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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5204

[Filed March 1, 2019]

BRITTANY MONTROIS, CLASS OF MORE THAN 700,000 SIMILARLY SITUATED INDIVIDUALS AND BUSINESSES, ET AL., APPELLEES	)
v.	)
UNITED STATES OF AMERICA, APPELLANT	)

Argued May 11, 2018 Decided March 1, 2019

Appeal from the United States District Court
for the District of Columbia
(No. 1:14-cv-01523)

Gilbert S. Rothenberg, Attorney, U.S. Department of Justice, argued the cause for appellant. With him on the briefs were *Jessie K. Liu*, U.S. Attorney, and *Richard Farber* and *Norah E. Bringer*, Attorneys.

Jonathan E. Taylor argued the cause for appellees. With him on the brief were *Deepak Gupta*, *William H.*

Narwold, *Allen Buckley*, *Louis Bograd*, and *Christopher S. Rizek*. *Elizabeth S. Smith* entered an appearance.

Allen Buckley was on the supplemental brief for plaintiffs-appellees.

Before: GARLAND, *Chief Judge*, and SRINIVASAN and MILLETT, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SRINIVASAN.

SRINIVASAN, *Circuit Judge*: Tax-return preparers are persons who prepare clients' tax returns for compensation. Internal Revenue Service regulations require preparers to obtain from the agency (and renew annually) a unique identifying number known as a Preparer Tax Identification Number, or PTIN. Preparers must list that PTIN on any return they prepare.

In 2010, the IRS began charging tax-return preparers a fee to obtain and renew PTINs. The fee is designed to recoup the costs to the agency of issuing and maintaining a database of PTINs. As authority to exact the PTIN fee, the IRS relies on the Independent Offices Appropriations Act, which allows federal agencies to charge fees for services in certain conditions. 31 U.S.C. § 9701.

A group of tax-return preparers filed a class action lawsuit challenging the PTIN fee. They argued that the IRS lacks authority under the Independent Offices Appropriations Act to charge them for obtaining (and renewing) PTINs and that the IRS's decision to charge the fee was arbitrary and capricious. The district court

ruled in favor of the preparers, concluding that the IRS lacks statutory authority to charge the fee. The court issued an injunction barring the IRS from charging the PTIN fee and ordered the agency to refund previously collected fees.

We conclude that the IRS acted within its authority under the Independent Offices Appropriations Act in charging tax-return preparers a fee to obtain and renew PTINs. We further conclude that the IRS's decision to charge the fee was not arbitrary and capricious. We thus vacate the judgment of the district court and remand for further proceedings, including an assessment of whether the amount of the PTIN fee unreasonably exceeds the costs to the IRS to issue and maintain PTINs.

I.

A.

The Internal Revenue Code defines a tax-return preparer as "any person who prepares for compensation" a federal income tax return or claim for refund. I.R.C. § 7701(36)(A). The Code establishes no professional constraints on who may act as a tax-return preparer, with the result that preparers range from uncredentialed persons to attorneys and certified public accountants. *See* Internal Revenue Service, Return Preparer Review 8–9 (December 2009), https://www.irs.gov/pub/irs-utl/54419109.pdf. As of 2009, "a majority of U.S. taxpayers . . . rel[ied] on tax return preparers to assist them in meeting their federal tax filing obligations." *Id.* at 7.

In 1976, Congress enabled the IRS to require a preparer to list an identifying number on any return she prepared, and Congress specified that the identifying number would be the preparer's social security number. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 1203(d), 90 Stat. 1520, 1691. Congress also imposed monetary penalties on preparers in certain circumstances for understating a taxpayer's liability or failing to list certain information on a return. I.R.C. §§ 6694, 6695. In addition, Congress gave the Department of Justice authority (in consultation with the IRS) to seek an injunction preventing tax-return preparers from engaging in unlawful conduct. I.R.C. § 7407.

In 1998, Congress, acting out of concern that "inappropriate use might be made of a preparer's social security number," S. Rep. No. 105-174, at 106 (1998), allowed the IRS to permit or require preparers to list a different identifying number on returns they prepared. I.R.C. § 6109(a), (d); *see* Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3710, 112 Stat. 685, 779. The IRS subsequently issued regulations allowing—but not requiring—preparers to obtain from the agency a unique Preparer Tax Identification Number (PTIN) and to list that PTIN, instead of a social security number, on any return they prepared. Furnishing Identifying Number of Income Tax Return Preparer, 64 Fed. Reg. 43,910 (Aug. 12, 1999) (codified at 26 C.F.R. pt. 1).

By 2009, the IRS had become concerned that many taxpayers were being "poorly served by some tax return preparers" due to preparers' inadequate education and

training as well as deficiencies in the agency's compliance regime. Return Preparer Review 6; *see id.* at 33–37. Seeking to improve matters, the IRS issued three sets of regulations in 2010 and 2011.

First, the IRS sought to establish a credentialing and registration regime for tax-return preparers. It did so by requiring otherwise uncredentialed preparers—that is, preparers who are neither attorneys nor certified public accountants—to become "registered tax return preparers." Regulations Governing Practice Before the Internal Revenue Service, 76 Fed. Reg. 32,286, 32,286–87 (June 3, 2011). To become a registered tax-return preparer, a person would need to undergo a background check, pass a competency exam, and satisfy continuing education requirements. *Id.* at 32,287.

Second, the IRS required preparers to obtain a PTIN and renew it annually. Furnishing Identifying Number of Tax Return Preparer, 75 Fed. Reg. 60,309, 60,309–10 (Sept. 30, 2010). According to the agency, the "requirement to use a PTIN will allow the IRS to better identify tax return preparers, centralize information, and effectively administer the rules relating to tax return preparers." *Id.* at 60,309. The IRS further noted that the PTIN requirement would benefit "tax return preparers and help maintain the confidentiality of [their] SSNs." *Id.*

Third, the IRS decided it would charge tax-return preparers a fee of roughly $50 (plus a vendor fee) to obtain and renew a PTIN. The agency explained the fee would cover the costs of "the development and maintenance of the IRS information technology system"

associated with the PTINs, as well as the costs of "the personnel, administrative, and management support needed to evaluate and address tax compliance issues, investigate and address conduct and suitability issues, and otherwise support and enforce the programs that require individuals to apply for or renew a PTIN." User Fees Relating to Enrollment and Preparer Tax Identification Numbers, 75 Fed. Reg. 60,316, 60,316, 60,319 (Sept. 30, 2010).

B.

A group of tax-return preparers challenged the first set of regulations described above: the registered-tax return preparer system establishing a registration and credentialing system for preparers. The plaintiffs argued that the IRS lacks authority under the Internal Revenue Code to establish a licensing system for tax-return preparers.

Our court agreed and invalidated the registered tax-return preparer regulations. *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014). Because our invalidation of the registered-tax return program meant that there was no longer an agency-administered credentialing scheme in effect, our decision in *Loving* had the effect of reinstating a regime in which anyone who wishes to prepare tax returns for others can do so as long as she obtains a PTIN (and pays the associated fee), without needing to satisfy any credential requirements. *Id.* at 1021–22.

In 2014, after we issued our decision in *Loving*, several tax-return preparers initiated the action now before us in this appeal. The preparers challenge the

lawfulness of the IRS's assessment of a fee for providing them a PTIN. They argue that the PTIN fee is contrary to the Independent Offices Appropriations Act and is arbitrary and capricious.

While the case was pending before the district court, the IRS reduced the amount of the PTIN fee from $50 to $33 (not including a vendor fee). Preparer Tax Identification Number (PTIN) User Fee Update, 81 Fed. Reg. 52,766, 52,766 (Aug. 10, 2016). The IRS adjusted the PTIN fee in the wake of our decision in *Loving*. A portion of the original PTIN fee was to have been used to pay the costs of the registered tax-return preparer program invalidated in *Loving*, and the IRS reduced the amount of the PTIN fee to cover the costs of those portions of the PTIN program that remained in effect after *Loving*. *Id.*

The district court, after certifying a plaintiffs' class of tax-return preparers, granted summary judgment in the preparers' favor in relevant part. The court upheld the IRS's requirement that preparers obtain a PTIN. But the court invalidated the PTIN fee charged by the IRS on the ground that the fee violates the Independent Offices Appropriations Act. *Steele v. United States*, 260 F. Supp. 3d 52 (D.D.C. 2017).

The court reasoned in part that, for an assessment to qualify as a fee under that Act as opposed to an unauthorized general tax, the assessment must relate to a specific benefit conferred to an identifiable set of users. But here, the court emphasized, essentially any person can obtain a PTIN after *Loving* invalidated the PTIN eligibility criteria, such that the PTIN program, in the court's view, could no longer be said to benefit a

particular set of individuals rather than the public in general. *Id.* at 67. The court also rejected the IRS's argument that the PTIN fee could be sustained based on an interest in protecting tax-return preparers' social security numbers. The court believed that the agency had not adequately raised or explained that rationale when it issued the rule establishing the fee. *Id.*

The IRS now appeals.

II.

Before addressing the merits of the IRS's arguments, we first assess whether the district court had jurisdiction over this case. We must assure ourselves of the existence of jurisdiction even though no party argues it is lacking. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998).

The specific question we confront is whether the jurisdictional exhaustion requirement applicable to suits for refunds under the Internal Revenue Code obligated the tax-return preparers to pursue their claims with the IRS before filing suit in federal court. *See* I.R.C. § 7422. We conclude that the exhaustion requirement is inapplicable in the circumstances of this case.

The exhaustion provision states that "[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary"

of the Treasury. I.R.C. § 7422(a). Neither party believes that provision pertains to this case, and their belief is correct.

We understand § 7422(a)'s exhaustion requirement to pertain to actions seeking a refund of any "tax," "penalty," or "sum" collected under the Internal Revenue Code. The PTIN fee, by contrast, was established under the Independent Offices Appropriations Act, a statute that lies outside the Internal Revenue Code and that generally applies to all federal agencies. The tax-return preparers correspondingly bring their claims in this case under the general provisions of the Administrative Procedure Act, not under any refund provision in the Internal Revenue Code.

Our understanding of the scope of § 7422(a)'s exhaustion requirement is grounded in the provision's terms. In cases seeking "recovery of any . . . tax alleged to have been erroneously or illegally assessed or collected," the language of the provision limits its application to refund requests involving "internal revenue" taxes, *id.*—that is, those taxes collected under the Internal Revenue Code. *Cf. Horizon Coal Corp. v. United States*, 43 F.3d 234, 240 (6th Cir. 1994) (per curiam) ("[T]he dictates of § 7422(a) apply only to taxes imposed pursuant to Title 26.") And while the provision applies not just to "internal revenue taxes," but also to "any penalty" or "any sum" alleged to have been unlawfully or wrongfully collected, I.R.C. § 7422(a), we believe that, just as the provision applies only to "internal revenue" taxes, it also pertains only to a "penalty" or "sum" that is collected under the Internal

Revenue Code. That would encompass, for instance, penalties levied on a tax-return preparer for understating a client's liability on a tax return. *See id.* § 6694.

The conclusion that § 7422(a)'s exhaustion requirement applies only to penalties and sums assessed under the Internal Revenue Code follows from the recognition that the government imposes various taxes pursuant to authority outside the Code. *See Horizon Coal Corp.*, 43 F.3d at 236–37 (describing the reclamation fee imposed on coal mine operators under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1232, as a tax). In that light, a reading of the exhaustion provision that would apply only to "internal revenue taxes" but would extend to any "penalty" or "sum" at all (beyond the context of the Internal Revenue Code) would lead to anomalous results: it would mean that a taxpayer who wishes to challenge both a non–Title 26 tax and an associated penalty would be required to exhaust her penalty refund request, but not her related tax refund request, before filing suit. We do not understand Congress to have intended to require that sort of splitting of claims.

Relatedly, § 7422(a)'s exhaustion requirement calls for claims to be presented initially to the "Secretary," *i.e.*, the Secretary of the Treasury. And it would make little sense to understand Congress to have required payers of penalties and sums unrelated to the Internal Revenue Code (and, in many cases, imposed by entities other than the IRS) to nonetheless seek a refund from the Secretary of the Treasury. *See Horizon Coal Corp.*,

43 F.3d at 240. We thus conclude that § 7422(a) is not meant to reach the claims in this case.

That result coheres with the context and purpose of the provision. With claims challenging the collection of taxes or penalties assessed under the Internal Revenue Code, the IRS can correct any errors through its own administrative processes. But the IRS reports that it has no such administrative process to examine the lawfulness of its PTIN fee and to correct any errors associated with collecting that fee. Requiring the tax-return preparers to present their claims first to the IRS thus would neither promote efficient resolution of their claims nor serve § 7422(a)'s goal of "prevent[ing] surprise" and "giv[ing] adequate notice to the Service of the nature of the claim and the specific facts upon which it is predicated, thereby permitting an administrative investigation and determination," *Computervision Corp. v. United States*, 445 F.3d 1355, 1363 (Fed. Cir. 2006) (internal quotation marks omitted).

For those reasons, we conclude that § 7422(a) did not require the tax-return preparers to submit their claims to the IRS before bringing this action in federal court.

III.

On the merits, the tax-return preparers contend that the PTIN fee is unlawful for two distinct reasons. First, they argue (and the district court agreed) that the Independent Offices Appropriations Act does not provide statutory authority for the fee. Second, they

contend that the IRS's decision to impose the fee was arbitrary and capricious. We disagree on both counts.

A.

We first consider whether the IRS had authority under the Independent Offices Appropriations Act to charge tax-return preparers a fee to obtain and renew a PTIN. The Independent Offices Appropriations Act helps federal agencies recover the costs of services provided to beneficiaries. *See Nat'l Cable Tel. Ass'n, Inc. v. United States*, 415 U.S. 336, 337 n.1 (1974). Under the Act, the "head of each agency . . . may prescribe regulations establishing the charge for a service or thing of value provided by the agency." 31 U.S.C. § 9701(b).

