IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Palm Beach Division

LARRY KLAYMAN Plaintiff, v. BARACK HUSSEIN OBAMA and MARCO RUBIO and BILL NELSON and PATRICK MURPHY Defendants.	Civil Action No. 9:15-cv-81023 **EXPEDITED ORAL ARGUMENT REQUESTED**

PLAINTIFF'S EXPEDITED RESPONSE TO JUDGE'S INQUIRY

Plaintiff hereby respectfully responds to the Court's Inquiry Regarding Jurisdiction ("Inquiry") from the Honorable Kenneth A. Marra, presiding judge, issued as an order July 27, 2015.

I. INTRODUCTION

Judge Marra questioned *sua sponte* the jurisdiction of the U.S. District Court for the Southern District of Florida as a federal court organized with limited jurisdiction pursuant to Article III of the U.S. Constitution on two topics. Judge Marra ordered the Plaintiff "to [1]

demonstrate to the Court, on or before August 21, 2015, why he meets the legal test for standing and [2] why this case presents a justiciable case or controversy."

The Complaint alleges that the "Iran Nuclear Agreement Review Act of 2015" which is Public Law No: 114-17 (hereinafter "INARA"), violates Article II, Sec. 2, Par. 2 of the U.S. Constitution by changing the method and radically altering the requirements by which treaties are ratified, who ratifies treaties, and the voting requirements to do so.

The case asks for a ruling under declaratory judgment and other legal theories that INARA is unconstitutional. A judicial ruling construing the U.S. Constitution and its treaty-ratification process may inform the Congress, in accordance with the purpose of declaratory judgment of guiding the parties in their legal rights and obligations under legal instruments, to swiftly repeal INARA and enact legislation conforming with the U.S. Constitution, and not in violation of it.

The Complaint brings as causes of action a request for a declaratory judgment as to the unconstitutionality of INARA, violation of the U.S. Constitution and specific performance, Plaintiff's *Bivens* Action under the Fifth Amendment to the U.S. Constitution, Plaintiff's constitutional and civil rights claim under 42 U.S.C. § 1983, and Plaintiff's *Bivens* Action under the First Amendment to the U.S. Constitution.

The two questions presented in the Court's Inquiry are: (1) whether the substance of the complaint is a dispute involving certain political questions which lie outside the subject matter jurisdiction of the federal courts, and (2) whether the Plaintiff has the standing necessary to bring the lawsuit as a jurisdictional element that there exists a "case or controversy" under Article III of the U.S. Constitution.

II. NATURE OF THE CASE

The Plaintiff sues for declaratory judgment as to the unconstitutionality of INARA and sues to have the law ruled unconstitutional, null, and void. The Plaintiff's representatives in Congress have modified and perverted the U.S. Constitution without complying with the amendment process. Defendants are the Plaintiff's representatives who owed a fiduciary duty to uphold his rights and protections under the U.S. Constitution, and protect his rights and security.

The Defendants swore an oath to faithfully represent the Plaintiff's interests and to protect his interests, safety, and security, and to uphold and defend the U.S. Constitution. The Defendants gave away, abrogated and undermined the Plaintiff's constitutional rights, putting him in danger, including giving away the protections inherent in the U.S. Constitution requiring a two-thirds vote to ratify a treaty. The Defendants had no authority to do this.

Because the U.S. Constitution's process for ratification has been changed by INARA, Obama's July 13, 2015, "Joint Comprehensive Plan of Action" ("JCPOA") treaty with Iran will have a binding legal effect as a treaty, when otherwise it would fail at being ratified. The change in the ratification rules rigs the game to cause this outcome, by undermining the U.S. Senate's role in ratification and making it inevitable that the treaty goes into effect legally, diluting the role of the U.S. Senate, and by granting a veto opportunity to President Obama. While Congress might pass a joint resolution of disapproval for the Iran Treaty pursuant to INARA, it is numerically certain that Congress will not vote to over-ride President Obama's veto based on analysis of the announced positions of the members of Congress. Plaintiff is injured by these actions detrimental to him and the United States that would not otherwise occur.

As a result, Plaintiff will face waves of terrorism funded directly (openly) and covertly from an estimated $150 billion "signing bonus" that Iran will receive under the JCPOA treaty

and the ending of sanctions on Iranian commerce, at home in the United States and while travelling in Israel, in Europe or elsewhere internationally. Iran's growing power and growing nuclear weapons capability will embolden Iran, Iran's allies, and terrorist groups funded by Iran, and strip the Plaintiff of dwindling security and safety as Iran is emboldened and strengthened and the United States security capabilities grow weaker in comparison.

