done. So all Plaintiffs to whom it applies reasonably fear it will be imposed on them. Plaintiff Kuettel alleges that he is *personally* harmed because of his inability to establish and contribute to a college-savings account in his U.S.-citizen daughter's name that would exceed $10,000 because she would know of the need to file an FBAR but could not because she is too young (and both parents, neither a U.S. citizen, object to filing it for their U.S.-Citizen daughter). (Doc. No. 1, PageID 19-20.) Because the daughter would know of the need to file an FBAR, but cannot, there is a reasonable fear that her failure to file would be deemed willful and the Willfulness Penalty imposed. (*Id.*) Thus, her father's investment in her future college expenses would be consumed by a penalty, requiring replacement for her education.[5]

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

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

The Government claims that Plaintiffs' complaint is barred by the Anti-Injunction Act (AIA), 26 U.S.C. § 7421(a). (Doc. No. 27, PageID 332.) However, the Government examination of the holdings and analysis in *Direct Marketing Association v. Brohl*, 135 S.Ct. 1124 (2015) (unanimous) readily reveals that the Government's effort to distinguish *Brohl* is unavailing.[6]

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[5] Further, Plaintiffs seek to add additional facts to their complaint to address this concern from the Government; however, the Government opposes such amendment. Should the Court allow amendment of the complaint, many of the Government's concerns regarding standing will be alleviated.

[6] The Government argues that the 30% withholding is a tax, not a penalty. (Doc. No. 27, Page ID

(Doc. No. 27, PageID 336-338.)

In *Brohl*, the unanimous Supreme Court, held that the analogous "Tax Injunction Act, which provides that federal district courts 'shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law,' 28 U.S.C. § 1341, [does not] bar[] a suit to enjoin the enforcement of this law." 135 S.Ct. at 1127. *Brohl* addressed a Colorado effort to collect more sales/use tax by mandating that non-Colorado retailers send notices to purchasers (about paying such taxes) and requiring "noncollecting retailers ... [to] send a statement to [Colorado] listing the names of their Colorado customers, their known addresses, and the total amount each Colorado customer paid for Colorado purchases in the prior calendar year." *Id.* at 1128. The federal district court "enjoined enforcement of the notice and reporting requirements," *Id.* at 1129, but the Tenth Circuit reversed on the basis that it lacked jurisdiction under the TIA because a successful merits challenge "'would limit, restrict, or hold back the state's chosen method of enforcing its tax laws and generating revenue,'" *Id.* (citation omitted). In a unanimous Court opinion, the Supreme Court reversed. *Id.* at 1127. In doing so, it provided the controlling analysis for the present case.

First, *Brohl* equated the TIA with the AIA for construing the meaning of terms employed. *Brohl* said that in interpreting the TIA, the Court "looked to federal tax law as a guide," noting that the TIA "was modeled on the Anti-Injunction Act (AIA)," which "provides ... that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any

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

court by any person.'" *Id.* at 1129 (quoting 26 U.S.C. 7421(a)).

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

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

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

Fourth, *Brohl* construed "assessment," which is included in both the TIA and the AIA, as "the next step in the process" (after "information gathering," *supra*), and as "refer[ing] to the official recording of a taxpayer's liability." *Id.* at 1130.[7]

Fifth, *Brohl* construed "collection," which is in both the TIA and the AIA, as "the act of obtaining payment of taxes due," *id.* (citation omitted), to "be understood narrowly as a step in the taxation process that occurs after a formal assessment. Consistent with this understanding, it is part of the 'enforcement process ... that "assessment" sets in motion." *Id.* (quoting *Hibbs*, 542 U.S. at 102 n.4).

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

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

Colorado's enforcement of its notice and reporting requirements." *Id.* at 1131.

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

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

Brohl, 135 S.Ct. at 1131.