The Supreme Court considered the Act in companion decisions issued on the same day in 1974. *Fed. Power Comm'n v. New England Power Co.*, 415 U.S. 345 (1974); *Nat'l Cable*, 415 U.S. 336. The Court "construe[d] the Act to cover only 'fees' and not 'taxes.'" *New England Power*, 415 U.S. at 349. That is because "[t]axation is a legislative function, and Congress . . . is the sole organ for levying taxes." *Nat'l Cable*, 415 U.S. at 340. The Court explained that fees, as opposed to taxes, are imposed on identifiable recipients of particular government services. *Id.* at 340–41; *New England Power*, 415 U.S. at 349. The Court thus understood the Act to give agencies authority to impose a "reasonable charge" on an "identifiable recipient for a measurable unit or amount of Government service or property from which [the recipient] derives a special benefit." *New England Power*, 415 U.S. at 349 (quoting OMB Circular No. A-25 (Sept. 23, 1959)).

The Act, that is, enables an agency to impose a fee only for "a service that confers a specific benefit upon an identifiable beneficiary." *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1180 (D.C. Cir. 1994). To justify a fee under the Act, then, an agency must show (i) that it provides some kind of service in exchange for the fee, (ii) that the service yields a specific benefit, and (iii) that the benefit is conferred upon identifiable individuals. *Id.*; *see Seafarers Int'l Union of N. Am. v. U.S. Coast Guard*, 81 F.3d 179, 184–85 (D.C. Cir. 1996). Here, the PTIN fee satisfies those conditions.

1.

We first assess whether the IRS provides a service in exchange for the PTIN fee. We conclude it does: the service of providing tax-return preparers a PTIN. In particular, the IRS generates a unique identifying number for each tax-return preparer and maintains a database of those PTINs, enabling preparers to use those numbers in place of their social security numbers on tax returns. The IRS devotes personnel and resources to managing the PTIN application and renewal process and developing and maintaining the database of PTINs. The provision of a PTIN, and the associated functions, constitute the provision of a service.

The tax-return preparers question how robust a service the IRS undertakes when it provides them a PTIN. As they point out, before our decision in *Loving* invalidated the registered tax-return preparer regulations, the activities the IRS undertook in connection with PTINs were more substantial. That now-invalidated regime called for the agency to

administer competency tests and continuing-education requirements for preparers. 76 Fed. Reg. at 32,287. After *Loving*, the IRS no longer performs those functions. Instead, the agency's PTIN-related services are now confined to generating and maintaining a database of PTINs. Preparer Tax Identification Number (PTIN) User Fee Update, 80 Fed. Reg. 66,792, 66,794 (Oct. 30, 2015).

Those functions, although a slimmed-down version of the PTIN-related services afforded by the agency before *Loving*, still constitute the provision of a service. To the extent the tax-return preparers believe that the amount of the PTIN fee is out of step with the narrowed scope of remaining PTIN-related functions, those concerns pertain to the reasonableness of the fee, not to whether a fee can be assessed in the first place. *See Seafarers*, 81 F.3d at 185–86. There may be force to the tax-return preparers' claim that the fee amount is excessive, but no court has yet considered that claim, and the preparers can press the matter in the proceedings on remand.

2.

Having determined that the IRS provides a service—the provision of a PTIN—in exchange for the challenged fee, we next consider whether that service affords a specific benefit. We conclude it does: the PTIN helps protect tax-return preparers' identities by allowing them to list a number on returns other than their social security number.

The service provided in exchange for a fee assessed under the Independent Offices Appropriations Act

must confer a "specific benefit" on the charged party, *Engine Mfrs. Ass'n*, 20 F.3d at 1180—*i.e.*, a "special benefit . . . above and beyond that which accrues to the public at large," *Ayuda, Inc. v. Attorney Gen.*, 848 F.2d 1297, 1301 (D.C. Cir. 1988). That understanding comes from the Supreme Court's construction of the Act as authorizing fees rather than taxes, with the former assessed against those specifically benefitting from a particular service and the latter imposed for the benefit of the general public. *See Nat'l Cable*, 415 U.S. at 340–41.

In contending that the "specific benefit" requirement is met here, the IRS reasons in part that agency regulations require tax-return preparers to obtain a PTIN in order to prepare tax returns for compensation, and "[t]he ability to prepare tax returns . . . for compensation is a special benefit." 80 Fed. Reg. at 66,794. The tax-return preparers respond that, in light of *Loving*'s conclusion that the IRS lacks statutory authority to establish a licensing scheme for preparers, the PTIN fee cannot be justified as offsetting the costs of administering a licensing regime. Nor, the tax-return preparers argue, can the agency simply create an obligation to obtain a PTIN that is untethered to any underlying licensing system, and then treat satisfaction of that agency-invented requirement as a specific benefit for which a fee may be assessed. *See Seafarers*, 81 F.3d at 186 ("[A]n agency is not free to add extra licensing procedures and then charge a user fee merely because the agency has general authority to regulate in a particular area."); *Cent. & S. Motor Freight Tariff Ass'n v. United States*, 777 F.2d 722, 729 (D.C. Cir. 1985) ("To be legally cognizable, the private

benefit must be predicated upon something other than the mere fact of regulation . . . .").

We need not resolve whether satisfying the agency-imposed requirement to obtain a PTIN, standing alone, could qualify as a specific benefit for which the agency may levy a fee. That is because the PTIN requirement is supported by an additional justification advanced by the IRS, one that we find adequate to support the assessment of a PTIN fee: the protection of the confidentiality of tax-return preparers' social security numbers. *See* 75 Fed. Reg. at 60,309; 80 Fed. Reg. at 66,793. And not only does that confidentiality-protection justification independently support assessment of a PTIN fee, but the permissible *amount* of the fee would remain the same regardless of whether it is justified based on that rationale or instead based on the need to satisfy the agency-imposed requirement to obtain a PTIN. In either case, the IRS would need to construct and maintain a PTIN database and provide a PTIN to each tax-return preparer, and it could permissibly recover the costs associated with those functions through the PTIN fee, *see Nat'l Cable Television Ass'n v. FCC*, 554 F.2d 1094, 1107 (D.C. Cir. 1976).

We thus can rest on the confidentiality-protection rationale alone as conferring a specific benefit for which a PTIN fee may be assessed. The confidentiality advantages associated with the PTIN requirement readily qualify as a specific benefit: without protection of their social security numbers, preparers would face greater risks of identity theft.

The tax-return preparers argue that the IRS cannot rely on the protection of confidential information as a benefit justifying the PTIN fee. They reason that the agency did not specifically invoke the confidentiality concern when it issued the PTIN regulation and thus may not lean on that justification now. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). We conclude, however, that the IRS adequately relied on the confidentiality protections afforded by PTINs when issuing the PTIN regulations.

The IRS's concern with maintaining the confidentiality of preparers' social security numbers runs throughout the regulatory history of the PTIN requirement and fee. When proposing the PTIN regulations in 2010, the IRS decided to require all tax-return preparers to use a single identifying number so that it could "better collect and track data on . . . preparers." User Fees Relating to Enrollment and Preparer Tax Identification Numbers, 75 Fed. Reg. 43,110, 43,110 (July 23, 2010). The IRS at that point faced a choice: it could use the preparers' social security numbers, or it could instead use PTINs (which many preparers by then had obtained). The agency chose to mandate the use of PTINs.

In opting to require the use of PTINs in 2010, the IRS explained that they provide "an alternative to using the tax return preparers' social security numbers." *Id.* When issuing its final PTIN regulations later that year, the IRS specifically noted the "identity protection currently provided by PTINs," 75 Fed. Reg. at 60,318, and explained that the regulations would benefit "tax return preparers and help maintain the

confidentiality of SSNs," 75 Fed. Reg. at 60,309. The IRS's view is consistent with the concern animating Congress's grant of authority to the IRS to mandate the use of PTINs: "that inappropriate use might be made of a preparer's social security number" under the pre-PTIN scheme. S. Rep. No. 105-174, at 106. And when the IRS reissued the PTIN fee regulations in 2015 after our decision in *Loving* invalidated the registered tax-return preparer program, the agency again explained that "[r]equiring the use of PTINs . . . benefits tax return preparers by allowing them to provide an identifying number on the return that is not an SSN." 80 Fed. Reg. at 66,793.

The tax-return preparers submit that those various statements by the IRS should not count because they appear in the regulatory commentary addressed to the agency's underlying requirement that preparers obtain a PTIN, not in the agency's explanation of the *fee* for providing a PTIN. But the IRS noted "the identity protection currently provided by PTINs" in the portion of the 2010 regulatory commentary addressed to the PTIN fee, not the portion generally discussing the PTIN requirement. *See* 75 Fed. Reg. at 60,318. And in any event, the IRS's explanation of the PTIN requirement bears directly on the specific benefit conferred in exchange for the PTIN fee. After all, the specific-benefit question concerns what benefit, if any, the *PTIN* affords to preparers. And when the IRS observed that a "benefit[]" of the PTIN is that it allows preparers to "provide an identifying number on the return that is not an SSN," 80 Fed. Reg. at 66,793, the agency necessarily conveyed that a benefit preparers

receive in exchange for the PTIN fee is the ability to provide a number "that is not an SSN," *id.*

The tax-return preparers question the extent to which the PTIN requirement in fact helps protect preparers' confidential information. In their view, because the IRS already allowed preparers to omit their social security numbers on the copy of returns provided to the taxpayer, the replacement of social security numbers with PTINs affords no additional protection of preparers' confidential information.

Congress, however, believed otherwise. When Congress in 1998 amended the Internal Revenue Code to allow the IRS to mandate the use of PTINs, the IRS had been allowing preparers to omit their social security numbers from the taxpayers' returns for over twenty years. *See* Rev. Rul. 78-317, 1978-2 C.B. 335. Notwithstanding the longtime availability of that option, Congress authorized the IRS to require PTINs based on concerns "that inappropriate use might be made of a preparer's social security number." S. Rep. No. 105-174, at 106.

Nor did the option to omit social security numbers on the taxpayer's copy of a return mitigate *preparers*' concerns about the exposure of their confidential information. After the IRS in 2010 proposed mandating the use of PTINs, Furnishing Identifying Number of Tax Return Preparer, 75 Fed. Reg. 14,539 (Mar. 26, 2010), several groups of tax-return preparers submitted comments supporting the change due to concerns about protecting the confidentiality of preparers' social security numbers. H&R Block, which in 2010 was the "largest employer of tax return preparers

(approximately 120,000)," supported the IRS's proposal to mandate PTINs because PTINs "protect the confidentiality of SSNs." H&R Block, Comment Letter on Proposed Rule Furnishing Identifying Number of Tax Return Preparer, at 1, 6 (Apr. 21, 2010), https://www.regulations.gov/document?D=IRS-2010-0009-0127. The Ohio Society of Certified Public Accountants, representing 23,000 members, likewise approved of the IRS's proposal because "the use of the PTIN as a preparer identifier will minimize confidentiality concerns related to what could have been an alternative: the use of preparer social security numbers." Ohio Society of CPAs, Comment Letter on Proposed Rule Furnishing Identifying Number of Tax Return Preparer, at 1 (Apr. 26, 2010), https://www.regulations.gov/document?D=IRS-2010-0009-0193. The IRS reasonably agreed with those preparers—and with Congress—that PTINs would help to protect preparers' confidential information.

The tax-return preparers next argue that, even if confidentiality concerns could justify assessing a fee for *initially* providing a PTIN, those concerns cannot justify the IRS's fee to *renew* that number annually. We are unpersuaded. The IRS not only provides a PTIN upon an initial application but also maintains a database that allows preparers to continue using their PTINs in subsequent years. The renewal fee, then, pertains to the agency's continuing efforts in that regard.

To be sure, the tax-return preparers might question whether the amount of the renewal fee bears an adequate relationship to the continuing costs incurred

by the IRS to maintain the PTIN database. But those concerns pertain to the amount of the fee, not the antecedent question of whether the fee generally lies within the IRS's statutory authority under the Independent Offices Appropriations Act. On remand, the district court is free to consider arguments concerning the alleged excessiveness of the fee, including whether the renewal fee is "reasonably related" to the "costs which the agency actually incurs" in providing the service, *Nat'l Cable Television Ass'n*, 554 F.2d at 1107, and "the value of the service to the recipient," *Cent. & S. Motor*, 777 F.2d at 729. For purposes of the issue we consider at this stage of the proceedings, though, it is enough for us to conclude that the PTIN requirement specifically benefits tax-return preparers by helping to protect the confidentiality of their personal information.

3.

Finally, we address whether the IRS provides the service and associated benefit—*i.e.*, the provision of PTINs and the resulting protection of confidential personal information—to "identifiable recipients" rather than to the public at large. *Seafarers*, 81 F.3d at 184. We think it does. Tax-return preparers as a group qualify as identifiable recipients for purposes of justifying a fee assessed under the Independent Offices Appropriations Act.

The tax-return preparers submit that, because essentially *anyone* can obtain a PTIN after our decision in *Loving*, the service and benefit associated with the PTIN extend to the public at large rather than only to specific, identifiable recipients. It does not matter,

though, that the service and benefit are theoretically available to the general public. What matters is that the service is provided to, and the corresponding benefit is received by, the specific group of persons who in fact pay the fee.

That understanding draws support from the Supreme Court's identification of passports as an example of a service for which an agency can appropriately charge a fee under the Act. *See New England Power*, 415 U.S. at 349 n.3. Although passports are generally available to the entire citizenry, the Act, as understood by the Supreme Court, enables the State Department to charge a fee to the particular persons who apply for a passport because the service undertaken to process passport applications benefits those persons. *See id.* The same is true of those persons who, in exchange for paying a fee, obtain and renew a PTIN. And because the IRS charges only those who receive the benefit of a PTIN, the specific benefit supporting the fee extends only to identifiable individuals rather than the public writ large. *See id.* at 349.

In sum, the IRS acted within its statutory authority under the Independent Offices Appropriations Act in charging tax-return preparers a fee to obtain and renew PTINs.

B.