Secretary of State John Kerry, Secretary of Defense Ashton Carter, Secretary of the Treasury Jack Lew and other officials openly admit that[1] Iran will be free to use the $150 billion to fund terrorism against Israel and the United States, to topple countries throughout the Middle East, and to expand Iran's power throughout the Middle East. However, the Obama administration naively hopes that Iran's fanatical leaders will instead prefer to spend that $150 billion on shovel-ready jobs, infrastructure, and the civilian economy to benefit Iran's people.

Confirming that the Plaintiff will be placed in harm's way, Iran's leadership led national, public rallies crying "Death to America!" immediately after the treaty was signed and then Ayatollah Ali Khamenei published a new book[2] called "Palestine," which is a blueprint for the destruction of the United States as "the Great Satan," the destruction of Israel (because of Israel's alliance with the United States among other reasons), and the recovery of formerly Islamic lands in Europe, Russia, China, all of India, the Phillipines, and Thailand.

The Plaintiff voted for Marco Rubio and Bill Nelson as his U.S. Senators, charging them and trusting them as fiduciaries to represent him and his interests, safety, and security. As a

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[1] July 29, 2015, accessible at http://www.c-span.org/video/?327380-1/hearing-iran-nuclear-agreement

[2] Amir Taheri, "Iran publishes book on how to outwit US and destroy Israel," The New York Post, August 1, 2015, http://nypost.com/2015/08/01/iran-publishes-book-on-how-to-outwit-us-and-destroy-israel/

result, the Plaintiff has lost and been injured in the loss of his constitutional, civil, and political rights.

III. THE ISSUES OF THE COMPLAINT ARE JUSTICIABLE

The lawsuit before the Court presents a justiciable question, more clearly than many other federal cases. The Complaint arises under a crystal-clear provision of the U.S. Constitution. Specifically, a president has no legal power whatsoever to enter into a treaty without two-thirds votes of U.S. Senators present voting for ratification ("advice and consent"). Therefore, INARA cannot grant to a president treaty-making power beyond Article II, Sec. 2, Par. 2.

Here, the judicial function called upon is the traditional competence of the judiciary to interpret and construe legislation enacted by Congress and the terms of the U.S. Constitution. The federal judiciary has a crystal-clear legal standard to follow and apply so as to be able to arrive at a judicial decision, while abstaining from any judgment as to the wisdom of legislation or any policy disputes.

The Complaint seeks a declaration that President Obama and the other Defendants have not been granted the power that INARA purports to give him.[3] Quite simply, INARA purports to grant power to a president to enter into a treaty outside of the strictly limited treaty-making power specified in the U.S. Constitution. The issue does not raise niceties of Senate procedure. Either INARA complies with Article II, Sec. 2, Par. 2 so as to authorize a treaty or it does not. And here it does not.

The interpretation and construction of the U.S. Constitution called for in this case is well within the core traditional functions of the federal judiciary. Compliance of congressional

[3] President Obama, by and through his Cabinet officers, entered into the treaty on July 13, 2015, after, encouraged by, and in reliance upon INARA signed into law on May 22, 2015.

enactments with the procedures established by the U.S. Constitution and the limitations on powers granted thereunder are well-grounded roles of the federal courts.

Justice William J. Brennan predicted the case at bar in his dissent in *Goldwater v. Carter*, 444 U.S. 996 (1979)

> A simple hypothetical demonstrates the confusion that I find inherent in Mr. Justice REHNQUIST's opinion concurring in the judgment. ***Assume that the President signed a mutual defense treaty with a foreign country and announced that it would go into effect despite its rejection by the Senate***. Under Mr. Justice REHNQUIST's analysis that situation would present a political question ***even though Art. II, 2, clearly would resolve the dispute.*** Although the answer to the hypothetical case seems self-evident because it demands textual rather than interstitial analysis, the nature of the legal issue presented is no different from the issue presented in the case before us. In both cases, ***the Court would interpret the Constitution to decide whether congressional approval is necessary to give a Presidential decision on the validity of a treaty the force of law.*** Such an inquiry demands no special competence or information beyond the reach of the Judiciary. Cf. *Chicago & Southern Air Lines v. Waterman S.S. Corp*., 333 U.S. 103, 111 (1948).1

Id., 444 U.S. at 1000 *(emphases added.)*. And furthermore:

> The issue of decision-making authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts.

Id. And:

> But "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, *supra*, 369 U.S., at 211 . This case "touches" foreign relations, but the question presented to us concerns only the constitutional division of power between Congress and the President.

Id.

