No. 17-911

In the Supreme Court of the United States

MARK CRAWFORD, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
RICHARD E. ZUCKERMAN
Principal Deputy Assistant Attorney General
GILBERT S. ROTHENBERG
TERESA E. MCLAUGHLIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioners have standing to seek an injunction against enforcement of federal statutes, regulations, and intergovernmental agreements aimed at curbing offshore tax evasion.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 868 F.3d 438. The order of the district court dismissing the case (Pet. App. 41a-73a) is not published in the Federal Supplement but is available at 2016 WL 1642968. The order of the district court denying a preliminary injunction (Pet. App. 74a-115a) is not published in the Federal Supplement but is available at 2015 WL 5697552.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 2017. A petition for rehearing was denied on September 26, 2017 (Pet. App. 116a). The petition for a writ of certiorari was filed on December 21, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States has adopted various statutes, regulations, and international agreements aimed at curbing offshore tax evasion.

a. The Foreign Account Tax Compliance Act (FATCA), Pub. L. No. 111-147, Tit. V, Subtit. A §§ 501-535, 124 Stat. 97-115 (2010), instituted two reporting regimes. One of those regimes governs United States taxpayers who hold foreign financial assets, including foreign bank accounts; the other governs foreign financial institutions (FFIs) with accounts held by United States taxpayers and certain foreign entities controlled by United States taxpayers. A taxpayer must disclose the name and address of the FFI that maintains the account, the account number, "[t]he maximum value" of the account "during the taxable year," the "amount of any income, gain, loss, deduction or credit" on the account, and the opening or closing of certain accounts. 26 U.S.C. 6038D(c)(1) and (4); 26 C.F.R. 1.6038D-4(a)(8). Those requirements apply to individual taxpayers only if the individual holds more than $50,000 in foreign financial assets at the end of a taxable year, or more than $75,000 in such assets at any time during the year. 26 U.S.C. 6038D(a). The respective threshold amounts are $200,000 and $300,000 for individuals who live abroad full-time, and $400,000 and $600,000 for married couples who live abroad. 26 C.F.R. 1.6038D-2(a)(3) and (4).

Reporting by FFIs is not mandated, but FATCA encourages FFIs to enter into agreements with the Secretary of the Treasury (Secretary) to disclose information on accounts held by United States taxpayers. 26 U.S.C. 1471(b). When an FFI declines to report, a 30% tax is withheld from certain United States-source

income payable to the FFI. 26 U.S.C. 1471(a), 1473(1)(A). An FFI that chooses to report under FATCA, in lieu of being subject to the withholding tax, must determine which accounts are subject to FATCA. 26 U.S.C. 1471(b)(1)(A). For those accounts, FFIs must report account numbers and balances; the name, address, and taxpayer identification number of the account holder; and "the gross receipts and gross withdrawals or payments from the account." 26 U.S.C. 1471(c)(1)(D); see 26 U.S.C. 1471(c)(1)(A)-(C); see also 26 C.F.R. 1.1471-4(d). An FFI must also deduct and withhold a 30% tax on certain "passthru" payments to "recalcitrant" account holders who fail to comply with the FFI's "reasonable requests" for FATCA-related information. 26 U.S.C. 1471(b)(1)(D) and (d)(6)(A).

FATCA's reporting provisions do not apply to all FFIs or accounts. FFIs need not report information about depository accounts held by individuals for whom the FFI maintains less than $50,000 in total assets. 26 U.S.C. 1471(d)(1)(B). In lieu of reporting information under FATCA, an FFI may also choose either to comply with regulations designed to "ensure that [it] does not maintain" accounts for United States persons, 26 U.S.C. 1471(b)(2)(A), or to abide by reporting provisions that apply to United States banks, 26 U.S.C. 1471(c)(2). The Secretary may also exempt an FFI from Section 1471(b) if he determines that its application is unnecessary. 26 U.S.C. 1471(b)(2)(B).

b. The United States has reached agreements with many foreign governments to facilitate the implementation of FATCA and improve international tax compliance. Those intergovernmental agreements (IGAs) take one of two forms.

"Model 1" agreements "implement FATCA through reporting by financial institutions to [a] foreign government * * * , followed by automatic exchange of the reported information with the IRS." 26 C.F.R. 1.1471-1(b)(78). The foreign government agrees to disclose, *inter alia*, the value of certain accounts held with that country's financial institutions by "U.S. Person[s]" and, for depository accounts, the total amount of interest paid. Model 1 IGA Art. 2, § 2(a)(1), (4), and (6). Any financial institution in that country that reports information under the agreement "shall be treated as complying with, and not subject to withholding under," FATCA. *Id.* Art. 4, § 1. As a result, those institutions need not withhold tax from recalcitrant account holders. *Id.* § 2. The United States has concluded Model 1 IGAs with Canada, the Czech Republic, Denmark, France, and Israel.[1] Pet. App. 15a.

