IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

BRETT BASS, an individual; SWAN SEABERG, an individual; THE SECOND AMENDMENT FOUNDATION, INC., a Washington non-profit corporation; and NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.; a New York non-profit association;

Plaintiffs,

v.

CITY OF EDMONDS, a municipality; DAVE EARLING, Mayor of the City of Edmonds, in his official capacity; EDMONDS POLICE DEPARTMENT, a department of the City of Edmonds; and AL COMPAAN, Chief of Police, in his official capacity,

Defendants.

CASE NO. 18-2-07049-31

DEFENDANTS' MOTION TO DISMISS

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I. RELIEF REQUESTED

This precipitously filed lawsuit should be dismissed because Plaintiffs lack standing and their claims are not ripe. The two individual Plaintiffs lack standing because they do not allege a concrete intent to engage in the irresponsible storage of firearms prohibited by Edmonds Ordinance 4120 (the "Ordinance") (such as leaving a gun unsecured when children are present or the gun owner is not at home). The two organizational Plaintiffs also lack standing because they have not alleged an organizational purpose to promote such irresponsible storage. Nor could they plausibly do so, since the advice they give their members – to make sure their guns are responsibly stored so as to be inaccessible to others, especially children – is consistent with, and not threatened by, the Ordinance. Finally, this pre-enforcement challenge – brought over six months before the Ordinance is to be enforced – is not ripe because the circumstances of any potential violation and enforcement action are purely hypothetical and speculative and Plaintiffs have not alleged how waiting to challenge any future civil fine incurred under the Ordinance would be a meaningful hardship.

For these reasons, set forth more fully below, the Complaint should be dismissed. In the alternative, the Court should order a more definite statement because Plaintiffs have failed to identify the constitutional provisions under which they wish to invalidate the Ordinance.

II. STATEMENT OF GROUNDS

On July 24, 2018, the Edmonds City Council enacted the Ordinance, which requires city residents to store firearms responsibly when not being carried by or under the owner's control. (Compl. ¶ 13.) In so acting, Edmonds joined a number of states and cities across the country that have laws requiring responsible gun storage and/or imposing penalties when unsafe storage leads to prohibited access (particularly by children) and injuries or death.[1] Within days of the new

[1] For additional information about the laws that govern safe storage, *see* Giffords Law Center to Prevent Gun Violence, *Safe Storage*, http://lawcenter.giffords.org/gun-laws/policy-areas/child-consumer-safety/safe-storage/ (last visited Aug. 15, 2018). For additional information about the laws that govern child access, *see* Giffords Law Center to Prevent Gun Violence, *Child Access Prevention*, http://lawcenter.giffords.org/gun-laws/policy-areas/child-consumer-safety/child-access-prevention/ (last visited Aug. 15, 2018).

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Ordinance's publication, Plaintiffs filed this lawsuit, a pre-enforcement challenge to a law that is not scheduled to be enforced until January 2019.[2]

In enacting the Ordinance, the City of Edmonds "recognize[d] the grave harm that could occur when an unlocked firearm is used by someone other than the firearm's rightful owner." Ordinance at preamble.[3] Moreover, the City Council found that "in 2015, 714 Washington State residents died from a firearm injury" and that "suicide is the leading cause of firearm death in Washington State." *Id.* In enacting the Ordinance, the City Council relied upon evidence that "63% of firearm-owning households in Washington state do not store their firearms locked and unloaded," and noted that, "according to 2018 RAND corporation analysis of firearm policies throughout the United States available evidence supports the conclusion that safe storage laws, reduce self-inflicted fatal or nonfatal firearm injuries among youth, as well as unintentional firearm injuries or deaths among children." *Id.*

The Ordinance contains two prescriptive provisions. The first requires responsible storage of firearms:

> It shall be a civil infraction for any person to store or keep any firearm in any premises unless such weapon is secured by a locking device, properly engaged so as to render such weapon inaccessible or unusable to any person other than the owner or other lawfully authorized user. Notwithstanding the foregoing, for purposes of this Section 5.26.020, such weapon shall be deemed lawfully stored or lawfully kept if carried by or under the control of the owner or other lawfully authorized user.

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[2] Seattle passed a very similar ordinance several weeks prior to Edmonds. The NRA and Second Amendment Foundation immediately challenged that ordinance as well in a lawsuit that is nearly identical to this one. *Alim, et al. v. City of Seattle, et al.*, King County Cause No. 18-2-18114-3 SEA. Seattle has moved to dismiss in a motion raising the same arguments raised herein. That motion is pending.

[3] Defendants append a copy of the Ordinance hereto as Exhibit A. *See McAfee v. Select Portfolio Servicing, Inc.*, 193 Wn. App. 220, 226, 370 P.3d 25 (2016) (superior courts may take judicial notice of public documents on a motion to dismiss); *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 844, 347 P.3d 487 (2015) ("where a plaintiff asserts allegations in a complaint on specific documents but does not physically attach those documents, the documents may be considered in ruling on a CR 12(b)(6) motion ….").

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Id. § 5.26.020. The second penalizes irresponsible storage that leads to access by minors and other unauthorized persons:

> It shall be a civil infraction if any person knows or reasonably should know that a minor, an at-risk person, or a prohibited person is likely to gain access to a firearm belonging to or under the control of that person, and a minor, an at-risk person, or a prohibited person obtains the firearm.

Id. § 5.26.030.

A violation of Section 5.26.020 is a civil infraction and will result in a fine of not more than $500 or community service, so long as no authorized person has accessed the gun. *Id.* § 5.26.040. The fine for a violation of either provision that results in a prohibited person (someone who is prohibited from owning or possessing a firearm), minor, or at-risk person (someone who is at risk of harming themselves or another person) obtaining access to a gun increases to $1,000. *Id.* Finally, if a violation of either provision results in a prohibited person, minor, or at-risk person obtaining the firearm and using it to injure or cause death or in connection with a crime, the maximum fine is $10,000. *Id.* Any fine imposed under the Ordinance can be challenged in Municipal Court and appealed to Superior Court. *Id.* §§ 5.26.060, 5.26.070.

Four plaintiffs have sued seeking declaratory and injunctive relief. Plaintiff Brett Bass alleges that he "owns a firearm that he keeps unlocked in his home for self-defense" and "has a strong desire to continue having his firearm in an unlocked and usable state in his home." (Compl. ¶ 1.) Plaintiff Swan Seaberg alleges that he "currently owns a firearm that he keeps unlocked in his home for self-defense and defense of his family" and that he "has a strong desire to continue having his firearm in an unlocked and usable state." (*Id.* ¶ 2.) Plaintiff Second Amendment Foundation, Inc. ("SAF") alleges it "has over 600,000 members and supporters nationwide, including thousands in the state of Washington" and that its purposes "include education, research, publishing, and legal action focusing on the constitutional right to own and possess firearms." (*Id.* ¶ 3.) Plaintiff National Rifle Association of America, Inc. ("NRA") alleges it "has over five million members, including members in the state of Washington" and its purposes "include protection of the right of

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citizens to have firearms for lawful defense, hunting, and sporting use, and to promote public safety." (*Id.* ¶ 4.) Plaintiffs allege the Ordinance violates RCW 9.41.290, the State's firearms preemption law, even though that law does not mention "storage" of firearms and the Supreme Court has instructed that the central purpose for enacting RCW 9.41.290 was to ensure uniformity in ***criminal laws*** relating to firearms.[4] Plaintiffs further allege that the Ordinance violates Article XI, Section 11 of the Washington Constitution, which grants police powers to the cities.

III. STATEMENT OF ISSUES

1. Do the individual plaintiffs lack standing because they fail to allege a concrete intention to violate the challenged Ordinance?

2. Do the organizational plaintiffs lack standing where they fail to allege any impact on their members and the organizations' alleged interests are not inconsistent with the challenged ordinance?

3. Should the Complaint be dismissed because Plaintiffs' challenge to the Ordinance is not ripe and therefore not justiciable?

[4] *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 356, 144 P.3d 276 (2006) ("[T]he central purpose of RCW 9.41.290 was to eliminate ***conflicting municipal criminal codes*** and to advance uniformity in ***criminal*** firearms regulation.") (emphasis in original) (internal quotation marks and citations omitted). *See also Watson v. City of Seattle*, 189 Wn.2d 149, 172, 401 P.3d 1 (2017) ("Essentially, Watson argues that the legislature has occupied the entire field of gun-related laws and ordinances unless specifically authorized by state law. We disagree.") (citations omitted).

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IV. LEGAL AUTHORITY

The Complaint should be dismissed under CR 12(b)(1) because Plaintiffs' claims are not justiciable.[5] *See, e.g., Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 814-15, 514 P.2d 137 (1973) (the Supreme Court has "steadfastly adhered to the virtually universal rule that, before the jurisdiction of a court may be invoked under the act, there must be a justiciable controversy"). Justiciability includes both standing and ripeness, *e.g., To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001), and as set forth below, Plaintiffs can satisfy neither element.

A. The Individual Plaintiffs Lack Standing.

"A person may not urge the invalidity of an ordinance unless he is harmfully affected by the particular feature of the ordinance alleged to be . . . invalid." *City of Seattle v. Long*, 61 Wn.2d 737, 740-41, 380 P.2d 472 (1963); *see also Kadoranian by Peach v. Bellingham Police Dep't*, 119 Wn.2d 178, 191, 829 P.2d 1061 (1992) (no standing where "no actual injury has been claimed"). "The touchstone … is whether the plaintiff has suffered an injury or threat of injury that is credible, not 'imaginary or speculative.'" *Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2010) (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).[6]

Plaintiffs sued within days of the Ordinance's passage and over five months before it will be enforced. In this pre-enforcement context, courts have held that plaintiffs must, *inter alia*, "establish, with some degree of concrete detail that they intend to violate the challenged law." *Id.*; *see also Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) ("[W]e look to whether the plaintiffs have articulated a 'concrete plan' to violate the law in question.") (citation omitted).[7]

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[5] Standing and ripeness are appropriately decided under CR 12(b)(1). *See Inland Foundry Co. v. Spokane Cty. Air Pollution Control Auth.*, 98 Wn. App. 121, 122, 989 P.2d 102 (1999).

[6] "Washington courts interpret the injury-in-fact test consistently with federal case law." *Snohomish Cty. Pub. Transp. Benefit Area v. State Pub. Emp't Relations Comm'n*, 173 Wn. App. 504, 513, 294 P.3d 803 (2013).

[7] Courts also consider whether there is a credible threat of enforcement and the history of the law's enforcement in determining whether a pre-enforcement plaintiff faces a concrete injury. *See, e.g., Thomas*, 220 F.3d at 1139. The Ordinance has no enforcement history, further indicating Plaintiffs' challenge is not ripe.

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The individual Plaintiffs have not alleged "a concrete intent to violate the challenged law." *Lopez*, 630 F.3d at 787. With respect to Section 5.26.020, neither individual Plaintiff has alleged that in January 2019, when enforcement of the Ordinance begins, he intends to leave his firearm unsecured (not secured by a locking device) when he is not carrying the firearm and does not otherwise have it under his control. Instead, the Plaintiffs merely allege that they have a "strong desire" to continue keeping their firearms unlocked in order to defend themselves – not that they will actually do so. But Plaintiffs must plead "something more than a hypothetical intent to violate the law," and their allegations – which are bereft of details as to when, how and under what circumstances they intend to store their firearms in a prohibited fashion – fall woefully short. *See Thomas*, 220 F.3d at 1139 ("A general intent to violate a statute at some unknown date in the future does not rise to the level of an articulated, concrete plan."). And notably, keeping firearms unlocked for self-defense ***complies*** with the Ordinance so long as the firearms remain under one's control. The individual Plaintiffs allege no intention to maintain unlocked firearms outside their control in an unsecured manner, and if they are ***responsible*** gun owners, cannot allege so in good faith.

Moreover, the Complaint pleads even less of a concrete plan to violate Section 5.26.030 of the Ordinance because the individual Plaintiffs do not come close to alleging that they intend to store their firearms in a manner in which "a minor, an at-risk person, or a prohibited person is likely to gain access to a firearm" that belongs to them. Ordinance § 5.26.030. The most Plaintiffs allege is that they "desire" to store their firearms in an "unlocked and usable state." (Compl. ¶¶ 1, 2.) Crucially, there are no allegations that minors, at-risk persons or prohibited persons live in or are likely to visit Plaintiffs' homes, much less that Plaintiffs are aware that such a person is likely to gain access to an improperly stored firearm while there. *See* Ordinance § 5.26.030. Nor is it even possible at this early stage for Plaintiffs to allege that such a person will in fact gain access to a firearm that was not stored consistently with the Ordinance. *See id.*

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Finally, Plaintiffs allege that when the Ordinance becomes effective, they "will be forced to alter the manner in which they possess firearms" (Compl. ¶ 18), which is another way of saying they intend to ***comply*** with the Ordinance rather than violate it. Alleging an intent to comply with rather than violate the Ordinance makes it especially "hypothetical" and "speculative" that the individual Plaintiffs will suffer any injury from the Ordinance's enforcement. *See To-Ro Trade Shows*, 144 Wn.2d at 411, 413-14 (plaintiff failed to show harm from enforcement of a statute prohibiting unlicensed RV dealers from selling at trade shows because it failed to identify "RV dealers who wanted to forgo the licensing process"; "[t]o the contrary, . . . it was unimaginable that dealers would incur the expense of participating in an RV trade show if they were not allowed to sell vehicles at the show").

B. The Organizational Plaintiffs Lack Standing.

The organizational Plaintiffs also lack standing because they do not allege that they or their members will suffer an injury once the Ordinance is enacted. An organization "has standing to bring suit on behalf of its members when, inter alia: (a) its members would otherwise have standing to sue in their own right; [and] (b) the interests it seeks to protect are germane to the organization's purpose." *Am. Legion Post #149 v. State Dep't of Health*, 164 Wn.2d 570, 595, 192 P.3d 306 (2008) (citation omitted). For an organization to assert standing on its own behalf, it must show that it falls within the zone of interests of the ordinance and that it has suffered an injury-in-fact. *Id*. Here, the organizational Plaintiffs fail both tests.

1. The Organizational Plaintiffs Lack Representative Standing.

For representational standing, the organizational Plaintiffs must show that their members have standing to sue, which requires a showing that their members will be harmed by the Ordinance. *Id.* at 594. But as with the individual Plaintiffs, the Complaint contains no allegation that either organization's members intend to violate the Ordinance. SAF and NRA allege only that

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their "Edmonds members . . . possess firearms in Edmonds and plan to do so in the future" – not that they intend to violate the Ordinance to their detriment. (Compl. ¶ 18.) These general allegations do not suffice to establish that each organization has individual members who will actually be impacted by the Ordinance and therefore have standing to sue. *See Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 251 (S.D.N.Y. 2011), *aff'd sub nom. Kachalsky v. Cty. Of Westchester*, 701 F.3d 81 (2d Cir. 2012) ("[The Second Amendment Foundation] . . . has neither identified particular members who have standing, nor specified how they would have standing to sue in their own right"); *Montana Shooting Sports Ass'n v. Holder*, No. CV-09-147-DWM-JCL, 2010 WL 3926029, at *14 (D. Mont. Aug. 31, 2010), *report and recommendation adopted*, No. CV 09-147-M-DWM-JCL, 2010 WL 3909431 (D. Mont. Sept. 29, 2010) (similar) (attached as Exhibit B).

Moreover, the organizational Plaintiffs fail to adequately allege that the interests that they seek to protect in this lawsuit are germane to their purposes. *See KS Tacoma Holdings, LLC v. Shorelines Hearings Bd.*, 166 Wn. App. 117, 140, 272 P.3d 876 (2012) (no standing where the interests organizational plaintiffs sought to protect conflicted with the organization's purpose). SAF alleges that its purpose is to protect "the constitutional right to own and possess firearms," while NRA alleges that its purpose is "protection of the right of citizens to have firearms for lawful defense, hunting, and sporting use, and to promote public safety." (Compl. ¶¶ 3, 4.) Neither organization has pled that its purpose is to preserve a right of members to leave firearms unsecured in their homes when those members are not carrying their firearms and do not otherwise have them under their control. Nor could they, given that the organizational Plaintiffs' own public pronouncements make it clear they instruct their members to store firearms in a manner that is consistent with what the Ordinance requires – i.e., to keep their firearms secured whenever they are not under the owners' control so that unauthorized persons cannot gain access.[8]

[8] According to NRA's website, "NRA's longstanding rule of gun storage is to store your guns so that they are inaccessible to any unauthorized users, especially your children and the children that visit your home."

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2. The Organizational Plaintiffs Lack Direct Standing.

The organizational Plaintiffs must satisfy the same test for direct standing as the individual Plaintiffs – i.e., that they will suffer "some 'personal injury fairly traceable to the challenged conduct'" – but fail to do so. *See Washington Trucking Ass'ns v. State, Emp't Sec. Dep't*, 192 Wn. App. 621, 638, 369 P.3d 621 (2016) (citation omitted) (trade association that did "not allege that [defendant] interfered with its own contracts or business expectancies" lacks standing), *rev'd in part on other grounds* , 188 Wn.2d 198, 393 P.3d 761 (2017). Although an organization may satisfy the injury-in-fact requirement by pleading "a drain on its resources from both a diversion of its resources and a frustration of its mission," *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002), SAF and the NRA allege no such thing. Absent allegations that the organizational Plaintiffs have suffered a direct injury – "economic or otherwise" – that is traceable to the Ordinance and capable of being redressed, they lack direct organizational standing. *Washington Trucking Ass'ns*, 192 Wn. App. at 638.

C. This Pre-Enforcement Challenge Is Not Ripe.

The Complaint should also be dismissed because Plaintiffs' challenge to the Ordinance is not ripe and therefore not justiciable. In determining ripeness, courts examine the fitness of the issue for judicial determination and the hardship to the parties from withholding such determination; a case is fit for judicial determination if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. *First Covenant Church of Seattle, Wash. v. City of Seattle*, 114 Wn.2d 392, 400, 787 P.2d 1352 (1990). Washington courts are disinclined to consider pre-enforcement challenges where the challenger has not yet been affected by state action, particularly when a statute is not yet in effect. *See Walker v. Munro*, 124 Wn.2d 402, 412, 879 P.2d

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https://eddieeagle.nra.org/faqs/ (last visited Sep. 14, 2018) (FAQ: "What are gun owner's responsibilities?"). Similarly, SAF leads the Safer Homes Coalition, a network of firearms retailers, Second Amendment rights groups, health care providers, and suicide prevention experts who work to prevent suicides. http://depts.washington.edu/saferwa/about-us/our-team/ (last visited Sep. 14, 2018) The Coalition directs people to "[l]ock up all firearms" and describes a Safer Home as one that "secures all firearms in locked storage" and where "[a]uthorized access to these potentially lethal items is restricted to only the owner or user and perhaps one additional adult." Safer Homes Coalition, "What is a Safer Home?", *available at* http://depts.washington.edu/saferwa/what-is-a-safer-home/ (last visited Aug. 9, 2018).

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920 (1994) (dismissing because statute not in effect and therefore "this is only a speculative dispute").

The issues in this case are not yet fit for judicial decision. First, as noted above, Plaintiffs do not allege that they plan to violate the Ordinance once it becomes effective or even that their "desired" conduct would not comply with the Ordinance. Based on that alone, the case is not ripe and thus not justiciable. *See, e.g., Diversified Indus.*, 82 Wn.2d at 815.

Moreover, Plaintiffs rushed to file this action within days of enactment and can point to no history of enforcement and nothing but speculation as to whether and how the Ordinance might be enforced to their detriment. This factor is especially important here because it is perfectly feasible for Plaintiffs to satisfy their "desire" to maintain unlocked guns for self-defense and comply with the Ordinance, as explained above. *See Walker*, 124 Wn.2d at 415 ("[T]his court will not render judgment on a hypothetical or speculative controversy, where concrete harm has not been alleged."). Whether or not each Plaintiff has been able to do so will be highly circumstantial, and as courts in other jurisdictions that have considered challenges to similar safe storage laws have recognized, the applicability of the statute must be determined on a case-by-case basis. *See, e.g., Com. v. Patterson*, 946 N.E.2d 130, 134 (Mass. App. Ct. 2011) ("Of course, the determination whether a particular firearm is under an individual's control will depend on the facts and circumstances of any given case.").