The U.S. Supreme Court just decided *Zivotofsky v. Kerry*, 576 U.S. ___ (2015), Record No. 13-628, June 8, 2015. Although the U.S. Supreme Court ruled that the power to recognize a foreign country is exclusively within the power of the presidency, the Court explained on Pages 17-18 of the slip opinion:

> ***[M]any decisions affecting foreign relations***—including decisions that may determine the course of our relations with recognized countries—***require congressional action***. Congress may "regulate Commerce with foreign Nations," "establish an uniform Rule of Naturalization," "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," "declare War," "grant Letters of Marque and Reprisal," and "make Rules for the Government and Regulation of the land and naval Forces." U. S. Const., Art. I, §8.
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> ***In addition, the President cannot make a treaty*** or appoint an ambassador ***without the approval of the Senate. Art. II, §2, cl. 2.*** The President, furthermore, could not build an American Embassy abroad without congressional appropriation of the necessary funds. Art. I, §8, cl. 1. Under basic separation-of-powers principles, it is for the Congress to enact the laws, including "all Laws which shall be necessary and proper for carrying into Execution" the powers of the Federal Government. §8, cl. 18.
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> In foreign affairs, as in the domestic realm, the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown*, 343 U. S., at 635 (Jackson, J., concurring).

Id. (Emphases added).

Of note, Zivotofsky had standing because although he was born in Jerusalem, U.S. Embassy officials refused to list Zivotofsky's place of birth as "Israel," citing the Executive Branch's position that the U.S. does not recognize Jerusalem as belonging to any country. Standing for a momentous constitutional and foreign policy decision flowed merely from what place of birth Zivotofsky wished to be stamped in his passport.

Here, there is no policy question before the Court, which is one factor of justiciability. "We deal, however, not with a question of policy, but with a problem of constitutional power." *Williams v. Rhodes Socialist Labor Party*, 393 U.S. 23, 48 (1968) (Justice Stewart, dissenting).

There is no judgment call or review of wisdom before the Court. "These are matters of local policy, on the wisdom of which the federal judiciary is neither permitted nor qualified to sit in judgment." *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). "The courts are not called upon to judge the wisdom or efficacy of the challenged statutory scheme. *See, e.g., id.*

at 9 ("The question before us, however, is not whether it is wise to enforce the statute in these circumstances."); *Wickard*, 317 U.S. at 129." *Florida v. U.S. Dep't of Health & Human Serv.* 648 F.3d 1235 (11th Cir. 2011). The question was whether to enforce the U.S. Constitution.

There are no questions before the Court lacking a discernible standard for the Court to apply. "At least two of the formulations of the 'political question' doctrine laid down by the U.S. Supreme Court in *Baker v. Carr* are directly pertinent to this case. One bars entertainment of a suit if the court finds 'a lack of judicially discoverable and manageable standards for resolving (the controversy).'" *Ripon Soc., Inc. v. National Republican Party*, 525 F.2d 567, 611, 173 U.S.App.D.C. 350 (C.A.D.C., 1976). And "Arguably the question now before us is nonjusticiable under Baker because of a 'lack of judicially discoverable and manageable standards for resolving it.' *Id*. at 217, 82 S.Ct. at 710." *Id.* At 577.

There are no subjective half-measures involved here. An agreement with Iran entered into by President Obama concerning Iran's nuclear weapons development program either has legal effect or it does not, either entirely valid or entirely invalid, null, and void under the U.S. Constitution.

A treaty is "primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Edye v. Robertson* [*Head Money Cases]*, 112 U.S. 580, 598, 5 S.Ct. 247, 28 L.Ed. 798 (1884). Although this instant case does not require this Court to delve into what the Iran treaty says, the U.S. Supreme Court has explained that a treaty ratified by the United States is "an agreement among sovereign powers," and the courts consider as "aids to its interpretation" the negotiation and drafting history. *MedellÍn v. Texas*, 552 U.S. 491, 128 S.Ct. 1346, 1357-1358, 170 L.Ed.2d 190, (2008) (citing to *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226, 116

S.Ct. 629, 133 L.Ed.2d 596 (1996) ; see also *United States v. Stuart*, 489 U.S. 353, 365–366, 109 S.Ct. 1183, 103 L.Ed.2d 388 (1989); *Choctaw Nation v. United States*, 318 U.S. 423, 431–432, 63 S.Ct. 672, 87 L.Ed. 877 (1943).

The consequences of failing to follow the treaty ratification process of Article II, Sec. 2, Par. 2 is that a president has no power to make – and Congress to vote on – a treaty under these circumstances. President Obama's July 13, 2015 treaty with Iran and with other countries has effects external to the "political" branches. President Obama's JCPOA treaty with Iran directly limits and constrains the exercise of the powers of the United States, as explained in testimony by the U.S. Senate Foreign Relations Committee, July 30, 2015,[4] by Juan Zarate, Former Assistant Treasury Secretary for Terrorist Financing and Financial Crimes and Former Deputy National Security Counter-Terrorism Advisor. The JCPOA purports to be binding upon the United States by restraining and limiting the exercise of United States national powers.