"Model 2" agreements provide for "reporting by [FFIs] directly to the IRS * * * , supplemented by the exchange of information between [the] foreign government * * * and the IRS." 26 C.F.R. 1.1471-1(b)(79). The United States has concluded a Model 2 IGA with Switzerland. The Swiss government has agreed to direct its financial institutions to "register with the IRS" and to comply with the "due diligence, reporting, and withholding" provisions of FATCA. Switzerland IGA Art. 3, § 1(a). Article 5 of the IGA permits the United States to make "group requests" to the Swiss government for information about nonconsenting account

[1] The IGA with Israel was signed on June 30, 2014, but did not enter into force until August 29, 2016, while this case was pending on appeal. The Treasury Department has declared, however, that any foreign country that signed an IGA before November 30, 2014, will be treated as if it had an IGA in effect. Pet. App. 15a-16a.

holders and nonparticipating financial institutions. *Id.* Art. 5, § 1. Article 5 is not currently in effect because the Senate has not approved a necessary protocol. But under the IGA, the withholding of taxes under FATCA is generally not being applied to Swiss financial institutions or their account holders. Pet. App. 16a-17a.

c. As amended in 1982, see Pub. L. No. 97-258, 96 Stat. 877, the Bank Secrecy Act (BSA), Pub. L. No. 91-508, Tit. I, II, 84 Stat. 1114, 1118, requires all United States persons who have covered relationships with foreign financial agencies to file foreign bank account reports (FBARs). 31 U.S.C. 5314(a); see 31 C.F.R. 1010.350(a). Among those covered by the requirement are permanent United States residents and United States citizens, regardless of residence, who have an interest in or signatory authority over foreign financial accounts that exceed $10,000 in the aggregate. 31 C.F.R. 1010.306(c). The FBAR calls for information including the maximum account balance during the reporting year. Pet. App. 17a. A civil penalty may be imposed on any person who fails to file a required FBAR. 31 U.S.C. 5321(a)(5)(A). The penalty generally may "not exceed $10,000" and may be excused for reasonable cause. 31 U.S.C. 5321(a)(5)(B). For "[w]illful" violations, however, the maximum penalty is "the greater of $100,000" or 50% of the account value at the time of the violation. 31 U.S.C. 5321(a)(5)(C)(i); see 31 U.S.C. 5321(a)(5)(D).

2. Petitioners are current and former United States citizens who challenge FATCA's reporting provisions, the related withholding taxes on noncompliant FFIs and recalcitrant account holders, the IGAs, and the FBAR requirements and penalties.

Mark Crawford is an American citizen living in Albania. He owns Aksioner, an Albanian brokerage firm

that is a partner of Saxo Bank in Denmark. Crawford alleges that Saxo will not allow Aksioner to accept clients who are United States citizens "in part because the bank does not wish to assume burdens that would be foisted on it by FATCA." Pet. App. 3a (citation omitted); see *id.* at 130a. He alleges that Aksioner denied Crawford's own application for a brokerage account, and that he has also suffered financial harm because he has been "forc[ed]" to turn away prospective American clients living in Albania. *Id.* at 3a (citation omitted).

Roger Johnson, an American citizen living in the Czech Republic, is married to a Czech citizen. Johnson alleges that he previously shared joint financial accounts with his wife, but that they have separated their accounts to avoid subjecting her account information to disclosure under FATCA. Pet. App. 4a.

Steven J. Kish, a citizen and resident of Canada, was an American citizen at the time the complaint was filed but later renounced his American citizenship. Kish and his wife, who is also Canadian, share a joint account at a Canadian bank. Kish alleges that "FATCA has at times caused some discord" between him and his wife, who "strongly opposes the disclosure of her personal financial information from [the] joint bank account to the U.S. government." Pet. App. 4a; see *id.* at 136a.

Daniel Kuettel is a Swiss citizen and former American citizen living in Switzerland. Pet. App. 4a-5a. He alleges that he renounced his American citizenship in 2012 "because of difficulties caused by FATCA," including unsuccessful efforts to refinance his mortgage with Swiss banks before his renunciation. *Id.* at 5a; see *id.* at 138a. Kuettel maintains, in his own name, a college savings account for his minor daughter, who is a citizen of Switzerland, the Philippines, and the United States.