We next address whether the IRS's decision to assess a PTIN fee was arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A). An agency generally must "give adequate reasons for its decisions," and the

requirement to give a "satisfactory explanation for its actions" is "satisfied when the agency's explanation is clear enough that its path may reasonably be discerned." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

The tax-return preparers principally contend that the IRS's account of its reasons for imposing a PTIN fee does not survive our decision in *Loving*. In the preparers' view, the IRS provided no reasoned justification for the fee separate from justifications that can no longer support the fee after *Loving*. The preparers emphasize that the 2010 regulations originally establishing the PTIN fee stated that the fee would pay for the registered tax-return preparer program, which *Loving* later invalidated. *See* 75 Fed. Reg. at 43,111.

We conclude that the IRS sufficiently rooted its decision to assess a PTIN fee in justifications independent of those rejected in *Loving*. When the IRS reissued the PTIN fee regulations after *Loving*, it explained that PTINs would benefit preparers by protecting their confidential information and would improve tax compliance and administration. 80 Fed. Reg. at 66,793. *Loving* did not cast doubt on those justifications, which are independent of the registered tax-return preparer program we considered and invalidated there.

With specific regard to assessing a fee for providing a PTIN, the IRS explained that generating PTINs and maintaining a database of PTINs cost substantial sums, and that, in its view, those costs were more appropriately recouped from preparers who obtain a

PTIN than from the general public. *See id.* at 66,793–94. Those costs, as explained, can be recovered through the PTIN fee. *See supra* at 13. And the IRS noted that it incurred costs associated with providing PTINs beyond the costs of the services invalidated in *Loving*, and that it was reducing the fee to account for the elimination of those functions deemed beyond its authority in *Loving*. *See* 80 Fed. Reg. at 66,794.

It is true that the IRS's accounting in the regulatory materials of the services paid for by the PTIN fee generally describes certain functions that, depending on their precise scope, could be seen to raise questions about whether they range beyond the IRS's authority after *Loving*—*e.g.*, "background checks," "professional designation checks," and "compliance and IRS complaint activities." 80 Fed. Reg. at 66,794. But the IRS also explained that the fee is "based on direct costs of the PTIN program, which include staffing and contract-related costs for activities, processes, and procedures related to the electronic and paper registration and renewal submissions." *Id.* That explanation survives *Loving* because, as the district court held, the IRS's requirement that preparers obtain and renew a PTIN survives *Loving*. *See Steele*, 260 F. Supp. 3d at 62–63.

The tax-return preparers' concerns that the justifications for the PTIN fee might encompass functions deemed in *Loving* to fall outside the IRS's regulatory authority can be addressed on remand, when the district court examines whether the amount of the fee is reasonable and consistent with the Independent Offices Appropriations Act. But aside

from questions to be considered on remand about whether the *amount* of the PTIN fee impermissibly encompasses functions falling outside the IRS's statutory authority, the IRS's decision to charge a fee at all was adequately grounded in services lying within its authority, and thus was not arbitrary and capricious.

* * * * *

For the foregoing reasons, we vacate the judgment of the district court and remand the case for further proceedings.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5204

September Term, 2018

[Filed March 1, 2019]

BRITTANY MONTROIS, CLASS OF MORE THAN 700,000 SIMILARLY SITUATED INDIVIDUALS AND BUSINESSES, ET AL., APPELLEES	)
v.	)
UNITED STATES OF AMERICA, APPELLANT	)

Appeal from the United States District Court
for the District of Columbia
(No. 1:14-cv-01523)

Before: GARLAND, *Chief Judge,* and SRINIVASAN and MILLETI, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby vacated and the case is remanded for further proceedings, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Ken Meadows
Deputy Clerk

Date: March 1, 2019

Opinion for the court filed by Circuit Judge Srinivasan.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5204

September Term, 2018

1:14-cv-01523-RCL

[Filed March 1, 2019]

Brittany Montrois, Class of More than 700,000 Similarly Situated Individuals and Businesses, et al.,	)
Appellees	)
v.	)
United States of America,	)
Appellant	)

BEFORE: Garland, Chief Judge; Srinivasan and Millett, Circuit Judges

ORDER

Upon consideration of the motion for leave to supplement brief of plaintiffs-appellees, the lodged

supplemental brief, the response and opposition to the motion for leave to file a supplemental brief, the replies and supplement thereto; and the emergency motion to seal documents, it is

ORDERED that the motions be granted. The Clerk is directed to file the lodged supplemental brief. The Clerk is further directed to maintain under seal the documents identified in the emergency motion to seal documents filed April 4, 2018.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5204

September Term, 2018

1:14-cv-01523-RCL

[Filed March 1, 2019]

Brittany Montrois, Class of More than 700,000 Similarly Situated Individuals and Businesses, et al.,	)
Appellees	)
v.	)
United States of America,	)
Appellant	)

ORDER

It is **ORDERED**, on the court's own motion, that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41. This

instruction to the Clerk is without prejudice to the right of any party to move for expedited issuance of the mandate for good cause shown.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 1:14-cv-01523-RCL

[Filed July 10, 2017]

Adam Steele, Brittany Montrois, and Joseph Henchman, on behalf of themselves and all others similarly situated, *Plaintiffs,*	)
v.	)
United States of America, *Defendant.*	)

~~[PROPOSED]~~ FINAL JUDGMENT AND PERMANENT INJUNCTION

The plaintiffs Adam Steele, Brittany Montrois, and Joseph Henchman, on behalf of themselves and all others similarly situated, filed this class action on September 8, 2014, against the defendant, United States of America. The Court finds, orders, and adjudges as follows:

WHEREAS the plaintiffs filed their class action complaint on September 8, 2014;

WHEREAS the plaintiffs filed their amended class action complaint on August 7, 2015, alleging two causes of action: one challenging the IRS's preparer tax identification number ("PTIN") fee as an unlawful agency action (Count One) and one alternatively challenging the PTIN fee as excessive (Count Two);

WHEREAS the PTIN fee is comprised of an amount payable to the Internal Revenue Service and an amount payable to a third-party vendor, which processes initial and renewal PTIN applications;

WHEREAS the plaintiffs filed their motion for class certification on September 9, 2015. On February 9, 2016, the Court granted their motion in part and denied it in part (ECF Nos. 54 & 55), and the plaintiffs moved for reconsideration of the Court's order on February 16, 2016;

WHEREAS, on August 8, 2016, this Court granted the plaintiffs' motion for reconsideration and certified the following class under Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3): "All individuals and entities who have paid an initial and/or renewal fee for a PTIN, excluding Allen Buckley, Allen Buckley LLC, and Christopher Rizek" (ECF Nos. 63 & 64);

WHEREAS, beginning on October 7, 2016, the plaintiffs, in accordance with Federal Rule of Civil Procedure 23(c)(2), provided notice of this action and an opportunity for exclusion from the action. One thousand seventy five (1,075) individuals and entities excluded themselves from the class in this action;

WHEREAS, on September 7, 2016, the plaintiffs filed a motion for summary judgment, and the United

States filed a motion for partial summary judgment; and

WHEREAS, on June 1, 2017, in a Memorandum Opinion and accompanying Order ("Memorandum Opinion and Order") (ECF Nos. 78 & 79), the Court granted both motions in part and denied them in part.

In accordance with the Memorandum Opinion and Order, the following is hereby:

ORDERED that this Court has jurisdiction over the subject matter of this action;

ORDERED that the Internal Revenue Service may require the use of PTINs as the exclusive identifying number under 26 U.S.C. § 6109(a)(4);

ORDERED that final judgment on Count One is entered in favor of the plaintiffs and the class members and against the United States;

ORDERED that the following declaratory relief is granted to the plaintiffs and class members: all fees that the defendant has charged to class members to issue or renew a PTIN under 26 C.F.R. § 300.13, including those paid to the third-party vendor, are hereby declared unlawful;

ORDERED that the defendant is permanently enjoined from charging PTIN fees;

ORDERED that the defendant provide each class member with a full refund of all PTIN fees paid from September 1, 2010 to present. The United States shall make payment of such refunds to the claims administrator selected by the plaintiffs' counsel

promptly after the expiration of the period for appeal or, in the event of an appeal, promptly after the final determination of all appeals or the final judgment of this Court on remand, whichever is later. The claims administrator shall process the individual refunds, less the pro rata share of any attorneys' fees and costs approved by the Court, to class members within 60 days of the final determination of the amount of any attorneys' fees and costs that may be awarded to the plaintiffs' counsel;

ORDERED that, pursuant to Federal Rule of Civil Procedure 23(c)(2), the plaintiffs provide notice and an opportunity for exclusion to any class members who have paid initial PTIN fees after August 20, 2016, and did not receive notice of pendency of this action and did not have an opportunity to exclude themselves before December 7, 2016. A separate order shall be entered regarding procedures related to the plaintiffs' plan of notice. Such orders shall in no way disturb or affect this final judgment and shall be considered separate from this final judgment;

ORDERED that all individuals and entities listed by ClaimID in Exhibit C to the Declaration of Kathleen Wyatt Regarding Notice Procedures (ECF No. 77-1) are hereby excluded from the class, are not bound by this final judgment with respect to refund relief ordered above, and may not make any claim to the claims administrator in this case with respect to or receive any refund benefit on account of the judgment in this case;

ORDERED that, in light of the relief described above, Count Two is dismissed as moot, without

prejudice to the plaintiffs' right to revive that claim if this final judgment is reversed on appeal;

ORDERED that, pursuant to Federal Rule of Civil Procedure 54(d) and Local Civil Rule 54.2, an application by the plaintiffs for attorneys' fees, related nontaxable expenses, or costs shall be filed no later than 30 days after the expiration of the period for appeal or, in the event of an appeal, shall be filed within 30 days of the final determination of all appeals or the final judgment of this Court on remand, whichever is later. A separate order shall be entered regarding class counsel's application for attorneys' fees and reimbursement of expenses as allowed by the Court. Such orders shall in no way disturb or affect this final judgment and shall be considered separate from this final judgment;

ORDERED that, pursuant to Federal Rule of Civil Procedure 23(h)(1), notice to the class of any hearing on an attorneys' fees and costs application shall be disseminated no later than 30 days after the Court's approval of the plan and form of notice. A separate order shall be entered regarding notice and briefing procedures relating to attorneys' fees and costs. Such orders shall in no way disturb or affect this final judgment and shall be considered separate from this final judgment;

ORDERED that there is no just reason for delay in the entry of this final judgment and immediate entry by the Clerk of the Court is directed. For the purposes of Federal Rule of Appellate Procedure 4(a), this is a final, appealable order; and

ORDERED that jurisdiction is hereby retained over the parties and the class members for all matters relating to this action, including the administration, interpretation, effectuation, or enforcement of this final judgment.

IT IS SO ORDERED.

Dated: 7/7/17

/s/Royce C. Lamberth
The Honorable Royce C. Lamberth
Senior United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No: 14-cv-1523-RCL

[Filed June 1, 2017]

ADAM STEELE, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Defendant.	)
	)

MEMORANDUM OPINION

I. INTRODUCTION

Plaintiffs bring this class action against the United States to challenge regulations promulgated by the Treasury Department and the Internal Revenue Service requiring tax return preparers to obtain and pay fees for preparer tax identification numbers (PTINs). Both parties have moved for partial summary judgment on the first issue raised in plaintiffs' lawsuit: whether Treasury and the IRS have the authority to require that all tax return preparers obtain and pay for

a PTIN.[1] For the reasons stated below, the Court finds that although the IRS has the authority to require the use of PTINs, it does not have the authority to charge fees for issuing PTINs. The Court will grant in part and deny in part both parties' summary judgment motions.

II. BACKGROUND

This case revolves around a group of 2010–2011 regulations promulgated by the Treasury Department and the IRS regarding tax return preparers. As explained fully below, the regulations imposed certain requirements for becoming a tax return preparer, including obtaining a specific PTIN and paying a user fee for obtaining such PTIN. Plaintiffs argue that the government lacks legal authority to require PTINs and PTIN fees, and alternatively, that the fee imposed is excessive and impermissible. They seek a declaratory judgment that Treasury and the IRS lack legal authority to charge these fees or that the fees charged are excessive, and for the return or refund of all fees previously collected or for the return and refund of the excessive fees. In 2016, this Court certified the proposed class of "all individuals and entities who have paid an initial and/or renewal fee for a PTIN, excluding Allen Buckley, Allen Buckley LLC, and Christopher Rizek." *See Steele v. United States*, 159 F. Supp. 3d 73, 88 (D.D.C. 2016); *Steele v. United States*, 200 F. Supp. 3d 217, 227 (D.D.C. 2016).

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[1] The Court makes no determination regarding plaintiffs' second claim: that the fees exacted were excessive.

A. Statutory and Regulatory Framework

Each year, every American is required to submit a tax return to the IRS. Given the complexity of the tax code, it is unsurprising that many people hire others—tax return preparers—to prepare their returns for them. Some tax return preparers have credentials, such as CPAs and attorneys, but others are known as uncredentialed tax return preparers. Before 2010, anyone could file a tax return on behalf of someone else, credentialed or not. In 2010, however, the IRS, attempting to regulate both credentialed and uncredentialed tax return preparers, promulgated new regulations. The regulations established a new "registered tax return preparer" designation, requiring individuals other than attorneys and CPAs to: "(1) [p]ass a one-time competency exam, (2) pass a suitability check, and (3) obtain a PTIN (and pay the amount provided in the PTIN User Fee regulations)." Regulations Governing Practice Before the Internal Revenue Service, 76 Fed. Reg. 32286, 32287 (June 11, 2011); 26 C.F.R. § 301.7701-15 (defining "tax return preparer"); 31 C.F.R. § 10.4(c) (describing the requirements to become a registered tax return preparer); 31 C.F.R. § 10.3(f) (stating that registered tax return preparers may practice before the IRS); 31 C.F.R. § 10.5(b) (stating that fees may be charged for becoming a registered tax return preparer); 26 C.F.R. § 1.6109-2(d) ("Beginning after December 31, 2010, all tax return preparers must have a preparer tax identification number or other prescribed identifying number that was applied for and received at the time and in the manner, including the payment of a user fee, as may be prescribed by the Internal Revenue

Service."). The regulations also imposed renewal and continuing education requirements. Regulations Governing Practice Before the Internal Revenue Service, 76 Fed. Reg. at 32287; 31 C.F.R. § 10.6. As statutory authority for these regulations, the IRS relied on a provision of the U.S. Code which states that the Secretary of the Treasury may "(1) regulate the practice of representatives of persons before the Department of the Treasury; and (2) before admitting a representative to practice, require that the representative demonstrate—(A) good character; (B) good reputation; (C) necessary qualifications to enable the representative to provide to persons valuable service; and (D) competency to advise and assist persons in presenting their cases." 31 U.S.C. § 330(a).