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

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

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

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

The foregoing examination of *Brohl*'s actual language, analysis, and holdings readily refutes the Government's suggestion that *Brohl* does not control. Legally, the Government argues that the narrow reading of the TIA in *Brohl* "does not support an equally narrow reading of the AIA" because there is a key distinction between the two. (Doc. No. 27, PageID 337.) The alleged "key distinction" is that the TIA's prohibition is on suits that restrain, while the AIA's prohibition is on suits "for the purpose of restraining." *Id.* But "for the purpose" language is inherently vague, as the Supreme Court held famously in construing "for the purpose of influencing" in *Buckley v. Valeo*, 424 U.S. 1 (1976), to require express words of advocacy of a clearly identified candidate, *id.* at 77-82. To rely on such vague language here is to reject *Brohl*'s requirement of a bright-line jurisdictional statute. 135 S.Ct. at 1133. And under *Brohl*'s equation of language between the TIA and the AIA, *id.* at 1129, the statutes say essentially the same thing; the TIA commands courts not to "restrain" and the AIA commands courts not to maintain suits "for the purpose of restraining." Reading "for the purpose of" as somehow changing this essential equation of language is to reject the Supreme Court's just-asserted statement: "We assume that words used in both Acts are generally used the same way," *Id.* at 1129.

Here, instead of relying on the controlling *Brohl* decision, 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.)[8] That is a remarkable, but clearly erroneous. *Brohl*'s legal analysis is what controls here.[9]

C. Plaintiffs' Eighth Amendment Claims Are Ripe for Adjudication

Next the Government contends that Plaintiffs' challenges under the "excessive fines" clause are not ripe because "it is not clear that any harm the plaintiffs contemplate will ever come to pass" and "if it were to apply, the § 1471(a) withholding tax would be imposed on FFIs, not individuals." (Doc. No. 27, PageID 339-342.) Plaintiffs' position is that FFIs comply with the FATCA and IGA account-search and reporting requirements *because of* the FFI Penalty, so Plaintiffs have standing to challenge that provision. And because they do not want their

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[8] The Government also suggests that a concurrence by Justice Ginsburg makes this case factually distinguishable (Doc. 27, PageID 338), but of course she joined the unanimous Court opinion, which controls as described in text. But even her comment, to the effect that there might be a different question if a taxpayer tried to enjoin his own reporting obligations, does not arise here because Plaintiffs do not challenge FBAR and income-tax reporting and filing. There is no "different question" (*id.)* here based on the fact that this case is brought by taxpayer-plaintiffs because the AIA question is whether success in this case would restrain tax assessment or collection (all narrowly defined terms in *Brohl*) and it does not.

[9] The Government further argues that jurisdiction under the Administrative Procedure Act (APA) is improper. (Doc. No. 27, PageID 338.) However, Plaintiffs position is that 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.

information disclosed *right now*, the challenge is ripe now. Regarding the Passthrough Penalty, they want to *not* comply with the challenged provisions right now, which would trigger the penalty, so they have standing to challenge the provision and the challenge is now ripe. Moreover, Plaintiff Zell has actually declined to file FATCA-required forms, so that he "reasonably fears that he will be classified as a recalcitrant account holder and subject to the ... Passthrough Penalty ...." (Doc. No. 1, PageID 26-27 (¶¶ 84-85.) Regarding the FBAR report, Plaintiff Kuettel wants *right now* to establish an account for his minor daughter and contribute to it to a level where it would be reportable under FBAR, but his daughter is too young to file FBAR reports though she would be aware of the need, (*id.*, PageID 19-20 (¶¶ 56-57), so this claim is ripe.

III. Plaintiffs Should Be Granted Relief Requested Based on Their Claims

A. The IGAs Are Unconstitutional Sole Executive Agreements

The Government argues that the "IGAs are a valid exercise of executive power because they are authorized by the Constitution, multiple statutory provisions, and prior treaties concerning the exchange of tax information with IGA partner countries." (Doc. No. 27, PageID 343.) On the contrary, 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.