Although Kuettel wishes to transfer the account to his daughter, he alleges that he has refrained from doing so because he fears that he or his daughter will be subject to a penalty if it is determined that there has been a willful failure to file an FBAR. Kuettel alleges that his daughter is incapable of filing the FBAR or of renouncing her United States citizenship because she is too young, and Kuettel does not wish to file the FBAR on her behalf, as the parent of a minor child would ordinarily be required to do. *Id.* at 5a.

Donna-Lane Nelson is a Swiss citizen and former American citizen living in Switzerland and France. She alleges that, after FATCA was enacted, she renounced her American citizenship when her Swiss bank notified her that, because she was an American, she would not be able to open a new account if she ever closed her existing one. Nelson later married an American citizen with whom she shares a joint account at BNP Paribas, a French bank. Nelson alleges that her private financial account information has been disclosed to the IRS and Treasury even though she is not an American citizen. Pet. App. 5a-6a.

L. Mark Zell, an attorney, is an American and Israeli citizen living in Israel. Zell alleges that, because of FATCA, he and his law firm have been required by their Israeli banks to complete IRS withholding forms as a precondition for opening trust accounts both for United States and for non-United States persons and entities. The bankers have told Zell that they require such submissions, whether or not the beneficiary is a United States person, because the trustee may be a United States person. As a result, he alleges, banks have required Zell and his firm to close some trust accounts and have refused to open others. Pet. App. 6a-7a.

Zell also alleges that he holds in trust certain client securities that are required by Israeli financial regulations to be held by a qualified Israeli financial institution. He further alleges that his Israeli financial institution has asked him to transfer the securities elsewhere because both he and the beneficiary in this instance are American citizens. Zell's non-United States clients have also been required by Israeli banks to complete the IRS forms even though they have no connection with the United States. Bankers have stated that the fact that a United States person, trustee, or law firm is acting as a fiduciary is enough to require non-United States beneficiaries to report their identities and assets to the United States. Zell alleges that some such beneficiaries have terminated their attorney-client relationship rather than undergo such disclosure, resulting in a financial loss to Zell and his firm. Pet. App. 6a-7a.

Senator Rand Paul alleges that he has been denied the opportunity to exercise his right as a Senator, under the Treaties Clause, U.S. Const. Art. II, § 2, Cl. 2, to vote against IGAs that implement FATCA. Pet. App. 3a-4a. Senator Paul claims that he would vote against the IGAs if they were submitted to the Senate for advice and consent or to the entire Congress for approval as "congressional-executive agreements." *Id.* at 4a; see *id.* at 132a.

3. Petitioners filed suit, seeking an injunction against enforcement of FATCA, the IGAs, and the FBAR requirement. Pet. App. 2a. Petitioners alleged, *inter alia*, that the IGAs are "unconstitutional sole executive agreements" that were required to be submitted to Congress either under the Treaty Clause or as regular legislation, *id.* at 18a-19a (citation omitted); that the differential treatment of United States citizens living

abroad and citizens living in the United States violates the equal protection component of the Fifth Amendment's Due Process Clause, *id.* at 19a; that the tax withholding and various penalties imposed on FFIs, on "recalcitrant" individuals, and on "[w]illful[]" FBAR violators are excessive fines, in violation of the Eighth Amendment, *id.* at 20a; and that reporting requirements imposed on FFIs by FATCA and the IGAs violate petitioners' Fourth Amendment rights to privacy, *ibid.*

a. The district court denied petitioners' motion for a preliminary injunction. Pet. App. 74a-115a. The court concluded that petitioners lacked standing because "the harms they allege are remote and speculative harms, most of which would be caused by third parties, illusory, or self-inflicted." *Id.* at 114a. The court also held that the allegations failed as a matter of law, and that petitioners "lack a sufficiently concrete and particularized injury" that would justify injunctive relief. *Ibid.*

The district court denied petitioners leave to amend their complaint and granted respondents' motion to dismiss the suit for lack of jurisdiction. Pet. App. 41a-73a. Consistent with its preliminary injunction ruling, the court determined that "[n]o individual [petitioner] has suffered an invasion of a legally protected interest, which is concrete and particularized, and actual or imminent, not conjectural or hypothetical"; that "no alleged injury is fairly traceable to the actions of the [respondents], but rather, [is traceable to] the actions of an independent third party"; and that petitioners did not allege "that it is likely that the alleged injury will be redressed by a favorable decision." *Id.* at 72a.

b. The court of appeals affirmed. Pet. App. 1a-40a.

i. The court of appeals held that no petitioner "has standing to challenge FATCA's individual-reporting requirements or the Passthru Penalty." Pet. App. 32a. The court explained that petitioners have not alleged "any actual enforcement of FATCA [against them] such as a demand for compliance with the individual-reporting requirement, the imposition of a penalty for noncompliance, or an FFI's deduction of the Passthru Penalty from a payment to or from a foreign account." *Id.* at 32a-33a. Nor has any petitioner claimed "to hold enough foreign assets to be subject to the individual-reporting requirement, and, as a result, no [petitioner] can claim that there is a 'credible threat' of either prosecution for failing to comply with FATCA or imposition of a Passthru Penalty by an FFI." *Id.* at 33a.