The case at bar is conceptually the same as the one-house veto cases in which highly popular congressional statutes purported to grant to either house of the Congress power to veto Executive Branch actions or regulations. The U.S. Supreme Court in, for example, *INS v. Chadha*, 462 U.S. 919, 957-959 (1983), ruled that the grant of power to either house to veto executive branch actions was an unconstitutional grant of power, because it violated the structure, checks and balances, details, and design of the U.S. Constitution (there the "presentment clause").[5] In *Chadha*, the grant of power violated ***implied*** restraints from U.S. Constitutional architecture. The U.S. Supreme Court did not consider the wisdom of any

[4] Video of testimony accessible on C-SPAN, in time period of 10:45 A.M. EST through 11:15 A.M. EST, and at 11:40 AM to 11:47 AM EST, accessible at: http://www.c-span.org/video/?327402-1/hearing-iran-nuclear-agreement

[5] The one-house veto legislation was held to be unconstitutional notwithstanding that the legislation had been signed into law by the president.

particular exercise of the veto, but merely whether the power to exercise a veto complied with the U.S. Constitution's process for passing a law.

In *Madison v. Marbury*, 5 U.S. 137 (1803), the U.S. Supreme Court confirmed that a court may declare an act of Congress void if it is inconsistent with the U.S. Constitution. *Marbury* decided how exactly a president's appointment must be exercised in order to be perfected.[6] *Marbury* involved a detail of the exercise of a president's powers *vis-à-vis* the other branches, specifically whether President James Madison's appointment power had actually been exercised where delivery had not been completed before President Madison's term ended.

The judiciary clearly can, does, and should apply the standards of the U.S. Constitution in litigation where such standards can be clearly discerned to guide the Court. If the legal effectiveness of details of a president's power is justiciable, then a clear violation of the unambiguous process for ratifying a treaty is justiciable. In *Marbury*, the question had no external effect, unlike here where the ratification of a treaty is binding upon the United States internationally.

Of course, a "political question" has nothing to do with whether there is a political aspect to the issues in a case. Many cases involve political issues, such as *Roe v. Wade*, 410 U.S. 113, (1973) concerning abortion or *Bush v. Gore*, 531 U.S. 98 (2000), concerning the winner of the election of the president of the United States. Rather, a "political question" concerns whether the question presented can only be decided by the "political" – that is, popularly elected – branches. A case is "political" in judicial parlance only if there are no standards by which a court can

[6] The *Marbury* Court famously declined to issue a writ of mandamus on procedural questions about whether the authority to issue a mandamus writ rested with the lower courts or the U.S. Supreme Court as an appellate court, but asserted its authority as the final arbiter of the meaning of the U.S. Constitution and its application to the other two branches.

decide the case without resorting to a subjective opinion or evaluation of the wisdom of a law or course of action.

IV. THE PLAINTIFF HAS STANDING TO MAINTAIN THIS LAWSUIT

The Plaintiff has standing to prevent a violation of the U.S. Constitution as a necessary part of the protections of the U.S. Constitution. The Plaintiff also has standing because he is being personally harmed in his constitutional and civil rights, as well as his personal safety and security, by the Defendants' breach of their fiduciary duty to the Plaintiff.

Here, although the issue has not arisen before, this is in large part because of the actions of public officials have become unprecedented in their disregard of the U.S. Constitutional guardrails. The U.S. Constitution is in effect being trashed by both the executive and legislative branches of government.

Injury to the Plaintiff must legally be presumed as a result of U.S. Constitutional violations. Unlike compensatory damages, nominal damages can be automatically presumed from a U.S. Constitutional violation. *Carey v. Piphus*, 435 U.S. 247 (1978); *Kincaid v. Rusk*, 670 F.2d 737, 746 (7th Cir. 1982) (awarding nominal damages for violation of First Amendment rights). Therefore, it is presumed by operation of law that there is at least some injury to the Plaintiff from a violation of Plaintiff's U.S. Constitutional rights, at least nominal damages.

It has long been established that the loss of U.S. Constitutional freedoms, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)) *Elrod* explained that the injury sufficient for standing was only an intangible impact of restraint upon the exercise of First Amendment rights, summarizing first the lower court:

> Inasmuch as this case involves First Amendment rights of association which must be carefully guarded against infringement by public office holders, we judge that injunctive relief is clearly appropriate in these cases."
>
> We agree. At the time a preliminary injunction was sought in the District Court, one of the respondents was only threatened with discharge. In addition, many of the members of the class respondents were seeking to have certified prior to the dismissal of their complaint were threatened with discharge or had agreed to provide support for the Democratic Party in order to avoid discharge. It is clear therefore that First Amendment interests were either threatened or in fact being impaired at the time relief was sought.

