CASE NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 17-5204

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRITTANY MONTROIS, CLASS OF MORE THAN 700,000 SIMILARLY SITUATED INDIVIDUALS AND BUSINESSES, *et al.*,
Plaintiffs-Appellees

v.

UNITED STATES OF AMERICA,
Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

OPENING BRIEF FOR THE APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. The parties, intervenors, and amici appearing in the District Court for the District of Columbia and in this Court are as follows:

Joseph Henchman, Plaintiff-Appellee

Brittany Montrois, Plaintiff-Appellee

Adam Steele, Plaintiff-Appellee

United States of America, Defendant-Appellant

B. Rulings Under Review. The rulings under review are (1) an order that the District Court (Hon. Royce C. Lamberth) entered on June 1, 2017 (J.A.200-01) granting in part, and denying in part, the parties' cross-motions for summary judgment, and (2) the final judgment and permanent injunction that the court entered on July 10, 2017 (J.A.202-06). The supporting opinion is published at 260 F. Supp. 3d 52 (D.D.C. 2017).

C. Related Cases. This case was not previously before this Court or any other appellate court. Counsel are not aware of any related cases currently pending in this Court or in any other court, as provided in D.C. Cir. R. 28(a)(1)(C).

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GLOSSARY

Acronym	Definition
Doc.	Documents filed in the District Court, as numbered by the Clerk of that Court
IOAA	Independent Offices Appropriations Act, 31 U.S.C. § 9701
I.R.C.	Internal Revenue Code of 1986 (26 U.S.C.)
IRS	Internal Revenue Service
J.A.	Joint appendix
PTIN	Preparer tax identification number
RTRP	Registered tax return preparer
SSN	Social security number

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STATEMENT OF JURISDICTION

On August 7, 2015, plaintiffs filed an amended class action complaint challenging regulations issued by the Department of the Treasury and the Internal Revenue Service[1] that (1) require tax return

[1] We interchangeably refer herein to the Department of the Treasury and the IRS.

preparers (*i.e.*, individuals who prepare tax returns for compensation) to obtain a preparer tax identification number ("PTIN") and provide the PTIN on prepared returns; and (2) impose a fee to obtain or renew a PTIN. (J.A.12-29.)[2] Ruling on the parties' cross-motions for summary judgment, the District Court upheld the PTIN requirement as a valid exercise of authority that Congress delegated to the IRS under Section 6109(a)(4) of the Internal Revenue Code of 1986 (26 U.S.C.) ("I.R.C."). The court further held, however, that the PTIN user fee was invalid under the Independent Offices Appropriations Act ("IOAA"), 31 U.S.C. § 9701. The Government has appealed, but the plaintiffs have not.

This appeal thus solely concerns whether the IOAA authorizes the IRS to charge return preparers a fee to obtain and renew their respective PTINs.[3] The District Court had jurisdiction over that issue

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[2] "J.A." references are to the joint appendix submitted concurrently with this brief. "Doc." references are to the documents filed in the District Court, as numbered by the clerk of that court.

[3] The District Court originally deferred consideration of plaintiffs' additional claim that the amount of the PTIN user fee is excessive. (Doc. 52.) Because the court subsequently held that the IRS may not charge *any* fee for issuing or renewing a PTIN, the court ultimately had no occasion to address the propriety of the amount of the fee. (J.A.178 n.1.) Should this Court rule in favor of the Government on appeal, the case should be remanded to have the District Court address the

under 28 U.S.C. § 1331. The court entered a final judgment and permanent injunction on July 10, 2017 (J.A.202-06), which disposed of all claims of the parties. On September 6, 2017, the Government filed a timely notice of appeal (J.A.207-08). Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the District Court erred as a matter of law in holding that the Independent Offices Appropriations Act ("IOAA"), 31 U.S.C. § 9701, did not authorize the IRS to charge a user fee to tax return preparers for issuing or renewing a preparer tax identification number ("PTIN").