The court of appeals found that petitioners also lack standing to challenge the withholding of taxes imposed on FFIs that fail to comply with FATCA "because such a challenge would require either that the foreign banks themselves bring suit or that [petitioners] rely on third-party standing, and [petitioners] have made clear that they do not." Pet. App. 34a. The court explained that, although petitioners assert that FATCA has inflicted other harms on them, "none of these alleged harms are injuries that are fairly traceable to FATCA." *Id.* at 35a; see *id.* at 35a-36a. Rather, "[a]t best, [petitioners'] claimed injuries are the second-order effects of government regulation on the market for international banking services." *Id.* at 37a.

ii. The court of appeals held that petitioners lack standing to challenge the IGAs. The court observed that Senator Paul, who alleged that he was denied the opportunity to vote against the IGAs as a member of the

Senate, had identified only a "diminution in the Senate's lawmaking power," which is "not particularized but is rather a generalized grievance." Pet. App. 37a. The court explained that, unlike in other cases where legislators have been found to have standing, "Senator Paul has not pleaded that his vote on its own would have been sufficient to forestall the IGAs." *Ibid.* The court further held that no other petitioner has standing to challenge the IGAs because no petitioner "ha[s] alleged injuries that are traceable to the IGAs." *Id.* at 38a.

iii. The court of appeals held that petitioners lacked standing to challenge the FBAR requirement because "no [petitioner] has alleged both an intent to violate the FBAR requirement and a credible threat of the imposition of a failure-to-file penalty." Pet. App. 38a. The court explained that Zell was the only petitioner who had alleged an intention to violate the FBAR requirement, "[b]ut Zell has not alleged any facts that would show a credible threat of enforcement against him." *Ibid.* The court further explained that, even if a credible threat of enforcement against Zell existed, "Zell has not alleged any facts that show that the Willfulness Penalty, as opposed to the lower ordinary penalty (which [petitioners] do not challenge), would be imposed for Zell's noncompliance." *Ibid.* (citation omitted). The court also observed that, although Kuettel's daughter claimed "that she would like to have a college-savings account placed in her name," *id.* at 38a-39a, her father's decision not to transfer the account into her name "is traceable to Daniel Kuettel's personal choice not to transfer the account, and not to the FBAR," *id.* at 39a.

iv. The court of appeals held that the district court had properly rejected petitioners' attempt to amend

their complaint. The court of appeals explained that, "even if [petitioners] were granted leave" to add new allegations, such as the balances in petitioners' bank accounts, "no [petitioner] would have standing to bring any of the claims in the proposed amended complaint." Pet. App 39a.

ARGUMENT

Petitioners contend (Pet. 17-32) that they have standing to challenge FATCA, the IGAs, and the FBAR requirement. The court of appeals correctly rejected petitioners' arguments, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. "[T]he irreducible constitutional minimum of standing contains three elements." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "[A] plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likelihood' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List* v. *Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Lujan*, 504 U.S. at 560-561) (brackets omitted).

To establish an injury in fact, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560). A plaintiff who raises only a generalized grievance regarding "harm to his and every citizen's interest in proper application of the Constitution and laws" lacks standing to sue. *Lujan*, 504 U.S. at 573. This Court has accordingly held that an individual legislator generally lacks standing in his official capacity to challenge an action that results in "the

abstract dilution of institutional legislative power." *Raines* v. *Byrd*, 521 U.S. 811, 826 (1997). Rather than stating a concrete, personal injury, an allegation of lost political power from a diminution of all legislators' voting authority amounts to a claim of "institutional injury" that "runs * * * with the Member's seat" in Congress. *Id.* at 821.

When a plaintiff seeks prospective injunctive relief, his "past exposure" to allegedly "illegal conduct" is not sufficient to show an injury in fact absent "any continuing, present adverse effects." *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983) (quoting *O'Shea* v. *Littleton*, 414 U.S. 488, 495-496 (1974)) (brackets omitted). And an allegation of potential future injury may suffice only if "the threatened injury is 'certainly impending,' or there is a 'substantial risk that the harm will occur.'" *Driehaus*, 134 S. Ct. at 2341 (quoting *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013)). To pursue a pre-enforcement challenge to a statute or regulation, a plaintiff therefore must show "an intention to engage in a course of conduct" that is "proscribed by" the challenged law, as well as "a credible threat of prosecution" under the law. *Id.* at 2342 (quoting *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

The causal link needed to establish standing is present only if the injury is "fairly traceable to the defendant's allegedly unlawful conduct." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). An injury resulting from the independent actions of a third party is not fairly traceable to the defendant's conduct. *Bennett* v. *Spear*, 520 U.S. 154, 169 (1997). Nor is an injury fairly traceable to the defendant's conduct if the plaintiffs "inflict[] harm on themselves based on their fears of hypothetical future

harm that is not certainly impending." *Clapper*, 568 U.S. at 416. Finally, "a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself." *Larson* v. *Valente*, 456 U.S. 228, 244 n.15 (1982).