Plaintiffs also fail to plead and cannot show that they will suffer meaningful hardship if the Ordinance is enforced against them. For starters, no fine has been imposed on Plaintiffs, and no fine may ever be imposed on Plaintiffs. But in the event that Plaintiffs do violate the Ordinance, they could face a civil fine of no more than $500 for a simple infraction. Ordinance § 5.26.040. The theoretical potential of incurring a relatively small fine is simply not a threat of imminent substantial harm warranting intervention in the pre-enforcement stage. *See Crawford v. United States Dep't of the Treasury*, Case No. 3:15-cv-250, 2015 U.S. Dist. LEXIS 131496, at *21-22,

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(S.D. Ohio Sept. 29, 2015) (finding that plaintiff's "discomfort with complying" with a law and "fear of" potential future fines imposed are "imagined future events" and "cannot form the foundation of [a] lawsuit") (attached as Exhibit C); *Butler v. Obama*, 814 F. Supp. 2d 230, 234 (E.D.N.Y. Sept. 30, 2011) (finding it "abundantly clear" that "the possibility of having to pay a fine . . . is a 'conjectural and hypothetical' injury that does not rise to the level of a 'concrete and particularized' actual or imminent injury needed to establish Article III standing."). And while larger fines are possible if a firearm is improperly accessed, the Ordinance allows persons to challenge any citation in the Municipal Court of Edmonds and further provides that "[a]n appeal from the [Municipal] court's determination or order shall be to the Superior Court." Ordinance §§ 5.26.040, 5.26.070. The proper time for a challenge to the Ordinance is after it is in effect and has been enforced on a concrete and not imagined or speculative set of facts. No hardship accrues to Plaintiffs if they are made to wait until this occurs, if it does occur.

In short, Plaintiffs have not pled that waiting until the Ordinance is enforced would create a meaningful hardship, and thus have no basis for overcoming the presumption against reviewing a law before it is enforced. *California Dep't of Educ. v. Bennett*, 833 F.2d 827, 834 (9th Cir. 1987) (expected financial harm "is an insufficient showing of hardship to justify pre-enforcement judicial review."); *San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121 (9th Cir. 1996) (finding that plaintiffs would face no hardship by delaying resolution of their claims where no plaintiff had been charged yet with violating the challenged law); *American-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501 (9th Cir. 1992) (exercising jurisdiction was premature because plaintiffs had not yet been prosecuted for violating the challenged provision and because adequate procedures existed for the vindication of plaintiffs' claims in the future).

V. CONCLUSION

For the foregoing reasons, Defendants request that the Court dismiss the Complaint due to lack of justiciability, or, in the alternative, order a more definite statement.

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DATED this 18th day of September, 2018.

Respectfully submitted,

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EXHIBIT A

ORIDINANCE NO. 4120

AN ORDINANCE RELATING TO THE SAFE STORAGE OF AND ACCESS TO FIREARMS.

WHEREAS, in 2015, 714 Washington State residents died from a firearm injury and a child or teen under the age of 17 was killed by gunfire in every nine days, on average, according to WA State Department of Health, Center for Health Statistics Death Certificate data; and

WHEREAS, suicide is the leading cause of firearm death in Washington State according to the WA State Department of Health. In 2015, 47% of all those who took their own lives – used a firearm; and

WHEREAS, the Federal Bureau of Justice Statistics estimated an average of at least 232,000 guns were stolen per year from 2005 to 2010; and

WHEREAS, the US Secret Service and US Department of Education published a study examining school shootings from 1974-2000 that found that in more than 65% of cases, the shooter obtained the firearm from their home or that of a relative.

WHEREAS, 63% of firearm-owning households in Washington state do not store their firearms locked and unloaded, according to 2018 research led by the University of Washington School of Public Health; and

WHEREAS, among firearm-owning households, keeping firearms unlocked have been associated with a greater risk of firearm suicide among both youths and adults; and

WHEREAS, according to 2018 RAND corporation analysis of firearm policies throughout the United States available evidence supports the conclusion that safe storage laws, reduce self-inflicted fatal or nonfatal firearm injuries among youth, as well as unintentional firearm injuries or deaths among children; and

WHEREAS, the Center for Disease Control states safe firearm storage practices—such as keeping guns secured with a cable lock or in a gun safe—reduce the risk of firearm injuries; and

WHEREAS, in 2012, the Washington State Division One Court of Appeals recognized the potential for liability in a negligence action when a firearm owner allows an individual who may be at-risk of misusing a weapon to have access to that weapon while in the weapon-owner's home; and

WHEREAS, the Legislature of the State of Washington has expressed a public policy that third-parties should avoid allowing firearms to come into the possession of persons who would be ineligible to obtain such weapons under RCW 9.41.040, including minors in most circumstances; and

WHEREAS the people of the State of Washington enacted by initiative the "Extreme Risk Protection Order Act," now RCW Chapter 7.94, allowing family, household members, and law enforcement to petition a court to remove firearms from at-risk individuals; and

WHEREAS the City of Edmonds recognizes the grave harm that could occur when an unlocked firearm is used by someone other than the firearm's rightful owner, such as when an unlocked firearm is stolen and used by a third-party to perpetrate a crime; NOW, THEREFORE,

THE CITY COUNCIL OF THE CITY OF EDMONDS, WASHINGTON, DO ORDAIN AS FOLLOWS:

Section 1. A new Chapter 5.26 is added to the Edmonds City Code as follows:

Chapter 5.26 STORAGE OF FIREARMS

5.26.010 Definitions

For purposes of this Chapter 5.26, the following definitions apply:

A. "At-risk person" means any person who has made statements or exhibited behavior that indicates to a reasonable person there is a likelihood that the person is at risk of attempting suicide or causing physical harm to oneself or others.

B. "Firearm" means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder, including but not limited to any machine gun, pistol, rifle, short-barreled rifle, short-barreled shotgun, or shotgun as those terms are defined in RCW 9.41.010. "Firearm" does not include a flare gun or other pyrotechnic

visual distress signaling device, or a powder-actuated tool or other device designed solely to be used for construction purposes.

C. "Lawfully authorized user" means any person who:

1. Is not in the unlawful possession of a firearm under RCW 9.41.040; and

2. Is not prohibited from possessing a firearm under any other state or federal law; and

3. Has the express permission of the owner to possess and use the firearm.

D. "Locking device" includes any cable lock, barrel lock, storage container, or other device approved of or meeting specifications established by the Chief of Police by rule promulgated in accordance with Chapter 5.26.

E. "Minor" means a person under 18 years of age who is not authorized under RCW 9.41.042 to possess a firearm, or a person of at least 18 but less than 21 years of age who does not meet the requirements of RCW 9.41.240.

F. "Prohibited person" means any person who is not a lawfully authorized user.

5.26.020 Safe storage of firearms

It shall be a civil infraction for any person to store or keep any firearm in any premises unless such weapon is secured by a locking device, properly engaged so as to render such weapon inaccessible or unusable to any person other than the owner or other lawfully authorized user.

Notwithstanding the foregoing, for purposes of this Section 5.26.020, such weapon shall be deemed lawfully stored or lawfully kept if carried by or under the control of the owner or other lawfully authorized user.

5.26.030 Unauthorized access prevention

It shall be a civil infraction if any person knows or reasonably should know that a minor, an at-risk person, or a prohibited person is likely to gain access to a firearm belonging to or under the control of that person, and a minor, an at-risk person, or a prohibited person obtains the firearm.

5.26.040 Penalties

A. A violation of Section 5.26.020 shall constitute a civil infraction subject to a civil fine or forfeiture not to exceed $500. For good cause shown, the court may provide for the performance of community restitution, in lieu of the fine or forfeiture imposed under this subsection 5.26.040.A.

B. A violation of Section 5.26.020 or 5.26.030 shall constitute a civil infraction subject to a civil fine or forfeiture in an amount up to $1,000 if a prohibited person, an at-risk person, or a minor obtains a firearm as a result of the violation. For good cause shown, the court may provide for the performance of community restitution, in lieu of the fine or forfeiture imposed under this subsection 5.26.040.B.

C. A violation of Section 5.26.020 or 5.26.030 shall constitute a civil infraction subject to a civil fine or forfeiture in an amount up to $10,000 if a prohibited person, an at-risk person, or a minor obtains an unsecured firearm and uses it to injure or cause the death of oneself or others, or uses the firearm in connection with a crime. A separate civil fine or forfeiture may be issued for each instance that a person that is injured or killed as a result of a violation of Section 5.26.020 or 5.26.030.

D. A violation of Section 5.26.020 or 5.26.030 is hereby deemed at minimum negligent and may be considered reckless depending upon the knowledge and actions of the violator.

E. Nothing in this Chapter 5.26 shall be construed to alter any requirements, including, but not limited to, any warrant requirements applicable under the Fourth Amendment to the United States Constitution or Article I, Section 7 of the Washington State Constitution.

F. Sections 5.26.020 and 5.26.030 shall not apply to "antique firearms," as defined in RCW 9.41.010.

5.26.050 Notice of infraction—Issuance

A. A peace officer has the authority to issue a notice of infraction:

1. When an infraction under this Chapter 5.26 is committed in the officer's presence;

2. If an officer has reasonable cause to believe that a person has committed an infraction under this Chapter 5.26.

B. A court may issue a notice of infraction upon receipt of a written statement of the officer that there is reasonable cause to believe that an infraction was committed.

5.26.060 Response to notice of infraction—Contesting determination—Hearing—Failure to appear

A. Any person who receives a notice of infraction shall respond to such notice as provided in this section within 15 days of the date the notice is personally served or, if the notice is served by mail, within 18 days of the date the notice is mailed.

B. If the person determined to have committed the infraction does not contest the determination the person shall respond by completing the appropriate portion of the notice of infraction and submitting it, either by mail or in person, to the Edmonds Municipal Court. A check or money order in the amount of the penalty prescribed for the infraction must be submitted with the response, if responding by mail, or if responding online, payment may be made using a credit card. When a response that does not contest the determination is received, an appropriate order shall be entered in the court's records.

C. If the person determined to have committed the infraction wishes to contest the determination the person shall respond by completing the portion of the notice of infraction requesting a hearing and submitting it, either by mail or in person, to the

Edmonds Municipal Court. The court shall notify the person in writing of the time, place, and date of the hearing, and that date shall not be sooner than seven days from the date of the notice, except by agreement.

D. If the person determined to have committed the infraction does not contest the determination but wishes to explain mitigating circumstances surrounding the infraction, the person shall respond by completing the portion of the notice of infraction requesting a hearing for that purpose and submitting it, either by mail or in person, to the Edmonds Municipal Court. The court shall notify the person in writing of the time, place, and date of the hearing.

E. In any hearing conducted pursuant to subsections 5.26.060.C or 5.26.060.D, the court may defer findings, or in a hearing to explain mitigating circumstances may defer entry of its order, for up to one year and impose conditions upon the defendant the court deems appropriate. Upon deferring findings, the court may assess costs as the court deems appropriate for administrative processing. If at the end of the deferral period the defendant has met all conditions and has not been determined to have committed another infraction under this Chapter 5.26, the court may dismiss the infraction. A person may not receive more than one Deferral within a seven-year period.

F. If any person issued a notice of infraction:

1. Fails to respond to the notice of infraction as provided in subsection 5.26.060.B; or

2. Fails to appear at a hearing requested pursuant to subsections 5.26.060.C or 5.26.060.D; the court shall enter an appropriate order assessing the monetary penalty prescribed for the infraction and any other penalty authorized by this Chapter 10.79.

5.26.070 Hearing—Contesting determination that infraction committed—Appeal

A. A hearing held for the purpose of contesting the determination that an infraction has been committed shall be without a jury.

B. The court may consider the notice of infraction and any other written report made under oath submitted by the officer who issued the notice or whose written statement was the basis for the issuance of the notice in lieu of the officer's personal appearance at the hearing. The person named in the notice may subpoena witnesses, including the officer, and has the right to present evidence and examine witnesses present in court.

C. The burden of proof is upon the City to establish the commission of the infraction by a preponderance of the evidence.

D. After consideration of the evidence and argument, the court shall determine whether the infraction was committed. Where it has not been established that the infraction was committed, an order dismissing the notice shall be entered in the court's records. Where it has been established that the infraction was committed, an appropriate order shall be entered in the court's records.

E. An appeal from the court's determination or order shall be to the Superior Court. The decision of the Superior Court is subject only to discretionary review pursuant to Rule 2.3 of the Rules of Appellate Procedure.

Section 2. The provisions of this ordinance are declared to be separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section, or portion of this ordinance, or the invalidity of its application to any person or circumstance, does not affect the validity of the remainder of this ordinance or the validity of its application to other persons or circumstances.

Section 3. Effective Date. This ordinance is subject to referendum and shall take effect thirty (30) days after final passage of this ordinance. Once effective, this ordinance shall not be enforced until one hundred eighty (180) days after final passage.

APPROVED:

MAYOR DAVE EARLING

ATTEST/AUTHENTICATED:

CITY CLERK, SCOTT PASSEY

APPROVED AS TO FORM:
OFFICE OF THE CITY ATTORNEY:

BY

JEFF TARADAY

FILED WITH THE CITY CLERK:	July 20, 2018
PASSED BY THE CITY COUNCIL:	July 24, 2018
PUBLISHED:	July 29, 2018
EFFECTIVE DATE:	August 23, 2018
ORDINANCE NO.	4120

SUMMARY OF ORDINANCE NO. 4120
of the City of Edmonds, Washington

On the 24th day of July, 2018, the City Council of the City of Edmonds, passed Ordinance No. 4120. A summary of the content of said ordinance, consisting of the title, provides as follows:

AN ORDINANCE RELATING TO THE SAFE STORAGE OF AND ACCESS TO FIREARMS.

The full text of this Ordinance will be mailed upon request.

DATED this 25th day of July, 2018.

CITY CLERK, SCOTT PASSEY

Everett Daily Herald

Affidavit of Publication

State of Washington }
County of Snohomish } ss

Dicy Sheppard being first duly sworn, upon oath deposes and says: that he/she is the legal representative of the Everett Daily Herald a daily newspaper. The said newspaper is a legal newspaper by order of the superior court in the county in which it is published and is now and has been for more than six months prior to the date of the first publication of the Notice hereinafter referred to, published in the English language continually as a daily newspaper in Snohomish County, Washington and is and always has been printed in whole or part in the Everett Daily Herald and is of general circulation in said County, and is a legal newspaper, in accordance with the Chapter 99 of the Laws of 1921, as amended by Chapter 213, Laws of 1941, and approved as a legal newspaper by order of the Superior Court of Snohomish County, State of Washington, by order dated June 16, 1941, and that the annexed is a true copy of EDH818914 ORDINANCE 4118-4121 as it was published in the regular and entire issue of said paper and not as a supplement form thereof for a period of 1 issue(s), such publication commencing on 07/29/2018 and ending on 07/29/2018 and that said newspaper was regularly distributed to its subscribers during all of said period.

The amount of the fee for such publication is $61.92.

Dicy Sheppard

Subscribed and sworn before me on this 30th day of July, 2018.

Linda Phillips

Notary Public in and for the State of Washington.

Linda Phillips
Notary Public
State of Washington
My Appointment Expires 08/29/2021

City of Edmonds - LEGAL ADS | 14101416
SCOTT PASSEY

Classified Proof

ORDINANCE SUMMARY
of the City of Edmonds, Washington

On the 24th day of July, 2018, the City Council of the City of Edmonds, passed the following Ordinances, the summaries of said ordinances consisting of titles are provided as follows:

ORDINANCE NO. 4118

AN ORDINANCE OF THE CITY OF EDMONDS, WASHINGTON, AMENDING ORDINANCE NO. 4109 AS A RESULT OF UNANTICIPATED TRANSFERS AND EXPENDITURES OF VARIOUS FUNDS, AND FIXING A TIME WHEN THE SAME SHALL BECOME EFFECTIVE.

ORDINANCE NO. 4119

AN ORDINANCE DESIGNATING THE EXTERIOR OF THE YOST HOUSE LOCATED AT 658 MAPLE STREET, EDMONDS, WASHINGTON FOR INCLUSION ON THE EDMONDS REGISTER OF HISTORIC PLACES, AND DIRECTING THE DEVELOPMENT SERVICES DIRECTOR OR DESIGNEE TO DESIGNATE THE SITE ON THE OFFICIAL ZONING MAP WITH AN "HR" DESIGNATION., AND FIXING A TIME WHEN THE SAME SHALL BECOME EFFECTIVE.

ORDINANCE NO. 4120

AN ORDINANCE RELATING TO THE SAFE STORAGE OF AND ACCESS TO FIREARMS

ORDINANCE NO. 4121

AN ORDINANCE RELATING TO THE REPORTING OF LOST OR STOLEN FIREARMS; INCREASING THE MAXIMUM PENALTY FOR FAILURE TO REPORT A LOST OR STOLEN FIREARM; ADDING LEGAL PRESUMPTIONS AND DEFENSES REGARDING COMPLIANCE OR FAILURE TO COMPLY WITH SECTION 5.24.070 OF THE EDMONDS CITY CODE

The full text of these Ordinances will be mailed upon request.

DATED this 25th day of July, 2018.

CITY CLERK, SCOTT PASSEY

Published: July 29, 2018. EDH818914

EXHIBIT B

2010 WL 3909431
Only the Westlaw citation is currently available.
United States District Court, D. Montana, Missoula Division.

MONTANA SHOOTING SPORTS ASSOCIATION, Second Amendment Foundation, Inc., and Gary Marbut, Plaintiffs,
v.
Eric H. HOLDER, Jr., Attorney General of the United States of America, Defendants.

No. CV 09–147–M–DWM–JCL.
|
Sept. 29, 2010.

ORDER

DONALD W. MOLLOY, District Judge.

***1** The Court having reviewed Magistrate Judge Jeremiah C. Lynch's Findings and Recommendations together with the objections of the Plaintiffs and Intervener and the response filed by the Defendant, and having conducted a de novo review as required by 28 U.S.C. § 636(b)(1),

IT IS HEREBY ORDERED that Judge Lynch's Findings and Recommendations (Doc. No. 103) are adopted in full, and the Defendant's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim (Doc. No. 10) is GRANTED, The case will be dismissed and judgment entered upon the filing of a forthcoming explanatory opinion.

All Citations

Not Reported in F.Supp.2d, 2010 WL 3909431

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

MONTANA SHOOTING SPORTS ASSOCIATION, SECOND AMENDMENT FOUNDATION, INC., and GARY MARBUT

Plaintiffs,

vs.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,

Defendant.

CV-09-147-DWM-JCL

FINDINGS &RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Plaintiffs Montana Shooting Sports Association, Second Amendment Foundation, and Gary Marbut bring this declaratory judgment action seeking a determination that they may manufacture and sell firearms under the recently enacted Montana Firearms Freedom Act without complying with Federal firearms laws. They invoke federal question jurisdiction under 28 U.S.C § 1331. Defendant Eric H. Holder, Jr., Attorney General of the United States of America ("United

States"), has moved under Federal Rule of Civil Procedure 12(b) to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.

To the extent Plaintiffs seek judicial review under the Administrative Procedures Act, they have not shown final agency action. Furthermore, because Plaintiffs do not have standing to pursue their claims for declaratory and injunctive relief, this case should be dismissed in its entirety for lack of subject matter jurisdiction. Even if presiding United States District Court Judge Donald W. Molloy were to disagree, and conclude on review of the undersigned's Findings and Recommendation that there is subject matter jurisdiction, Plaintiffs have failed to state a claim upon which relief may be granted and their Second Amended Complaint should be dismissed.

I. Background

The Montana Firearms Freedom Act ("the Act"), Mont Code Ann. § 30-20-101, et seq., is a product of Montana's 2009 legislative session. The Act, which went into effect on October 1, 2009, declares that "[a] personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in Montana and that remains within the borders of Montana is not subject to federal law or federal regulation, including registration, under the authority of congress

[sic] to regulate interstate commerce." Mont. Code Ann. § 30-20-104.

In the months preceding the Act's effective date, the United States Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") received a number of inquiries from firearms industry members as to the potential effects of Montana's new law on their business activities. Dkt. 33-2. In light of those inquiries, the ATF authored a July 16, 2009, open letter to all Montana Federal Firearms Licensees for the purpose of providing guidance regarding their continuing obligations under federal law. Dkt. 33-2. The ATF explained that "because the Act conflicts with Federal firearms laws and regulations, Federal law supersedes the Act, and all provisions of the Gun Control Act and the National Firearms Act, and their corresponding regulations, continue to apply." Dkt. 33-2. The ATF indicated that any Federal requirements and prohibitions would "apply whether or not the firearms or ammunition have crossed state lines." Dkt. 33-2, at 2.

In August 2009, Plaintiff Gary Marbut wrote to the resident agent in charge of the ATF field office in Billings, Montana, seeking similar guidance. Marbut indicated that he wanted to manufacture firearms, firearms accessories, or ammunition consistent with the Act and asked whether it would be permissible under federal law for him to do so. Dkt. 33-1. The ATF responded by letter on September 29, 2009, identifying various requirements under federal firearms laws.