STATUTES AND REGULATIONS

Pursuant to D.C. Cir. R. 28(a)(5), pertinent statutes and regulations are in an addendum hereto.

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plaintiffs' alternative claim that the amount of the PTIN user fee is excessive.

STATEMENT OF THE CASE

A. Statutory and Regulatory Context

1. Introduction to tax return preparers

The Internal Revenue Code defines "tax return preparer" as "any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by this title or any claim for refund of tax imposed by this title," including a person who prepares "a substantial portion" thereof.[4] I.R.C. § 7701(a)(36)(A). Some tax return preparers are licensed professionals – *e.g.*, lawyers and certified public accountants – or Enrolled Agents with the IRS (collectively, "credentialed preparers").[5] Tax return preparers who have no such qualifications are referred to herein as "uncredentialed preparers." Credentialed preparers generally may represent their clients on any tax matter before the IRS, and long have been subject to the requirements of Treasury Department Circular No. 230 (31 C.F.R., Subtitle A, Part 10), which governs practice before the

[4] For purposes of the PTIN requirement, "tax return preparer" is limited to individuals. 26 C.F.R. ("Treas. Reg.") § 1.6109-2(g).

[5] An individual may become an Enrolled Agent by passing a written examination or by virtue of his or her past service and technical experience as an IRS employee. 31 C.F.R. § 10.4.

IRS. Circular 230 imposes, for example, a duty to "exercise due diligence" in preparing tax returns and other documents submitted to the IRS, 31 C.F.R. § 10.22, as well as a competency requirement, 31 C.F.R. § 10.35.

In December 2009, following input from a variety of return preparation stakeholders, the IRS published a report, the *Return Preparer Review*. (J.A.65-121.) The Review observed "that our system of federal tax administration and a large number of taxpayers may be poorly served by some tax return preparers" (J.A.73), and made a number of recommendations to improve return preparation, including recommending that the IRS establish competency testing and continuing education requirements for all uncredentialed preparers (J.A.101-03). Section 6109(a)(4) of the Internal Revenue Code requires preparers to include an identifying number on prepared returns, and at the time of the Review, preparers could use a PTIN, a social security number ("SSN"), or both as that identifying number. The Review explained, however, that "[t]he use of more than one number by any

signing tax return preparer[6] . . . makes it more difficult for the IRS to collect accurate tax return preparer data and to identify an individual tax return preparer." (J.A.100.) The Review recommended that the IRS require all signing tax return preparers "to register and obtain a [PTIN]." (J.A.70.)

Following the Review, the IRS promulgated three regulations that the District Court here viewed as "clearly interrelated." (J.A.192.) In this case, plaintiffs challenged two of those regulations (collectively, the "PTIN regulations"), which were made final on September 30, 2010: (1) the regulation requiring that all tax return preparers (credentialed and uncredentialed) obtain a PTIN and provide it on prepared returns, and (2) the regulation imposing the PTIN user fee. 26 C.F.R. ("Treas. Reg.") §§ 1.6109-2, 300.13. As indicated, the District Court here upheld the regulation requiring return preparers to obtain and use a PTIN on their respective returns, but concluded that the regulation imposing a

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[6] A "signing tax return preparer" is the person "who has the primary responsibility for the overall substantive accuracy of the preparation of [a] return or claim for refund." Treas. Reg. § 301.7701-15(b)(1).

user fee for the PTIN was invalid because such fee was not authorized by the IOAA.