In support of its conclusion that such regulations were necessary, the IRS pointed to the prevalence of the use of tax return preparers but the lack of consistent oversight, and specifically found that

> [t]he tax system is best served by tax return preparers who are ethical, provide good service, and are qualified. . . . As such, the IRS recognizes the need to apply a uniform set of rules to offer taxpayers some assurance that their tax returns are prepared completely and accurately. Increasing the completeness and accuracy of returns would necessarily lead to increased compliance with tax obligations by taxpayers.

Regulations Governing Practice Before the Internal Revenue Service, 76 Fed. Reg. at 32294. Thus, "[t]he primary benefit anticipated from these regulations is

that they will improve the accuracy, completeness, and timeliness of tax returns prepared by tax return preparers." *Id.* The IRS later specifically identified two overarching objectives of the new regulations: "The first overarching objective is to provide some assurance to taxpayers that a tax return was prepared by an individual who has passed a minimum competency examination to practice before the IRS as a tax return preparer, has undergone certain suitability checks, and is subject to enforceable rules of practice. The second overarching objective is to further the interests of tax administration by improving the accuracy of tax returns and claims for refund and by increasing overall tax compliance." Furnishing Identifying Number of Tax Return Preparer, 75 Fed. Reg. 60309, 60310 (Sept. 30, 2010).

A statutory provision—in effect prior to the new regulations—requires that "[a]ny return or claim for refund prepared by a tax return preparer shall bear such identifying number for securing proper identification of such preparer, his employer, or both, as may be prescribed." 26 U.S.C. § 6109(a)(4). The statute explains that an individual's social security number "shall, except as shall otherwise be specified under regulations of the Secretary, be used as the identifying number." *Id.* § 6109(d). The regulations, however, required, for the first time, that "tax return preparers must obtain and exclusively use the [PTIN] in forms, instructions, or other guidance, rather than a social security number (SSN), as the identifying number to be included with the tax return preparer's signature on a tax return or claim for refund." Furnishing Identifying Number of Tax Return

Preparer, 75 Fed. Reg. at 60309; 26 C.F.R. § 1.6109-2(d). As justification for the requirement that preparers must obtain and use a PTIN, the IRS repeatedly cited to the need to identify individuals involved in preparing a tax return for others so as to aid their ability to oversee such individuals "and to administer requirements intended to ensure that tax return preparers are competent, trained, and conform to rules of practice." Furnishing Identifying Number of Tax Return Preparer, 75 Fed. Reg. at 60310, 60313. The IRS further explained the need for the exclusive use of PTINs, as opposed to both PTINs and social security numbers, arguing that "[m]andating a single type of identifying number for all tax return preparers and assigning a prescribed identifying number to registered tax return preparers is critical to effective oversight." *Id.* at 60313. Specifically, "[e]stablishing a single, prescribed identifying number for tax return preparers will enable the IRS to accurately identify tax return preparers, match preparers with the tax returns and claims for refund they prepare, and better administer the tax laws with respect to tax return preparers and their clients." *Id.* at 60314. The IRS also briefly mentioned that the regulations requiring the use of a PTINs would "help maintain the confidentiality of SSNs." *Id.* at 60309.

The regulations also imposed a user fee requirement for obtaining a PTIN. *See* User Fees Relating to Enrollment and Preparer Tax Identification Numbers, 75 Fed. Reg. 60316 (Sept. 30, 2010); 26 C.F.R. § 300.13. As authority for requiring these fees, the IRS relied on the Independent Offices Appropriations Act of 1952 ("IOAA"). *See* User Fees Relating to Enrollment and

Preparer Tax Identification Numbers, 75 Fed. Reg. at 60317. The IOAA provides that agencies "may prescribe regulations establishing the charge for a service or thing of value provided by the agency." 31 U.S.C. § 9701(b). The IRS stated that a PTIN is a "service or thing of value" because without a PTIN "a tax return preparer could not receive compensation for preparing all or substantially all of a federal tax return or claim for refund," and "[b]ecause only attorneys, certified public accountants, enrolled agents, and registered tax return preparers are eligible to obtain a PTIN, only a subset of the general public is entitled to a PTIN and the special benefit of receiving compensation for the preparation of a return that it confers." User Fees Relating to Enrollment and Preparer Tax Identification Numbers, 75 Fed. Reg. at 60317.

B. Prior Caselaw Interpreting the Tax Return Preparer Regulations

In 2014, the D.C. Circuit addressed the regulations regarding the exam and education requirements, asking "whether the IRS's statutory authority to 'regulate the practice of representatives of persons before the Department of the Treasury' [under 31 U.S.C. § 330] encompasses authority to regulate tax-return preparers." *Loving v. I.R.S.*, 742 F.3d 1013, 1015 (D.C. Cir. 2014). Considering the meaning of the terms "representatives" and "practice . . . before the Department of the Treasury," the history of Section 330, the broader statutory framework, the nature and scope of authority being claimed by the IRS, and the IRS's past approach to the statute, the Circuit found that the IRS's interpretation of Section 330 was

unreasonable and failed under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Id.* at 1016–22. The court concluded that "the IRS's statutory authority under Section 330 cannot be stretched so broadly as to encompass authority to regulate tax-return preparers," and invalidated the regulations requiring competency testing and continuing education. *Id.* at 1015. Thus, after *Loving*, the only part of the new regulatory scheme that remains is the PTIN requirement and the attendant PTIN fee requirement.

The only other cases regarding these regulations that have been litigated have taken place in the Northern District of Georgia (and subsequently the Eleventh Circuit), and all were decided prior to the D.C. Circuit's *Loving* opinion. First, in *Brannen v. United States*, plaintiffs sought "to prevent charges of user fees under 31 U.S.C. § 9701 for the right to receive an identification number necessary to file tax returns on behalf of others for compensation and to recover amounts paid as such fees." *Brannen v. United States*, No. 4:11-CV-0135-HLM, 2011 WL 8245026, at *1 (N.D. Ga. Aug. 26, 2011). After concluding that the authority to charge a user fee for a PTIN stemmed from 31 U.S.C. § 9701, and finding that the complaint failed to contain allegations to state a claim that the amount of the fee was inappropriate under § 9701, the *Brannen* court rejected the argument that "the imposition of the PTIN fee is an unauthorized attempt on the part of the Secretary of the Treasury to license tax return preparers." *Id.* at *5. It found that "Congress specifically authorized the Secretary of the Treasury to create regulations requiring tax return preparers to identify themselves, by means of identifying numbers,

on tax returns and refund claims that they prepare" in 26 U.S.C. § 6109 and therefore the Secretary of the Treasury did not exceed his authority by issuing regulations requiring the use of PTINs. *Id.* It then found that the PTIN fee requirement was authorized by Section 9701 because PTINs provide a benefit to tax return preparers: "The provision of a PTIN confers a special benefit on tax return preparers, who otherwise would not be permitted to prepare tax returns and refund claims on behalf of others in exchange for compensation." *Id.* at *6.

The *Brannen* decision was affirmed on appeal. *See Brannen v. United States*, 682 F.3d 1316 (11th Cir. 2012). The Eleventh Circuit held that the PTIN user fees are permissible under Section 9701:

> [A] tax return preparer cannot prepare tax returns for others for compensation without having the required identifying number. And because § 6109(a)(4) expressly authorizes the Secretary to assign such numbers, a person cannot prepare tax returns for another for compensation unless that person obtains from the Secretary the required identifying number. For this reason, when the Secretary assigns the identifying number (the preparer tax identification number or "PTIN"), the Secretary is conferring a special benefit upon the recipient, i.e., the privilege of preparing tax returns for others for compensation.

Id. at 1319.

Approximately eighteen months after the *Brannen* decision, and after the *Loving* district court decision,

the Northern District of Georgia considered "whether 26 U.S.C. § 6109(a)(4) permits the United States Treasury Department to issue regulations that assess user fees as well as annual renewal fees associated with PTIN assigned to those who prepare tax forms for compensation" and "whether the annual renewal fee assessed for renewing one's PTIN number is either arbitrary and capricious or excessive." *Buckley v. United States*, No. 1:13-CV-1701, 2013 WL 7121182, at *1 (N.D. Ga. Dec. 4, 2013). Agreeing with *Brannen*, the *Buckley* court found that the imposition of PTIN user fees was authorized and that the fee confers a special benefit on tax return preparers. *Id.* at *1–2. The court then found *Loving*—which at the time was still a district court decision—inapplicable because it "reviewed the competency testing and continuing education requirements for return preparers," which were not at issue in *Buckley*. *Id.* at *2. It concluded that "the *Loving* case specifically held that Congress authorized the PTIN scheme via a different statutory authority than the testing and competency requirements for registered tax return preparers, which were at issue in the *Loving* case." *Id.* Following the D.C. Circuit's *Loving* decision, there have been no further developments in the caselaw specifically analyzing the authority to require PTINs and charge fees for them.

III. LEGAL STANDARDS

Plaintiffs first argue that the PTIN requirements—that tax return preparers obtain and pay fees for PTINS—are arbitrary and capricious under the Administrative Procedure Act. They alternatively

argue that even if the fee requirements are not arbitrary and capricious, they are unlawful under the IOAA because Congress did not grant the IRS licensing authority over tax return preparers, so the fees do not confer a "service or thing of value." After summarizing the general legal standards for summary judgment, the Court will address the standards for review of an agency action and those applicable to the IOAA.

A. Summary Judgment

Courts "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To show that a dispute is "genuine" and defeat summary judgment, the nonmoving party must present evidence "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Facts are material when they might affect the outcome of the suit. *Id.* The parties here have agreed that the first claim—whether the government had the legal authority to charge PTIN fees—may be decided as a matter of law at the summary judgment stage.

B. Review of an Agency Action

The APA permits the judicial review of an agency action unless a statute precludes judicial review or an "agency action is committed to agency discretion by law." 5 U.S.C. § 701. Although some agency actions are therefore unreviewable, there is a strong presumption of judicial review for agency actions, and the exemption to judicial review is "very narrow." *Abbott Labs. v.*

Gardner, 387 U.S. 136, 140 (1967); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). The exemption applies "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Pres. Overton Park, Inc.*, 401 U.S. at 410. In other words, "a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Labs*, 387 U.S. at 141.

If a court may review an agency action, more than one standard of review exists. First, *Chevron* review—the standards promulgated in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)—is appropriate to determine "whether an agency has authority to act under a statute." *Arent v. Shalala*, 70 F.3d 610, 615 (D.C. Cir. 1995). *Chevron* review employs a two step analysis:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the

> question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 842–43. "The paradigmatic Chevron case concerns '[t]he power of an administrative agency to administer a congressionally created . . . program.'" *Arent*, 70 F.3d at 615 (quoting *Chevron*, 467 U.S. at 843). As described by the D.C. Circuit, "a reviewing court's inquiry under *Chevron* is rooted in statutory analysis and is focused on discerning the boundaries of Congress' delegation of authority to the agency; and as long as the agency stays within that delegation, it is free to make policy choices in interpreting the statute, and such interpretations are entitled to deference." *Id.*

Alternatively, agency actions may be held unlawful because they are arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A). When "a statute plainly authorizes an agency authority to act and '[t]he only issue . . . is whether the [agency]'s discharge of that authority was reasonable,' the case 'falls within the province of traditional arbitrary and capricious review.'" *Sociedad Anonima Vina Santa Rita v. U.S. Dep't of Treasury*, 193 F. Supp. 2d 6, 15 (D.D.C. 2001) (quoting *Arent*, 70 F.3d at 616). The standards for arbitrary and capricious review were set out in the Supreme Court's *State Farm* decision:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory

> explanation for its action including a "rational connection between the facts found and the choice made." In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: "We may not supply a reasoned basis for the agency's action that the agency itself has not given." We will, however, "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal citations omitted). Keeping with the rule that agencies must explain their decisions, courts "do not defer to the agency's conclusory or unsupported suppositions." *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004). Courts must "set aside agency regulations which, though well within the agencies' scope of authority, are not supported by the reasons that the agencies adduce." *Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 374 (1998).

Although agencies may change existing policies, to survive arbitrary and capricious review they must "provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). Although it "'need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate,' . . . the agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Id.* at 2125–26. Unexplained inconsistencies in agency position are arbitrary and capricious and therefore unlawful. *Id.* at 2126.

Chevron review and arbitrary and capricious review under *State Farm* "overlap at the margins." *Arent*, 70 F.3d at 615, n.6 ("[W]hether an agency action is 'manifestly contrary to the statute' is important both under *Chevron* and under *State Farm*."). For example, "a finding that an agency has acted arbitrarily or capriciously in discharging its statutory duties could be phrased as a conclusion that the agency's interpretation of the controlling statute is unreasonable." *Sociedad Anonima Vina Santa Rita*, 193 F. Supp. 2d at 16. In such cases, a decision that an agency action is arbitrary and capricious is "functionally equivalent" to a determination that the action is unreasonable under *Chevron*. *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996).