The dilution of the effectiveness of a voter's vote and political rights is considered enough to grant standing. Allegations that even just one citizen's vote might be diluted by someone else's vote is sufficient. Dilution can never be known for certain. *Baker v. Carr*, 369 U.S. 186, 205, 82 S. Ct. 691, 7 L.Ed.2d 663 (1962) explained:

> Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult U.S. Constitutional questions? This is the gist of the question of standing. It is, of course, a question of federal law.
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> The complaint was filed by residents of Davidson, Hamilton, Knox, Montgomery, and Shelby Counties. Each is a person allegedly qualified to vote for members of the General Assembly representing his county.
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> ***

Id. Also, an injury constituting standing need not be an all-or-nothing effect. *Id.*

Standing must be analyzed in light of the purpose and effect of the cause of action. The Plaintiff here is seeking a declaratory judgment among other relief. The purpose of declaratory judgment is precisely to ***not*** wait until actual injury or legal harm occurs, but to determine the validity and meaning of legal instruments before a person risks suffering or inflicting harm. One core purpose of declaratory judgment is to construe the meaning of a law or instrument (or here the U.S. Constitution) ***before*** a traditional case or controversy arises.

Standing exists in this case just as it did in *Golden v. Zwickler*, 394 U.S. 103 (1969), where a political activist expressed his intention to violate New York election law. Challenging the law, the activist intended to circulate anonymous campaign literature – not labeled as the law required –in the 1966 election. Zwickler had been convicted for violating the law in the 1964 election. But *Golden v. Zwickler* was not an appeal of that but a challenge based on his professed plans to defy the labeling rules again. There was no other basis for standing except that Zwickler might face legal jeopardy – conditional upon whether a prosecutor might choose to prosecute, the facts available, and an actual outcome of any trial.[7]

The U.S. Supreme Court restated the elements required for declaratory judgment --

> (1) whether the facts alleged, under all the circumstances, show that
>
> (2) there is a substantial controversy,
>
> (3) between parties having adverse legal interests,
>
> (4) of sufficient immediacy in reality to warrant the issuance of a declaratory judgment.

> For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, no abstractions' are requisite. This is as true of declaratory judgments as any other field.' *United Public Workers of American (C.I.O.) v. Mitchell*, 330 U.S. 75, 89, 67 S.Ct. 556, 564, 91 L.Ed. 754 (1947). 'The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy any *[sic]* reality to warrant the issuance of a declaratory judgment.' *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941).

Id.

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[7] Declaratory judgment became moot while the case was pending, removing the required element "of sufficient immediacy in reality," when the opposed candidate changed careers.

The Federal Declaratory Judgment Act provides at 28 U.S. Code § 2201:

> (a)In a case of actual controversy within its jurisdiction, except with respect to Federal taxes ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

For example, the U.S. Supreme Court explained with regard to the dangers of patent infringement:

> In the absence of the declaratory judgment procedure, Medtronic would face the precise dilemma that MedImmune describes. Either Medtronic would have to abandon its right to challenge the scope of Mirowski's patents, or it would have to stop paying royalties, risk losing an ordinary patent infringement lawsuit, and thereby risk liability for treble damages and attorney's fees as well as injunctive relief. See 35 U. S. C. §§283-285 (providing for injunctive relief, treble damages, and—in "exceptional cases"—attorney's fees as remedies for patent infringement). ***As in MedImmune, the declaratory judgment action rescues Medtronic from this dilemma.***

Medtronic, Inc. v. Mirowski Family Ventures, LLC, 134 S. Ct. 843 (2014) (Slip Op. Page 12) *(Emphasis added).* A declaratory judgment action exists to resolve actual cases and controversies, such as the unconstitutionality of a statute, before risking any actual harm or injury to the Plaintiff in the more typical sense.

It is important that legal rules do not expand or contract based upon favoritism toward certain causes. In a declaratory judgment action, *Roe v. Wade*, 410 U.S. 113 (1973), Norma McCarvey professed that she never did have an abortion but wished one. In fact, she never did have any abortion. Yet declaratory judgment was awarded in the landmark precedent concerning how the law in Texas affected her intangible legal rights, despite no financial damages or direct damage being experienced. Similarly, Sandra Cano in *Doe v. Bolton*, 410 U.S. 179 (1973), never wanted an abortion and never had one yet used the same argument outlined in *Roe v. Wade* that by excluding the possibility of abortion in most circumstances in Georgia violated a plaintiff's

constitutional rights. Cano sought only free legal services to recover custody of her children but was listed against her knowledge as a plaintiff concerning abortion. Indeed, Cano claimed that her attorney had used her in order to find a plaintiff with standing.