The third regulatory change that followed the Review is not directly at issue in this case, but we briefly discuss it here because the District Court nonetheless (and in the Government's view, incorrectly) found it to be highly relevant in determining the validity of the PTIN user fee. In that third regulatory change, the IRS required uncredentialed tax return preparers to become "registered tax return preparers" ("RTRPs"). 76 Fed. Reg. 32,286 (June 3, 2011) (codified at various parts of 31 C.F.R. part 10) ("RTRP regulations"). To qualify as an RTRP, a preparer was required to pass an initial competency exam, complete continuing education requirements, and satisfy certain ethical and suitability requirements. RTRPs, like all other return preparers, also were required to obtain and use a PTIN on their returns. 76 Fed. Reg. at 32,301, 32,303 (codified at 31 C.F.R. §§ 10.4, 10.6). The RTRP regulations were finalized on June 3, 2011, nearly nine months after the PTIN regulations. To allow for a transition period, however, the IRS issued Notice 2011-6, 2011-3 I.R.B. 315, in which it announced that individuals who obtained a PTIN (or provisional PTIN) and paid the

PTIN user fee could prepare returns until December 31, 2013, without becoming RTRPs.

In issuing the RTRP regulations, the IRS relied on 31 U.S.C. § 330, which grants the IRS authority to "regulate the practice of representatives of persons before the Department of the Treasury." In *Loving v. IRS*, 917 F. Supp. 2d 67 (D.D.C. 2013), the district court concluded that § 330 did not authorize the regulation of tax return preparers in the manner set out in the RTRP regulations and enjoined the IRS from enforcing those regulations. The district court in *Loving* subsequently clarified, however, that its injunction against the RTRP regulations did not invalidate the PTIN requirement, as "Congress has specifically authorized the PTIN scheme by statute," in § 6109(a)(4). *Loving v. IRS*, 920 F. Supp. 2d 108, 109 (D.D.C. 2013). The district court in *Loving* held only that the IRS could not restrict the issuance of PTINs only to those "authorized to practice" under § 330 – *i.e.*, to RTRPs and credentialed preparers. *Id.*

This Court affirmed the district court's invalidation of the RTRP regulations but had no reason to address – and, in fact, did not address – the PTIN requirement or the validity of the PTIN user fee under the

IOAA. *Loving v. IRS*, 742 F.3d 1013, 1015 (D.C. Cir. 2014). Moreover, in its opinion, this Court made clear that the conduct of return preparers remains fully subject to the scrutiny of the IRS under various provisions of the Internal Revenue Code (26 U.S.C.). *See id.* at 1020-21.

2. History of identifying numbers for tax return preparers

In 1976, Congress first mandated that an individual return preparer provide an identifying number – at that time, his or her SSN – on prepared returns. Tax Reform Act of 1976, Pub. L. 94-455 § 1203, 90 Stat. 1520, 1688-91; I.R.C. § 6109(a)(4) (1976). Having identified various "abuses" in the rapidly growing industry of tax return preparation, Congress enacted this requirement "to enable the IRS to identify all returns prepared by a specific individual in cases where the IRS has discovered some returns improperly prepared by that individual." H.R. Rep. No. 94-658 at 274, 277 (1975).

Congress later became "concerned that inappropriate use might be made of a preparer's social security number." S. Rep. No. 105-174, at 106 (1998). *See also* Staff of Joint Comm. on Taxation, 105th Cong., General Explanation of Tax Legislation Enacted in 1998 at 131 (Nov. 24, 1998) (same). Congress, therefore, amended § 6109(a) in 1998 and

granted the IRS authority to prescribe an identifying number, other than the SSN, for return preparers. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206 § 3710, 112 Stat. 685, 779. Section 6109(a)(4) now provides that "[w]hen required by regulations prescribed by the Secretary . . . [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." I.R.C. § 6109(a)(4). And § 6109(d) authorizes the Secretary to specify an identifying number other than the SSN for purposes of the Internal Revenue Code. A tax return preparer who fails to include the prescribed identifying number on any prepared return is subject to a $50 penalty for each such failure, up to a maximum of $25,000 in a calendar year, I.R.C. § 6695(c), and also is subject to being enjoined in a civil action from continuing to prepare returns. *See* I.R.C. § 7407.