Dkt. 33-1. The ATF cautioned Marbut that a violation of the Gun Control Act or the National Firearms Act "could lead to...potential criminal prosecution." Dkt. 33-1. In closing, the ATF stated once again that to the extent "the Montana Firearms Freedom Act conflicts with Federal firearms laws and regulations, Federal law supersedes the Act, and all provisions of the [Gun Control Act] and [National Firearms Act], and their corresponding regulations, continue to apply." Dkt. 33-1.

Unsatisfied with that response, Marbut commenced this declaratory judgment action on October 1, 2009, along with fellow Plaintiffs the Montana Shooting Sports Association[1] and the Second Amendment Foundation.[2] Dkt. 1. Plaintiffs have amended their complaint twice since then, most recently on April 9, 2010.[3] Dkt. 6, 33. Plaintiffs explain that Marbut and other individuals want to be

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[1] Gary Marbut is the president of the Montana Shooting Sports Association, which is a non-profit corporation organized for the purpose of supporting and promoting firearm use and safety, as well as educating its members on their constitutional right to keep and bear arms. Dkt. 33, at 2-3.

[2] The Second Amendment Foundation is a State of Washington non-profit organization with members nationwide, similarly dedicated to promoting the constitutional right to keep and bear firearms.

[3] Plaintiffs amended their Complaint once as a matter of course on December 14, 2009. See Fed. R. Civ. P. 15(a)(1). After the United States moved to dismiss, Plaintiffs filed a Second Amended Complaint primarily to bolster their allegations relating to the questions of standing and final agency action. Dkt. 33. As the United States notes, however, Plaintiffs filed their Second Amended Complaint without first obtaining the opposing party's written consent or leave of

able to manufacture and sell small arms and small arms ammunition to customers in Montana pursuant to the Act without complying with the National Firearms Act, the Gun Control Act of 1968, or any other applicable federal laws. Dkt. 33, at 7-8. According to Marbut, he "has hundreds of customers who have offered to pay his stated asking price for both firearms and firearms ammunition manufactured under the [Act]," but those sales "are all specifically conditioned on the [firearms] being manufactured pursuant to the [Act], without [National Firearms Act] or [Gun Control Act] licensing, or as the customers see it, [ATF] interference." Dkt. 33, ¶ 15.

Citing the ATF's September 29, 2009 letter, however, Plaintiffs maintain the ATF has made clear that "no Montanan who wishes to proceed under the [Act] can do so without becoming licensed by [ATF], and without fear of federal criminal prosecution and/or civil sanctions...." Dkt. 33, ¶ 16. This presents a potential problem for the Plaintiffs, who indicate they do not want to pay the requisite ATF licensing fees and taxes, and do not want to submit to National

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court as required by Fed. R. Civ. P. 15(a). Dkt. 70, at 11 n.2. Nevertheless, the United States has not moved to strike the Second Amended Complaint and has had the opportunity to address Plaintiffs' newly amended pleading in its reply brief and at oral argument. Accordingly, and bearing in mind that leave to amend shall be freely given under Fed. R. Civ. P. 15(a)(2), the Court will consider Plaintiffs' Second Amended Complaint as the operative pleading from this point forth. Dkt. 33.

Firearms Act or Gun Control Act licensing and registration procedures, record keeping requirements, and marking mandates. Dkt. 33, ¶ 16. Plaintiffs allege that the threat of federal criminal prosecution and/or civil action is effectively preventing them "and all law abiding citizens from exercising their rights under and otherwise benefitting from the" Act. Dkt. 33, ¶ 22.

Plaintiffs bring this action for declaratory and injunctive relief in an effort to have those rights adjudicated. They ask the Court to declare that: (1) the United States Constitution confers no power on Congress to regulate the special rights and activities contemplated by the Act; (2) under the Ninth and Tenth Amendments of the United States Constitution, all regulatory authority of all such activities within Montana's political borders is left in the sole discretion of the State of Montana; and (3) federal law does not preempt the Act and cannot be invoked to regulate or prosecute Montana citizens acting in compliance with the Act. Dkt. 33, at 14. Plaintiffs also seek injunctive relief to that effect, asking that the Court permanently enjoin the United States "and any agency of the United States of America from prosecuting any civil action, criminal indictment or information under the [National Firearms Act] or the [Gun Control Act], or any other federal laws and regulations, against Plaintiffs or other Montana citizens acting solely within the political borders of the State of Montana in compliance

with the [Act]." Dkt. 33, at 14.

The United States has moved under Federal Rule of Civil Procedure 12(b) to dismiss this entire action for lack of standing, lack of subject matter jurisdiction, and failure to state a claim upon which relief may be granted. After the United States filed its motion, the State of Montana intervened as of right in this matter and submitted a brief in support of the Act. Dkt. 46, 47. Also contributing to the current discussion are the several amici curiae who have filed briefs in support of either the Plaintiffs or the United States.[4]

Having reviewed the briefs and materials of record, and having heard oral argument on July 15, 2010, the Court turns now to the question of whether Plaintiffs' Second Amended Complaint is sufficient to withstand the United States' motion to dismiss.

II. Legal Standards - Motion to Dismiss

A. Rule 12(b)(1)

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[4] The following Amici have appeared in support of the Plaintiffs: Goldwater Institute Scharf-Norton Center for Constitutional Government, *et al.*; Weapons Collectors Society of Montana; the States of Utah and other States; several members of the Montana Legislature; the Paragon Foundation; the Center for Constitutional Jurisprudence and several state lawmakers from seventeen states; and the Gun Owners Foundation *et al.*

The following Amici have appeared in support of the United States: The Brady Center to Prevent Gun Violence *et al.*

A motion to dismiss under Rule 12(b)(1) challenges the court's subject matter jurisdiction over the claims asserted. "Once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence." *Rattlesnake Coalition v. United States Environmental Protection Agency*, 509 F.3d 1095, 1102 n. 1 (9th Cir. 2007).

A defendant may pursue a Rule 12(b)(1) motion to dismiss for lack of jurisdiction either as a facial challenge to the allegations of a pleading, or as a substantive challenge to the facts underlying the allegations. *Savage v. Glendale Union High School, Dist. No. 205, Maricopa County*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003). A facial challenge to the jurisdictional allegations is one which contends that the allegations "are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The success of a facial challenge to jurisdiction depends on the allegations in the complaint, and does not involve the resolution of a factual dispute. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). In a facial challenge the court must assume the allegations in the complaint are true and it must "draw all reasonable inferences in [plaintiff's] favor." *Wolfe*, 392 F.3d at 362.

"By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe*

Air for Everyone, 373 F.3d at 1039. In resolving such a factual attack, the court "may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Safe Air for Everyone*, 373 F.3d at 1039. If the moving party has "converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Safe Air for Everyone*, 373 F.3d at 1039 (*quoting Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003)). In looking to matters outside the pleadings, the Court must "resolve all disputes of fact in favor of the non-movant...similar to the summary judgment standard." *Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1996). As with a motion for summary judgment, the party moving to dismiss for lack of subject matter jurisdiction "should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Casumpang v. Int'l Longshoremen's & Warehousemen's Union*, 269 F.3d 1042, 1060-61 (9th Cir. 2001).

B. Rule 12(b)(6)

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint. *Navarro v. Black*, 250 F.3d 729, 732 (9th Cir.

2001). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, __ U.S. __, 129 S.Ct. 1937, 1949 (2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This means that the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 129 S.Ct. at 1949.

While the court must accept all factual allegations in the complaint as true and construe them in the light most favorable to the plaintiffs, it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555. "Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Sciences Securities Litigation*, 536 F.3d 1049, 1055 (9th Cir. 2008). Assessing a claim's plausibility is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S.Ct. at 1950.

III. Discussion

The United States argues that this declaratory judgment action should be dismissed for lack of subject matter jurisdiction because Plaintiffs have not established a waiver of sovereign immunity under the Administrative Procedure Act, 5 U.S.C. § 551 et seq., and have not demonstrated that they are entitled to non-statutory review of a non-final agency action. The United States also maintains that subject matter jurisdiction is lacking because Plaintiffs have not shown an economic injury or credible threat of imminent prosecution sufficient to confer standing for purposes of pursuing their pre-enforcement constitutional challenge. Even if the Court does have subject matter jurisdiction, the United States argues that Plaintiffs have failed to state a claim upon which relief may be granted under binding United States Supreme Court and Ninth Circuit precedent.

A. Sovereign Immunity

"Federal courts are courts of limited jurisdiction," having the power to hear cases only as authorized by the Constitution and by Congress. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Pursuant to 28 U.S.C. § 1331, Congress has authorized the federal courts to exercise federal question jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." Plaintiffs have invoked this jurisdictional provision, and ask the Court to

answer such federal questions as whether the United States Constitution gives Congress the power to regulate the intrastate firearms commerce activities contemplated by the Act. Dkt. 33, at 4 & 14. While Plaintiffs' lawsuit can thus be said to arise under federal law for § 1331 purposes, the United States nevertheless argues the Court is without subject matter jurisdiction because the government has not waived its sovereign immunity.

The doctrine of sovereign immunity operates as "an important limitation on the subject matter jurisdiction of federal courts." *Dunn & Black, P.S. v. U.S.*, 492 F.3d 1084, 1087 (9th Cir. 2007) (*quoting Vacek v. U.S. Postal Service*, 447 F.3d 1248, 1250 (9th Cir. 2006)). As a sovereign, the United States "is immune from suit unless it has expressly waived such immunity and consented to be sued." *Dunn & Black*, 492 F.3d at 1087-88 (*quoting Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985)). Absent an unequivocally expressed waiver, there is no federal court jurisdiction. *Dunn & Black*, 492 F.3d at 1088.

Plaintiffs bear the burden of showing that the United States has waived its sovereign immunity. *Cato v. United States*, 70 F.3d 1103, 1107 (9th Cir. 1995). Citing the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701 et seq., Plaintiffs allege the United States has unequivocally waived its immunity with respect to their claims. Dkt. 33, ¶ 7. Section 702 of the APA indeed waives

sovereign immunity for certain nonmonetary claims against the United States, providing as it does that

> [a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency...acted or failed to act...shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.
>
> 5 U.S.C. § 702.

As with any waiver of sovereign immunity, however, the waiver set forth in § 702 is to be strictly construed in favor of the United States. *See e.g. Dunn & Black*, 492 F.3d at 1088; *Vacek*, 477 F.3d at 1250. Consistent with this principle, the United States argues that § 702 does not provide a waiver of sovereign immunity in this case because judicial review under the APA is limited to final agency action, and there has been no such final decision here.[5]

The APA provides the procedural mechanism by which "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," may obtain "judicial review thereof." 5 U.S.C. § 702. By its terms, the APA limits this right of judicial review to "final agency action for which there is no other adequate remedy in a

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[5] This amounts to a factual attack on jurisdiction, whereby the United States challenges the Plaintiffs' allegations regarding final agency action. Because the United States has mounted a factual attack, the Court may look to matters outside the pleadings for purposes of resolving the motion.

court."[6] 5 U.S.C. § 704. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 882 (1990). In other words, the APA provides for judicial review of agency action, but only if that action is final. *See Lujan*, 497 U.S. at 882; *Rattlesnake Coalition v. EPA*, 509 F.3d 1095, 1103 (9th Cir. 2007).

Plaintiffs allege that the ATF's September 29, 2009, letter to Marbut constituted "final agency action" within the meaning of the APA. Dkt. 33, ¶¶ 14-16. The ATF wrote the letter in response to an inquiry from Marbut as to whether it would be permissible under federal law for him to engage in the firearms manufacturing activities authorized by the Act. Dkt. 33-1. The ATF's letter explained that the manufacture of certain firearms, even for personal use, would require ATF approval, and advised Marbut that "[t]he manufacture of firearms or ammunition for sale to others in Montana requires licensure by [the] ATF." Dkt. 33-1. The ATF cautioned Marbut "that any unlicensed manufacturing of firearms or ammunition for sale or resale, or the manufacture of any [National Firearms Act] weapons, including sound suppressors, without proper registration and payment of tax, is a violation of Federal law and could lead to the forfeiture of such items and potential criminal prosecution under the [Gun Control Act] or the

[6] The APA also provides for judicial review of an "[a]gency action made reviewable by statute." 5 U.S.C. § 704. Because neither party points to any agency action made reviewable by statute, this provision is not implicated here.

[National Firearms Act]." Dkt. 33-1. In closing, the ATF stated that to the extent "the Montana Firearms Freedom Act conflicts with Federal firearms laws and regulations, Federal law supersedes the Act, and all provisions of the [Gun Control Act] and [National Firearms Act], and their corresponding regulations, continue to apply." Dkt. 33-1.

For an agency action like this letter to be considered final for purposes of the APA, it must satisfy the following two criteria: (1) "the action must mark the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature;" and (2) "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear,* 520 U.S. 154, 177-78 (1997) (internal citations and quotation marks omitted). "The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Oregon Natural Desert Association v. United States Forest Service*, 465 F.3d 977, 982 (9th Cir. 2006) (citation and quotation omitted).

The ATF's letter to Marbut does not satisfy either of the *Bennett* criteria. With respect to the first requirement, there is nothing to suggest that the letter marks the consummation of the ATF's decisionmaking process. In fact, there is

nothing to suggest that the ATF engaged in any decisionmaking process at all. The letter simply restates the requirements of federal firearms laws and reiterates well-established principles of federal supremacy and conflict preemption. *See Golden and Zimmerman, LLC v. Domenech*, 599 F.3d 426, 432 (4th Cir. 2010) (concluding "there was simply no decisionmaking process" involved in the publication of an ATF reference guide that did nothing more than restate the requirements of federal firearms laws in response to frequently asked questions) .

Even assuming the letter did somehow mark the consummation of the ATF's decisionmaking process, it does not satisfy the second prong of the *Bennett* finality test, which requires that the agency's action "be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 178 (internal quotations omitted). In other words, the specific action challenged must have some "legal effect." *Oregon Natural Desert Association v. United States Forest Service*, 465 F.3d 977, 987 (9th Cir. 2006). In determining whether an agency action satisfies this second *Bennett* criteria, the court may properly consider whether the action "has a direct and immediate effect on the day-to-day business of the subject party," whether it "has the status of law or comparable legal force, and whether immediate compliance with its terms is expected." *Oregon Natural Desert Association*, 465 F.3d at 987.

The ATF's letter to Marbut did not have any such legal effect. The letter did not impose any new obligations on Marbut, deny him a right, or otherwise fix some legal relationship. The letter simply restated Marbut's obligations under longstanding federal firearms laws. Even if the ATF had not written the letter, Marbut would still have been required to comply with those federal firearms laws. In other words, any legal consequences in this case emanate not from the ATF's letter, but from applicable federal firearms laws and their implementing regulations. *See Golden and Zimmerman*, 599 F.3d at 433.

At oral argument, Plaintiffs maintained that the ATF's letter did more than just restate Marbut's obligations under federal firearms laws. According to Plaintiffs, the letter had the legal effect of clarifying Marbut's obligations under those federal laws in light of Montana's newly passed Firearms Freedom Act. The ATF did advise Marbut that "[t]o the extent that the Montana Firearms Freedom Act conflicts with Federal firearms laws and regulations, Federal law supersedes the Act, and all provisions of the [Gun Control Act] and [National Firearms Act], and their corresponding regulations, continue to apply." Dkt. 33-1. But because that statement did nothing to in any way alter Marbut's pre-existing obligations under those federal firearms laws, it was of no concrete legal effect.

Because the ATF's letter did not impose any obligation, deny a right, or have any

legal effect on Marbut, the letter does not satisfy the second *Bennett* criteria for final agency action.

Even assuming they cannot show the requisite final agency action, Plaintiffs argue they are entitled to relief under the narrow doctrine of non-statutory review. "The basic premise behind non-statutory review is that, even after the passage of the APA, some residuum of power remains with the district court to review agency action that is ultra vires." *Rhode Island Dept. of Environmental Management v. United States*, 304 F.3d 31, 42 (1st Cir. 2002). A plaintiff requesting non-statutory review of a non-final decision must show that the agency acted "in excess of its delegated powers and contrary to a specific prohibition [that] is clear and mandatory." *Leedom v. Kyne*, 358 U.S. 184, 188 (1958).

As they articulated it at oral argument, Plaintiffs' theory that the ATF was acting in excess of its delegated powers is inextricably intertwined with the merits of their constitutional challenge. On the merits, Plaintiffs argue that Congress exceeded its powers under the Commerce Clause by enacting federal firearms laws regulating the intrastate firearms activities contemplated by the Act. Assuming the federal firearms laws Congress has charged the ATF with enforcing are unconstitutional, Plaintiffs maintain that any actions taken by the ATF to enforce

those unconstitutional laws can only be considered ultra vires.[7] This argument is inescapably circular. Under Plaintiffs' approach, the Court would not be able to determine the threshold jurisdictional question of whether Plaintiffs are entitled to non-statutory review without first conducting that review and addressing the merits of their constitutional claims.

It is this Catch-22 that best illustrates why Plaintiffs' argument regarding non-statutory review of non-final agency action is misplaced. Plaintiffs first developed this argument in response to the United States' motion to dismiss, which understandably characterized Plaintiffs' action as one brought for judicial review of a final agency action under the APA. Plaintiffs' First Amended Complaint, which was the operative pleading when the United States filed its motion to dismiss, alleged jurisdiction "based generally on § 704," which provides for judicial review of final agency action, but said nothing about an alleged waiver of sovereign immunity or anything further about an alleged final agency action. Dkt. 6, ¶ 6. Presumably construing Plaintiffs' jurisdictional allegation as a request for judicial review under the APA, the United States moved to dismiss on the

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[7] Plaintiffs have not cited any authority for the proposition that such conduct is properly described as "ultra vires." Nevertheless, there is authority to support the general notion that sovereign immunity does not bar an action for judicial review of an agency decision where a government officer acts "pursuant to an unconstitutional grant of power from the sovereign." *State of Alaska v. Babbitt*, 38 F.3d 1068, 1076 (9th Cir. 1994).

ground that it had not waived its sovereign immunity under § 702, because there was no final agency action. After the United States filed its motion to dismiss, Plaintiffs amended their complaint a second time to specifically allege a waiver of sovereign immunity under § 702, and that the ATF's September 29, 2009, letter to Marbut constituted "final agency action" within the meaning of the APA. Dkt. 33, ¶¶ 7, 14-16.

As discussed above, however, the ATF's September 29, 2009, letter does not constitute final agency action within the meaning of the APA. Consequently, Plaintiffs are not entitled to judicial review under the APA. This does not mean, however, that Plaintiffs' entire lawsuit should be dismissed on that basis alone, as the United States suggests.

Plaintiffs' lawsuit is not simply one for judicial review of agency action under the APA. Rather, the suit seeks declaratory and injunctive relief to prevent the United States from enforcing what Plaintiffs allege are unconstitutional federal firearms laws.[8] For example, Plaintiffs' Second Amended Complaint asks the

[8] As noted above, while Plaintiffs' first two complaints alleged jurisdiction based on § 704 of the APA, they contained no allegations of final agency action and did not specifically allege a waiver of sovereign immunity. *See* Dkt. 1 & 6. It may well be that Plaintiffs simply intended to rely on the waiver of sovereign immunity set forth in § 702 of the APA for purposes of pursuing their constitutional challenge, over which the Court would have federal question subject matter jurisdiction.

Court to declare that the United States Constitution confers no power on Congress to regulate the special rights and activities contemplated by the Act. Dkt. 33, at 14. The Second Amended Complaint also seeks injunctive relief enjoining the United States "and any agency of the United States of America from prosecuting any civil action, criminal indictment or information under the [National Firearms Act] or the [Gun Control Act], or any other federal laws and regulations, against Plaintiffs or other Montana citizens acting solely with the political borders of the States of Montana in compliance with the [Act]." Dkt. 33, at 14.