Similarly, in *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989), the Court held that public interest groups (in this case, the "Washington Legal Foundation" and the "Public Citizen") had standing to sue the U.S. Department of Justice ("DoJ") to seek declaratory and injunctive relief that the American Bar Association's ("ABA") Standing Committee on the Federal Judiciary for evaluation of qualifications of nominees for federal judgeships was an "advisory committee" for purposes of the Federal Advisory Committee Act, 5 U.S.C.A.App. §§ 1, et seq.

The injury claimed was an intangible U.S. Constitutional right affecting the conduct and progress of governmental decisions. The DoJ consistently seeks advice from this ABA Standing Committee regarding all potential nominees for judgeships. If the Federal Advisory Committee Act covers the ABA Committee, then it would have to make reports available to the public. The Plaintiffs asserted U.S. Constitutional political rights in the legal procedures that should be followed by DoJ and the ABA in commenting on the nomination of judges.

But the U.S. Supreme Court held that the Plaintiffs there suffered a "discrete injury" because they were unable to scrutinize and monitor committee activities to the extent that the Federal Advisory Committee Act allowed. If the plaintiffs were to prevail, the ruling would give them at least some of the records they requested. *Public Citizen*, 491 U.S. at 448–51.

But here the Court's Inquiry posed in this case appropriately raises the question provoked by some overly expansive wording in some precedents of whether a party can have standing if

the same injury is also shared in common by others generally. Those comments in precedents are, frankly, wrong and contradicted by the very precedents relied upon for such a proposition.

The fact that other people are also injured – despite frequent quotes to the contrary – simply does not undermine the Plaintiff's own claim to standing. A Plaintiff who has been injured does not lose standing because others, even large numbers, may also be injured as well:

In *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), the U.S. Supreme Court heard a case asking the EPA to regulate carbon dioxide and other greenhouse gases as pollutants because of their role in creating a danger of man-made global warming.

It is beyond question – if humans are actually contributing to the warming of the entire planet Earth – *all humans on planet Earth share in that harm*. While some may suffer injuries more than others, harm from the emissions of greenhouse gases is "an injury the plaintiff suffers in some indefinite way in common with people generally…" *Mass. v. Mellon*, 262 U.S. 447, 488 (1923). Indeed, there is no human being alive who would not share in the same injury.

Yet the U.S. Supreme Court explained in *Massachusetts v. EPA* in 2007:

> EPA maintains that because greenhouse gas emissions inflict widespread harm, the doctrine of standing presents an insuperable jurisdictional obstacle. We do not agree. At bottom, "the gist of the question of standing" is whether petitioners have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Baker v. Carr*, 369 U. S. 186, 204 (1962).

Id. at 13-14 (page numbers in slip opinion). And furthermore, the U.S. Supreme Court cited:

> As JUSTICE KENNEDY explained in his *Lujan* concurrence:
>
> While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, * * *

Id. at 14 (in slip opinion). And discussing the case below in *Massachusetts v. EPA*:

> Judge Sentelle wrote separately because he believed petitioners failed to "demonstrat[e] the element of injury necessary to establish standing under Article III." Id., at 59 (opinion dissenting in part and concurring in judgment). In his view, they had alleged that global warming is "harmful to humanity at large," but could not allege "particularized injuries" to themselves. Id., at 60 (citing *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 562 (1992)). While he dissented on standing, however, he accepted the contrary view as the law of the case and joined Judge Randolph's judgment on the merits as the closest to that which he preferred. 415 F. 3d, at 60–61.

Id. at 11 (page in slip opinion). And:

> … at 66, that projected rises in sea level would lead to serious loss of coastal property was a "far cry" from the kind of generalized harm insufficient to ground Article III jurisdiction. *Id.*, at 65. He found that petitioners' affidavits more than adequately supported the conclusion that EPA's failure to curb greenhouse gas emissions contributed to the sea level changes that threatened Massachusetts' coastal property. *Ibid.* As to redressability, he observed that one of petitioners' experts, a former EPA climatologist, stated that "'[a]chievable reductions in emissions of CO2 and other [greenhouse gases] from U. S. motor vehicles would . . . delay and moderate many of the adverse impacts of global warming.'" *Ibid.*

Id. at 12 (page in slip opinion).

Fundamentally, precedents and discussion of standing are wildly inconsistent. Despite this Court's honorable approach here of not only questioning its jurisdiction but doing so by fair and open hearing, the modern trend of selectively citing to some precedents on standing raises the serious danger of ignoring other precedents which point in exactly the opposite direction.