C. "Service or Thing of Value" Under the IOAA

The IOAA permits agencies to charge user fees for "a service or thing of value provided by the agency." 31

U.S.C. § 9701(b). The Supreme Court has read the language of the Act narrowly in order to distinguish between fees and taxes, the latter of which are the province of Congress. *See Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 340–41 (1974). Fees are "incident to a voluntary act" and connote a benefit. *Id.* Agencies may impose fees for bestowing special benefits on individuals not shared by the general public. *Id.*; *Fed. Power Comm'n v. New England Power Co.*, 415 U.S. 345, 350–51 (1974); *Engine Mfrs. Ass'n v. E.P.A.*, 20 F.3d 1177, 1180 (D.C. Cir. 1994). There must be "a sufficient nexus between the agency service for which the fee is charged and the individuals who are assessed." *Seafarers Int'l Union of N. Am. v. U.S. Coast Guard*, 81 F.3d 179, 183 (D.C. Cir. 1996). Agencies must "make clear the basis for a fee it assesses under the IOAA." *Nat'l Cable Television Ass'n, Inc. v. F.C.C.*, 554 F.2d 1094, 1100 (D.C. Cir. 1976)

IV. ANALYSIS

The Court first finds that the agency action here is reviewable. The statute enacted by Congress specifies that tax return preparers shall use their social security numbers to identify themselves on prepared returns unless the Secretary of the Treasury specifies otherwise. *See* 26 U.S.C. § 6109. Nowhere does the government identify the clear and convincing evidence showing that Congress sought to specifically commit discretion to the agency to determine whether a different number should be used so as to completely preclude judicial review. *Cf. Abbott Labs*, 387 U.S. at 141. Therefore the Court will review the agency action here and will determine whether the agency had the

authority to require the use of a PTIN and to charge PTIN user fees.

A. The Agency is Authorized to Require the Exclusive Use of PTINs

Although the parties disagree about the proper standard under which to judge the IRS's action, the Court first finds that the IRS was authorized to issue regulations requiring the exclusive use of PTINs under both *Chevron* and *State Farm*. First, plaintiffs' arguments fail step one of *Chevron*. *Chevron* states that "if Congress has directly spoken to the precise question at issue . . . that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842. The statute specifically says that the Secretary has the authority to specify the required identifying number to be used on prepared tax returns. 26 U.S.C. § 6109(d) ("The social security account number issued to an individual for purposes of section 205(c)(2)(A) of the Social Security Act shall, *except as shall otherwise be specified under regulations of the Secretary*, be used as the identifying number for such individual for purposes of this title." (emphasis added)). The Court must give effect to the unambiguous intent of Congress that the Secretary may require the use of such a number.

In addition, the decision to require the use of PTINs was not arbitrary or capricious. The agency offered several justifications for the regulation requiring the exclusive use of PTINs. First, the IRS explained the need to identify tax return preparers in order to maintain oversight, and stated that the use of a single

identifying number was critical to such effective oversight. *See* Furnishing Identifying Number of Tax Return Preparer, 75 Fed. Reg. at 60310, 60313. The IRS stated that the use of a single number would "enable the IRS to accurately identify tax return preparers, match preparers with the tax returns and claims for refund they prepare, and better administer the tax laws with respect to tax return preparers and their clients." *Id.* at 60314. The IRS has articulated satisfactory explanations for its actions. *See State Farm*, 463 U.S. at 43. There is a rational connection between the regulations—requiring the use of PTINs—and the stated rationales—effective administration and oversight. *See id.* And, there is no indication that the IRS entirely failed to consider an important aspect of the problem, or that its rationales ran counter to the evidence before it, or that its reasoning is completely implausible. *See id.* In addition, this was not an unexplained change in policy. *See Encino Motorcars*, 136 S. Ct. at 2126. The aforementioned reasons for the change in policy were identified by the IRS.

Other courts to consider this issue also have found that the PTIN requirement is authorized by law. *See Brannen*, 2011 WL 8245026, at *5 ("Congress specifically authorized the Secretary of the Treasury to create regulations requiring tax return preparers to identify themselves, by means of identifying numbers, on tax returns and refund claims that they prepare."); *Brannen*, 682 F.3d at 1319 ("§ 6109(a)(4) expressly

authorizes the Secretary to assign such numbers"); *Buckley*, 2013 WL 7121182, at *1–2.[2]

For these reasons, the Court concludes that the IRS was authorized to issue the regulations requiring tax return preparers to obtain PTINs.

B. The IRS May Not Impose User Fees for PTINs

Having found that the IRS has the authority to require the exclusive use of PTINs, the Court now turns to the question of whether the IRS is authorized to charge user fees for PTINs. Plaintiffs argue that after the D.C. Circuit struck down the eligibility criteria for becoming a registered tax return preparer in *Loving*, it removed the IRS's stated rationale for requiring PTIN fees—to regulate tax return preparers. Given that the IRS now no longer has any valid justification for the fees, plaintiffs argue that they are arbitrary and capricious, and therefore unlawful under the APA. Alternatively, plaintiffs argue that because Congress did not grant the IRS licensing authority—as found by *Loving*—tax return preparers receive no special benefit in exchange for the fees, rendering them unlawful under the IOAA. In other words, plaintiffs argue that the IRS originally created a licensing scheme that would limit tax return preparers to those certain people who could meet eligibility criteria. But, because *Loving* found that Congress did not authorize a license requirement for tax return preparers, there

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[2] As explained in the next section, however, this Court disagrees with these decisions to the extent that they conclude that the IRS may charge fees for PTINs under the IOAA.

are now no restrictions on who may obtain a PTIN and therefore it is no longer true that only a specific set of people may receive PTINs and the "special benefit" of being able to prepare tax returns for compensation. The only beneficiary of the PTIN system is therefore the IRS.

The government argues that the PTIN and user fee regulations are separate from the regulations imposing eligibility requirements on registered tax return preparers. It argues that the PTIN requirements are not arbitrary and capricious because they make it easier to identify tax return preparers and the returns they prepare, which is a critical step in tax administration, and because PTINs protect social security numbers from disclosure. In support of its position that it may charge fees for PTINs, the IRS states that PTINs are a service or thing of value because the ability to prepare tax returns for compensation is a special benefit provided only to those people who obtain PTINs, who are distinct from the general public. Individuals without PTINs cannot prepare tax returns for compensation. In addition, the IRS argues that PTINs protect the confidentiality of tax return preparers' social security numbers, and that protection itself is a service or thing of value.

The Court finds that PTINs do not pass muster as a "service or thing of value" under the government's rationale. First, the argument that the registered tax return preparer regulations regarding testing and eligibility requirements and the PTIN regulations are completely separate and distinct is a stretch at best. While it is true that they were issued separately and at

different times, they are clearly interrelated. The RTRP regulations specifically mention the PTIN requirements and state that PTINs are part of the eligibility requirements for becoming a registered tax return preparer. *See* Regulations Governing Practice Before the Internal Revenue Service, 76 Fed. Reg. at 32287–89; 26 C.F.R. § 1.6109-2(d) ("[T]o obtain a [PTIN] or other prescribed identifying number, a tax return preparer must be an attorney, certified public accountant, enrolled agent, or registered tax return preparer authorized to practice before the Internal Revenue Service under 31 U.S.C. 330 and the regulations thereunder."). Furthermore, the overarching objectives named in the PTIN regulations indicate a connection to the RTRP regulations. They were 1) "to provide some assurance to taxpayers that a tax return was prepared by an individual who has passed a minimum competency examination to practice before the IRS as a tax return preparer, has undergone certain suitability checks, and is subject to enforceable rules of practice;" and 2) "to further the interests of tax administration by improving the accuracy of tax returns and claims for refund and by increasing overall tax compliance." Furnishing Identifying Number of Tax Return Preparer, 75 Fed. Reg. at 60310. The first objective clearly relates to the RTRP regulations regarding eligibility requirements for tax return preparers. The second objective is less explicit, but it does not stretch common sense to conclude that the accuracy of tax returns would be improved by requiring tax return preparers to meet certain education requirements.

Having concluded the inter-connectedness of the regulations, the government's argument begins to break down. The *Loving* court concluded that the IRS does not have the authority to regulate tax return preparers. *Loving*, 742 F.3d at 1015. It cannot impose a licensing regime with eligibility requirements on such people as it tried to do in the regulations at issue. Although the IRS may require the use of PTINs, it may not charge fees for PTINs because this would be equivalent to imposing a regulatory licensing scheme and the IRS does not have such regulatory authority. Granting the ability to prepare tax return for others for compensation—the IRS's proposed special benefit—is functionally equivalent to granting the ability to practice before the IRS. The D.C. Circuit has already held, however, that the IRS does not have the authority to regulate the practice of tax return preparers. *See id.* In coming to its conclusion, the Circuit considered the statutory language that the Secretary may "regulate the practice of representatives of persons before the Department of the Treasury." *Id.* at 1017–18 (quoting 31 U.S.C. § 330(a)(1)). The court found that the IRS improperly expanded the definition of "practice . . . before the Department of Treasury" to include "preparing and signing tax returns" because to "practice before" an agency "ordinarily refers to practice during an investigation, adversarial hearing, or other adjudicative proceeding." *Id.* at 1018. The *Loving* court concluded that "[t]hat is quite different from the process of filing a tax return" in which "the tax-return preparer is not invited to present any arguments or advocacy in support of the taxpayer's position . . . [and] the IRS conducts its own ex parte, non-adversarial assessment of the taxpayer's liability."

Id. The ability to prepare tax returns is the "practice" identified by the IRS in *Loving*, but the court found that such an activity does not qualify as practicing before the IRS. Therefore, it appears to this Court that the IRS is attempting to grant a benefit that it is not allowed to grant, and charge fees for granting such a benefit.

Over forty years ago, the Supreme Court interpreted the predecessor to the current form of the IOAA, which stated that that an agency could charge fees for "any work, service . . . benefit, . . . license, . . . or similar thing of value" provided by the agency. *Nat'l Cable Television Ass'n, Inc.*, 415 U.S. at 337. In listing examples of activities for which an agency could charge a fee, the Supreme Court noted "a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station," *i.e.*, permits and occupational licenses. *Id.* at 340. Subsequently, the D.C. Circuit cases finding that a fee was permissible under the IOAA generally concern valid regulatory schemes, as opposed to the situation here where the regulatory scheme was struck down. In *Elec. Indus. Ass'n, Consumer Elecs. Grp. v. F.C.C.*, common carriers and equipment manufacturers *regulated by the FCC* challenged the validity of fees for "(1) common carrier application, filing, and grant fees; (2) common carrier tariff filing fees; and (3) equipment type approval, type acceptance and certification fees." 554 F.2d 1109, 1111 (D.C. Cir. 1976). The court found that fees could be assessed for tariff filings and equipment testing and approval because such services created the "independent private benefit[s]" of "provid[ing] a means for the carrier to obtain its

revenues and to regulate subscriber use of its facilities" and "assist[ing] the manufacturer in marketing a quality product and giv[ing] him credibility in the market place." *Id.* at 1015–16. The other fees were "justified by the statutory requirement of a permit for construction of new or extended lines or the discontinuance of service by a common carrier, and by the requirement of an operating license and station construction permit." *Id.* at 1016.

In *Engine Mfrs. Ass'n v. E.P.A.*, the Engine Manufacturers Association ("EMA") challenged an EPA rule assessing fees for the EPA's "Motor Vehicle and Engine Compliance Program under which it test[ed] vehicles and engines for compliance with the emissions standards of the Clean Air." 20 F.3d at 1178. Each year, vehicle manufacturers were required to obtain certificates of compliance to sell their equipment through EPA's compliance program which included a comprehensive testing regime. *Id.* at 1179. The testing had three stages: 1) manufacturer testing; 2) selective enforcement audits by EPA; and 3) in-use testing. *Id.* The EMA did not dispute that the compliance certificate conferred a special benefit, but argued that selective enforcement audits and in-use compliance testing were means of enforcing emissions standards and the benefits of such testing accrued exclusively to the public. *Id.* at 1180. The court found that "[s]elective enforcement audits and in-use compliance testing are integral parts of the compliance regime . . . [and] passing each successive compliance test is necessary in order to keep its product certified for sale and to avoid the cost of a recall." *Id.* The court therefore concluded that "the manufacturer obtains a benefit from the

entire Compliance Program, not just from the annual certification." *Id.*

Finally, in *Seafarers Int'l Union of N. Am. v. U.S. Coast Guard*, the court considered fees charged for issuing "merchant mariner licenses, certificates of registry, or merchant mariner documentation . . . to qualified individuals seeking to work aboard a United States merchant marine vessel," which were documents that "serve[d] as occupational licenses." 81 F.3d at 181. The court, finding that "a person who is lawfully required to obtain an occupational license may be charged a fee to reimburse the agency for the cost of processing the license," concluded that an "agency may exact a fee for administering any procedures reasonably necessary to ensure that [job-related eligibility criteria necessary to obtain a license] have been met." *Id.* at 185. The court therefore concluded that because Congress laid out specific eligibility criteria for such licenses which "permit[ted] the Coast Guard to take reasonable steps to ensure that the particular requirements have been met," the Coast Guard could charge fees "to recover the expense of whatever reasonable procedure is employed by the Coast Guard to comply with the statute." *Id.* at 185–86.

The Court acknowledges that courts in the Eleventh Circuit have found that the PTIN fees are permissible under the IOAA. *See Brannen*, 682 F.3d at 1319; *Brannen*, 2011 WL 8245026, at *5–6; *Buckley*, 2013 WL 7121182, at *2. But, the *Brannen* decisions were made prior to D.C. Circuit's *Loving* decision, *i.e.*, prior to the finding that the IRS lacks the authority to regulate tax return preparers and the striking down of the

regulations attempting to do so. In addition, the Court disagrees with the *Buckley* court's finding that *Loving* (at the time the district court opinion) is entirely inapplicable because although the PTIN scheme was authorized by a different statutory authority, it is, as explained above, interrelated with the RTRP scheme.

If tax return preparers were regulated entities required to obtain licenses, this case would be very different and the cases cited above may support the government's argument that it is authorized to charge fees. However, *Loving* makes clear that the IRS may not regulate in this area or require that tax return preparers obtain an occupational license. The Court is unaware of similar cases in which an agency has been allowed to charge fees under the IOAA for issuing some sort of identifier when that agency is not allowed to regulate those to whom the identifier is issued, and the government has not pointed to any.