These claims fall within a well-established exception to the doctrine of sovereign immunity. Federal courts have long recognized that the doctrine of sovereign immunity is inapplicable "in declaratory and/or injunctive relief suits against federal entities or officials seeking to enjoin the enforcement of an unconstitutional statute." *Kelley v. United States*, 69 F.3d 1503, 1507 (10th Cir. 1995). *See also Entertainment Network, Inc. v. Lappin*, 134 F.Supp.2d 1002, 1009 (S.D. Ind. 2001); *Tenneco Oil Co. v. Sac and Fox Tribe*, 725 F.2d 572, 574 (10th Cir. 1984) (claim that law is unconstitutional falls within exception to doctrine of sovereign immunity). As the United States Supreme Court once explained it, the doctrine does not apply in such cases because "the conduct against which specific relief is sought is beyond the officer's power and is, therefore, not the conduct of

the sovereign." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949). Consequently, there is an exception to sovereign immunity in a suit for declaratory and/or injunctive relief against federal officials where the plaintiff "alleges that the statute conferring power upon the officers is unconstitutional." *Kozero v. Spirito*, 723 F.2d 1003, 1008 (1st Cir. 1983). *See also Clinton v. Babbitt*, 180 F.3d 1081, 1087 (9th Cir. 1999). "Any other rule would mean that a claim of sovereign immunity would protect a sovereign in the exercise of power it did not possess." *Kelley*, 69 F.3d at 1507 (quoting *Tenneco Oil Co.*, 725 F.2d at 574).[9]

Because the doctrine of sovereign immunity does not apply to Plaintiffs' claims for declaratory and injunctive relief to prevent the United States from enforcing allegedly unconstitutional federal firearms laws, it would not be appropriate to dismiss this entire case based on Plaintiffs' failure to establish a valid waiver. Of course, Plaintiffs must still demonstrate that they have standing under Article III of the United States Constitution to pursue their pre-enforcement challenge. This brings the Court to the United States' next argument, which is that

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[9] Many courts have essentially read the APA's waiver of sovereign immunity for nonmonetary actions against the United States as a codification of that common law rule. *See e.g. Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1329 (D.C. Cir. 1996). This may well be why Plaintiffs cited the APA in the first instance. As noted above, however, they alleged jurisdiction based on § 704 of the APA, and did not allege a waiver of sovereign immunity under § 702 until after their lawsuit had been understandably construed as one seeking judicial review under § 704.

Plaintiffs' pre-enforcement challenge should be dismissed for lack of subject matter jurisdiction based on lack of standing.

B. Standing

The United States argues that subject matter jurisdiction is lacking in this case because Plaintiffs have not shown an economic injury or credible threat of imminent prosecution sufficient to confer standing.[10]

Article III of the United States Constitution "limits the jurisdiction of federal courts to 'cases' and 'controversies.'" *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). Standing is an "essential and unchanging part" of this case-or-controversy requirement. *Wolfson v. Brammer*, 2010 WL 3191159 * 5 (9th Cir. 2010). As the party invoking federal jurisdiction, a plaintiff bears the burden of establishing standing to sue. *San Diego County*, 98 F.3d at 1126.

At an "irreducible constitutional minimum," Article III standing requires proof "(1) that the plaintiff suffered an injury in fact that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical;' (2) of a

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[10] The United States' motion to dismiss for lack of standing constitutes a factual challenge to the subject matter jurisdiction of this Court. To determine whether Plaintiffs have established standing based on economic injury or threat of prosecution, the Court properly looks outside the pleadings to the other materials of record.

causal connection between the injury and the complained-of conduct; and (3) that a favorable decision will likely redress the alleged injury."[11] *Alaska Right to Life Political Action Committee v. Feldman*, 504 F.3d 840, 848 (9th Cir. 2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). And where, as here, "plaintiffs seek declaratory and injunctive relief only, there is a further requirement that they show a very significant possibility of future harm." *San Diego County*, 98 F.3d at 1126. The United States maintains that Plaintiffs cannot make it over the threshold hurdle of establishing that they have suffered an injury in fact for purposes of satisfying the first element of Article III standing.

Plaintiffs claim to have suffered two types of injury sufficient to confer standing.[12] First, Plaintiffs maintain that as a result of the ATF's September 29, 2009 letter, they face an imminent and credible threat of prosecution under Federal firearms laws . Second, Plaintiffs allege economic injury because the United

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[11] The doctrine of prudential standing "supplements the requirement of Article 3 constitutional standing" and may require that the Court consider a number of other factors when assessing standing. *Get Outdoors II, LLC v. City of San Diego, Cal.*, 506 F.3d 886, 891 (9th Cir. 2007). Because Plaintiffs lack Article III standing for the reasons set forth below, those prudential concerns are not implicated here.

[12] As briefed, Plaintiffs collectively claim to have standing. As the ensuing discussion reflects, however, their arguments regarding threat of prosecution and economic standing pertain solely to Marbut. Thus, for purposes analyzing these two issues, the Court will refer only to Marbut. The Court will address the standing of the two organizational plaintiffs separately.

States has effectively prevented them from manufacturing firearms under the Act and in turn selling those firearms to prospective customers. The Court will address each of these alleged injuries in turn.

1. Threat of prosecution

Marbut's claims for declaratory and injunctive relief are, in substance, a pre-enforcement challenge to the Federal firearms laws they maintain are unconstitutional. To demonstrate an injury in fact when bringing such a pre-enforcement challenge, a plaintiff must show that "there exists a credible threat of prosecution." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). This does not mean that a plaintiff must go so far as to "first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute." *Babbitt*, 442 U.S. at 298. *See also Holder v. Humanitarian Law Project*, __ U.S.__, 2010 WL 2471055 *11 (2010). By the same token, however, "the mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III." *San Diego County,* 98 F.3d at 1126 (citation and quotations omitted). A plaintiff is thus tasked with showing that he faces a "genuine threat of imminent prosecution." *San Diego County*, 98 F.3d at 1126.

When evaluating the credibility of a threat of prosecution in any given case,

the court is to consider (1) "whether the plaintiffs have articulated a 'concrete plan' to violate the law in question," (2) "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings," and (3) "the history of past prosecution or enforcement under the challenged statute."[13] *Thomas v. Anchorage Equal Rights Comm'n.*, 220 F.3d 1134, 1139 (9th Cir. 2000). Assuming Marbut could establish – which he most likely would – a history of Federal government enforcement of the various mandates of the National Firearms Act and Gun Control Act, he has failed to show the remaining two factors.

a. Concrete plan to violate federal law

To demonstrate a concrete plan, a plaintiff must point to "something more than a hypothetical intent to violate the law." *Thomas*, 220 F.3d at 1139. "A general intent to violate a statute at some unknown date in the future does not rise to the level of an articulated, concrete plan." *Thomas*, 220 F.3d at 1139. "Such 'some day' intentions – without any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

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[13] This test "coincides squarely with" the ripeness inquiry. *Thomas*, 220 F.3d at 1138. Regardless of whether the jurisdictional inquiry is framed "as one of standing or of ripeness, the analysis is the same." *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1093 (9th Cir. 2003).

Furthermore, if "[t]he acts necessary to make plaintiffs' injury – prosecution under the challenged statute – materialize are almost entirely within plaintiffs' own control," then the "high degree of immediacy" necessary for purposes of establishing standing is not present. *San Diego County,* 98 F.3d at 1127. Thus, plaintiffs who merely "wish and intend to engage in activities prohibited" by existing law cannot be said to have articulated a concrete plan to violate the law. *San Diego County,* 98 F.3d at 1127.

While Marbut would clearly like to manufacture firearms in accordance with the Act, that is not sufficient for purposes of articulating a concrete plan to violate the law. *San Diego County,* 98 F.3d at 1127. Marbut claims he has the means to manufacture a .22 caliber rifle he proposes to call the Montana Buckaroo, and has presented some evidence in an attempt to establish that this is so, but he has correspondingly indicated that he has no concrete plans to manufacture those firearms if doing so means he will be in violation of federal law. In February 2010, for example, Marbut sent an email to members of the Montana Shooting Sports Association, soliciting customers for his "not-yet-available" Montana Buckaroo. Dkt. 86-18 at 1. Marbut advised the prospective customers that he "may only make these" rifles "IF we win the lawsuit, and IF I can actually produce them." Dkt. 86-18, at 1. Thus, while Marbut states in his

sworn declaration that he "wishes to pursue this commercial activity," he has not expressed any intent to actually do so in violation of the federal firearms laws he claims are unconstitutional.

Whether Marbut will ever face prosecution under Federal firearms law is at this point almost entirely within his own control, depending in the first instance on whether he decides to manufacture firearms in accordance with the Act. Because the acts necessary to make Marbut's injury materialize are almost entirely within his control," the "high degree of immediacy" necessary for purposes of establishing standing is lacking. *San Diego County,* 98 F.3d at 1127.

Because Marbut has not "articulated a 'concrete plan' to violate the law in question," he cannot show that he faces a credible, genuine threat of imminent prosecution. *Thomas,* 220 F.3d at 1139. Even if the Court were to conclude otherwise and find that Marbut had articulated sufficiently concrete plans to violate the Federal firearms laws in question, he has not shown that he faces a specific threat of prosecution.

b. Specificity of threat

To establish standing based on the threat of prosecution, Marbut must show that the federal firearms laws at issue are "actually being enforced" against him. *San Diego County*, 98 F.3d at 1127. Under this standard, "a general threat of

prosecution is not enough to confer standing." *San Diego County*, 98 F.3d at 1127. Marbut must instead show "[a] specific warning of an intent to prosecute under a criminal statute..." *San Diego County*, 98 F.3d at 1127. This entails showing something more than a general assertion by prosecuting officials that they intend to enforce particular laws. *See e.g. Poe v. Ullman*, 367 U.S. 497, 499 (1961); *Rincon Band of Mission Indians v. County of San Diego,* 495 F.2d 1, 5-6 (9th Cir. 1974) Such general assertions lack the "immediacy" necessary to give rise to a justiciable controversy. *Poe*, 367 U.S. at 501.

Marbut argues that a specific threat of prosecution can be found in the ATF's September 29, 2009, letter. As noted above, however, the ATF simply identified various requirements under current federal firearms laws, and cautioned Marbut "that any unlicensed manufacturing of firearms or ammunition for sale or resale, or the manufacture of any [National Firearms Act] weapons, including sound suppressors, without proper registration and payment of tax, is a violation of Federal law and could lead to the forfeiture of such items and potential prosecution under the [Gun Control Act] or the [National Firearms Act]." Dkt. 33-1. This statement amounts to nothing more than a general assertion that anyone who violates the nation's federal firearms statutes may be subject to criminal prosecution. Such a general statement is not a specific threat of an imminent

intent to prosecute Marbut as required for purposes of establishing standing.[14] *See National Rifle Ass'n. v. Magaw*, 132 F.3d 272, 293-94 (6th Cir. 1997) (concluding that "plaintiffs who telephoned BATF agents, submitted a hypothetical question, and received an answer that the questioned activity could subject them to federal prosecution does not confer standing"); *Kegler v. U.S. Dept. Of Justice*, 436 F.Supp.2d 1204, 1212-19 (D. Wyo. 2006); *Crooker v. Magaw*, 41 F.Supp.2d 87, 91- 92 (D. Mass. 1999). Absent a specific threat of prosecution, Marbut cannot establish that he has standing to pursue his pre-enforcement challenge.

When all is said and done, Marbut has not shown that he faces a genuine threat of imminent prosecution, which in turn means he has not satisfied the injury in fact requirement for purposes of Article III standing. While Marbut's threat of prosecution argument thus fails, he claims in the alternative to have standing based on economic injury. *See National Audubon Society, Inc. V. Davis*, 307 F.3d 835, 855 (9th Cir. 2002) (economic injury and threat of prosecution are alternate theories by which a plaintiff may establish standing)

2. Economic harm

[14] To the extent any of the Plaintiffs might argue that the ATF's July 2009 open letter to all Montana federal firearms licensees constitutes a specific threat of prosecution, that argument would fail for the same reasons. The July 2009 letter was even more general, written as it was for the public at large.

Marbut alleges he has suffered, and will continue to suffer, economic injury because the United States has effectively prevented him from manufacturing firearms under the Act and in turn selling those firearms to prospective customers. Dkt. 33, ¶ 15.

A plaintiff may satisfy the injury-in-fact prong of the constitutional standing analysis by demonstrating economic injury. *Central Arizona Water Conservation Dist. v. United States Environmental Protection Agency*, 990 F.2d 1531, 1537 (9th Cir. 1993). As with any injury that is alleged for purposes of establishing standing, such an economic injury must be "concrete and particularized and actual or imminent, not conjectural or hypothetical." *Central Arizona Water*, 990 F.2d at 1537. *See also*, *National Audubon Society*, 307 F.3d at 856 (economic harm must be "actual, discrete, and direct").

Marbut claims to have "suffered past injury in the loss of economic opportunities" since the effective date of the Act because he has not been able to do as he would like, which is to manufacture and sell firearms under the Act without complying with federal firearms laws. Dkt. 51-1, at 8. According to Marbut, the fact that he has "already suffered economic harm" should be "enough [t]o confer standing." Dkt. 51-1, at 8.

Marbut is mistaken for two reasons. First of all, his allegations of past

economic harm amount to nothing more than a hypothetical injury, consisting only of theoretical lost profits from a non-existent business operation. There is nothing concrete, particularized, or actual about such an alleged economic injury. Even if Marbut did have some plausible basis upon which he might claim past economic injury, that would not be sufficient to confer standing under the circumstances. Because Marbut is seeking "declaratory and injunctive relief only," he needs to do more than demonstrate past economic injury. *Bras v. California Public Utilities Commission*, 59 F.3d 869, 873 (9th Cir. 1995). He must instead "show actual present harm or a significant possibility of future harm in order to demonstrate the need for pre-enforcement review." *National Rifle Ass'n of America v. Magaw*, 132 F.3d 272, (6th Cir. 1997) (*citing Bras*, 59 F.3d at 873).

Marbut does allege that he is suffering ongoing economic harm, and will continue to suffer that economic harm in the future, because the United States is effectively preventing him from manufacturing and selling firearms under the Act "for significant economic gain." Dkt. 33, ¶ 15. In an effort to demonstrate that this alleged economic injury is more than just hypothetical and speculative, Marbut has presented evidence of his proposed plans for manufacturing the Montana Buckaroo. Dkt. 86-2, ¶ 15; 86-6. For example, Marbut indicates he has identified third-party commercial entities that can assist him with various aspects

of the manufacturing process, and has solicited a number of prospective customers who will buy the Montana Buckaroo if it becomes available. Dkt. 86-2, ¶ 15; 86-6, 86-18. Marbut maintains that the evidence he has presented is sufficient to show that, were it not for the federal firearms laws he claims are unconstitutional, he would be reaping significant financial gain and is therefore suffering an ongoing economic injury.

The Ninth Circuit has long recognized the principle that a plaintiff whose pre-existing business activities are adversely affected by newly enacted legislation or other government action may have standing based on economic injury. In *National Audubon Society, Inc. v. Davis*, 307 F.3d 835, 856 (9th Cir. 2002), for example, the court held that animal trappers whose commercial trapping activities were prohibited under newly enacted state law had standing based on economic injury to challenge the law. Similarly, in *Central Arizona,* 990 F.2d at 1537-38, the court held that a water district that was contractually obligated to repay a federal agency for a portion of the cost of complying with a final rule imposed by the Environmental Protection Agency had standing based on economic injury to challenge the rule.

Unlike the plaintiffs in *National Audubon* and *Central Arizona*, however, Marbut is not now, and has never been, engaged in a commercial activity that is

suffering, or is likely to suffer, any economic harm as a result of the federal firearms laws he is attempting to challenge. At this point, Marbut is claiming nothing more than hypothetical lost profits from a hypothetical and illegal business enterprise. As such, the ongoing and future economic harm Marbut claims is far too speculative to constitute an injury in fact for purposes of establishing standing. *See e.g. Regents of University of California v. Shalala*, 872 F.Supp. 728, 737 (C.D. Cal. 1994) (concluding that "assertions of possible economic injury are too conjectural and hypothetical" to establish an injury in fact); *Abbott Labs v. Gardner*, 387 U.S. 136, 153 (1967) (explaining that "a possible financial loss is not by itself a sufficient interest to sustain a judicial challenge to governmental action"); *Longstreet Delicatessen, fine Wines & Specialty Coffees, L.L.C. v. Jolly*, 2007 WL 2815022 * 18 (E.D. Cal. 2007) (allegations of economic harm are insufficient where plaintiff "has offered no evidence of actual harm suffered other than by potential lost sales). Regardless of the specificity of Marbut's proposed manufacturing plan, the fact remains that the business is nothing more than a theoretical one, as are the "significant economic gains" he claims he would be realizing if his proposed illegal business was up and running.

Marbut fails to cite any authority for the proposition that a plaintiff who

wishes he could start an illegal business, and would do so but for the fact that the idea he proposes is illegal, can claim to be suffering actual economic harm in the form of unrealized profits for purposes of establishing standing. While such a plaintiff might be able to establish standing if he proceeded with his plans to the point where he found himself faced with a credible threat of prosecution, that is not the situation here.

Simply put, there is nothing concrete, particularized, actual, or imminent about the economic injury Marbut alleges in this case. Nor has Marbut shown that he faces a credible threat of imminent prosecution. Marbut has thus failed to establish an injury in fact for purposes of satisfying the first element of Article III standing.

3. Organizational Plaintiffs

An organization or association like the Montana Shooting Sports Association or Second Amendment Foundation "has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181 (2000). While Marbut is a member of Montana Shooting Sports Association, he has failed to demonstrate that he has standing to bring this action in his own right. Consequently, the Montana Shooting Sports

Association also lacks standing. *See Cetacean Community v. Bush*, 386 F.3d 1169, 1179 (9th Cir. 2004) (concluding that organization lacked standing where it failed to identify a member who had standing in his or her own right). Similarly, the Second Amendment Foundation lacks standing because it has not identified any member of its organization that might have standing in his or her own right.

Because Plaintiffs lack constitutional standing, this case should be dismissed for lack of subject matter jurisdiction. In the event the presiding judge, United States District Court Judge Donald W. Molloy, were to disagree with this recommendation, it would be necessary to turn to the United States' final argument and determine whether Plaintiffs have stated a claim upon which relief may be granted. In the interest of judicial economy, the Court will address that final argument now and consider whether Plaintiffs' Commerce Clause challenge states a claim upon which relief may be granted in light of controlling United States Supreme Court and Ninth Circuit caselaw.

C. Commerce Clause

The operative portion of Montana's Firearms Freedom Act provides, in part, that "[a] personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in Montana and that remains within the borders of Montana is not subject to federal law or federal regulation, including registration,

under the authority of congress [sic] to regulate interstate commerce. " Mont. Code Ann. § 30-20-104. The Act expressly declares "that those items have not traveled in interstate commerce," and by its terms "applies to a firearm, a firearms accessory, or ammunition that is manufactured in Montana from basic materials and that can be manufactured without the inclusion of any significant parts imported from another state." Mont. Code Ann. § 30-20-104. The Act excepts certain firearms from its protective scope, such as those "that cannot be carried and used by one person," and requires that "[a] firearm manufactured or sold in Montana under this part must have the words 'Made in Montana' clearly stamped on a central metallic part, such as the receiver or frame." Mont. Code Ann. §§ 30-20-105, 106.

To that end, the Act includes several '[l]egislative declarations of authority," which specify that the Montana Legislature's authority to promulgate such a statutory scheme comes from the Second, Ninth, and Tenth Amendments to the United States Constitution, and from that portion of the Montana Constitution guaranteeing the citizens of this state the right to bear arms. Mont. Code Ann. § 30-20-102. These legislative declarations state, for example, that "[t]he regulation of intrastate commerce is vested in the states under the 9th and 10th amendments to the United States constitution, particularly if not expressly preempted by federal

law," and note that "Congress has not expressly preempted state regulation of intrastate commerce pertaining to the manufacture on an intrastate basis of firearms, firearms accessories, and ammunition." Mont. Code Ann. § 30-20-102(3). Intervenor State of Montana ("State of Montana") emphasizes that the Montana Legislature, in its normal deliberative manner, enacted the Act as "principally a political statement...setting forth its conception of the interplay between the powers granted to Congress by the Commerce Clause and the powers retained by the states and the people pursuant to the Tenth Amendment." Dkt. 47, at 5. Consistent with the Montana Legislature's reading of the United States Constitution, Plaintiffs ask the Court to declare, among other things, that Congress does not have the power "to regulate the special rights and activities contemplated by the [Act]." Dkt. 33, at 14.

As the nature of Plaintiffs' request for declaratory relief reflects, the central question in this case is whether Congress has the power to regulate those activities the Act purportedly exempts from federal law, namely, the intrastate manufacture and sale of firearms, firearms accessories, and ammunition. Article I, § 8 of the United States Constitution enumerates the powers granted to Congress, including the power "[t]o regulate Commerce...among the several States" and to "[t]o make all Laws which shall be necessary and proper for carrying [that power] into

Execution." The United States Supreme Court has long held that the Commerce Clause vests Congress with the authority to regulate three types of economic activity: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce" and (3) "those activities having a substantial relation to interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). *See also Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005); *United States v. Stewart*, 451 F.3d 1071, 1073 (9th Cir. 2006).

Because the Act purports to exempt only the intrastate manufacture and sale of firearms, ammunition, and accessories from federal regulation, the first two categories of economic activity are not implicated here. This means that whether Congress has the power to regulate the intrastate activity contemplated by the Act is properly analyzed under the third and final *Lopez* category. To fall within Congress' Commerce Clause power on this basis, "the regulated activity must substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59.