Responding to Congress's interest in protecting preparers' SSNs, the IRS promptly issued temporary regulations on August 12, 1999, and then final regulations on August 14, 2002, that allowed return preparers to choose the identifying number they provided on prepared

returns: an SSN or the newly created PTIN. 64 Fed. Reg. 43,910 (Aug. 12, 1999) (to be codified at Treas. Reg. §§ 1.6109-2, 1.6109-2T); 67 Fed. Reg. 52,862 (Aug. 14, 2002) (to be codified at Treas. Reg. §§ 1.6109-2A, 1.6109-2). In announcing the new form for requesting a PTIN, the IRS explained that the 1998 amendment authorizing the creation of the PTIN "responds to concerns that a preparer's SSN could be used inappropriately by clientele and others having access to a prepared return." (J.A.123.)

3. Preparer tax identification number ("PTIN") requirement

On March 26, 2010, the IRS issued a notice of proposed rulemaking, which proposed amendments to Treas. Reg. § 1.6109-2 that would require all tax return preparers to have a PTIN and to use that number exclusively, rather than the SSN, as the identifying number on prepared returns. 75 Fed. Reg. 14,539 (Mar. 26, 2010). That notice stated that "[t]he *principal objective* of the proposed regulations is to enable the IRS to more accurately identify tax return preparers and the tax returns and refund claims associated with each tax return preparer." *Id.* at 14,542 (emphasis added). In accord with Congress's purpose in amending § 6109(a) – that is, to protect SSNs – the IRS also

stated that the PTIN requirement would "help maintain the confidentiality of SSNs." *Id.* at 14,541. In addition to these benefits from the PTIN requirement, standing alone, the IRS recognized the separate role that the PTIN could play regarding the anticipated RTRP program.[7] *See, e.g.*, *id.* Following *Loving*, the RTRP program was never fully implemented, and such benefits have not come to fruition.

The final regulation establishing the PTIN requirement was published on September 30, 2010. 75 Fed. Reg. 60,309 (Sept. 30, 2010) (codified at Treas. Reg. § 1.6109-2).[8] As with the notice of proposed rulemaking, the preamble accompanying the final regulation identified benefits that stemmed from the PTIN requirement, standing alone, as well as expected *future* benefits from the combination of the PTIN requirement with the anticipated RTRP program. In the former category, the PTIN requirement was "needed to identify tax return

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[7] As used herein, "RTRP program" refers to the RTRP regulations (76 Fed. Reg. 32,286) invalidated in *Loving*. The IRS's voluntary Annual Filing Season Program, announced in July 2014, is not at issue here. *See* Rev. Proc. 2014-42, 2014-29 I.R.B. 192 (announcing the new voluntary program and clarifying that "the RTRP program is no longer in effect").

[8] PTINs must be renewed annually, for which the IRS also charges a user fee under the IOAA. *See* Treas. Reg. § 300.13(b).

preparers and the tax returns and claims for refund that they prepare" and "to aid the IRS's oversight of tax return preparers." *Id.* at 60,313. In the latter category, in the context of the future RTRP program, the PTIN requirement would be "intended to ensure that tax return preparers are competent, trained, and conform to rules of practice." *Id.* To obtain a PTIN, the regulation provided that a person must be a credentialed preparer or an RTRP. *Id.* at 60,315 (codified at Treas. Reg. § 1.6109-2(d)). But, as mentioned above, the IRS deferred that restriction until December 31, 2013. By that time, the district court in *Loving* had held that the IRS could continue to enforce the PTIN requirement, but could not restrict the issuance of PTINs solely to credentialed preparers and RTRPs. Following that order, the IRS severed the planned connection between the PTIN requirement and the RTRP program. Accordingly, after *Loving*, the IRS began issuing PTINs to almost every person who requested one, as well as similarly granting almost all requests for renewals of existing PTINs.[9]

[9] Not everyone is eligible to obtain a PTIN. For example, a person who has been enjoined from preparing tax returns, under I.R.C. § 7407, is not eligible to obtain a PTIN. In addition, the IRS will not issue a PTIN to an individual who is under 18 years of age, and those