Unfortunately, standing is becoming tainted as a gimmick to implement, perhaps unconsciously, one agenda over another. Because objections to standing are usually raised by the U.S. Government bureaucracy when sued, the test of standing is easily passed for cases brought by the political left, but challenged with regard to legal cases "not in favor." Standing has become a topic with two or more inconsistent lines of authority, contradicting each other.

As explained in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), SCRAP was an unincorporated association whose members' use

of the forests, rivers, streams, and so on was adversely affected by increased rates on freight. Moreover, SCRAP alleged that the air its members breathed had increased in pollution because of a modified rate structure for freight approved by the Interstate Commerce Commission ("ICC"). And, SCRAP alleged, each of its members has been forced to pay increased taxes because of the sums that must be expended to dispose of otherwise reusable waste materials. The 2.5% surcharge, SCRAP argued, was unlawful because the ICC had failed to file a detailed environmental impact statement.

However, none of those injuries – all of them requiring several steps of causation – were unique in any way to those plaintiffs. In part II of the opinion of the Court (written by Justice Stewart), the Court admitted,

> [A]ll persons who utilize the scenic resources of the country, and indeed all who breathe its air, could claim harm similar to that alleged by the environmental groups here. But we have already made it clear that standing is not to be denied simply because many people suffer the same injury.

412 U.S. at 687, 93 S.Ct. at 2416.

Moreover, the Court specifically refused to limit standing to those "significantly" affected by agency action. ***An "identifiable trifle" is enough. 412 U.S. at 689 n. 14, 93 S.Ct. at 2417 n. 14***, quoting Davis, Standing: Taxpayers and Others, 35 U.Chi.L.Rev. 601, 613 (1968). See also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985), on remand 240 Kan. 764, 732 P.2d 1286 (1987), cert. denied 487 U.S. 1223 (1988).

Similarly, in *Mills v. District of Columbia*, 571 F.3d 1304 (D.C. Cir. 2009), the prestitous D.C. Circuit reversed and awarded four citizens a preliminary injunction to enjoin further implementation of a police checkpoint program in the District of Columbia, even though it was unknown if they would be stopped in the random stops in the future. But the D.C. Circuit also

made clear that the level of showing of irreparable injury required is reduced by a strong likelihood of success on the merits because of the violation of their U.S. Constitutional rights:

> We further conclude that appellants have sufficiently demonstrated irreparable injury, particularly in light of their strong likelihood of success on the merits. *See City Fed Fin. Corp.*, 58 F.3d at 747. The harm to the rights of appellants is apparent. It cannot be gainsaid that citizens have a right to drive upon the public streets of the District of Columbia or any other city absent a U.S. Constitutionally sound reason for limiting their access. As our discussion of the likelihood of success has demonstrated, there is no such U.S. Constitutionally sound bar in the NSZ checkpoint program. It is apparent that appellants' U.S. Constitutional rights are violated.

Id. at 1312-1313. And:

> Granted, the District is not currently imposing an NSZ checkpoint, but it has done so more than once, and the police chief has expressed her intent to continue to use the program until a judge stops her.

Id. at 1312-1313.

So even though it was clear that the checkpoints had stopped, the possibility that they could perhaps resume again in the future and the possibility that the four (4) plaintiffs *might conceivably be among those stopped in the future* was found to be sufficient for the plaintiffs to have standing to challenge the unconstitutionality of the checkpoints.

Similarly, the injury and chain of causation asserted in *Massachusetts v. EPA*, *supra*, depended upon the speculative possibility that the Earth is actually warming, and the speculative possibility that any such warming is caused by greenhouse gases, the speculative possibility that other factors don't cancel out the greenhouse gases (such as plants consuming carbon dioxide in increased quantities), the speculative possibility that with all the complexity of the oceans that a rise in sea levels might result, and the speculative possibility that the plaintiff would actually be harmed decades from today into the future.

Likewise, in *Natural Res. Def. Council v. Envtl. Prot. Agency* (D.C. Cir. Case Nos. 98–1379, 98–1429, 98–1431, June 27, 2014), NRDC's plaintiff members lived near third-party, independent actor power plants that might conceivably – perhaps – switch to new fuels. It was unknown if any of the power plants near any of the plaintiffs would or would-not use alternative fuels. Moreover, the regulation specifically allowed alternative fuels only if no more polluting and no less safe than current fuels. It was speculative whether any of the plaintiffs might suffer any actual medical or physical injury from breathing air perhaps miles away. The regulation had not yet gone into effect, so only prediction was possible:

> Once EPA promulgated the Comparable Fuels Exclusion, it was "'a hardly-speculative exercise in naked capitalism' " to predict that facilities would take advantage of it to burn hazardous-waste-derived fuels rather than more expensive fossil fuels. *Id.* (inferring that "motor carriers would respond to the hours-increasing provisions by requiring their drivers to use them and work longer days" (quoting *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 135 (D.C. Cir. 2006))).