Applying this standard, the United States Supreme Court has repeatedly held that even purely local activities are subject to the regulatory powers of Congress if those activities "are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). In *Raich*, the Supreme Court considered whether Congress could, in the

exercise of its powers under the Commerce Clause, apply the Controlled Substances Act to prohibit the purely local production and medical use of marijuana authorized by state law. *Raich*, 545 U.S. at 5-8.

The Court answered this question in the affirmative, holding that the Controlled Substances Act constituted a valid exercise of federal commerce power even as applied to the purely local activity at issue. *Raich,* 545 U.S. at 9. Harkening back to its decision in *Wickard v. Filburn*, 317 U.S. 111 (1942), the *Raich* majority reiterated that "Congress can regulate purely intrastate activity" even if that activity is not itself commercial, "if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Raich*, 545 U.S. at 18. The Court explained that it was not required to determine whether the local "activities, taken in the aggregate, substantially affect[ed] interstate commerce in fact, but only whether a 'rational basis' exist[ed] for so concluding."[15] *Raich*, 545 U.S. at 22.

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[15] The *Raich* Court thus looked to the rational basis standard for purposes of determining whether Congress had acted within its Commerce Clause powers. At oral argument, Plaintiffs cited the United States Supreme Court's recent decision in *McDonald v. City of Chicago, Ill.*, 130 S.Ct. 3020 (U.S. 2010) and argued that federal firearms laws should be subjected to strict scrutiny because they regulate what has now been classified as an individual's fundamental right to possess a handgun in the home for the purpose of self defense. As discussed below, however, Plaintiffs have not pled a Second Amendment claim in this case. Nor have Plaintiffs established that they have a fundamental Second Amendment right to manufacture and sell firearms. For these reasons *McDonald* is inapposite.

As the *Raich* Court discussed at some length, the Controlled Substances Act provided a "comprehensive framework for regulating the production, distribution, and possession" of the controlled substances, including marijuana. *Raich*, 545 U.S. at 24. Citing "the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere," along with "concerns about diversion into illicit channels," the Court had "no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacturing and possession of marijuana would leave a gaping hole in the [Controlled Substances Act]." *Raich*, 545 U.S. at 22. In doing so, the Court emphasized the fact that the regulatory scheme "ensnares some purely intrastate activity is of no moment." *Raich*, 545 U.S. at 22.

In the end, the Court rejected Raich's attempt to excise individual applications of [the] concededly valid statutory scheme" established by way of the Controlled Substances Act. *Raich*, 545 U.S. at 23. As the Court explained it, "[t]he notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected." *Raich*, 545 U.S. at 30. Particularly when "[t]aking into account the fact that California [was] only one of at least nine states to have authorized the medical

use of marijuana," the *Raich* majority found that "Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision [was] unquestionably substantial." *Raich*, 545 U.S. at 32.

Under *Raich*, Montana's attempt to similarly excise a discrete local activity from the comprehensive regulatory framework provided by federal firearms laws cannot stand. As did the federal statute at issue in *Raich*, the federal firearms laws from which Plaintiffs seek to be exempted regulate the production and distribution "of commodities for which there is an established, lucrative interstate market." *Raich*, 454 U.S. at 26. The Ninth Circuit has specifically recognized the corollary between the regulatory framework of the Controlled Substances Act and that provided by federal firearms laws, noting that "[g]uns, like drugs, are regulated by a detailed and comprehensive statutory regime designed to protect individual firearm ownership while supporting 'Federal, State and local law enforcement officials in their fight against crime and violence.'" *United States v. Stewart*, 451 F.3d 1071, 1076 (9th Cir. 2006) (*quoting* Gun Control Act of 1968, Pub. L. No. 90-168, § 101, 82 Stat. 1213, 1213). To that end, the National Firearms Act and Gun Control Act set forth various firearms registration, licensing, record keeping, and marking requirements. *See generally*, 26 U.S.C. § 5801 et seq.; 18 U.S.C. § 921 et

seq.

In Congress' view, the Gun Control Act was necessary to keep firearms "out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency, and to assist law enforcement authorities in the States and their subdivisions in combating the increasing prevalence of crime in the United States." S. Rep. No. 1097, 90th Cong., 2nd Sess. 1968, 1968 U.S.C.C.A.N. 2112, 2113-2114. Congress found that "[o]nly through adequate Federal control over interstate and foreign commerce in firearms, and over all persons engaging in the business of importing, manufacturing, or dealing in firearms can this problem be dealt with, and effective State and local regulation of the firearms traffic be made possible." *Id.* at 2114.

Here, as in *Raich*, Congress had a rational basis for believing that failure to regulate the intrastate manufacture and sale of firearms, ammunition, and accessories "would leave a gaping hole" in the National Firearms Act and Gun Control Act, thereby undercutting federal regulation of the interstate market in those commodities. *Raich*, 545 U.S. at 18, 22. The size of the "gaping hole" that would be left in the federal regulatory scheme were Montana able to exempt the intrastate activities contemplated by the Act is of particular concern when taking into account the fact that, as of this writing, virtually identical Firearms Freedom

Act legislation has been enacted in six more states and proposed in twenty-two others. *Raich*, 545 U.S. at 32. Taking this into account, "Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial." *Raich*, 545 U.S. at 32.

As *Raich* instructs, the fact that federal firearms laws "ensnare some purely intrastate activity," such as the manufacturing and sales activity purportedly exempted from regulation by the Act, "is of no moment." *Raich*, 545 U.S. at 22. Under *Raich*, the National Firearms Act and Gun Control Act constitute a valid exercise of federal commerce power, even as applied to the purely intrastate manufacture and sale of firearms contemplated by the Act.

That this is so is even more clear in light of the fact that the Ninth Circuit has since applied *Raich* to hold that a statute criminalizing machine gun possession constitutes a valid exercise of Congressional power under the Commerce Clause, even as applied to purely intrastate activities. *United States v. Stewart*, 451 F.3d 1071, 1078 (9th Cir. 2006). As in *Raich*, the defendant in *Stewart* argued that "his possession [fell] within a subgroup of purely intrastate activities that [could] easily be cordoned off from those Congress may constitutionally control." *Stewart*, 451 F.3d at 1074.

The Ninth Circuit rejected that argument, noting that "[l]ike the possession regulation in the Controlled Substance Act [at issue in *Raich*], the machine gun possession ban fit[] within a larger scheme for the regulation of interstate commerce in firearms." *Stewart*, 451 F.3d at 1076. Citing *Raich* and *Wickard*, the Court found the fact that the guns had not traveled in interstate commerce was "entirely irrelevant." *Stewart*, 451 F.3d at 1077. Observing that "[t]he market for machineguns [was] established and lucrative, like the market for marijuana," the Court determined there was "a rational basis to conclude that federal regulation of intrastate incidents of transfer and possession [was] essential to effective control of the interstate incident of such traffic." *Stewart*, 451 F.3d at 1077.

Read together, *Stewart* and *Raich* thus "compel the conclusion that Congress' power under the Commerce Clause is almost unlimited where the prohibited product has significant economic value such as with drugs or guns." *United States v. Rothacher*, 442 F.Supp.2d 999, 1007(D. Mont. 2006). Plaintiffs do not disagree, and in an attempt to reverse the course of current Commerce Clause jurisprudence take the novel approach of asking this Court to overrule the United States Supreme Court and Ninth Circuit. Dkt. 51-1, at 18-23.

But this Court is not at liberty to do what Plaintiffs ask. This Court is bound by the decisions of the United States Supreme Court and Ninth Circuit

Court of Appeals. *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001). "[C]aselaw on point *is* the law," and "[b]inding authority must be followed unless and until overruled by a body competent to do so." *Hart*, 266 F.3d at 170. This Court is thus bound by *Raich*, and must leave to the United States Supreme Court "the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). This Court is likewise bound to follow existing Ninth Circuit precedent, and could disregard *Stewart* only if the decision was "clearly irreconcilable" with "intervening higher authority." *Miller v. Gammie,* 335 F.3d 889, 900 (9th Cir. 2003). That is not the case here. *Raich* and *Stewart* remain good law, and control this Court's analysis.

Plaintiffs argue in the alternative that *Raich* is distinguishable, and maintain that under the circumstances it would be appropriate for this Court to return to the United States Supreme Court's pre-*Raich* Commerce Clause jurisprudence as set forth in *United States v. Lopez*, 514 U.S. 549 91995), *United States v. Morrison*, 529 U.S. 598 (2000), and *Jones v. United States*, 529 U.S. 848 (2000). Particularly in light of the Ninth Circuit's decision in *Stewart*, however, Plaintiffs attempts to distinguish *Raich* are unavailing.

Plaintiffs first claim that *Raich* is distinguishable because it involved the market for illegal drugs, and argue its holding should be limited accordingly. But

there is nothing in *Raich* to suggest that the Court meant for its holding to apply only to commerce in illegal drugs. Any argument to the contrary is put to rest by *Stewart*, in which the Ninth Circuit likened the regulatory scheme governing interstate commerce in drugs with that governing interstate commerce in firearms and applied *Raich* accordingly. *Raich*, 451 F.3d at 1076-78.

Plaintiffs also argue that *Raich* should not be viewed as controlling because, unlike the medical marijuana statute at issue there, the Act specifically states that it applies only to intrastate firearms commerce and provides a means for identifying those firearms that come within its protective scope. By its terms, the Act indeed applies only to those firearms, firearms accessories, and ammunition that are manufactured in Montana and that remain within the borders of this state. Mont. Code Ann. § 30-20-104. And as Plaintiffs note, the Act requires that any firearms "manufactured or sold in Montana under this part must have the words 'Made in Montana' clearly stamped on a central metallic part, such as the receiver or frame." Mont. Code Ann. § 30-20-106. Presumably, the statute at issue in *Raich* did not similarly specify that it applied only to marijuana grown and used within the state of California, and did not provide a means for distinguishing locally cultivated marijuana from that cultivated elsewhere. Under the *Raich* Court's analysis, however, neither of these distinctions is material.

Even assuming, as Plaintiffs allege in their Second Amended Complaint, it is possible to have a purely intrastate firearms market,[16] the fact that the Act purports only to exempt activities within that intrastate market from federal regulation is of no consequence. While California's medical marijuana statute might not have specified that it was to be applied only to intrastate activity, that was the only type of activity at issue in *Raich*. As the *Raich* Court framed it, the question presented was whether Congress had authority under the Commerce Clause to "prohibit the local cultivation and use of marijuana in compliance with California law." *Raich*, 545 U.S. at 5. It was undisputed that the marijuana at issue had been cultivated locally for personal use within California and had never entered the stream of interstate commerce. *Raich*, 454 U.S. at 5-7. Upholding the Controlled Substances Act even as applied to that purely local activity, the Court found the fact that the statute's regulatory framework "ensnare[d] some purely intrastate activity [was] of no moment." *Raich*, 545 U.S. at 22.

That the intrastate firearms commerce contemplated by the Act falls within

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[16] Under *Iqbal*, this Court need not accept as true those allegations that are facially implausible. *Iqbal*, 129 S.Ct. at 1949. This Court is not convinced it is plausible that firearms could be manufactured and sold in Montana without ever thereafter leaving the state. *See e.g. Raich*, 545 U.S. at 30 (finding "[t]he notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition....). The Court will nevertheless assume for present purposes that Plaintiffs' allegations are plausible and will proceed on that assumption.

the reach of Congress' Commerce Clause power is even more clear in the wake of the Ninth Circuit's decision in *Stewart*. Applying *Raich*, the *Stewart* court concluded that whether or not the machineguns at issue there had traveled in interstate commerce was "entirely irrelevant." *Stewart*, 451 F.3d at 1077. As the Ninth Circuit summed it up, "when Congress makes an interstate omelet, it is entitled to break a few intrastate eggs." *Stewart*, 451 F.3d at 1075.

The fact that the Act provides a means for distinguishing firearms manufactured in Montana from those manufactured elsewhere does not change matters. As Plaintiffs note, the Act requires that any firearms manufactured or sold under its protective umbrella be clearly stamped with the words "Made in Montana." Mont. Code Ann. § 30-20-106. In Plaintiffs' myopic view, this case is thus different from *Raich,* where there was no such mechanism for distinguishing locally cultivated marijuana in the stream of commerce. The *Raich* Court indeed cited the "the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere" as one reason for finding "that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the [Controlled Substances Act]." *Raich*, 545 U.S. at 23. But marijuana's fungibility was only a part of the *Raich* Court's explanation.

The *Raich* Court did not intend for its discussion "of the effect of intrastate marijuana use on national drug prices" to limit Congress' Commerce Clause power "to the sale of fungible goods." *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1276 (11th Cir. 2007). Rather, "the Court's discussion of commodity pricing in *Raich* was part of its explanation of the rational basis Congress had for thinking that regulating home-consumed marijuana was an essential part of its comprehensive regulatory scheme aimed at controlling access to illegal drugs." *Alabama-Tombigbee Rivers Coalition*, 477 F.3d at 1276.

The *Raich* Court also cited "concerns about diversion into illicit channels" – concerns that would remain in this case regardless of whether or not firearms manufactured under the Act bear a "Made in Montana" stamp. *Raich*, 545 U.S. at 23. Even more importantly, the *Raich* majority focused on the aggregate effect of medical marijuana use in the nine states with similar statutes and found that "Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial." *Raich*, 545 U.S. at 32.

The same can be said here. Congress could rationally have concluded that allowing local firearms commerce to escape federal regulation would severely undercut the comprehensive regulatory scheme set in place by federal firearms

laws. The rationality of this conclusion is evidenced by the number of states that have already enacted or are contemplating enacting similar Firearms Freedom Act legislation. This is so regardless of whether or not those locally manufactured firearms were to be emblazoned with a marker identifying the state of manufacture, or whether they ever enter the stream of interstate commerce.

Adding its voice to that of Plaintiffs, State of Montana attempts to distinguish *Raich* and *Stewart* on one more basis. The State of Montana begins by pointing to the *Raich* Court's discussion regarding the necessity of congressional findings. The respondents in *Raich* argued that the Controlled Substances Act could not "be constitutionally applied to their activities because Congress did not make a specific finding that the intrastate cultivation and possession of marijuana for medical purposes based on the recommendation of a physician would substantially affect the larger interstate marijuana market." *Raich*, 545 U.S. at 21.

The Court rejected that argument, explaining that "absent a special concern such as the protection of free speech," Congress need not "make particularized findings in order to legislate." *Raich*, 545 U.S. at 21. Elaborating further, the Court stated that "[w]hile congressional findings are certainly helpful in reviewing the substance of a congressional statutory scheme, particularly when the

connection to commerce is not self-evident, and while we will consider congressional findings in our analysis when they are available, the absence of particularized findings does not call into question Congress' authority to legislate." *Raich*, 545 U.S. at 21.

Based on *Raich*, the Ninth Circuit in *Stewart* placed no significance on the apparent absence of specific congressional findings regarding the effects of homemade weapons on the interstate market. *Stewart*, 451 F.3d at 1075. In doing so, the Court noted there was no special concern that might necessitate particularized findings. The Court reasoned "that since the Second Amendment does not grant individual rights" it could not rely on that constitutional provision "as a basis for requiring Congress to make specific findings in legislation touching on firearms." *Stewart*, 451 F.3d at 1075 n. 6. The State of Montana argues the *Stewart* panel's logic is now flawed in view of the United States Supreme Court's decisions in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008).

Heller made clear that the Second Amendment does in fact confer an individual right to keep and bear arms, subject to certain limitations. *Heller*, 128 S.Ct. at 2799. Characterizing the right to keep and bear arms as one that is related to the inherent right of self-defense, *Heller* described the individual right conferred by the Second Amendment as the right of "law-abiding, responsible

citizens to use arms in defense of hearth and home." *Heller*, 128 S.Ct. at 2817, 2821.

The fact that *Heller* recognized a Second Amendment right to possess firearms in the home for self-defense does not mean that Congress must have made particularized findings in order to enact a comprehensive regulatory scheme encompassing the intrastate manufacture and sale of firearms. *Heller* specifically contemplated that "the right secured by the Second Amendment is not unlimited," and is subject to regulation. *Heller*, 128 S.Ct. at 2816. The Court cautioned, for example, that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 128 S.Ct. at 2816-17. In fact, the prohibitions are "presumptively lawful regulatory measures." *Heller*, 128 S.Ct. At 2817, n. 26. The federal firearms laws at issue here do just what *Heller* considered appropriate – they impose conditions and qualifications on the manufacture and sale of arms.

Even more importantly, the specific Second Amendment right recognized by *Heller* is simply not implicated in this case. *Heller* recognized that the Second Amendment guarantees the individual right to keep and bear arms, subject to

certain limitations. But Plaintiffs are not individuals seeking to enforce their constitutionally protected right to keep and bear arms as articulated in *Heller*. Instead, they are individuals who essentially claim they have the right to manufacture and sell firearms within the state of Montana without interference from the federal government. *Heller* said nothing about extending Second Amendment protection to firearm manufacturers or dealers. If anything, *Heller* recognized that firearms manufacturers and dealers are properly subject to regulation by the federal government under existing federal firearms laws.[17] *Heller*, 128 S.Ct. at 2816-17 (emphasizing that its holding should not be seen as casting doubt on laws imposing conditions and qualifications on the commercial sale of arms).

The United States Supreme Court reaffirmed this notion in the even more recent case of *McDonald v. City of Chicago, Ill.*, 130 S.Ct. 3020 (2010). The Court held in *McDonald* that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right to possess a handgun in

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[17] Consistent with *Heller*, a number of lower courts have previously determined or assumed that there is "no Second Amendment right to be a firearm manufacturer or dealer." *Olympic Arms v. Magaw*, 91 F.Supp.2d 1061, 1071 (E.D. Mich. 2000), *aff'd Olympic Arms, et al. v. Buckles*, 301 F.3d 384 (6th Cir. 2002). *See also United States v. King*, 532 F.2d 505, 510 (5th Cir. 1976); *Gilbert Equip. Co. v. Higgins*, 709 F.Supp. 1071, 1080-81 (S.D. Ala. 1989).

the home for the purpose of self-defense. *McDonald*, 130 S.Ct. at 3050. In doing so, the Court repeated the assurances it had made in *Heller*, explaining that its holding "did not cast doubt on such longstanding regulatory measures as...'laws imposing conditions and qualifications on the commercial sale of arms.'" *McDonald*, 130 S.Ct. at 3047 (*quoting Heller*, 128 S.Ct. at 2816-17).

At oral argument, Plaintiffs maintained that in light of the fundamental nature of the Second Amendment right recognized in *McDonald,* this Court should apply strict scrutiny to its review of federal firearms laws rather than the rational basis standard applied by the United States Supreme Court in *Raich*. But Plaintiffs have not pled a Second Amendment claim in this case. Dkt. 33. Plaintiffs do not allege that their Second Amendment rights have been violated, and their prayer for declaratory relief does not even mention the Second Amendment. Dkt. 33. Because Plaintiffs have not pled a Second Amendment claim, *McDonald* does not apply.

Even if Plaintiffs had alleged a Second Amendment violation, *McDonald* says nothing about extending Second Amendment protection to firearm manufacturers or dealers. Because the United States Supreme Court did not intend for its holding in *McDonald* and *Heller* to undermine existing laws regulating the manufacture and sale of firearms, *Raich* and *Stewart* control. Congress was not

required to make particularized findings that the intrastate manufacture and sale of firearms, if performed under the constraints set forth in the Act, would substantially affect the interstate market.

For all of the above reasons, this Court concludes that under *Raich* and *Stewart*, the National Firearms Act and Gun Control Act constitute a valid exercise of Congress' Commerce Clause power, even as applied to the purely intrastate manufacture and sale of firearms contemplated by the Act.

C. The Supremacy Clause and the Tenth Amendment

The Supremacy Clause to the United States Constitution reads, in its entirety, as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> U.S. Const. art. VI, cl. 2.

In other words, "[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Raich*, 545 U.S. at 29. "It is beyond peradventure that federal power over commerce is 'superior to that of the States to provide for the welfare or necessities of their inhabitants,' however legitimate or dire those necessities may be." *Raich*,

545 U.S. 29 (*quoting Maryland v. Wirtz*, 392 U.S. 183, 196 (1968)). It is well-established that State and Federal law conflict "where it is impossible for a private party to comply with both State and Federal requirements or where State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

The Act is in clear conflict with Federal firearms laws, including the Gun Control Act and National Firearms Act. The Act purports to exempt Montana small arms manufacturers and dealers, whose activities are confined within the state of Montana, from requirements imposed by federal law. In fact, it is the conflict between these state and federal statutory schemes that prompted this litigation. Because the Federal firearms laws are a valid exercise of Congressional power under the Commerce Clause, even as applied the Plaintiffs' intrastate activities, those federal laws prevail to the extent the Act conflicts with them.[18]

To the extent Plaintiffs argue this results in a Tenth Amendment violation, they are mistaken. The Tenth Amendment provides that "[t]he powers not

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[18] Intervenor State of Montana accurately notes that the Supremacy Clause is directed to the judges of every state, and does not operate to circumscribe the state legislatures - or the people - from expressing their views. *Printz v. United States*, 521 U.S. 898, 912 (1997). The United States is not suggesting otherwise, as it is indeed the prerogative of Montana's Legislature to riddle the statutory code with "political statements" if the Legislature deems it prudent to do so. The issue at hand, however, is whether the Act may be relied upon to prevent enforcement of the Federal firearms laws in relation to a firearm manufactured and sold intrastate.

delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people." U.S. Const. amend X. The Tenth Amendment thus reserves to the states those powers not specifically delegated to the federal government.