Additionally, the Court notes that after *Loving*, anyone can obtain a PTIN. They need not meet any type of eligibility criteria. Thus, it is no longer the case that only a subset of the general public may obtain a PTIN and prepare tax returns for others for compensation. Hypothetically, every member of the public could obtain a PTIN, which means that every member of the public would also get the supposed "benefit" of being able to prepare tax returns for others for compensation. There is therefore no special benefit for certain individuals not available to the general public. It seems that if a benefit exists, it inures to the IRS, who, through the use of PTINs, may better

identify and keep track of tax return preparers and the returns that they have prepared.

The government argues that the fact that anyone may obtain a PTIN is irrelevant, comparing it to the fact that anyone may enter a national park if they buy a ticket. This is unpersuasive. The Secretary of the Interior is authorized by statute to "establish, modify, charge, and collect recreation fees at Federal recreational lands and waters." 16 U.S.C. § 6802(a). As plaintiffs note, that statute would be wholly unnecessary if the agency were allowed to charge fees under the IOAA.[3] Here, the Secretary of the Treasury is not specifically authorized to charge user fees for PTINs, so the national park analogy fails.

Finally, the Court addresses the IRS's second argument that PTINs are things of value because they protect the confidentiality of social security numbers. The confidentiality justification is mentioned only briefly in the regulations requiring the use of PTINs: "The final regulations will also benefit taxpayers and tax return preparers and help maintain the confidentiality of SSNs." Furnishing Identifying Number of Tax Return Preparer, 75 Fed. Reg. at 60309. It is not discussed in the regulation specifically addressing user fees. *See generally* User Fees Relating to Enrollment and Preparer Tax Identification Numbers, 75 Fed. Reg. 60316. Despite the fact that tax return preparers were allowed for many years to use their SSNs, and that under the statute SSNs are

[3] The Court makes no decision regarding whether fees for national park entry are permissible solely under the IOAA.

presumptively to be used as the required identifying number, and that the taxpayer's SSN appears on their tax returns regardless of whether they used a tax return preparer, the regulations fail to even state that SSNs were being inadvertently disclosed or that their confidentiality was at risk. It is not at all clear that requiring PTINs was necessary for this reason. There is no stated evidence in the administrative record that permitted the IRS to make such a determination. *See Innovator Enterprises, Inc. v. Jones*, 28 F. Supp. 3d 14, 20 (D.D.C. 2014) ("[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did."). The Court will not defer to these conclusory and unsupported justifications, *see McDonnell*, 375 F.3d at 1187, and finds that the IRS may not charge fees for PTINs for this reason.

For all of the reasons stated above, the Court concludes that PTINs are not a "service or thing of value" provided by the IRS. The IRS may therefore not charge fees for issuing PTINs and the regulations requiring payment of fees for PTINs are unlawful.

V. CONCLUSION

In sum, the Court finds that although the IRS may require the use of PTINs, it may not charge fees for issuing PTINs. The Court will grant in part and deny in part both parties' motions for summary judgment. Plaintiffs' motion shall be denied insofar as it argues that the IRS may not require the use of PTINs, but will granted with respect to the argument that the IRS may not charge fees under the IOAA for PTINs. The

government's motion shall be granted with respect to the issue of whether it may require the use of PTINs, but shall be denied with respect to the issue of whether it may charge fees for PTINs under the IOAA.

A separate Order accompanies this Memorandum Opinion.

Dated: ~~May~~ June 1, 2017

/s/Royce C. Lamberth
Royce C. Lamberth
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No: 14-cv-1523-RCL

[Filed June 1, 2017]

ADAM STEELE, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Defendant.	)
	)

ORDER

In accordance with the accompanying Memorandum Opinion, plaintiffs' motion for partial summary judgment [67] is hereby **GRANTED** in part and **DENIED** in part. Plaintiffs' motion is **DENIED** insofar as it argues that the IRS may not require the use of Personal Tax Identification Numbers (PTINs), but is **GRANTED** with respect to the argument that the IRS may not charge fees under the IOAA for PTINs. Defendant's motion for summary judgment [66] is **GRANTED** in part and **DENIED** in part. It is **GRANTED** with respect to the issue of whether it may require the use of PTINs, but is **DENIED** with respect to the issue of whether it may charge fees for PTINs under the IOAA.

It is further **ORDERED** that all fees that the defendant has charged to class members to issue and renew a PTIN under 26 C.F.R. § 300.13 are hereby declared unlawful, and the defendant is enjoined from charging those fees in the future.

It is further **ORDERED** that the defendant shall provide each class member with a full refund of all PTIN fees paid.

It is further **ORDERED** that counsel for the parties shall meet and confer regarding a schedule for subsequent proceedings in this case, and submit within 30 days of this order a proposal for addressing any remaining issues in this case, including a plan for determining the amount of money owed to each class member and proposing a form of final judgment.

It is **SO ORDERED.**

Dated: ~~May~~ June 1, 2017

/s/Royce C. Lamberth
Royce C. Lamberth
United States District Judge

APPENDIX F

IRS Department of the Treasury
Internal Revenue Service
Ogden UT 84201-0038

Notice	CP148B
Notice date	March 4, 2019
Employer ID number	XX-XXX6554
To contact us	Phone 800-829-0115
Page 1 of 1	

119048.125336.385908.32430 1 AB 0.412 370

ALLEN BUCKLEY LLC
ALLEN BUCKLEY SOLE MBR
5192 FOREST VIEW CT SE
MABLETON GA 30126-5950

.9048

We changed your mailing address

We updated our records for your mailing address. We update our records anytime the address entered on a tax return is different from what we have in our records, or a Form 8822-B is received.

The address shown above is where we previously sent IRS notices and letters about your tax account. We will no longer mail notices and letters to that address. We

also sent a confirmation notice to your new mailing address.

What you need to do

Our update to your address may be for minor changes in words and abbreviations, such as using "Street" rather than "St." in your address. To avoid confusion, you or your tax preparer should always enter your correct mailing address in exactly the same way every time you file tax returns.

If there should not be a change to your address, call or write to us using the contact information at the top of this page. If you call, please review the most recent tax returns you filed for differences in addresses entered. For any written correspondence, include a copy of this notice. We can address concerns more quickly via telephone.

Caution for employers regarding third-party payroll providers

If we find any issues with an account, we send a letter or notice to your address of record. We strongly caution any employer against changing the address of record to that of a payroll service provider or any other third party as it may significantly limit our ability to inform the employer of tax matters involving the business. The employer is ultimately responsible for depositing and paying all federal employment tax liabilities.

For more information, visit www.irs.gov and search keywords, "Change of Address" or "Outsourcing Payroll Duties."

Additional information

- Visit www.irs.gov/cp148b
- For tax forms, instructions, and publications, visit www.irs.gov/forms-pubs or call 800-TAX-FORM (800-829-3676).
- Keep this notice for your records.

If you need assistance, please don't hesitate to contact us.

APPENDIX G

IRS

Return Preparer Office Federal Tax Return Preparer Statistics

Data current as of 5/1/2019

Number of Individuals with Current Preparer Tax Identification Numbers (PTINs) for 2019†	**754,500**
Professional Credentials‡	
Attorneys	**29,136**
Certified Public Accountants	**209,227**
Enrolled Actuaries	**216**
Enrolled Agents	**55,487**
Enrolled Retirement Plan Agents	**667**
Other Qualifications	
2019 Annual Filing Season Program Records of Completion Issued	**60,217**

† Cumulative number of individuals issued PTINs since 9/28/2010: **1,548,778**

‡ Some preparers have multiple professional credentials and qualifications.

Page Last Reviewed or Updated: 01-May-2019

https://www.irs.gov/tax-professionals/return-preparer-office-federal-tax-return-preparer-statistics

APPENDIX H

W-12 (2013), IRS Paid Preparer Tax Identification Number (PTIN) Application and Renewal

[*Fold-Out Exhibit, see next 3 pages*]

Form **W-12**
(Rev. January 2013)
Department of the Treasury
Internal Revenue Service

IRS Paid Preparer Tax Identification Number (PTIN) Application and Renewal

► **Information about Form W-12 and its separate instructions is available at *www.irs.gov/w12.***

OMB No. 1545-2190

1 Name and PTIN (Print in ink or Type)

First name | Middle name | Last name

☐ Initial application ☐ Renewal application (Enter PTIN: P)

2 Personal Mailing Address and Phone Number

Street address. Use a P.O. box number only if the post office does not deliver mail to your street address.

City or town, state/province, and, if outside U.S., country. Include ZIP or postal code where appropriate. Do not abbreviate name of country.

Phone Number ( ) -

3 SSN and Date of Birth

SSN - -

Date of birth (month, day, year) / /

4 Email Address

Enter the email address that should be used to contact you.

5 Past Felony Convictions

Have you been convicted of a felony in the past 10 years? ☐ **Yes** ☐ **No**

If "Yes," list the date and the type of felony conviction(s) and explain why the Internal Revenue Service should consider you suitable to practice.

6 Federal Tax Compliance

Are you current on both your individual and business federal taxes, including any corporate and employment tax obligations? ☐ **Yes** ☐ **No**

If you have never filed a U.S. individual income tax return because you are not required to do so, check the "Yes" box.

If "No," provide an explanation.

7 Professional Credentials

Check all that apply. Enter state abbreviation and appropriate number(s):

- ☐ Attorney - Licensed in which state(s): ____ Number(s): _____ Expiration Date(s): _____
- ☐ Certified Public Accountant (CPA) - Licensed in which state(s): ____ Number(s): _____ Expiration Date(s): _____
- ☐ Enrolled Agent (EA) ____ Number(s): _____ Expiration Date(s): _____
- ☐ Enrolled Actuary ____ Number(s): _____ Expiration Date(s): _____
- ☐ Enrolled Retirement Plan Agent (ERPA) ____ Number(s): _____ Expiration Date(s): _____
- ☐ State Regulated Tax Preparer-State(s): ____ Number(s): _____ Expiration Date(s): _____
- ☐ Certified Acceptance Agent _____
- ☐ None

Skip lines 8, 9, and 10 if you are an attorney, CPA, or EA.

8 Form 1040 Preparation

Do you prepare Form 1040 series tax returns (or accompanying schedules) for compensation? (If you ONLY prepare Form 1040-PR or Form 1040-SS for residents of Puerto Rico, check "No.") ☐ **Yes** ☐ **No**

9 Supervised Preparer Determination

Are you employed by an attorney or CPA firm, or other recognized firm at least 80 percent owned by attorneys, CPAs, or Enrolled Agents? ☐ **Yes** ☐ **No**

Are you supervised by an attorney, CPA, EA, ERPA, or Enrolled Actuary? ☐ **Yes** ☐ **No**

Does an attorney, CPA, EA, ERPA, or Enrolled Actuary sign **all** of the tax returns that you prepare? ☐ **Yes** ☐ **No**

If you checked "Yes" to all of these questions, you are a supervised preparer and must enter your supervisor's PTIN: P

10 Reserved

Reserved

Reserved

11 Business Identification Numbers

Are you self-employed or an owner, partner, or officer of a tax preparation business? ☐ **Yes** ☐ **No**

If you check "Yes," complete this line. If you check "No," go to line 12.

Your CAF Number	EIN -	EFIN

12 Business Mailing Address

Business address

Business city or town, state/province, and, if outside U.S., country. Include ZIP or postal code where appropriate. Do not abbreviate name of country.

13 Business Phone Number	Domestic business phone number (optional) ( ) - Ext.	International business phone number (optional) +
14 Business Name and Website Address	Enter the business name and website address (optional).	

If this is your **initial application** for a PTIN, continue to line 15. If you are renewing your PTIN, go to line 17.

15 Address of Your Last Individual Income Tax Return Filed

Enter the address that you used on the last individual income tax return you filed.

If you have never filed a federal income tax return, check here ☐ . See line 15 instructions for documents that must be submitted with this form. Skip line 16, and continue to line 17.

16 Filing Status and Tax Year on Last Individual Income Tax Return Filed

☐ Single ☐ Head of Household

☐ Married filing jointly ☐ Qualifying widow(er) with dependent child

☐ Married filing separately Tax Year _____

If your last return was filed more than 4 years ago, see instructions.

17 Fee

If you are **applying for a PTIN,** your fee is $64.25. If you are **renewing your PTIN,** your fee is $63.00. The fee is nonrefundable. **Full payment must be included with your request/renewal or it will be rejected. Make your check or money order payable to IRS Tax Pro PTIN Fee.** Do not use paper clips or staples.

PTIN application ► $64.25 PTIN renewal ► $63.00

If you are filing Form W-12 to apply for a PTIN, and you anticipate that you will not receive your PTIN until after October 15th, check the box to indicate whether you want your PTIN to be valid for the current calendar year or the next calendar year. ☐ Current calendar year ☐ Next calendar year

Sign Here

Under penalties of perjury, I declare that I have examined this application and to the best of my knowledge and belief, it is true, correct, and complete. I understand any false or misleading information may result in criminal penalties and/or the denial or termination of a PTIN.

Your signature Date (MM,DD,YYYY)

/ /

For Internal Use Only

APPENDIX I

W-12 (2017), IRS Paid Preparer Tax Identification Number (PTIN) Application and Renewal

[*Fold-Out Exhibit, see next 3 pages*]

Form **W-12**
(Rev. October 2017)
Department of the Treasury
Internal Revenue Service

IRS Paid Preparer Tax Identification Number (PTIN) Application and Renewal

► **Go to *www.irs.gov/FormW12* for instructions and the latest information.**

OMB No. 1545-2190

1 Name and PTIN (Print in ink or Type)

First name | Middle name | Last name

☐ Initial application

☐ Renewal application (Enter PTIN: P)

2 Year of Application/ Renewal

If you checked the "Initial application" box and are submitting this form between October 1 and December 31, indicate below whether you want your PTIN to be valid for the current calendar year or the next calendar year.

☐ Current calendar year ☐ Next calendar year

Prior year(s) (YYYY): Check box(es) below for the prior year(s) you are renewing your PTIN. See line 2 instructions for additional guidance.