2. The court of appeals correctly held that petitioners lack standing to bring their current challenges to FATCA, the IGAs, and the FBAR requirements and penalties.

a. The court of appeals correctly held that "[n]o [petitioner] has standing to challenge FATCA's individual-reporting requirements or the Passthru Penalty" or the FFI penalty "because no [petitioner] (or proposed Plaintiff) has alleged either an actual injury that is fairly traceable to FATCA or an imminent threat of prosecution from noncompliance with FATCA." Pet. App. 32a.

Petitioners do not appear to be subject to FATCA's reporting requirements. Johnson and Zell are the only petitioners who have alleged holding at least $50,000 in foreign accounts, the minimum threshold at which the reporting requirements can apply. Pet. App. 33a; see 26 U.S.C. 6038D(a). Although Johnson alleged that he held at least $75,000 in his accounts, he lives outside the United States, where the reporting threshold is $200,000, or $400,000 if he elects to file a joint return with his wife. 26 C.F.R. 1.6038D-2(a)(3) and (4); see Pet. App. 33a ("[N]ow and at the time [petitioners] filed suit, Johnson is not subject to FATCA."). Zell alleged that he has signatory authority over accounts for the benefit of non-United States persons exceeding $200,000. See Pet. App. 34a. But "FATCA *itself* does not require reporting where, as here, the trust accounts are held entirely for the benefit of non-United States persons," nor

does FATCA require "reporting of accounts based on signatory authority." *Ibid.*[2]

Petitioners also lack standing to challenge the penalties and withholding taxes that FATCA requires. No petitioner has alleged "the imposition [against him] of a penalty for noncompliance, or an FFI's deduction of the Passthru Penalty from a payment to or from a foreign account." Pet. App. 32a-33a. Nor has any petitioner alleged that he was subjected to "a demand for compliance." *Id.* at 32a. Petitioners also lack standing to pursue their current challenge to the so-called "FFI Penalty," that is, the tax withholding "imposed upon financial institutions for their noncompliance with FATCA." *Id.* at 34a. "[S]uch a challenge would require either that the foreign banks themselves bring suit or that [petitioners] rely on third-party standing, and [petitioners] have made clear that they do not." *Ibid.*

The court of appeals correctly held that other harms allegedly flowing from FATCA were not fairly traceable to respondents' conduct. Pet. App. 35a-36a. Crawford alleged that Saxo Bank had refused to allow his firm, Aksioner, to accept American clients. *Id.* at 35a. Yet even if that refusal could qualify as a cognizable injury, "it is not fairly traceable to FATCA but rather * * * to Saxo Bank's own independent actions" in choosing how the bank complies with FATCA. *Ibid.*; see *Allen*, 468 U.S. at 758 (describing as "entirely speculative" plaintiffs' allegation that withdrawal of an allegedly unconstitutional tax exemption from non-party private school

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[2] "[O]nly the Israeli IGA, not FATCA itself, required (or requires) reporting of accounts based on signatory authority, and the Israeli IGA was not in effect when [petitioners] filed or sought to amend their complaint." Pet. App. 34a-35a; see p. 4 n.1, *supra*.

"would lead the school to change its policies"). For similar reasons, neither Adams's and Zell's alleged difficulties in obtaining banking services from FFIs, nor the decision of Zell's foreign clients not to do business with him for fear of being forced to disclose information, gives petitioners standing to sue. Rather, "a foreign bank's choice either not to do business with Adams or Zell, or (as in Zell's case) to require Zell's non-United States clients to make financial or other disclosures even though these clients are not subject to FATCA, is a choice voluntarily made by the bank and is not fairly traceable to FATCA." Pet. App. 35a-36a. Nor may Johnson challenge FATCA on the basis of his own decision to separate his assets from his wife's in order to avoid disclosure of her finances. "[T]here is no allegation that FATCA has actually compelled any such disclosure," and the decision to separate their finances "is traceable to the Johnsons' own independent actions, not to FATCA." *Id.* at 35a.