Where, as here, a federal statute "is within the powers granted to Congress under the Commerce Clause, it cannot constitute an exercise of power reserved to the states." *Columbia River Gorge United - Protecting People and Property v. Yeutter*, 960 F.2d 110, 114 (9th Cir. 1992). If Congress has acted within its power under the Commerce Clause, "the Tenth Amendment expressly disclaims any reservation of power to the States." *New York v. United States*, 505 U.S. 144, 156 (1992). In other words, a valid exercise of Congress' Commerce Clause power is not a violation of the Tenth Amendment.[19] *See e.g. United States v. Collins*, 61 F.3d 1379, 1384 (9th Cir. 1995); *Garcia v. San Antonio Metropolitan Trans. Auth.*, 469 U.S. 528 (1985). Because federal firearms laws are a valid exercise of Congress' power under the Commerce Clause as applied to the intrastate activities

[19] Plaintiffs also make a cursory reference to the Ninth Amendment, which provides that "[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend IX. *See* Dkt. 51-1, at 30-31. The Ninth Amendment does not, as suggested by Plaintiffs, independently secure "any constitutional rights for purposes of making out a constitutional violation." *Schowengerdt v. United States*, 944 F.2d 483, 490 (9th Cir. 1991).

contemplated by the Act, there is no Tenth Amendment violation in this case.

IV. Conclusion

For all of the above reasons,

IT IS RECOMMENDED that the United States' motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which may be granted be GRANTED and this case be dismissed in its entirety.

DATED this 31st day of August, 2010

/s/ Jeremiah C. Lynch
Jeremiah C. Lynch
United States Magistrate Judge

EXHIBIT C

2015 WL 5697552
United States District Court,
S.D. Ohio, Western Division,
Western Division at Dayton.

Mark Crawford, et al., Plaintiffs,
v.
United States Department of the Treasury, et al., Defendants.

Case No. 3:15-cv-250
|
Signed 09/29/2015

ENTRY AND ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION, ECF. 8.

THOMAS M. ROSE, UNITED STATES DISTRICT JUDGE

***1** Plaintiffs request that the Court enjoin Defendants from enforcing the Foreign Account Tax Compliance Act("FATCA"), the intergovernmental agreements ("IGAs") negotiated by the United States Department of the Treasury ("Treasury Department") to supplant FATCA in the signatory countries, and the Report of Foreign Bank and Financial Accounts ("FBAR") administered by the United States Financial Crimes Enforcement Network ("FinCEN"). 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).

Plaintiffs seek preliminary injunctive relief on all claims. The first claim challenges the validity of the Canadian, Czech, Israeli, and Swiss IGAs used by the Treasury Department. The second claim addresses the information reporting provisions FATCA and the IGAs impose not on Plaintiffs, but on foreign financial institutions. The third claim aims at the heightened reporting requirements for foreign bank accounts under FATCA, the IGAs, and the FBAR. These reporting requirements require U.S. citizens to report information about their foreign bank accounts. The fourth claim challenges the 30% tax imposed by FATCA on payments to foreign financial institutions from U.S. sources when these foreign institutions choose not to report to the IRS about the bank accounts of their U.S. customers (the "FFI Penalty"). Similarly, the fifth claim challenges the 30% tax imposed by FATCA on account holders who exercise their rights under the statute not to identify themselves as American citizens to their banks and to refuse to waive privacy protections afforded their accounts by foreign law (the "Passthrough Penalty"). The sixth claim challenges the penalty imposed under the Bank Secrecy Act for "willful" failures to file an FBAR for foreign accounts, which can be as much as the greater of $100,000 or 50% of the value of the unreported account (the "Willfulness Penalty").

I. Background

A. FATCA Statute and Regulations

Congress passed the Foreign Accounts Tax Compliance Act (FATCA) in 2010 to improve compliance with tax laws by U.S. taxpayers holding foreign accounts. FATCA accomplishes this through two forms of reporting: (1) by foreign financial institutions (FFIs) about financial accounts held by U.S. taxpayers or foreign entities in which U.S. taxpayers hold a substantial ownership interest, 26 U.S.C. § 1471; and, (2) by U.S. taxpayers about their interests in certain foreign financial accounts and offshore assets. 26 U.S.C. § 6038D.

1. FATCA

President Obama signed FATCA into law on March 18, 2010. Senator Carl Levin, a co-sponsor of the FATCA legislation, declared that "offshore tax abuses [targeted by FATCA] cost the federal treasury an estimated $100 billion in lost tax revenues annually" 156 Cong. Rec. 5 S1745-01 (2010). FATCA became law as the IRS began its Offshore Voluntary Disclosure Program (OVDP), which since 2009 has allowed U.S. taxpayers with undisclosed overseas assets to disclose them and pay reduced penalties. By 2014, the OVDP collected $6.5 billion through voluntary disclosures from 45,000

participants. "IRS Makes Changes to Offshore Programs; Revisions Ease Burden and Help More Taxpayers Come into Compliance," http://www.irs.gov/uac/Newsroom/IRS-Makes-Changes-to-Offshore-Programs;-Revisions-Ease-Burden-and-Help-More-Taxpayers-Come-into-Compliance (last visited Sept. 15, 2015). The success of the voluntary program has likely been enhanced by the existence of FATCA.

2. Foreign Financial Institution Reporting Under FATCA

***2** Foreign Financial Institution reporting encourages FFIs to disclose information on U.S. taxpayer accounts. If the FFI does not, then a 30% withholding tax may apply to U.S.-sourced payments to the non-reporting FFI. A 30% withholding tax may also apply to FFI account holders who refuse to identify themselves as U.S. taxpayers.

> In the case of any withholdable payment to a foreign financial institution which does not meet the requirements of subsection (b) [specifying reporting criteria], the withholding agent with respect to such payment shall deduct and withhold from such payment a tax equal to 30 percent of the amount of such payment.

26 U.S.C. § 1471(a).

Section 1471(b)(1) then provides that, "[t]he requirements of this subsection are met with respect to any foreign financial institution if an agreement is in effect between such institution and the Secretary [of the Treasury] under which such institution agrees" to make certain information disclosures and "to deduct and withhold a tax equal to 30 percent of...[a]ny [pass-through] payment which is made by such institution to a recalcitrant account holder or another foreign financial institution which does not meet the requirements of this subsection[.]" § 1471(b)(1)(D)(i); see also § 1471(d)(7) (defining "pass[-through] payment"). A "recalcitrant account holder" is one who "[f]ails to comply with reasonable requests for information" that is either information an FFI needs to determine if the account is a U.S. account (§ 1471(b)(1)(A)) or basic information like the account holder's name, address, and taxpayer identification number (§ 1471(c)(1)(A)). Section 1471(c)(1) specifies the "information required to be reported on U.S. accounts," including "account balance or value." § 1471(c)(1)(C). Plaintiffs seek a preliminary injunction against enforcement of § 1471(a), (b)(1)(D), (c)(1), and (c)(1)(C). Prayer for Relief (part O).

Under § 1471(b)(2), "Financial Institutions Deemed to Meet Requirements in Certain Cases," an FFI "may be treated by the Secretary as meeting the requirements of this subsection if … such institution is a member of a class of institutions with respect to which the Secretary has determined that the application of this section is not necessary to carry out the purposes of this section." That means that an FFI that is treated this way is not subject to the reporting criteria in § 1471(b)(1). The Secretary can statutorily exempt FFIs from "attempt[ing] to obtain a valid and effective waiver" of foreign nondisclosure laws from each account holder and can exempt FFIs from "close such account...if a waiver...is not obtained from each such holder within a reasonable period of time." § 1471(b)(1)(F).[1] The Secretary's exemption of an FFI under § 1471(b)(2) also means that the FFI no longer has to make the report described in § 1471(c)(1) because that report is based on "[t]he agreement described in subsection (b)" that an FFI that the Secretary has exempted does not need to have in place to avoid withholding. Furthermore, the FATCA statute provides that, "[t]he Secretary shall prescribe such regulations or other guidance as may be necessary or appropriate to carry out the purposes of, and prevent the avoidance of, this chapter," i.e., §§ 1471-74. 26 U.S.C. § 1474(f). The Government asserts that the intergovernmental agreements (IGAs) constitute the Secretary's exercise of the statutory discretion afforded by §§ 1471(b)(2) and 1474(f).

***3** Plaintiffs also seek to enjoin enforcement of 26 C.F.R. § 1.1471-2T(a)(1). The "[g]eneral rule of withholding" under § 1471(a) is largely reiterated by 26 C.F.R. § 1.1471-2T(a)(1), which Plaintiffs also target. Prayer for Relief (part R). Plaintiffs seek to enjoin enforcement of 26 C.F.R. §§ 1.1471-4(a)(1), 1.1471-4(d), and 1.1471-4(d)(3)(ii), which repeat the content of § 1471(b) and (c). Prayer for Relief (part S). In addition, Plaintiffs seek an injunction against 26 C.F.R. § 1.1471-4T(b)(1), which addresses the 30% withholding tax for recalcitrant account holders established by the statute. Prayer for Relief (part T). Plaintiffs also seek to enjoin the IRS's use of Form 8966, "FATCA Report," the form on which FFIs make disclosures under § 1471(c). See 26 C.F.R. § 1.1471-4(d)(3)(v); Prayer for Relief (part V). In Plaintiffs' view, these FATCA regulations "primarily elaborate on the [ ] requirements of the statutory provisions and clarify the statutory requirements." Complaint ¶ 95(a).

3. Individual Reporting Under FATCA

There is a companion individual reporting requirement to § 1471's FFI reporting requirement located at 26 U.S.C. § 6038D. Under § 6038D, individuals holding more than $50,000 of aggregate value in "specified foreign financial assets," § 6038D(b), must file a report with their annual tax returns (§ 6038D(a)) that includes, for each asset "[t]he maximum value of the asset during the taxable year." § 6038D(c)(4). Plaintiffs seek to enjoin this asset-value reporting requirement. Prayer for Relief (part P). Section 6038D(h) also provides that, "[t]he Secretary shall prescribe such regulations or other guidance as may be necessary or appropriate to carry out the purposes of this section...." Plaintiffs seek to enjoin enforcement of the regulation that states this same reporting requirement. 26 C.F.R. § 1.6038D-4(a)(5); see Prayer for Relief (part U). Plaintiffs also target two other regulatory reporting requirements: disclosing whether a depository or custodial account was opened or closed during the taxable year (26 C.F.R. § 1.6038D-4(a)(6)); and "[t]he amount of any income, gain, loss, deduction, or credit recognized for the taxable year with respect to the reported specified foreign financial asset," (26 C.F.R. § 1.6038D-4(a)(8)). Prayer for Relief (part U).

B. The Canadian, Czech, Israeli, and Swiss Intergovernmental Agreements

Once FATCA became law, the Government began requiring coordination with FFIs and foreign governments. To facilitate FATCA implementation, the United States has concluded over 70 intergovernmental agreements (IGAs) with foreign governments addressing the exchange of tax information. Plaintiffs seek to enjoin IGAs with Canada, the Czech Republic, Israel, and Switzerland in their entirety. Prayer for Relief (parts A, E, I, M). Alternatively, they seek to enjoin parts of those IGAs. Prayer for Relief (parts B-D, FH, J-L, N).

The Canadian, Czech and Israeli IGAs are similar because they are all "Model 1" IGAs, whereas the Swiss IGA is a "Model 2" IGA. The key distinction is that under Model 1 IGAs, foreign governments agree to collect their FFIs' U.S. account information and to send it to the IRS, whereas under Model 2 IGAs, foreign governments agree to modify their laws to the extent necessary to enable their FFIs to report their U.S. account information directly to the IRS. All four IGAs, in their preambulatory clauses, recognize the partner governments' mutual "desire to conclude an agreement to improve international tax compliance" or, in the case of Switzerland, a "desire to conclude an agreement to improve their cooperation in combating international tax evasion." IGA Preambles (first clause).

All four IGAs mention the Tax Information Exchange Agreements (TIEAs) that the United States has with these four countries as part of preexisting treaties. IGA Preambles (second clause).[2] All four IGAs similarly note the need for "an intergovernmental approach to FATCA implementation" (or, in the Swiss case, "intergovernmental cooperation to facilitate FATCA implementation").

***4** The three Model 1 IGAs (Canadian, Czech and Israeli) define "Obligations to Obtain and Exchange Information with Respect to Reportable Accounts" in Article 2. In addition to seeking to enjoin Article 2 in full (Prayer for Relief, parts B, F, and J), Plaintiffs attack the agreement that IGA partners, with respect to each "U.S. Reportable Account" of its FFIs, will report, "in the case of any Depository Account, the total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period[.]" Canadian IGA Art. 2, § 2(a)(6); Czech IGA Art. 2, § 2(a)(6); Israeli IGA Art. 2, § 2(a)(6); see Prayer for Relief (parts C, G, K). If Model 1 partner countries comply with Article 2 as well as the "Time and Manner of Exchange of Information" agreed to in Article 3 and other rules, then their reporting FFIs "shall be treated as complying with, and not subject to withholding under, section 1471," nor will they be required to withhold "with respect to an account held by a recalcitrant account holder" under § 1471. Canadian IGA Art. 4, §§ 1, 2; Czech IGA Art. 4 §§ 1, 2; Israeli IGA Art. 4, §§ 1, 2. This is consistent with the Treasury Secretary's power to deem FFIs to be in compliance with § 1471 if statutory purposes are met. 26 U.S.C. § 1471(b)(2)(B).

The Israeli IGA is not yet in force. See Israeli IGA, Art. 10, § 1. However, the Government asserts that the Treasury Secretary has exercised his discretion not to impose § 1471 withholding against Israeli FFIs or recalcitrant account holders.

The Swiss IGA is different in that under its Article 3—which Plaintiffs seek to enjoin (Prayer for Relief, part N)—the Swiss government agrees to "direct all Reporting Swiss Financial Institutions" to report certain information directly to the IRS. Swiss IGA, Art. 3, § 1. Under Article 5—which Plaintiffs also seek to enjoin (Prayer for Relief,

part N)—the U.S. government "may make group requests...based on the aggregate information reported to the IRS pursuant to" Article 3. Swiss IGA Art. 5, § 1. "Such requests shall be made pursuant to Article 26 of the [Swiss] Convention, as amended by the Protocol," and, "such requests shall not be made prior to the entry into force of the Protocol[.]" Swiss IGA, Art. 5, § 2. The "Protocol" being "the Protocol Amending the [Swiss] Convention that was signed at Washington on September 23, 2009." Swiss IGA, preamble (clause 3). That Protocol has not yet been approved by the Senate, and because of that, Article 5 of the Swiss IGA cannot yet be implemented.

C. Report of Foreign Bank and Financial Account

The third body of law at issue in this case pertains to the Report of Foreign Bank and Financial Account (FBAR) requirements. U.S. persons who hold a financial account in a foreign country that exceeds $10,000 in aggregate value must file an FBAR with the Treasury Department reporting the account. See 31 U.S.C. § 5314; 31 C.F.R. § 1010.350; 31 C.F.R. § 1010.306(c). The current FBAR form is FinCEN Form 114. The form has been due by June 30 of each year regarding accounts held during the previous calendar year. § 1010.306(c). Beginning with the 2016 tax year, the due date of the form will be April 15. Pub. L. No. 114-41, § 2006(b)(11). A person who fails to file a required FBAR may be assessed a civil monetary penalty. 31 U.S.C. § 5321(a)(5)(A). The amount of the penalty is capped at $10,000 unless the failure was willful. See § 5321(a)(5)(B)(i), (C). A willful failure to file increases the maximum penalty to $100,000 or half the value in the account at the time of the violation, whichever is greater. § 5321(a)(5)(C). In either case, whether to impose the penalty and the amount of the penalty are committed to the Secretary's discretion. See § 5321(a)(5)(A) ("The Secretary of the Treasury may impose a civil money penalty[.]") & § 5321(a)(5)(B) ("[T]he amount of any civil penalty...shall not exceed" the statutory ceiling). Plaintiffs seek to enjoin enforcement of the willful FBAR penalty under § 5321(a)(5). Prayer for Relief, part Q. They also ask for an injunction against "the FBAR account-balance reporting requirement" of FinCen Form 114. Prayer for Relief, part W.

The Government asserts that the information in the FBAR assists law enforcement and the IRS in identifying unreported taxable income of U.S. taxpayers that is held in foreign accounts as well as investigating money laundering and terrorism.

II. Legal Standard for Preliminary Injunctions

***5** The standard for determining whether to issue a preliminary injunction involves the examination of: (1) the likelihood of plaintiff's success on the merits; (2) whether or not the injunctive relief will save plaintiff from irreparable injury; (3) whether or not the injunctive relief will harm others; and (4) whether or not public interest will be served by the injunction. See *Rock and Roll Hall of Fame and Museum, Inc. v. Gentile Prods.*, 134 F.3d 749, 753 (6th Cir. 1998); *In re DeLorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985). These factors are not prerequisites, but elements balanced by the Court. *Frisch's Restaurants, Inc. v. Shoney's Inc.*, 759 F.2d 1261, 1263 (6th Cir. 1985) and *DeLorean Motor Co.*, 755 F.2d at 1229. The Court will evaluate each of these factors.

A. Likelihood of Prevailing on the Merits

Defendants initially contend that Plaintiffs are not likely to prevail on the merits of their claim because they lack standing to bring their action. Federal courts may only decide actual cases or controversies. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). "One element of the case-or-controversy requirement" is that plaintiffs "must establish that they have standing to sue." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). The standing requirement protects the "time-honored concern about keeping the Judiciary's power within its proper constitutional sphere." Id. at 820. "[S]tanding inquir[ies are] especially rigorous when reaching the merits of the dispute would force [a court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013).

Standing contains three elements:

> First, plaintiffs must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to

> the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations and internal quotation omitted).

As for the first consideration, a "threatened injury must be certainly impending to constitute injury in fact," and "'[a]llegations of possible future injury' are not sufficient." *Clapper*, 133 S. Ct at 1147 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)) (emphasis in original). Similarly, "a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74; see also id. at 577 (rejecting attempt "to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts"). Also, plaintiffs generally cannot establish standing indirectly when their injury is the result of "the independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976); see also *Lujan*, 504 U.S. at 560-61 (same); *Shearson v. Holder*, 725 F.3d 588, 592 (6th Cir. 2013) (same); *Ammex, Inc. v. United States*, 367 F.3d 530, 533 (6th Cir. 2004) (no standing to challenge excise tax assessed against third party, since "alleged injury...in the form of increased fuel costs was not occasioned by the Government").

***6** As to the second consideration, "a plaintiff must 'assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."' *Coyne*, 183 F.3d at 494 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)); see also *United States v. Ovalle*, 136 F.3d 1092, 1100-01 (6th Cir. 1998); *Powers v. Ohio*, 499 U.S. 400, 410 (1991). The rare exception to this requirement arises where a plaintiff can "show that (1) it has suffered an injury in fact; (2) it has a close relationship to the third party; and (3) there is some hindrance to the third party's ability to protect his or her own interests." *Mount Elliott Cemetery Ass'n v. City of Troy*, 171 F.3d 398, 404 (6th Cir. 1999); see also *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 295 (6th Cir. 1998).

"A plaintiff bears the burden of demonstrating standing and must plead its components with specificity." *Coyne*, 183 F.3d at 494; see also *Lujan*, 504 U.S. at 561. A plaintiff "must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). The Supreme Court has "always insisted on strict compliance with this jurisdictional standing requirement," *Raines*, 521 U.S. at 819. Moreover, "suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations are, even when premised on allegations of several instances of violations of law, rarely if ever appropriate for federal-court adjudication." *Lujan*, 504 U.S. at 568 (quotation omitted).

Senator Paul seeks to base legal standing for Counts 1 and 2 in his role as a U.S. Senator, charged with the institutional task of advice and consent under the Constitution. He contends that the IGAs exceed the proper scope of Executive Branch power and should have been submitted for Senate approval. ¶¶ 28, 29.