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. *Id*. 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.*

As discussed above, 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). By default, 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 Dec. 29, 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[10], they must be stand or fall as sole executive agreements. The Government agrees that the IGAs are executive agreements, but argues they are a valid exercise of executive power and comply with FATCA. (Doc. No. 27, PageID 344.) The Government is wrong.

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

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

[10] The Government also argues that "the four IGAs at issue here are authorized by tax treaties previously approved by the Senate." (Doc. No. 27, PageID 347.) That is all of the Government's argument: the treaties support the IGAs because the IGAs cite them.

But those treaties do not support the IGAs. First, mere recitation of a treaty does not mean the treaty actually supports the IGA. Even an unwarranted sole executive agreement would likely recite some authority as justification. Second, the Government makes no effort to show how any treaty supports the IGAs, which seems a tacit admission that it has no argument. Third, this lack of any attempted demonstration may be explained by the fact that FATCA clearly overrides existing tax treaties. This argument is more fully briefed in Plaintiffs' Preliminary Injunction Reply but for these purposes, the relevant points are included here. *See* Doc. No. 21, PageID 288-290.

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).

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)).

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. *U.S. v. Guy W. Capps, Inc.*, 204 F.2d 655, 659 (4th Cir. 1953). 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.*

The Government attempts to portray executive power broadly, reciting authority in broad terms without attention to the necessary limits. (Doc. No. 27, PageID 343.) But it does not refute the point that Presidential authority may not invade the Legislative constitutional domain.

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

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).

In sum, sole executive agreements cannot override acts of Congress in the exercise of its constitutional authority, otherwise the President could unilaterally delegate Congress's legislative powers to himself and nullify any duly enacted laws he finds disagreeable.

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

The Government argues that the IGAs are not inconsistent with the FATCA statute. (Doc. No. 27, PageID 347.) This fails for two reasons. First, the IGAS are tax agreements falling squarely within Congress's power. Second, the IGAs directly contradict the statute enacted by Congress.

To the first point, 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 "[t]o lay and collect Taxes" under Article I.[11] 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 facilitate the U.S. government's tax collection efforts.[12] 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 Code. The IGAs require foreign governments to provide return information concerning U.S.

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[11] 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.

[12] 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").

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, over assessments, 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).

To the second point, 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 IGAs, on the contrary, 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 (i) employing the foreign governments as the collecting agents of the U.S. tax authorities, *see, e.g.*, Canadian IGA, *supra*, arts. 2, 4, or (ii) 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.

Despite the Government's contention that the IGAs requirements are just the Secretary using "discretionary power." (Doc. No. 27, PageID 348). The IGAs requirements are contrary to the way FATCA was written and the Treasury and IRS may not unilaterally rewrite it to suit their preferences. These IGAs exceed the scope of the President's independent constitutional power to make international agreements and abrogate FATCA.

B. Reporting Requirements Violate Equal Protection for Americans Living Abroad

The Government argues that citizens in a foreign county are treated the same as other U.S. taxpayers. (Doc. No. 27, PageID 349.) But 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,[13] 26 U.S.C. §§ 6049(a), (b); 26 C.F.R.

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[13] Unless a person is suspected of money laundering, or some other criminal or suspicious activity, then certain information is shared via the Bank Secrecy Act. That differs from the case here where Plaintiffs are just everyday people, not criminals suspected of wrongdoing.

§§ 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 U.S.C. § 1471(c)(1)(C); 26 C.F.R. §§ 1.1471-4(d)(3)(ii), -4(d)(4)(iv); 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, 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 U.S.C. §§ 1471(c)(1)(C), 6038D(c)(4); 26 C.F.R. §§ 1.1471-4(d)(3)(ii), 1.6038D-4(a)(5); Canadian IGA, art. 2, § 2(a)(4-5); Czech IGA, art. 2, § 2(a)(4-5); Israeli IGA, art. 2, § 2(a)(4-5); 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").[14] 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

[14] 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.

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.[15]

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 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.

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[15] 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.").

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.