An inference predicting harm from agency action was sufficient to constitute standing. Standing existed from a prediction about "a hardly-speculative exercise in naked capitalism" that third party, private actors in the energy industry, acting independently, would switch to less-expensive hazardous-waste-derived fuels. The regulation did not mandate that any private company switch fuels.

Further, the D.C. Circuit considered whether anyone else would have standing: "Were EPA to prevail, although NRDC might well have standing to bring an as-applied challenge to any particular 'not less stringent' determination, no one would have standing to challenge EPA's authority to allow alternatives in the first place. Especially given that Congress enacted Subpart 2 for the very purpose of curtailing EPA discretion, *see Am. Trucking*, 531 U.S. at 484-86, 121 S.Ct. 903, it would be ironic indeed if the application of standing doctrine allowed EPA to

effectively maintain that very discretion. Neither precedent nor logic requires us to adopt such a counterintuitive approach to standing." *Id.*

Generally, when it is said that the federal courts have limited jurisdiction, it means that the State courts should not be deprived of their important role by the state courts being supplanted and replaced by the federal courts. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

The federal courts must never shirk and shrink from their constitutional duty to uphold the U.S. Constitution and federal laws, which the state courts cannot do. Federal courts are limited only in deference to preserving the role of the State courts, not limited with regard to their politically sacred duty and authority to give full effect to the U.S. Constitution and laws enacted by the Congress pursuant to the U.S. Constitution.

The federal courts on their own invented a concept of standing to assure that there is an actual "case or controversy" for the court to decide, to assure a genuine and full presentation of a case so that a court will be fully informed and a decision will be meaningful.

Although described as jurisdictional, the origins of standing as a concept are entirely pragmatic, not statutory. 28 U.S.C. § 1331 authorizes ***original*** jurisdiction of ***all*** civil actions under the elastic test of "arising under" (1) the U.S. Constitution, (2) federal laws, or (3) treaties. 28 U.S.C § 1331 states, "the district courts shall have original jurisdiction of all civil actions arising under the U.S. Constitution, laws, or treaties of the United States."

Although often discussed as an Article III requirement, the concept of standing is not found anywhere in the U.S. Constitution. Nor is the concept of standing found in any of the statutes enacted by the Congress pursuant to the power to organize the federal courts:

The U.S. Constitution in Article III authorizes the federal courts to decide "all cases, in Law and Equity, arising under this U.S. Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." In full text it says:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this U.S. Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Article III, Section 2 of the U.S. Constitution. The 11th Amendment modified Article III, Section 2, as follows with regard to situations not relevant here.

The concept of standing is entirely judicially created. This concept must implement, not evade or dodge, the U.S. Constitutional duties with which the courts are charged under Article III, Section 2. *See Marbury v. Madison*. If any precedents have gone astray from this Article III U.S. Constitutional mandate of the judicial power, respectfully those precedents must be set aside to give fealty to the text of the U.S. Constitution.

Article III specifically authorizes a hearing of this case in three (3) respects, because "The judicial Power shall extend to all Cases" arising under (a) "this U.S. Constitution," (b) "the Laws of the United States," and (c) "Treaties." The instant case raises all three of these grounds for a case under Article III.

Thus neither the U.S. Constitution nor congressional enactments contemplate a requirement for standing, except where Congress has attempted to avoid the judicially created doctrine of standing in certain situations. Standing is judicially-created for the purpose of

ensuring that the parties before the Court are truly adverse so as to allow a fair and full presentation of the case on both (or all) sides.

V. CONCLUSION

Declaratory Judgment is needed to uphold, preserve and defend the U.S. Constitution's balance of powers and protections for the constitutional rights, civil liberties, and personal safety and circumstances of the Plaintiff and other Florida citizens. A court ruling construing the U.S. Constitution and the limits on legislative power to amend the U.S. Constitution is needed to guide Congress's compliance with it. A declaratory judgment may encourage Congress to repeal INARA and pass legislation that upholds the U.S. Constitution.

The Plaintiff has standing sufficient to bring this case and it presents a simple, justiciable case squarely within this Courts' traditional function and competence of construing laws and the U.S. Constitution.[8]

Dated: August 4, 2015

Respectfully submitted,

/s/ Larry Klayman

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[8] An expedited oral argument and ruling is respectfully requested given the exigencies involved with Congress's upcoming unconstitutional vote on the treaty. Defendants' have been served with the Complaint by U.S. Mail.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiff's Response to Judge's Inquiry of July 27, 2015, addressing the justiciability of the case and the Plaintiff's standing, was served upon the Defendants by first-class Express U.S. Mail, postage-prepaid, on this August 4, 2015.

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