Petitioners' other allegations relating to FATCA are similarly deficient. Nelson, who is not a United States citizen and is not subject to FATCA, "has stated no facts whatsoever indicating that her account information was disclosed because of FATCA." Pet. App. 35a. Kuettel's alleged difficulty in trying to refinance his mortgage—in addition to being "traceable only to the foreign banks and not to FATCA because nothing in FATCA prevented the foreign banks from refinancing Kuettel's mortgage"—at most constitutes past harm that would be insufficient to warrant prospective injunctive relief. *Id.* at 36a. Finally, petitioners' other alleged injuries, such as Kish's marital discord, and "discomfort" on the

part of Crawford and Johnson regarding FATCA's disclosure requirements, are "not the sort of concrete injury that can give rise to standing." *Ibid.*

b. The court of appeals correctly held that petitioners lacked standing to challenge the IGAs. Senator Paul is the only petitioner who has "alleged injuries that are traceable to the IGAs." Pet. App. 38a. Senator Paul claims that he "has been denied the opportunity to exercise his constitutional right as a member of the U.S. Senate to vote against the FATCA IGAs." *Id.* at 37a (citation omitted). This Court has held, however, that "the abstract dilution of institutional legislative power" does not cause cognizable injury to an individual legislator. *Raines*, 521 U.S. at 826. The court of appeals also correctly held that Senator Paul does not fall within the rule of *Coleman* v. *Miller*, 307 U.S. 433 (1939), in which this Court upheld the standing of a group of 20 state senators whose votes were "overridden and virtually held for naught." *Id.* at 438. It was crucial to this Court's resolution of the standing issue in *Coleman* that "the plaintiff-legislators' votes would have been sufficient to defeat the contested legislation." Pet. App. 37a; see *Coleman*, 307 U.S. at 438 ("[I]f [the state legislators] are right in their contentions their votes would have been sufficient to defeat [the challenged law]."). Senator Paul, by contrast, "has not pleaded that his vote on its own would have been sufficient to forestall the IGAs." Pet. App. 37a.

c. The court of appeals correctly held that petitioners do not have standing to challenge the FBAR requirement or the penalty for willful violations. Several petitioners have alleged that they hold foreign bank accounts with more than $10,000, so that the requirement applies to them. Pet. App. 38a. But no petitioner has

alleged "both an intent to violate the FBAR requirement and a credible threat of the imposition of a failure-to-file penalty," which would be necessary to maintain standing for a pre-enforcement challenge to the requirement. *Ibid.* Only Zell has alleged that he intends to violate the requirement, yet he "has not alleged any facts that would show a credible threat of enforcement against him." *Ibid.* And even if he had plausibly alleged that the requirement will be enforced against him, the penalty is discretionary: "Zell has not alleged any facts that show that the Willfulness Penalty, as opposed to the lower ordinary penalty (which [petitioners] do not challenge), would be imposed." *Ibid.* (citation omitted). Finally, the desire of Daniel Kuettel's daughter to hold her college fund in her own name does not give her or her father standing to challenge the FBAR requirement. Her alleged injury "is traceable to Daniel Kuettel's personal choice not to transfer the account, and not to the FBAR." *Id.* at 39a.

3. Petitioners' contrary arguments (Pet. 17-34) lack merit.

a. Petitioners principally contend (Pet. 17-19) that the court of appeals adopted an impermissibly restrictive approach to determining whether a plaintiff has standing to raise a pre-enforcement challenge seeking injunctive relief based on the threat of criminal prosecution. Petitioners assert that the court adopted a "rule that 'the threat of prosecution 'must be *certainly impending*,' with 'a *certain* threat of prosecution,'" Pet. 17 (quoting Pet. App. 26a), whereas this Court's decision in *Driehaus* requires only an allegation of "'certainly impending' future harm *or* a 'substantial risk' thereof," such as "'a credible threat of prosecution,'" *ibid.* (quot-

ing *Driehaus*, 134 S. Ct. at 2341-2342). Petitioners assert that the decision below conflicts with *Driehaus* and with decisions of other courts of appeals that have "followed *Driehaus*'s credible-threat-of-prosecution test for preenforcement challenges." See Pet. 19 (citing cases).