☐ 2015 ☐ 2016 ☐ 2017

☐ Other prior year(s)

3 SSN and Date of Birth

SSN - -

Date of birth (MM/DD/YYYY) / /

4 Personal Mailing Address and Phone Number

Street address. Use a P.O. box number only if the post office does not deliver mail to your street address.

City or town, state or province, country, and ZIP or foreign postal code. Do not abbreviate name of country.

Phone Number ( ) -

5a Business Mailing Address and Phone Number

Business address ☐ Check here if your business address is the same as your personal mailing address. If different, enter it below.

City or town, state or province, country, and ZIP or foreign postal code. Do not abbreviate name of country.

Domestic business phone number ( ) - EXT.

International business phone number +

b Business Identification

Are you self-employed or an owner, partner, or officer of a tax return preparation business? ☐ **Yes** ☐ **No**

If "Yes," then complete this line. If "No," go to line 6.

Enter the business name.

Your CAF Number | EIN - | EFIN

Website address (optional)

6 Email Address

Enter the email address that should be used to contact you.

For Internal Use Only

F: _____

E: _____

A: _____

7 Past Felony Convictions You must check a box. If "Yes," you must provide an explanation.

Have you been convicted of a felony in the past 10 years? ☐ **Yes** ☐ **No**

If "Yes," list the date and the type of felony conviction(s).

If this is your **initial application** for a PTIN, continue to line 8. If you are renewing your PTIN, go to line 10.

8 Address of Your Last U.S. Individual Income Tax Return Filed

Enter the address used on your last **U.S. individual income tax return** you filed.

☐ Check here if you have **never filed** a U.S. income tax return or do not have a U.S. income tax filing requirement. See line 8 instructions for documents that must be submitted with this form and continue to line 10.

9 Filing Status and Tax Year on Last U.S. Individual Income Tax Return Filed

☐ Single ☐ Head of Household

☐ Married filing jointly ☐ Qualifying widow(er) with dependent child

☐ Married filing separately Tax Year (YYYY) _____

Note: If your last return was filed more than 4 years ago, see instructions.

10 Federal Tax Compliance

Are you current on both your individual and business federal taxes, including any corporate and employment tax obligations? **Note:** If you have never filed a U.S. individual income tax return because you are not required to do so, check the "Yes" box. ☐ **Yes** ☐ **No**

If "No," provide an explanation.

11 Professional Credentials

Check all that apply. **Note: DO NOT check any professional credentials that are currently expired or retired.** Enter state abbreviation and appropriate number(s). **If the expiration date is left blank or incomplete, then NO professional credential will be added when the application is processed.**

- ☐ Attorney—Licensed in which jurisdiction(s): _____ Number(s): _____ Expiration Date(s): _____
- ☐ Certified Public Accountant (CPA)—Licensed in which jurisdiction(s): _____ Number(s): _____ Expiration Date(s): _____
- ☐ Enrolled Agent (EA) Number(s): _____ Expiration Date(s): _____
- ☐ Enrolled Actuary Number(s): _____ Expiration Date(s): _____
- ☐ Enrolled Retirement Plan Agent (ERPA) Number(s): _____ Expiration Date(s): _____
- ☐ State Regulated Tax Return Preparer—Licensed in which jurisdiction(s): _____ Number(s): _____ Expiration Date(s): _____
- ☐ Certifying Acceptance Agent (CAA) Number: _____
- ☐ None

Sign Here

Under penalties of perjury, I declare that I have examined this application and to the best of my knowledge and belief, it is true, correct, and complete. I understand any false or misleading information may result in criminal penalties and/or the denial or termination of a PTIN.

Your signature (Please use blue or black ink) Date (MM/DD/YYYY)

/ /

How To File

Online. Go to the webpage *www.irs.gov/ptin* for information. Follow the instructions to submit Form W-12. If you submit your application online, your PTIN generally will be provided to you immediately after you complete the application.

By mail. Complete Form W-12. Send the form to:

IRS Tax Professional PTIN
Processing Center
1605 George Dieter PMB 678
El Paso, TX 79936

Note: Allow 4 to 6 weeks for processing of PTIN applications. For additional information, refer to the separate Instructions for Form W-12.

APPENDIX J

742 F.3d 1013

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13–5061

[Filed February 11, 2014]

SABINA LOVING, ET AL., APPELLEES	)
V.	)
INTERNAL REVENUE SERVICE, ET AL., APPELLANTS.	)

Argued Sept. 24, 2013 Decided Feb. 11, 2014

Appeal from the United States District Court
for the District of Columbia
(No. 1:12-cv-00385)

Gilbert S. Rothenberg, Attorney, U.S. Department of Justice, argued the cause for appellants. With him on the briefs were *Tamara W. Ashford*, Principal Deputy Assistant Attorney General, *Richard Farber* and *Patrick J. Urda*, Attorneys.

David W. Foster was on the brief for *amici curiae* Former Commissioners of Internal Revenue in support of appellants.

Charles Harak was on the brief for *amici curiae* National Consumer Law Center, et al. in support of appellants.

Dan Alban argued the cause for appellees. With him on the brief were *William H. Mellor*, *Scott G. Bullock*, and *Ari S. Bargil*.

Patrick J. Smith was on the brief for *amici curiae* Ronda Gordon, et al. in support of appellees.

Before: KAVANAUGH, *Circuit Judge*, and WILLIAMS and SENTELLE, *Senior Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* KAVANAUGH.

KAVANAUGH, *Circuit Judge*: The federal income tax code is massive and complicated. So it is not surprising that many taxpayers hire someone else to help prepare their tax returns.

In 2011, responding to concern about the performance of some paid tax-return preparers, the IRS issued new regulations. Among other things, the new regulations require that paid tax-return preparers pass an initial certification exam, pay annual fees, and complete at least 15 hours of continuing education courses each year. The IRS estimates that the new regulations will apply to between 600,000 and 700,000 tax-return preparers.

As statutory authority for the new regulations, the IRS has relied on 31 U.S.C. § 330. Originally enacted in 1884, that statute authorizes the IRS to "regulate the practice of representatives of persons before the Department of the Treasury." 31 U.S.C. § 330(a)(1). In the first 125 years after the statute's enactment, the Executive Branch never interpreted the statute to authorize regulation of tax-return preparers. But in 2011, the IRS decided that the statute in fact did authorize regulation of tax-return preparers.

In this case, three independent tax-return preparers contend that the IRS's new regulations exceed the agency's authority under the statute. The precise question is whether the IRS's statutory authority to "regulate the practice of representatives of persons before the Department of the Treasury" encompasses authority to regulate tax-return preparers. The District Court ruled against the IRS, relying on the text, history, structure, and context of the statute. We agree with the District Court that the IRS's statutory authority under Section 330 cannot be stretched so broadly as to encompass authority to regulate tax-return preparers. We therefore affirm the judgment of the District Court.

I

Originally passed by Congress and signed by President Chester A. Arthur in 1884, Section 330 of Title 31 authorizes the Secretary of the Treasury – and by extension, the IRS, a subordinate agency within the Treasury Department – to "regulate the practice of representatives of persons before the Department of the Treasury." 31 U.S.C. § 330(a)(1). Before admitting

a person to practice as a representative, the IRS may require the applicant to demonstrate "good character," "good reputation," "necessary qualifications to enable the representative to provide to persons valuable service," and "competency to advise and assist persons in presenting their cases." *Id.* § 330(a)(2). The statute also empowers the IRS to discipline any representative who is "incompetent," "disreputable," "violates regulations prescribed under" Section 330, or who "with intent to defraud, willfully and knowingly misleads or threatens the person being represented or a prospective person to be represented." *Id.* § 330(b). Such representatives may be fined, or suspended or disbarred from practice. *Id.*

In longstanding regulations implementing Section 330, the IRS has maintained standards of competence for attorneys, accountants, and other tax professionals appearing in adversarial proceedings before the agency. Covered individuals who fail to comply with those requirements may be censured, suspended from practice, disbarred from practice, or monetarily sanctioned.

In 2011, after an IRS review found problems in the tax-preparation industry, the IRS issued a new rule regulating tax-return preparers, a group that had not previously been regulated pursuant to Section 330. *See* Regulations Governing Practice Before the Internal Revenue Service, 76 Fed. Reg. 32,286 (June 3, 2011). (The rule was technically issued by the Department of the Treasury, of which the IRS is a part.) A tax-return preparer is a person who "prepares for compensation, or who employs one or more persons to prepare for

compensation, all or a substantial portion of any return of tax or any claim for refund of tax under the Internal Revenue Code." 26 C.F.R. § 301.7701-15(a). The new 2011 regulations require tax-return preparers to register with the IRS by paying a fee and passing a qualifying exam. 31 C.F.R. §§ 10.3(f)(2), 10.4(c), 10.5(b). Each year after the initial registration, a tax-return preparer must pay an additional fee and complete at least 15 hours of continuing education classes. *Id.* § 10.6(d)(6), 10.6(e).

Plaintiffs in this case are three independent tax-return preparers who would be subject to the new requirements. They filed suit seeking declaratory and injunctive relief to prevent enforcement of the new regulations. On cross motions for summary judgment, the District Court ruled in favor of the plaintiffs, concluding that "together the statutory text and context unambiguously foreclose the IRS's interpretation of 31 U.S.C. § 330." *Loving v. IRS*, 917 F. Supp. 2d 67, 79 (D.D.C. 2013). The District Court permanently enjoined the tax-return preparer regulations. The IRS moved in the District Court for a stay of the District Court's decision and asked to keep the regulations in place pending appeal. The District Court denied the stay motion.

The IRS filed a timely notice of appeal disputing the District Court's construction of Section 330. The IRS also filed a stay motion in this Court to keep the regulations in place pending appeal. That motion was denied. *Loving v. IRS*, No. 13-5061, 2013 WL 1703893 (D.C. Cir. Mar. 27, 2013).

Our review of the District Court's statutory interpretation is de novo. *See, e.g.*, *Judicial Watch, Inc. v. FBI*, 522 F.3d 364, 367 (D.C. Cir. 2008).

II

The question in this case is whether the IRS's authority to "regulate the practice of representatives of persons before the Department of the Treasury" encompasses authority to regulate tax-return preparers. 31 U.S.C. § 330(a)(1). The IRS says it does. Under *Chevron*, we must accept an agency's authoritative interpretation of an ambiguous statutory provision if the agency's interpretation is reasonable. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). In determining whether a statute is ambiguous and in ultimately determining whether the agency's interpretation is permissible or instead is foreclosed by the statute, we must employ all the tools of statutory interpretation, including "text, structure, purpose, and legislative history." *Pharmaceutical Research & Manufacturers of America v. Thompson*, 251 F.3d 219, 224 (D.C. Cir. 2001); *see also Chevron*, 467 U.S. at 843 n.9. "No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

In our view, at least six considerations foreclose the IRS's interpretation of the statute.

First is the meaning of the key statutory term "representatives." In its opening brief, the IRS simply

asserts that there "can be no serious dispute that paid tax-return preparers are 'representatives of persons.'" IRS Br. 31 n.11. Beyond that ipse dixit, however, the IRS never explains how a tax-return preparer "represents" a taxpayer. And for good reason: The term "representative" is traditionally and commonly defined as an agent with authority to bind others, a description that does not fit tax-return preparers. *See, e.g.*, OXFORD ENGLISH DICTIONARY 660 (2d ed. 1989) ([4] "One who represents another as agent, delegate, substitute, successor, or heir"); BLACK'S LAW DICTIONARY 1416 (9th ed. 2009) ([1] "One who stands for or acts on behalf of another . . . . See agent"); BALLENTINE'S LAW DICTIONARY 1096 (3d ed. 1969) ("An agent, an officer of a corporation or association, a trustee, executor, or administrator of an estate, or any other person empowered to act for another."); 45 U.S.C. § 151 ("The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them."); U.C.C. § 1-201(b)(33) ("'Representative' means a person empowered to act for another, including an agent, an officer of a corporation or association, and a trustee, executor, or administrator of an estate.").

Put simply, tax-return preparers are not agents. They do not possess legal authority to act on the taxpayer's behalf. They cannot legally bind the taxpayer by acting on the taxpayer's behalf. The IRS cites no law suggesting that tax-return preparers have legal authority to act on behalf of taxpayers. Indeed, a tax-return preparer who tried to act on the taxpayer's behalf would run into trouble with the IRS: Under the

IRS regulation found at 26 C.F.R. § 601.504(a), "representation" of a taxpayer before the IRS requires formally obtaining the taxpayer's power of attorney, something tax-return preparers do not typically obtain when preparing returns. Moreover, because a tax-return preparer is not a representative, the taxpayer ordinarily must still sign and submit the return in his or her own name even when the taxpayer uses the services of a tax-return preparer.

Other IRS directives buttress the understanding that tax-return preparers are not representatives. For example, the IRS permits taxpayers to select any person as a "Third Party Designee" who may talk to the IRS about questions that arise during the processing of the taxpayer's return. *See* Third Party Authorization, Levels of Authority, IRS Publication 4019 (Oct. 2012). But as the instructions for the standard tax return form make clear, that third-party designee status is not the same as representative status or power of attorney: "You are not authorizing the designee to receive any refund check, bind you to anything (including any additional tax liability), or otherwise represent you before the IRS. If you want to expand the designee's authorization, see Pub. 947 [Practice Before the IRS and Power of Attorney]." 1040 Instructions 2012 at 77.

Of course, the meaning an agency attaches to a term in its regulations is not always the same as the meaning Congress intends to give that term when Congress includes it in statutes. But an agency's use of a term can be valuable information not only about ordinary usage but also about any specialized meaning that people in the field attach to that term. That is

particularly true when, as here, the term is one that the agency uses in a number of contexts. *Cf. FAA v. Cooper*, 132 S. Ct. 1441, 1449 (2012) ("when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken") (internal quotation marks omitted).

The tax-return preparer certainly *assists* the taxpayer, but the tax-return preparer does not *represent* the taxpayer. In light of the way the Code treats tax preparation, it would be quite wrong to say that a tax-return preparer "represents" the taxpayer in any meaningful legal sense. In short, the statute's use of the term "representative" excludes tax-return preparers.