C. The Challenged Penalties Violate the Excessive Fines Clause

The Government claims that Plaintiffs' Eighth Amendment counts do not have merit because Plaintiffs can only bring a "facial challenge" to the excessive fines clause and because the "FATCA withholding taxes . . . are taxes, not penalties." (Doc. No. 27, PageID 350). However, the 30% withholding is a penalty and Plaintiffs do have standing to challenge the penalties as applied to them.

First, the Government relies on its argument that the challenged penalties are really taxes and are, in any event remedial. (Doc. No. 27, PageID 350-351.) That these are penalties is explained in Plaintiffs Preliminary Injunction (*See* Doc. No. 8-1, PageID 162-170), and it seems self-evident because no "tax" is collected under these provisions unless a violation occurs. The Government argues that the 30% rate of the two FATCA penalties is "remedial because it is the same rate imposed" in another context (Doc. No. 27, PageID 351), but of course Plaintiffs who are U.S. citizens are otherwise subject to their usual tax rate, which is lower for most people. So the penalties are not remedial. And to get a refund, as the Government suggests (*id.*), Plaintiffs who want to retain their privacy by noncompliance with FATCA, i.e., be recalcitrant account holders, must relinquish that desired noncompliant status in order to get a refund.

Second, Plaintiffs have standing to challenge these penalties as applied to them. In particular, Plaintiff Kuettel wants to establish that college fund for his daughter without it being consumed by the FBAR penalty. That FBAR penalty is clearly overbroad and excessive as to that situation. But in any event excessive-fine analysis (as explained more thoroughly in Plaintiffs' Preliminary Injunction) involving a generally-applicable penalty does not turn on who a plaintiff is, though it does turn on "proportionality" (Doc. No. 8-1, PageID 163). That proportionality analysis turns on (1) reprehensibility, (2) relationship between penalty and harm, and (3) sanctions for comparable conduct. (*Id.*). Those factors do not get into whether a generally-applicable penalty is unconstitutional as applied to an ordinary citizen. In any event, as applied to the sort of ordinary citizens here at bar, and the vast majority of ordinary people identified in the Democrats Abroad survey, FATCA and FBAR penalties are unconstitutional.

D. Reporting Requirements Violate the Fourth Amendment

The Government argues that Plaintiffs' Fourth Amendment claims are baseless because the information reporting is not a "search" due to the fact that the challenged provisions only compel reporting by a tax penalty, the IGAs only require other governments to require reporting by their FFIs, and Plaintiffs have no reasonable expectation of privacy in bank records. (Doc. No. 27, PageID 351-352.) The Government is wrong. The account reporting requirements of FATCA and the IGAs do violate the Fourth Amendment, particularly because they require FFIs to report information about United States account holders without any judicial oversight of the searches of accounts necessary to that reporting.

The Government argues that Plaintiffs have no expectation of privacy in bank records under *Miller*. (Doc. No. 16, PageID 248.) But, as discussed above, *Miller* stands only for that proposition with respect to a search targeted at an individual suspected of some wrongdoing and where some judicial process attaches. *Miller*, 435 U.S. at 436. *Miller* expressly does not apply its holding to "blanket reporting," *id.* at 444 n.6, or to such bulk data collection with no judicial process: "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)). This blanket, bulk-data collection is exactly the type of government activity that *Miller* does *not* cover. Therefore, as more fully briefed above, people *do* have a reasonable expectation of privacy in their bank accounts, not expecting the sort of blanket reporting of information under FATCA and the IGAs without judicial oversight. *See supra* § II(A)(1). People do not expect bulk-collection of this sort of data unless there is judicial oversight because lack of such oversight makes such searches unreasonable per se.

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

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

IV. Conclusion

For all of the reasons stated above, Plaintiffs respectfully request that the Court deny the Government's Motion to Dismiss.

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Certificate of Service

I hereby certify that on December 29, 2015, the foregoing document was filed electronically using the Court's CM/ECF filing system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. The following persons should be notified:

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