Petitioners' argument reflects a misunderstanding of the court of appeals' ruling. The court correctly recognized that, "[i]n a pre-enforcement challenge to a federal statute, the Supreme Court has held that a plaintiff satisfies the injury requirement of standing by alleging 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and that there exists a credible threat of prosecution thereunder.'" Pet. App. 25a-26a (quoting *Driehaus*, 134 S. Ct. at 2342) (brackets omitted). The court of appeals further explained, however, that no matter how committed the plaintiff may be to engaging in the forbidden conduct, "[t]he mere possibility of prosecution * * * does not amount to a 'credible threat' of prosecution. Instead, the threat of prosecution 'must be certainly impending to constitute injury in fact.'" *Id.* at 26a (quoting *Clapper*, 568 U.S. at 410). The court's statement later in the same paragraph that "there must be a certain threat of prosecution," *ibid.*, was simply a paraphrase of this Court's statement in *Clapper* and other decisions that the "threatened injury must be *certainly impending* to constitute injury in fact." 568 U.S. at 409 (citation omitted). The court of appeals did not announce a new, substantively different test. Petitioners could not satisfy their own preferred test.

b. In holding that no petitioner has standing to challenge the FBAR requirement, the court of appeals ex-

plained that, "[o]ther than Zell, no [petitioner] has alleged any intent to violate" the requirement, and that "Zell has not alleged any facts that would show a credible threat of enforcement against him." Pet. App. 38a. Petitioners assert (Pet. 20) that "numerous Petitioners verified that they don't *want* to file FBAR reports, believing them unconstitutional, and wouldn't file them if not required." Petitioners contend on that basis (Pet. 20-21) that petitioners other than Zell have adequately alleged an intent to violate the FBAR requirement, and that the decision below conflicts with *Driehaus*. Although petitioners' argument is not entirely clear, petitioners appear to attribute to the court a holding that, in order to establish standing to challenge an allegedly invalid law, a plaintiff must allege that he intends to violate the law *even if* the court declines to declare the law invalid.

Nothing in the court of appeals' opinion supports that characterization. And the question whether the court correctly construed the complaint in stating that "[o]ther than Zell, no [petitioner] has alleged any intent to violate the FBAR requirement," Pet. App. 38a, has no significance beyond the circumstances of this case. In any event, the court acknowledged that Zell had adequately alleged an intent to violate the law, and it held that he lacked standing on the separate ground that he "ha[d] not alleged any facts that would show a credible threat of enforcement against him." *Ibid.* Petitioners identify no reason to believe that the court would have reached a different conclusion if it had examined whether other petitioners had adequately alleged a credible threat that the FBAR requirement would be enforced against them.

c. Petitioners contend (Pet. 21-25) that they have suffered an "indirect injury" from the legal requirements imposed on FFIs. Pet. 21 (capitalization altered). Petitioners assert (Pet. 22) that the restrictions on FFIs under FATCA and the IGAs have resulted in "FFIs * * * declining to provide financial services to Americans abroad," including some petitioners. Petitioners claim (Pet. 21) that they therefore have standing to challenge FATCA and the IGAs under the theory that a "third-party withholding of a service due to a law gives persons denied the service standing to challenge the law." Petitioners rely on *Roe* v. *Wade*, 410 U.S. 113 (1973), in which the Court held that "Jane Roe had standing to challenge" a law that penalized doctors performing abortions "because physicians wouldn't provide her an abortion." Pet. 22. Petitioners assert (*ibid.*) that, under *Roe*, they similarly have standing in light of the "coercive effect of FATCA and the IGAs."

As the court of appeals correctly recognized, petitioners' challenge is fundamentally dissimilar to the challenge in *Roe*. See Pet. App. 29a & n.8. There, neither a woman seeking an abortion, nor a doctor who desired to perform one, could have accomplished those ends without violating the law. *Ibid.* In the present case, by contrast, there is "a third option available" to FFIs, which is to "comply with FATCA and do business with United States persons—without imposing additional requirements on their clients beyond what FATCA and the IGAs themselves require." *Id.* at 29a. Petitioners have alleged that some FFIs have made a "voluntary choice to go above and beyond FATCA and the IGAs," including in some instances by declining to do business with United States citizens. *Id.* at 30a. Any

ensuing injury to petitioners, however, cannot be attributed to the challenged laws, but rather results from the FFIs' "own independent actions." *Id.* at 35a.

d. Petitioners contend (Pet. 25-28) that the court of appeals failed to accept their allegations as true and to construe the complaint in their favor, as required by *Warth* v. *Seldin*, 422 U.S. 490 (1975). Although petitioners acknowledge that the court articulated the correct standard, see Pet. App. 32a, they claim (Pet. 26) that the court "didn't do as required." Petitioners point in particular to the court's conclusion that any FFI denying service to a petitioner did so based on a "voluntary and independent" choice, which was not "traceable to the IGAs." Pet. 27 (quoting Pet. App. 30a, 38a) (emphasis omitted). That conclusion was improper, petitioners argue (*ibid.*), because "Petitioners said denial of services by FFIs was *because* of FATCA/IGAs."