Senator Paul's argument that the Executive Branch is usurping Congress's powers by not submitting the IGAs for a vote—that he has a "right to vote"—is a claim that the Executive Branch is not acting in accordance with the law and that he may remedy such violation in his official capacity as a senator. In *Raines v. Byrd*, several members of Congress challenged the constitutionality of the Line Item Veto Act of 1996, asserting that the statute infringed on their power as legislators. 521 U.S. at 816. The Supreme Court held that they lacked Article III standing. It noted that their claim asserted "a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally." *Id*. at 821. Because Plaintiffs' "claim of standing [was] based on a loss of political power, not loss of any private right," their asserted injury was not "concrete" for the purposes of Article III standing. *Id*. *Raines* bars Senator Paul's claims. This is true even if he frames the conduct he challenges as a "usurpation" of congressional authority. See *Chenoweth v. Clinton*, 181 F.3d 112, 116 (D.C. Cir. 1999) (a claim of usurpation of congressional authority is not sufficient to satisfy the standing requirement); see also *Walker v. Cheney*, 230 F. Supp. 2d 51, 73 (D.D.C. 2002) ("the role of Article III courts has not historically involved adjudication of disputes between Congress and the Executive Branch based on claimed injury to official authority or power.").

Senator Paul has not been authorized to sue on behalf of

the Senate. This fact also weighs against finding standing. See *Raines*, 521 U.S. at 829 ("We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action[.]"). Members of Congress possess an adequate remedy (since they may repeal the Act or exempt appropriations bills from funding its implementation). *Raines*, 521 U.S. at 829.

***7** Nor can Senator Paul base his standing on a more generalized interest in "vindication of the rule of law." See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106 (1998); see also *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) ("[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone[.]" (quotation omitted)). A legislator does not hold any legally protected interest in proper application of the law that is distinct from the interest held by every member of the public. Senator Paul thus fails to allege a particularized, legally cognizable injury by his claim that the Executive Branch is not adhering to the law. See *Campbell v. Clinton*, 203 F.3d 19, 22 (D.C. Cir. 2000) (Congressional plaintiffs do not "have standing anytime a President allegedly acts in excess of statutory authority").

Senator Paul has "not been singled out for specially unfavorable treatment." *Raines*, 521 U.S. at 821. All Plaintiffs here, including Senator Paul, have an adequate remedy to challenge the reporting requirements and penalties that they oppose: they may work toward repeal of the laws through the legislative process. *Id.* Of course, FATCA, the IGAs, and the FBAR requirements are not exempt from constitutional challenge, but they must be challenged by an individual who has suffered a judicially cognizable injury. *Id.* Plaintiffs in this case do not qualify.

In sum, Paul has alleged no injury to himself as an individual, the institutional injury he alleges is wholly abstract and widely dispersed, and his attempt to litigate this dispute at this time and in this form is contrary to historical experience. *Raines*, 521 U.S. at 829

None of the other Plaintiffs has alleged that he or she has suffered or is about to suffer injury under the FATCA withholding tax: none is an FFI to which the tax under § 1471(a) applies, and none has been assessed, or informed that IRS intends to assess, the recalcitrant account holder withholding tax imposed by § 1471(b). Moreover, all Plaintiffs but Crawford live in jurisdictions where FFIs are not currently subject to the § 1471(b) withholding tax. No plaintiff has alleged that he or she is subject to § 6038D reporting due to an aggregate asset value exceeding $50,000 or FBAR reporting due to a bank account exceeding $10,000 in value.

Mark Crawford decries his bank's policy against taking U.S. citizens as clients and claims the denial of his application for a brokerage account may have "impacted Mark financially," ¶ 21, any such harm is not fairly traceable to an action by Defendants, which are not responsible for decisions that foreign banks make about whom to accept as clients. Crawford cannot establish standing indirectly when third parties are the causes of his alleged injuries. See *Shearson*, 725 F.3d at 592. Moreover, his discomfort with complying with the disclosures required by FATCA, see ¶ 23, does not establish the concrete, particularized harm that confers standing to sue. See, e.g., *Lujan*, 504 U.S. at 561 (requiring "concrete and particularized" and "actual or imminent" injury). Even if Crawford fears "unconstitutionally excessive fines imposed by 31 U.S.C. § 5321 if he willfully fails to file an FBAR," ¶ 24, there is no allegation that he failed to file any FBAR that may have been required, much less that the Government has assessed an "excessive" FBAR penalty against him. Any harm that may come his way from imagined future events is speculative and cannot form the foundation for his lawsuit.

Crawford states that he is a United States citizen who lives in Albania and maintains a residence in Dayton, Ohio. ¶ 13. The United States does not have a FATCA IGA with Albania, and Crawford does not allege that he has a bank account in any of the four countries whose IGAs are challenged in the complaint. That means that Crawford has no standing to assert the violations alleged in Counts 1, 2, or 8, which exclusively concern those four IGAs.

***8** Crawford seeks to invalidate FATCA and the FBAR requirements on three bases: (1) his brokerage firm cannot accept U.S. citizens—including Crawford himself—as clients, due to a relationship with a bank that has a policy against taking on American clients, see ¶ 21; (2) he does not want the "financial details of his accounts" disclosed to the U.S. government, see ¶ 23; and (3) he fears "unconstitutionally excessive fines imposed by 31 U.S.C. § 5321 if he willfully fails to file an FBAR," see ¶ 24.

Roger Johnson states that he is a U.S. citizen who resides in the Czech Republic. ¶ 31. He seeks to invalidate the Czech IGA, FATCA, and the FBAR reporting requirements because: (1) his wife, who is not a plaintiff, "strongly objected to having her financial affairs disclosed to the United States government," leading to the couple's decision to separate their assets, see ¶ 35; (2) he does not want the financial details of his accounts

disclosed, see ¶ 38; and (3) he fears "unconstitutionally excessive fines" if he willfully fails to file an FBAR, see ¶ 39.

The harm Johnson alleges resulted from his wife's objections to FATCA and the choices that they made in response; this is not traceable to the Government. See *Simon*, 426 U.S. at 41-42. The Johnsons are free to reverse the separation of their assets at any time, regardless of FATCA, and the lack of legal compulsion defeats any claim to third-party standing. Johnson's personal discomfort with reporting requirements of American law does not support standing, as he does not allege any concrete constitutional injury. See *Lujan*, 504 U.S. at 561. Nor is the prospect of the hypothetical imposition of an excessive fine, if he willfully fails to file a required FBAR, sufficient. *Clapper*, 133 S. Ct at 1147 ("Allegations of possible future injury" do not convey standing). In effect, Johnson seeks an advisory opinion that future, hypothetical conduct by the Government would violate his constitutional rights.

Stephen J. Kish states that he is a dual citizen of the United States and Canada who lives in Toronto. ¶ 41. Kish alleges that his wife "strongly opposes the disclosure of her personal financial information" under FATCA. ¶ 47. His wife is not a plaintiff. Kish may not assert claims on her behalf. See *Coyne*, 183 F.3d at 494. That he has allegedly suffered some "discord" in his marriage, see ¶ 47, is too vague and indirect of a harm to establish standing. As explained above, reluctance to comply with the reporting requirements of American law, see ¶ 48, and theoretical "excessive fines" that would be imposed if he willfully violated the law, see ¶ 49, do not convey standing.

Daniel Kuettel states that he is a citizen of Switzerland who renounced his U.S. citizenship in 2012. ¶ 51. He claims that he decided to renounce due to "difficulties caused by FATCA," and he complains that "many Swiss banks have been unwilling to accept American clients because of FATCA." ¶ 55. He blames this practice of the Swiss banks for his "mostly unsuccessful" efforts to obtain mortgage refinancing prior to his renunciation of citizenship. *Id*. The only ongoing injury that Kuettel alleges is related to a college savings account for his daughter that he maintains at a Swiss bank. See ¶ 56. The account balance is currently only about $8,400, which is below the $10,000 threshold for FBAR reporting. Kuettel's daughter is ten years old, see ¶ 54, and is not a plaintiff in this case. Supposedly the account would receive "several advantages such as better interest rates and discounts for local businesses" if it were titled in her name. ¶ 56. The Complaint states Kuettel would like to transfer ownership of the account to his daughter, but he will not do so out of a concern that she might in the future be subjected to willful FBAR penalties, that she might be subject to an alleged harm. ¶ 57.13 Kuettel could obviate this concern by filing an FBAR for the account on his daughter's behalf, but "Daniel objects to filing an FBAR as required by FinCEN because he is not a U.S. citizen and would not do so for his daughter's account." ¶ 57. His wife similarly objects. His daughter is said to be too young to renounce her own U.S. citizenship. ¶ 57. Neither his wife, nor his daughter are named as plaintiffs, however. Thus, having renounced his own American citizenship, Kuettel now seeks relief based on his daughter's ineligibility for preferable interest rates and local discounts. The relief for any wrong here is either for Kuettel's daughter to sue her Swiss bank for disparate treatment, if Swiss law provides such protection, or to seek recourse in the power of the market moving her accounts to an institution that wishes to compete for her business.

***9** None of the allegations states that Kuettel is presently being harmed by FATCA or the Swiss IGA, and neither FATCA nor the IGA apply to him as a non-U.S. citizen. See ¶¶ 51-58. His assertion of past harm because he was "mostly unsuccessful" in refinancing his mortgage due to FATCA does not convey standing. If that was a harm, it was due to actions of third-party foreign banks not those of Defendants. Regardless, having now renounced his American citizenship and obtained refinancing on terms he found acceptable, any past harm is not redressable here. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210-11 (1995) ("[T]he fact of past injury...does nothing to establish a real and immediate threat that he would again suffer similar injury in the future." (quotation omitted)). This leaves Kuettel's claims concerning the FBAR requirement, in Counts 3 and 6, for which the Government concedes Kuettel has standing. Response, ECF 16, at 15, PAGEID 216.

Kuettel also lacks standing to challenge the FBAR reporting requirements that might apply not to him, but to his daughter. The reporting requirement would be hers, and any harm to the account is a detriment to her. Advantages his daughter might receive if Kuettel or his wife filed an FBAR on his daughter's behalf are based on a bank policy, not conduct of Defendants. The failure to reap those advantages is due to the Bank's policies regarding someone like Kuettel's reluctance to comply with the FBAR requirements, not any action fairly traceable to the Government. In any event, Kuettel has not established standing to sue on behalf of his daughter. See *Ovalle*, 136 F.3d at 1100-01.

Donna-Lane Nelson is a citizen of Switzerland who has also renounced her U.S. citizenship. ¶ 59. She alleges that her Swiss bank "notified her that she would not be able to open a new account if she ever closed her existing one because she was an American. Fearing that she would eventually not be able to bank in the country where she lived, she decided to relinquish her U.S. citizenship." ¶ 65. After she renounced, a Swiss bank "offered investment opportunities that were not available to her as an American." *Id.* She "resents having to provide" "explanations" to Swiss banks that have requested information on her past U.S. citizenship and payments to her daughter, who lives in the United States, and she sees "threats implied by these requests which appear to be prompted by FATCA." ¶ 68. Like other Plaintiffs, Nelson does not want to disclose financial information to the Government, and she fears willful FBAR penalties, even though no such penalty has been imposed or threatened against her. ¶¶ 69, 70. Unlike the preceding Plaintiffs, however, she adds that she fears the 30% withholding tax may be imposed against her "if her business partner," who is now her husband, and with whom she has joint accounts, "opts to become a recalcitrant account holder." ¶ 71.

Nelson's allegations of harm stem from third-party conduct and do not grant her standing against Defendants. Fear of hypothetical events that might have befallen her if she had not renounced her U.S. citizenship does not constitute concrete harm sufficient to confer Article III standing. Her claim "that she had to choose between having the ability to access local financial services where she lived or be a U.S. citizen" is refuted by her admission that UBS would have allowed her to continue banking in Switzerland as before, using her existing account, regardless of her citizenship. ¶ 65. Discretionary decisions of a foreign bank do not create standing. If her business partner and husband causes Nelson to be subjected to FBAR penalties by his future conduct that will be his fault, not Defendants'. Having renounced her U.S. citizenship and without standing to assert these claims, Nelson cannot air her "resentment" of U.S. law in this Court.

L. Marc Zell states that he is a practicing attorney and a citizen of both the United States and Israel who lives in Israel. He alleges that: (1) he and his firm have been required by Israeli banking institutions to complete IRS withholding forms for individuals whose funds his firm holds in trust, regardless of whether the forms are legally required, causing certain clients to leave his firm, ¶¶ 79 & 81; (2) Israeli banks have required his firm to close accounts, refused to open others, and requested conduct contrary to banking regulations, ¶¶ 79-80; and, (3) the compelled disclosure of his fiduciary relationship with clients impinges on the attorney-client relationship, ¶ 82. On request of clients, who claim their rights are violated by FATCA, Zell "has decided not to comply with the FATCA disclosure requirements whenever that alternative exists." ¶ 83. He fears that the FATCA 30% withholding tax on pass-through payments to recalcitrant account holders could be imposed due to his refusal to provide identifying information about a client to an Israeli bank. ¶ 84. He also has refused to provide information to his own bank and "fears that he will be classified as a recalcitrant account holder," ¶ 85. Like the other Plaintiffs, he does not want his financial information disclosed, ¶ 86, and fears an FBAR penalty if the IRS determines that he willfully failed to file an FBAR, ¶ 87.

***10** The majority of Zell's allegations concern conduct of Israeli banks and his belief that these actions have been unfair to him or his clients. But conduct of third parties (even if related to the banks' compliance with FATCA) does not confer standing to bring suit against Defendants. See, e.g., *Ammex Inc. v. United States*, 367 F.3d 530, 533 (6th Cir. 2004). Nor may Zell seek redress on behalf of third parties who have allegedly suffered harm, including unidentified clients. See *Warth v. Seldin*, 422 U.S. 490, 499 (1975). The third parties who have allegedly suffered harm are not plaintiffs, thus, alleged harm to them does not provide a basis for Zell to maintain this suit.

The contention that disclosure of the identity of clients for whom Zell holds funds in trust violates the attorney-client privilege is also without merit. He gives no example of harm that has occurred or how he was harmed by disclosure of clients' identities. He cannot raise the attorney-client privilege on his clients' behalf, nor is the fact of representation privileged. See *In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d 49, 62 (7th Cir. 1980) ("[A]ttorney-client privilege belongs to the client alone[.]"); *United States v. Robinson*, 121 F.3d 971, 976 (5th Cir. 1997) ("The fact of representation...is generally not within the privilege."). It is the fiduciary relationship, not the attorney-client relationship, that is the basis for the reporting requirement.

The claims that Zell asserts on his own behalf fare no better. His compliance with a client's wish to avoid the FATCA reporting requirements potentially subjects the client—not Zell—to the risk of imposition of a 30% tax. See 26 U.S.C. § 1471(b)(1)(D). Zell himself has not been assessed a 30% withholding tax under FATCA, nor could he (or his clients) be, because 30% withholding under § 1471 is not presently being imposed against Israeli FFIs or their recalcitrant account holders. Zell has not had a penalty imposed against him for any willful failure to file

an FBAR either. He has therefore suffered no concrete and particularized injury sufficient to convey standing. See *Lujan*, 504 U.S. at 560. Taking the allegations of the complaint at face value, Zell is losing clients because of discriminatory actions of the Israeli banks. Indeed, in their Reply, Plaintiffs admit it is Zell's client, a non-party, who objects to reporting. Reply at 4.

In their reply, Plaintiffs are more focused, directing all of their ire at the invasion of their privacy:

> A central burden is extensive financial disclosure that Plaintiffs do not want. … This opposition to disclosure provides standing to challenge provisions (including IGAs) expressly *requiring* disclosure…. So [P]laintiffs have standing to challenge FATCA, IGAs, and FBAR disclosure requirements, and they have standing to challenge the FFI Penalty (30% tax on payments to non-compliant FFIs)…because those FFIs disclose account holders' information *because of* that penalty.

Reply at 3. They continue, "Plaintiffs object to disclosure and also object to this penalty specifically designed to compel them to this disclosure, providing them standing." Reply at 4.

> But Plaintiffs verified that they do not want their financial affairs disclosed to the U.S. Government under FATCA, including [26 U.S.C. 6038D(a)], the necessary implication of which is either that Plaintiffs are doing such disclosure and want to cease or that Plaintiffs have arranged their affairs so as to avoid such disclosure that would otherwise have occurred, either of which gives them standing. (See, e.g., Doc. No. 1, PageID 12 (¶ 23), 14-15 (¶¶ 35, 37) (altered financial affairs to avoid disclosure), 15 (¶ 38).) Moreover, individuals may report otherwise qualifying accounts under that amount, are encouraged to do so, and the Government has not said that it would refuse such reports.
>
> ***11** The Government claims Plaintiffs may not challenge the FBAR requirement's Willfulness Penalty, 31 U.S.C. 5321(b)(C)(i), because none alleged "a bank account exceeding $10,000 in value." (Doc. No. 16, PageID 213.) But Plaintiffs alleged that they reasonably feared they would be subject to the Willfulness Penalty for willful failure to file FBARs.

Reply at 5.

Plaintiffs also contend that the existence of applicable statutory requirements and penalties might suffice for standing to challenge the unconstitutional provisions. Reply at 6 (citing *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) and *Doe v. Bolton*, 410 U.S. 179, 188 (1973)). However, this only applies where petitioners have alleged "an intention to engage in a course of conduct arguably affected with a constitutional interest." *Susan B. Anthony List*, 134 S. Ct. at 2332. Plaintiffs here have not identified a constitutionally protected interest.

The Supreme Court has held that depositors have no "reasonable expectation of privacy" in "information kept in bank records" because documents like "financial statements and deposit slips[ ] contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." *United States v. Miller*, 425 U.S. 435, 442 (1976); see also *id.* at 440 (noting that the depositor "can assert neither ownership nor possession" over the records at issue); *Smith*, 442 U.S. at 743-44 (1979) ("[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.").[3]

The only Plaintiff to have standing then is Kuettel, who is limited to claims concerning the FBAR requirement present in Count Three and Count Six.

Count Three challenges what it characterizes as heightened reporting requirements for foreign financial accounts denying U.S. citizens living abroad the equal protection of the laws. Plaintiffs quote both the Administrative Procedure Act and the Constitution. Under section 706 of the Administrative Procedure Act ("APA"), a court must "hold unlawful and set aside agency action...found to be –...(B) contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706. In the Constitution, 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 Due Process Clause of the Fifth Amendment includes a guarantee of equal protection equivalent to that expressly provided for under the Equal Protection Clause of the Fourteenth Amendment. "An equal protection claim against the federal government is analyzed under the Due Process Clause of the Fifth Amendment." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995); United *States v. Ovalle*, 136 F.3d 1092, 1095 (6th Cir. 1998). Thus, the federal government may not "deny to any person within its jurisdiction the

equal protection of the laws," U.S. Const. amend. XIV, § 1.

"We begin, of course, with the presumption that the challenged statute"—FATCA—"is valid. Its wisdom is not the concern of the courts; if a challenged action does not violate the Constitution, it must be sustained[.]" *INS v. Chadha*, 426 U.S. 919, 944 (1983); see also *National Federation of Independent Business v. Sebelius* 132 S. Ct. 2566, 2594 (2012) ("'[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality."' (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895))).

***12** Plaintiffs contend the only financial information the IRS requires to be reported about domestic accounts is the amount of interest paid to the accounts during a calendar year, 26 U.S.C. §§ 6049(a), (b); 26 C.F.R. §§ 1.6049-4(a)(1), 1.6049-4T(b)(1). For a foreign account, the information reported to the IRS includes not only the interest paid to the account, 26 USC § 1471(c)(1)(C); 26 C.F.R. §§ 1.1471-4(d)(3)(ii),-4(d)(4)(iv); Canadian IGA, art. 2, § 2(a)(4); Czech IGA, art. 2, § 2(a)(4); Israeli IGA, art. 2, § 2(a)(4); Swiss IGA, arts. 3, 5, but also the amount of any income, gain, loss, deduction, or credit recognized on the account, 26 C.F.R. § 1.6038D-4(a)(8), whether the account was opened or closed during the year, id. § 1.6038D-4(a)(6), and the balance of the account, 26 USC §§ 1471(c)(1)(C), 6038D(c)(4); 26 CFR §§ 1.1471-4(d)(3)(ii), 1.6038D-4(a)(5); Canadian IGA, art. 2, § 2(a)(6); Czech IGA, art. 2, § 2(a)(6); Israeli IGA, art. 2, § 2(a)(6); Swiss IGA, arts. 3, 5; FinCEN, BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Verified Complaint for Declaratory and Injunctive Relief 41 Case: 3:15-cv-00250-TMR Doc #: 1 Filed: 07/14/15 Page: 41 of 59 PAGEID #: 41 Accounts (FinCEN Form 114) 15 (June 2014), http://www.fincen.gov/forms/files/FBARLine0Item0FilingInstructions.pdf. Plaintiffs assert that comparable information is not required to be disclosed regarding domestic accounts of U.S. citizens.