Second is the meaning of the phrase "practice . . . before the Department of the Treasury." The IRS has long regulated service professionals such as attorneys and accountants who appear as representatives of taxpayers in adversarial tax proceedings before the IRS. Under its new regulations, however, the IRS expanded its definition of "practice" to cover tax-return preparers. According to the IRS, the "practice" of tax-return preparers consists of "preparing and signing tax returns and claims for refund, and other documents for submission to the Internal Revenue Service." 31 C.F.R. § 10.3(f)(2).

To be sure, "preparing and signing tax returns" could be considered a "practice" of sorts, particularly if the tax-return preparer is providing advice or making judgment calls about a taxpayer's liability. But Section 330 does not regulate the act of "practice" in the

abstract. The statute instead addresses "practice . . . *before the Department of the Treasury*." Although the exact scope of "practice before" a court or agency varies depending on the context, to "practice before" a court or agency ordinarily refers to practice during an investigation, adversarial hearing, or other adjudicative proceeding. *See, e.g.*, 35 U.S.C. § 32 (discussing "practice before the Patent and Trademark Office"); 26 U.S.C. § 7452 (practice before the tax court); 15 U.S.C. § 78d-3 ("Appearance and practice before" the SEC).

That is quite different from the process of filing a tax return. As the Supreme Court has explained, "[t]he Federal tax system is basically one of self-assessment, whereby each taxpayer computes the tax due and then files the appropriate form of return along with the requisite payment." *United States v. Galletti*, 541 U.S. 114, 122 (2004) (internal quotation marks omitted). Even when the IRS disagrees with a taxpayer's determination of the taxes due, the tax-return preparer is not invited to present any arguments or advocacy in support of the taxpayer's position. Instead, the IRS conducts its own ex parte, non-adversarial assessment of the taxpayer's liability. *See* 26 C.F.R. § 601.104(c); 26 U.S.C. § 6201-6204. Not until a return is selected for an audit, or the taxpayer appeals the IRS's proposed liability adjustments, does a taxpayer designate a representative to act on his or her behalf. *See* 26 U.S.C. § 7521 (procedures for "taxpayer interviews" during audits); 26 C.F.R. § 601.103(c), 601.106(c) (representation of taxpayers at appeals "conferences"). All of this underscores that tax-return preparers do not

practice *before the IRS* when they simply assist in the preparation of someone else's tax return.

The meaning of "practice . . . before the Department" in Section 330(a)(1) is further illustrated by the next subsection of the statute, Section 330(a)(2), which provides that the Secretary may:

> before admitting a representative to practice, require that the representative demonstrate –
>
> (A) good character;
>
> (B) good reputation;
>
> (C) necessary qualifications to enable the representative to provide to persons valuable service; *and*
>
> (D) competency to advise and assist persons *in presenting their cases*.

31 U.S.C. § 330(a)(2) (emphases added). With respect to the last clause of Section 330(a)(2)(D) – the reference to "presenting their cases" – the District Court succinctly and cogently explained: "Filing a tax return would never, in normal usage, be described as 'presenting a case.' At the time of filing, the taxpayer has no dispute with the IRS; there is no 'case' to present. This definition makes sense only in connection with those who assist taxpayers in the examination and appeals stages of the process." *Loving v. IRS*, 917 F. Supp. 2d 67, 74 (D.D.C. 2013).

In trying to sidestep the import of the Section 330(a)(2)(D) language, the IRS does not contend that preparing a tax return constitutes "presenting" a

"case." (Some outside commentators take that view, but the IRS does not.) Rather, the IRS says that "presenting their cases" is irrelevant because the listed criteria in Section 330(a)(2) should be read disjunctively as if they were connected by an "or" instead of an "and." *See* IRS Br. 37-38, Reply Br. 10-12. According to the IRS, not all of the criteria in Section 330(a)(2) apply to all persons regulated under that Section.

That is not a persuasive argument. Most obviously, the statute uses the conjunctive "and" – not the disjunctive "or" – when listing the various requirements, a strong indication that Congress did not intend the requirements as alternatives.

The IRS's insistence that the criteria in Section 330(a)(2) must be read as alternatives is further undermined by reference to the language of Section 330's predecessor statute. The provisions now codified as Section 330(a)(2)(A)-(D) originally authorized the Secretary of the Treasury to require that representatives were "of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and *otherwise* competent to advise and assist such claimants in the presentation of their cases." Act of July 7, 1884, ch. 334, sec. 3, 23 Stat. 258, 258-59 (emphasis added). The use of the word "otherwise" clearly indicates that, as originally formulated, the language now contained in Section 330(a)(2)(A)-(C) is to be read in conjunction with, and in terms of, the presentation of cases. That original language matters, particularly because Congress, when it adopted the

current streamlined language in 1982, stated that it intended to do so "without substantive change." *See* Pub. L. No. 97-258, 96 Stat. 877, 877 (1982).

To be sure, by their plain terms, the four requirements in Section 330(a)(2) are somewhat overlapping, as the IRS notes. But that is not a reason for changing "and" to "or." After all, some overlap is common in laws of this kind that set forth qualifications to obtain a government benefit or license. And more broadly, lawmakers, like Shakespeare characters, sometimes employ overlap or redundancy so as to remove any doubt and make doubly sure. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 934-35 (2013). Interpreting Section 330(a)(2) to have some modest overlap is far more reasonable than interpreting the statute, as the IRS does, to mean "or" when it says "and."

It is true, as the IRS points out, that the IRS's authority under Section 330(a)(2)(D) to require competence in "presenting their cases" is discretionary; the statute provides that the Secretary "may" do so. So we should not and do not over-rely on this contextual point. We merely think that Section 330(a)(2)(D) adds at least some color to the overall statutory picture here: On balance, it suggests that Congress, when it enacted Section 330(a)(2), envisioned that practice before the agency would involve traditional adversarial proceedings.

Third is the history of Section 330. The language now codified as Section 330 was originally enacted in 1884 as part of a War Department appropriation for "horses and other property lost in the military service." Act of July 7, 1884, ch. 334, sec. 3, 23 Stat. 258. It stated:

> [T]he Secretary of the Treasury may prescribe rules and regulations governing the recognition *of agents, attorneys, or other persons representing claimants before his Department*, and may require of such persons, agents and attorneys, before being recognized as representatives of claimants, that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and *otherwise* competent to advise and assist such claimants *in the presentation of their cases*.

Id. at 258-59 (emphases added).

That original language plainly would not encompass tax-return preparers. Even after tax-return preparation became a significant industry, moreover, Congress did not broaden the language. On the contrary, when Congress re-codified the statute in 1982, Congress simplified the phrase "agents, attorneys, or other persons representing claimants," to the current "representatives of persons." But importantly, as we have noted, Congress made clear *in the statute itself* that it intended no change to the statute's scope: The title of the amending legislation states that the 1982 Act was designed "[t]o revise, codify, and enact" the amended provisions "*without*

substantive change." *See* Pub. L. No. 97-258, 96 Stat. 877, 877 (1982) (emphasis added).

The fact that Congress used the words "agents," "attorneys," "claimants," "otherwise," and "presentation of their cases" in the original version of the statute, and that Congress then expressly stated in the statute itself that it intended no change in meaning when it streamlined the statute in 1982, further indicates that the statute contemplates representation in a contested proceeding, not simply assistance in preparing a tax return.

Fourth is the broader statutory framework. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Roberts v. Sea-Land Services, Inc.*, 132 S. Ct. 1350, 1357 (2012) (internal quotation marks omitted). Yet accepting the IRS's view of Section 330(a)(1) would effectively gut Congress's carefully articulated existing system for regulating tax-return preparers.

Over the years, Congress has enacted a number of targeted provisions specific to tax-return preparers, covering precise conduct ranging from a tax-return preparer's failing to sign returns to knowingly understating a taxpayer's liability. *See, e.g.*, 26 U.S.C. §§ 6694, 6695, 6713. Each of those statutory proscriptions comes with corresponding civil penalties. Congress has continued to revise those statutes. *See, e.g.*, Pub. L. No. 112-41, § 501(a), 125 Stat. 428, 459 (2011) (amending 26 U.S.C. § 6695(g) to increase penalties).

Under the IRS's view here, however, all of Congress's statutory amendments would have been unnecessary. The IRS, by virtue of its heretofore undiscovered carte blanche grant of authority from Section 330, would already have had free rein to impose an array of penalties on any tax-return preparer who "is incompetent," "is disreputable," "violates regulations prescribed under" Section 330, or "with intent to defraud, willfully and knowingly misleads or threatens the person being represented or a prospective person to be represented." 31 U.S.C. § 330(b). And that would have already covered all (or virtually all) of the conduct that Congress later spent so much time specifically targeting in individual statutes regulating tax-return preparers.

It is true that the views or understanding of later Congresses – such as those Congresses that enacted the targeted statutes regulating tax-return preparers – are not dispositive and sometimes can be a hazardous basis for interpreting the meaning of an earlier enacted statute such as Section 330. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185 (1994). That said, as the Supreme Court has reasoned in similar circumstances, we find at least some significance in the fact that multiple Congresses have acted as if Section 330 did not extend so broadly as to cover tax-return preparers. As the Supreme Court has stated, "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). So it is here.

Fifth is the nature and scope of the authority being claimed by the IRS. The Supreme Court has stated that courts should not lightly presume congressional intent to implicitly delegate decisions of major economic or political significance to agencies. *See Brown & Williamson*, 529 U.S. at 160 ("we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion").

If we were to accept the IRS's interpretation of Section 330, the IRS would be empowered for the first time to regulate hundreds of thousands of individuals in the multi-billion dollar tax-preparation industry. Yet nothing in the statute's text or the legislative record contemplates that vast expansion of the IRS's authority. This is the kind of case, therefore, where the *Brown & Williamson* principle carries significant force. Here, as in *Brown & Williamson*, we are confident that the enacting Congress did not intend to grow such a large elephant in such a small mousehole. In short, the *Brown & Williamson* principle strengthens the conclusion that Section 330 does not encompass tax-return preparers.

Sixth is the IRS's past approach to this statute. Until 2011, the IRS never interpreted the statute to give it authority to regulate tax-return preparers. Nor did the IRS ever suggest that it possessed this authority but simply chose, in its discretion, not to exercise it. In 2005, moreover, the head of the IRS's Criminal Investigation Division testified to Congress that "[t]ax return preparers are not deemed as individuals who represent individuals before the IRS."

Fraud in Income Tax Return Preparation: Hearing Before the Subcommittee on Oversight of the House Committee on Ways and Means, 109th Congress (2005) (testimony of Nancy J. Jardini). At the same hearing, the National Taxpayer Advocate – the government official who acts as a kind of IRS ombudsperson – stated to Congress that "the IRS currently has no authority to license preparers or require basic knowledge about how to prepare returns." *Id.* (testimony of Nina E. Olson). The IRS issued a guidance document in 2009 that likewise emphasized that "[j]ust preparing a tax return [or] furnishing information at the request of the IRS . . . is not practice before the IRS. These acts can be performed by anyone." Practice Before the IRS and Power of Attorney, IRS Publication 947, at 2 (April 2009).

The IRS is surely free to change (or refine) its interpretation of a statute it administers. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). But the interpretation, whether old or new, must be consistent with the statute. And in the circumstances of this case, we find it rather telling that the IRS had never before maintained that it possessed this authority. *Cf. Financial Planning Association v. SEC*, 482 F.3d 481, 490 (D.C. Cir. 2007) ("an additional weakness" in SEC's interpretation of statute was that it "flouts six decades of consistent SEC understanding of its authority under" statute). In light of the text, history, structure, and context of the statute, it becomes apparent that the IRS never before adopted its current interpretation for a reason: It is incorrect.

* * *

In our judgment, the traditional tools of statutory interpretation – including the statute's text, history, structure, and context – foreclose and render unreasonable the IRS's interpretation of Section 330. Put in *Chevron* parlance, the IRS's interpretation fails at *Chevron* step 1 because it is foreclosed by the statute. In any event, the IRS's interpretation would also fail at *Chevron* step 2 because it is unreasonable in light of the statute's text, history, structure, and context. It might be that allowing the IRS to regulate tax-return preparers more stringently would be wise as a policy matter. But that is a decision for Congress and the President to make if they wish by enacting new legislation. The "role of this Court is to apply the statute as it is written – even if we think some other approach might accord with good policy." *Burrage v. United States*, __ S. Ct. __ (2014) (internal quotation marks and brackets omitted). The IRS may not unilaterally expand its authority through such an expansive, atextual, and ahistorical reading of Section 330. As the Supreme Court has directed in words that are right on point here, the "fox-in-the-henhouse syndrome is to be avoided . . . by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013). We affirm the judgment of the District Court.

So ordered.

APPENDIX

§ 330. Practice before the Department

(a) Subject to section 500 of title 5, the Secretary of the Treasury may —

(1) regulate the practice of representatives of persons before the Department of the Treasury; and

(2) before admitting a representative to practice, require that the representative demonstrate —

(A) good character;

(B) good reputation;

(C) necessary qualifications to enable the representative to provide to persons valuable service; and

(D) competency to advise and assist persons in presenting their cases.

(b) After notice and opportunity for a proceeding, the Secretary may suspend or disbar from practice before the Department, or censure, a representative who —

(1) is incompetent;

(2) is disreputable;

(3) violates regulations prescribed under this section; or

(4) with intent to defraud, willfully and knowingly misleads or threatens the person

being represented or a prospective person to be represented.

The Secretary may impose a monetary penalty on any representative described in the preceding sentence. If the representative was acting on behalf of an employer or any firm or other entity in connection with the conduct giving rise to such penalty, the Secretary may impose a monetary penalty on such employer, firm, or entity if it knew, or reasonably should have known, of such conduct. Such penalty shall not exceed the gross income derived (or to be derived) from the conduct giving rise to the penalty and may be in addition to, or in lieu of, any suspension, disbarment, or censure of the representative.