Petitioners' assertions of traceability, however, are not the sort of "nonconclusory factual allegation[s]" that a court must take as true in ruling on a motion to dismiss. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 680 (2009). The court of appeals did not dispute petitioners' *factual* allegation that some FFIs have reacted to FATCA and the IGAs by declining service to Americans. See Pet. App. 35a-36a. The court held, however, that those choices were "voluntary," and therefore not "traceable to FATCA" or the IGAs as a *legal* matter, because neither FATCA nor the IGAs compelled them. *Id.* at 36a. The court's application of the traceability requirement is consistent with this Court's instruction that the requirement is not satisfied "if the injury complained of is the result of the independent action of some third party

not before the court." *Bennett*, 520 U.S. at 169 (brackets, citation, emphasis, and internal quotation marks omitted).

e. Petitioners assert (Pet. 28) that the court of appeals "erred by refusing to recognize a privacy interest in financial records under the conditions here," in conflict with this Court's decision in *United States* v. *Miller*, 425 U.S. 435 (1976). See Pet. 28-32. The Court in *Miller* made clear, however, that there is no "legitimate expectation of privacy concerning the information kept in bank records." 425 U.S. at 442. Documents reflecting account information are "business records of the banks," not "private papers" of the account holder, *id.* at 440 (internal quotation marks omitted), and thus "contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business," *id.* at 442.

Petitioners argue that modern bank records contain more personal information than such records did when *Miller* was decided. See Pet. 28 (arguing that this case implicates "conditions [that] were not at issue" in *Miller*). Petitioners rely on footnote six in *Miller*, 425 U.S. at 444 n.6, which petitioners claim (Pet. 29-30) requires a "context-specific analysis" that takes into account such considerations as whether the plaintiff challenges a "blanket" reporting requirement, whether the reporting scheme involves "judicial oversight," and whether the reporting requirement raises "security risks." But even if the circumstances here were fundamentally different from those in *Miller*, that would not establish that the decision below *conflicts* with *Miller*, only that *Miller* is not dispositive. Petitioners do not assert that any other court of appeals has recognized a privacy right in bank records under comparable circumstances.

In any event, footnote six of *Miller* suggests only that reporting requirements might raise First Amendment concerns under certain conditions, as when the plaintiff alleges "an improper inquiry into protected associational activities." 425 U.S. at 444 n.6; see *ibid.* ("There was no blanket reporting requirement of the sort we addressed in *Buckley* v. *Valeo*, 424 U. S. 1, 60-84 (1976)."). Petitioners do not and could not plausibly suggest that the reporting provisions at issue here raise First Amendment concerns. Those provisions involve only basic information, such as the existence of accounts and their balances, as well as the gains and losses needed to determine tax liability. Cf. *California Bankers Assn.* v. *Schultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring) (no First Amendment concerns triggered by BSA requirement to report on all domestic currency transactions above $10,000). Petitioners' assertion (Pet. 29-31) that the reporting of bank account information raises digital security concerns has no basis in *Miller*. It is also irrelevant, because petitioners' complaint contains no factual allegations underpinning that argument, and petitioners did not invoke digital security concerns as a ground for standing in their filings below.

f. Petitioners contend (Pet. 32-34) that Senator Paul has standing to challenge the IGAs, on which he was not permitted to vote in his capacity as a legislator. The court of appeals correctly rejected that argument as inconsistent with *Raines*, which held that a legislator may not demonstrate standing by alleging "the abstract dilution of institutional legislative power." 521 U.S. at 826. Petitioners argue both that *Raines* should be overruled (Pet. 34 n.15) and that the more relevant decision is *Coleman* (Pet. 33-34).

As the court of appeals explained, however, "the plaintiff-legislators' votes [in *Coleman*] would have been sufficient to defeat the contested legislation," while Senator Paul "has not pleaded that his vote on its own would have been sufficient to forestall the IGAs." Pet. App. 37a; see *Coleman*, 307 U.S. at 438. Other courts of appeals have rejected claims of legislative standing under similar circumstances. See, *e.g.*, *Baird* v. *Norton*, 266 F.3d 408, 412 (6th Cir. 2001) ("For legislators to have standing as legislators, then, they must possess votes sufficient to have either defeated or approved the measure at issue."); *Campbell* v. *Clinton*, 203 F.3d 19, 22 (D.C. Cir.) (holding that Members of Congress lacked standing to raise claim "that the President has acted illegally—in excess of his authority—because he waged war in the constitutional sense without a congressional delegation"), cert. denied, 531 U.S. 815 (2000).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
RICHARD E. ZUCKERMAN
Principal Deputy Assistant Attorney General
GILBERT S. ROTHENBERG
TERESA E. MCLAUGHLIN
Attorneys

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