Plaintiffs decry that U.S. citizens living in foreign countries are in this manner treated differently than U.S. citizens living in the United States. According to Plaintiffs, the federal government has no legitimate interest in knowing the amount of any income, gain, loss, deduction, or credit recognized on a foreign account, whether a foreign account was opened or closed during the year, or the balance of a foreign account.

Plaintiffs contend that the "heightened reporting requirements" imposed by FATCA, the FBAR information-reporting requirements, and the Canadian, Swiss, Czech, and Israeli IGAs, violate the Fifth Amendment rights of "U.S. citizens living in a foreign country" and should be enjoined. See Complaint ¶¶ 124-130.

Plaintiffs are unlikely to succeed on the merits of their claim that "U.S. citizens living in a foreign country are treated differently than U.S. citizens living in the United States," Complaint ¶ 128, without rational basis. A litigant may challenge federal government action under the Fifth Amendment's due process clause on the same grounds as a challenge to state action under the Fourteenth Amendment's equal protection clause. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); see also *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). "Under the Due Process Clause, if a statute has a reasonable relation to a proper legislative purpose, and [is] neither arbitrary nor discriminatory, the requirements of due process are satisfied." *Nebbia v. New York*, 291 U.S. 502, 537 (1934) (internal quotation marks and citations omitted). Likewise, under the Equal Protection Clause, a statute not directed at a suspect or quasi-suspect class must be upheld if it has a rational basis. *Clements v. Fashing*, 457 U.S. 957, 967 (1982) (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955)). "U.S. citizens living in a foreign country" are not a suspect or semi-suspect class of people, so Defendants need only show that "the classification drawn by [a] statute is rationally related to a legitimate state interest." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); see also *Igartua de la Rosa v. United States*, 842 F. Supp. 607, 611 (D.P.R. 1994).

A court "will not overturn [government conduct] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [it] can only conclude that the [government's] actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979); see also *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-14 (1993) (a statute subject to rational basis review must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."). A facial challenge, because of the extraordinary relief, requires a "heavy burden" and is "the most difficult challenge to mount successfully[.]" *United States v. Salerno*, 481 U.S. 739, 745 (1987).

***13** Plaintiffs' equal protection claims fail because the statutes, regulations, and executive agreements that they challenge simply do not make the classification they assert. None of the challenged provisions single out U.S. citizens living abroad. Instead, all Americans with specified foreign bank accounts or assets are subject to

reporting requirements, no matter where they happen to live. The provisions Plaintiffs contend discriminate against "U.S. citizens living abroad" actually apply to all U.S. taxpayers, no matter their residence. Plaintiffs argue that "[i]n practice, the increased reporting requirements for foreign financial accounts discriminate against U.S. citizens living abroad," see Doc. No. 8-1 at 22 (PageID 160), suggesting a claim of discrimination based on disparate impact. But it is well-settled that "mere disparate impact is insufficient to demonstrate an equal protection violation." *Copeland v. Machulis*, 57 F.3d 476, 481 (6th Cir. 1995); see also *Washington v. Davis*, 426 U.S. 229, 244-45 (1976).

FATCA requires FFIs to provide specified information about "United States Accounts." See 26 U.S.C. § 1471(c)(1)(C). "United States Accounts" are defined in the statute as "any financial account which is held by one or more specified United States persons or United States owned foreign entities." 26 U.S.C. § 1471(d)(1)(A). Similarly, the individual reporting requirements of FATCA under § 6038D(c)(4) apply to "any individual who, during any taxable year, holds any interest in a specified foreign financial asset[.]" 26 U.S.C. § 6038D(a) (emphasis added). The Bank Secrecy Act, under which the FBAR reporting requirement arises, also applies to any taxpayer with a financial interest in, or signatory authority over, a foreign financial account exceeding certain monetary thresholds. See 31 U.S.C. § 5314; 31 C.F.R. §§ 1010.350 & 1010.306(c). Neither do the challenged regulations make the classification Plaintiffs challenge; they apply to all taxpayers holding certain foreign accounts or assets. See 26 C.F.R. § 1.1471-4(d)(3)(ii) (FFI reporting requirement regarding "accounts held by specified U.S. persons"); 26 C.F.R. § 1.6038D-4(a)(5), (6), & (8) (setting forth information to be reported in Statement of Specified Foreign Financial Assets). Neither do the IGAs distinguish between the residence of the account holders whose information must be reported.

Plaintiffs have not correctly identified the classification made by these laws. The most basic element of an equal protection claim is the existence of at least two classifications of persons treated differently under the law. See *Silver v. Franklin Twp. Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992). But Plaintiffs fail to recognize that similarly situated persons to themselves—U.S. taxpayers living in the United States who hold foreign accounts—are not treated differently. In fact, for U.S. citizens living abroad, the regulations under 26 C.F.R. § 1.6038D-2 do not kick in until higher reporting thresholds are reached, as the regulations recognize that such individuals are likely to have significant foreign accounts in the ordinary course of their lives. For married individuals filing jointly, the filing threshold goes from $50,000 for U.S. residents to $150,000 for non-U.S. residents. To the extent that the law treats U.S. citizens living abroad unequally, it is in their favor insofar as the reporting requirements for foreign accounts are actually less onerous.

The distinction that the regulations do make is rationally related to a legitimate government interest. The U.S. tax system is based in large part on voluntary compliance: taxpayers are expected to disclose their sources of income annually on their federal tax returns. The information reporting required by FATCA is intended to address the use of offshore accounts to facilitate tax evasion, and to strengthen the integrity of the voluntary compliance system by placing U.S. taxpayers that have access to offshore investment opportunities in an equal position with U.S. taxpayers that invest within the United States. Third party information reporting is an important tool used by the IRS to close the tax gap between taxes due and taxes paid. The knowledge that financial institutions will also be disclosing information about an account encourages individuals to properly disclose their income on their tax returns. See Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance*, 60 STAN. L. REV. 695, 711 (2007). Unlike most countries, U.S. taxpayers are subject to tax on their worldwide income, and their investments have become increasingly global in scope. Absent the FATCA reporting by FFIs, some U.S. taxpayers may attempt to evade U.S. tax by hiding money in offshore accounts where, prior to FATCA, they were not subject to automatic reporting to the IRS by FFIs. The information required to be reported, including payments made or credited to the account and the balance or value of the account is to assist the IRS in determining previously unreported income and the value of such information is based on experience from the DOJ prosecution of offshore tax evasion. See *Senate Permanent Subcommittee on Investigations bipartisan report on "Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts,"* February 26, 2014; see also *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 29 (1974) ("when law enforcement personnel are confronted with the secret foreign bank account or the secret foreign financial institution they are placed in an impossible situation…they must subject themselves to time consuming and often times fruitless foreign legal process.").

***14** The FBAR reporting requirements, likewise, have a rational basis. As the Supreme Court noted in *California Bankers*, when Congress enacted the Bank Secrecy Act

(which provides the statutory basis for the FBAR), it "recognized that the use of financial institutions, both domestic and foreign, in furtherance of activities designed to evade the regulatory mechanism of the United States, had markedly increased." *Id.* at 38. The Government has a legitimate interest in collecting information about foreign accounts, including account balances held by U.S. citizens, for the same reason that it requires reporting of information on U.S.-based accounts. The information assists law enforcement and the IRS, among other things, in identifying unreported taxable income of U.S. taxpayers that is held in foreign accounts. Without FBAR reporting, the Government's efforts to track financial crime and tax evasion would be hampered. Congress, through FBAR reporting, attempted to complement domestic reporting on financial transactions. U.S. taxpayers who place their funds in foreign accounts cannot put themselves on a better footing than U.S. taxpayers who conduct their transactions stateside. FBAR reporting prevents individuals from trying to evade domestic regulation and provides a deterrent for those who would use foreign accounts to engage in criminal activity.

The distinctions made by FATCA, the FBAR reporting requirements, and the IGAs simply do not evince, on their face, discrimination that is "so unjustifiable as to be violative of due process." *Schneider v. Rusk*, 377 U.S. 163, 168 (1964).

In Count Six, Plaintiffs contend that the FBAR "Willfullness Penalty" is unconstitutional under the Excessive Fines Clause. Plaintiffs decry that 26 U.S.C. § 5321 imposes a penalty of up to $100,000 or 50% of the balance of the account at the time of the violation, whichever is greater, for failures to file an FBAR as required by 26 U.S.C. § 5314 (the FBAR "Willfulness Penalty"). 31 U.S.C. § 5321(b)(5)(C)(i).

Plaintiffs allege the Willfulness Penalty is designed to punish and is therefore subject to the Excessive Fines Clause. Plaintiffs further allege the Willfulness Penalty is grossly disproportionate to the gravity of the offense.

Plaintiffs' Eighth Amendment claims, however, are not ripe for adjudication because no withholding or FBAR penalty has been imposed against any Plaintiff; indeed, the 30% FFI withholding tax under § 1471(a) will never be imposed against any of them because they are individuals, not FFIs. Additionally, Plaintiffs' claims fail because they cannot show that the FATCA taxes and the willful FBAR penalties are grossly disproportional to the gravity of their (as yet unspecified) conduct. See *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

"Ripeness is a justiciability doctrine designed to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements. Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all." *Kentucky Press Ass'n v. Kentucky*, 454 F.3d 505, 509 (6th Cir. 2006) (citation and internal quotation marks omitted). The Sixth Circuit has listed three factors to be considered when deciding whether claims are ripe for adjudication: (1) the likelihood that the harm alleged by the plaintiffs will ever come to pass; (2) whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claim; and (3) the hardship to the parties if judicial relief is denied at this stage in the proceedings. *Id.*

Plaintiffs' Eighth Amendment challenges are not ripe under the *Kentucky Press Association* factors. First, it is not clear that any harm Plaintiffs contemplate will ever come to pass. With respect to the FATCA withholding tax in § 1471(b)(1), Plaintiffs can request a credit or refund of a future withheld amount on their federal income tax returns. See 26 U.S.C § 1474(a); 26 C.F.R. § 1.1474-3. Several Plaintiffs are United States citizens, so they must file federal income tax returns anyway. 26 C.F.R. § 1.6012-1(a)(1). Nelson and Kuettel, who renounced their U.S. citizenship, may possibly also be required to file returns if they have U.S.-source income. 26 C.F.R. § 1.6012-1(b)(1)(i). As for the willful FBAR penalty, whether it is imposed is entirely in IRS's discretion. See 31 U.S.C. § 5321(a)(5); 31 C.F.R. § 1010.810(g).

***15** Second, the factual record is not sufficiently developed to weigh whether the FATCA withholding taxes or FBAR penalty is grossly disproportionate, and such a factual record cannot reasonably be developed here. An Eighth Amendment proportionality analysis is "guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the [penalty] imposed on other [offenders] in the same jurisdiction; and (iii) the [penalty] imposed for commission of the same [offense] in other jurisdictions." *Solem v. Helm*, 463 U.S. 277, 292 (1983) (Cruel and Unusual Punishments Clause analysis); see also *Bajakajian*, 524 U.S. at 336 (drawing Excessive Fines Clause standard from Cruel and Unusual Punishments Clause jurisprudence). The first factor requires review of the circumstances of the offense "in great detail." *Solem*, 463 U.S. at 290-91. In this case, there are no circumstances to review, because no FATCA tax or FBAR penalty has been imposed. A fact-specific determination of excessiveness is impossible where any wrongful conduct is hypothetical.

Finally, Plaintiffs will not suffer appreciable hardship from the Court declining to hear their Eighth Amendment challenges. The Sixth Circuit has noted that, "[r]ipeness will not exist … when a plaintiff has suffered (or will immediately suffer) a small but legally cognizable injury, yet the benefits to adjudicating the dispute at some later time outweigh the hardship the plaintiff will have to endure by waiting." *Airline Profs. Ass'n of Int'l Broth. of Teamsters, Local No. 1224 v. Airborne, Inc.*, 332 F.3d 983, 988 n.4 (6th Cir. 2003). Challenges to statutes are not ripe where delaying judicial review results in no real harm. See *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 810-11 (2003). Once an amount is actually withheld from a payment, Plaintiffs can (after properly exhausting administrative remedies) file a refund suit if the IRS improperly fails to refund the withholding. See 26 U.S.C. § 7422. If an FBAR penalty is assessed against a Plaintiff, that Plaintiff may challenge the penalty at a later time. See *Moore v. United States*, No. C13-2063-RAJ, 2015 WL 1510007 at *12-*13 (W.D. Wash. Apr. 1, 2015) (rejecting Eighth Amendment challenge to non-willful FBAR penalty). At present, Plaintiffs have not established that their Eighth Amendment claims require immediate injunctive relief.

Because they have not alleged that any FATCA withholding taxes or willful FBAR penalties have actually been imposed against them, Plaintiffs appear to raise a facial challenge to those exactions under the Excessive Fines Clause. To prevail on a facial challenge, Plaintiffs must show that the statutes are "unconstitutional in all of [their] applications," *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015) (internal quotation omitted). The FATCA taxes satisfy neither of the two *Bajakajian* factors: they are not fines, nor are they grossly disproportional. 524 U.S. at 334. The willful FBAR penalty, while arguably equivalent to a fine, is not grossly disproportional in all applications.

The FATCA withholding taxes in § 1471(a) and § 1471(d)(1)(B) are taxes, not penalties. The Eighth Amendment applies to payments that "constitute punishment for an offense." *Bajakajian*, 524 U.S. at 328. Neither taxes nor remedial fines are punishment for an offense, and thus are not subject to the Eighth Amendment. See *Austin v. United States*, 509 U.S. 602, 621-22 (1993) (a fine is not "punishment for an offense" if it serves a wholly remedial purpose).

The FATCA withholding tax rate of 30% is remedial because it is the same rate imposed on all fixed or determinable annual or periodic income paid from a U.S. source to a non-resident alien. 26 U.S.C. § 1441(a), (b). FATCA's withholding tax on FFIs effectively assumes that if an FFI refuses to disclose information to the IRS, all U.S.-sourced payments to its account holders may be subject to that rate of taxation. Similarly, FATCA's withholding tax on recalcitrant account holders under § 1471(b)(1)(D) merely extends the same withholding rate as § 1441 to accounts where the account holder refuses to be identified. The rate is effectively reduced if the FFI's country has a substantive tax treaty reducing the rate of tax on a particular payment, see 26 U.S.C. § 1474(b)(2)(A)(i), underlining that the FATCA withholdings are meant to collect tax, not to impose a punishment. Again, to the extent that one of the individual Plaintiffs has money withheld over and above what is necessary to pay his or her federal income tax, the withholding is refundable. 26 U.S.C. § 1474; 26 C.F.R. §§ 1.1474-3, 1.1474-5. At least as to these Plaintiffs, the FATCA withholding taxes serve the remedial purpose of protecting the fisc. See *Helvering v. Mitchell*, 303 U.S. 391, 400-01 (1938) (50% fraud penalty was remedial in nature because it was "provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation").

***16** Nor is the magnitude of the withholding tax grossly disproportional, since it roughly approximates the presumed tax loss from FATCA non-compliance. Congress's determination that a 30% withholding tax rate was appropriate is accorded substantial deference. See, e.g., *United States v. Dobrowolski*, 406 F. App'x 11, 12-13 (6th Cir. 2010) (citing cases) (noting traditional deference given to legislative policy determinations). A penalty that is equal to, and does not duplicate, the applicable tax rate on a given payment is proportional to the "offense" of failing to report information under FATCA—it certainly is not excessive in "all" applications. Therefore, Plaintiffs' facial Eighth Amendment challenge to the § 1471 taxes is rejected.

The willful FBAR penalty also survives a facial challenge because the maximum penalty will be constitutional in at least some circumstances. A maximum penalty fixed by Congress is due substantial deference from the courts. See *Bajakajian*, 524 U.S. at 336 ("[J]udgments about the appropriate punishment for an offense belong in the first instance to the legislature."); see also *United States v. 817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F.3d 1304, 1309 (11th Cir. 1999). Congress increased the maximum FBAR penalty to its present level in 2004. See 31 U.S.C. § 5321(a)(5)(C). Congress chose this penalty range because FBAR reporting furthers an important law enforcement goal. The Senate Finance Committee explained:

> The Committee understands that the number of individuals involved in using offshore bank accounts to engage in abusive tax scams has grown significantly in recent years .... The Committee is concerned about this activity and believes that improving compliance with this reporting requirement is vitally important to sound tax administration, to combating terrorism, and to preventing the use of abusive tax schemes and scams.

S. Rep. 108-257, at 32(2004) (explaining increase in maximum willful penalty and creation of new civil non-willful penalty). Indeed, FBARs are available not only to the IRS but also to a variety of law enforcement agencies investigating crimes like money laundering and terrorist financing. See, e.g., *Amendment to the Bank Secrecy Act Regulations–Reports of Foreign Financial Accounts*, 75 Fed. Reg. 8844, 8844 (Feb. 26, 2010). Setting the maximum willful penalty as a substantial proportion of the account ensures that the willful penalty is not merely a cost of doing business for tax evaders, terrorists, and organized criminals.

A 50% willful FBAR penalty—the maximum permitted by statute—is severe. But given the ills it combats, it is an appropriate penalty in at least some circumstances. Accordingly, the Plaintiffs' facial challenge to it under the Eighth Amendment fails.

IV. Conclusion

Plaintiffs have failed to establish that they are entitled to a preliminary injunction. First, Plaintiffs are not likely to succeed on the merits. They lack standing, as the harms they allege are remote and speculative harms, most of which would be caused by third parties, illusory, or self-inflicted. Plaintiffs' allegations also fail as a matter of law, as there is no constitutionally recognized right to privacy of bank records.

Second, Plaintiffs are not likely to suffer irreparable injury if a preliminary injunction is not granted. Their lack of standing means that they lack a sufficiently concrete and particularized injury to sue in the first instance, much less an injury that is so imminent and irreparably harmful as to justify preliminary injunctive relief. The absence of the irreparable injury is reinforced by the facts that: their Fifth Amendment equal-protection allegation is based on a classification that does not exist; their Eighth Amendment claims are not ripe, with no FATCA withholding or willful FBAR penalties having been imposed against them; and their Fourth Amendment counts are based on information reporting that does not violate the Constitution.

***17** The third factor, the balance of the equities, also weighs against the entry of a preliminary injunction. That is because the fourth factor, the public interest, is best served by keeping the statutory provisions at issue, as well as their implementing regulations and international agreements, in place and enforceable during the pendency of this lawsuit. The FATCA statute, the IGAs, and the FBAR requirements encourage compliance with tax laws, combat tax evasion, and deter the use of foreign accounts to engage in criminal activity. A preliminary injunction would harm these efforts and intrude upon the province of Congress and the President to determine how best to achieve these policy goals. Thus, Plaintiffs' Motion for Preliminary Injunction, ECF 8, is **DENIED**.

DONE and **ORDERED** in Dayton, Ohio, this Tuesday, September 29, 2015.

All Citations

Not Reported in F.Supp.3d, 2015 WL 5697552, 116 A.F.T.R.2d 2015-6288, 2015-2 USTC P 50,499

Footnotes

1 If the country enters into an intergovernmental agreement (IGA) this provision becomes irrelevant because consent is no longer a legal impediment under foreign law.

2 See Convention Between the United States and Canada with Respect to Taxes on Income and on Capital done at Washington on September 26, 1980 ("Canadian Convention"), Article XXVII; Convention between the United States of America and the Czech Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, done at Prague on September 16, 1993 ("Czech Convention"), Article 29; Convention between the Government of the United States of America and the Government of the State of Israel with Respect to Taxes on Income, done at Washington on November 20, 1975 ("Israeli Convention"), Article 29; and Convention between the United States and the Swiss Confederation for the

Avoidance of Double Taxation with Respect to Taxes on Income, signed at Washington on October 2, 1996 ("Swiss Convention"), Article 26.

3 Here, the Supreme Court's estimation of what a reasonable person might expect appears to be diverging from reality. "A 2003 study conducted by Christopher Slobogin and Joseph E. Schumacher found that the 217 subjects considered 'perusing bank records' as more intrusive than a patdown or even an arrest for 48 hours." Samantha Arrington, *Expansion of the Katz Reasonable Expectation of Privacy Test Is Necessary to Perpetuate A Majoritarian View of the Reasonable Expectation of Privacy in Electronic Communications to Third Parties*, 90 U. Det. Mercy L. Rev. 179, 180 (2013). See also, e.g., Henry F. Fradella et. al., *Quantifying Katz: Empirically Measuring 'Reasonable Expectations of Privacy' in the Fourth Amendment Context*, 38 Am. J. Crim. L. 289, 371 (2011) ("judges often fail to appreciate the degree to which 'society' believes privacy should be protected from law enforcement intrusions.").

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