In the notice-and-comment process, some commentators objected to the proposed requirement that individuals who prepare or assist in preparing all or substantially all of a tax return, but do not sign the return, would nonetheless be required to obtain a PTIN. 75 Fed. Reg. at 60,310. In the context of addressing this specific objection, the IRS explained that the final regulations "are intended to address two overarching objectives," one of which was directly related to anticipated benefits from the combination of the PTIN requirement with the future RTRP program. *Id.* The District Court looked to this text in support of its conclusion that the PTIN requirement largely focused on the RTRP program, and thus was affected by *Loving* (J.A.193), but this is only part of the picture. Immediately after describing these "overarching objectives," the IRS explained that the broader PTIN requirement was maintained in the final regulation because "[i]t is critical to the IRS's

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requesting a PTIN must also pass an identity validation check. Thus, with limited exceptions, every adult who wants a PTIN can obtain one by following the IRS's procedures for making such a request and paying the user fee.

It appears from the plaintiffs' filings in the District Court that there are approximately 700,000 return preparers who have obtained PTINs, which amounts to less than one-fourth of one percent of the 300 million people in the United States.

tax administration efforts that, *in the first instance*, the IRS is readily able to identify all individuals who are involved in preparing all or substantially all of a tax return or claim for refund." *Id.* at 60,310 (emphasis added). Confirmation of preparers' "continuing competency and suitability" – *vis-à-vis* the anticipated RTRP program – was an "[a]dditional[]" benefit. *Id.* The IRS further explained that "[t]he final regulations will also benefit taxpayers and tax return preparers and help maintain the confidentiality of SSNs." *Id.* at 60,309.

4. PTIN user fee

In tandem with implementing the PTIN requirement, the IRS promulgated the regulation establishing the PTIN user fee. In doing so, the Government relied on authority under the Independent Offices Appropriations Act ("IOAA"), 31 U.S.C. § 9701.

a. The Independent Offices Appropriations Act ("IOAA"), 31 U.S.C. § 9701

In the IOAA, Congress expressed its "sense . . . that each service or thing of value provided by an agency . . . to a person . . . is to be self-sustaining to the extent possible." 31 U.S.C. § 9701(a). Accordingly, "[t]he 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). Circular A-25, issued in 1993 by the Office of Management and Budget, establishes guidelines for assessing user fees under 31 U.S.C. § 9701. 58 Fed. Reg. 38,142 (July 15, 1993). The Office of Management and Budget explained that "[a] user charge . . . will be assessed against each identifiable recipient for special benefits derived from Federal activities beyond those received by the general public." *Id.* at 38,144. Agencies are required to review the user charges biennially. *Id.* at 38,146 § 8.e.

In a case decided before the 1993 update to Circular A-25, the Supreme Court viewed the prior version of Circular A-25, issued in 1959, as providing "the proper construction of the [IOAA]." *Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345, 350-51 (1974). The Court extensively quoted from that document in *New England Power*, including the explanation that, under the IOAA, "'a special benefit will be considered to accrue and a charge should be imposed when'" an individual receives from the Government, for example, "'a passport.'" *Id.* at 349 n.3 (quoting Circular A-25 (1959)). The current iteration of Circular A-25 similarly provides that a "special benefit" for

which a fee should be charged includes "receiving a passport." 58 Fed. Reg. at 38,144.

b. Regulations establishing PTIN user fee

On July 23, 2010, relying on authority under the IOAA, the IRS issued a notice of proposed rulemaking and notice of public hearing, regarding its proposal to charge a fee, initially $50 plus a vendor fee, to obtain or renew a PTIN (the "PTIN user fee"). 75 Fed. Reg. 43,110 (July 23, 2010). The final regulations establishing the PTIN user fee were published on September 30, 2010. 75 Fed. Reg. 60,316 (Sept. 30, 2010) (originally codified at Treas. Reg. § 300.9, now at § 300.13). The IRS again recognized the role that the PTIN requirement played in "identity protection," when compared with return preparers using their SSNs as the identifying number that § 6109(a)(4) requires. *Id.* at 60,318.

The IRS explained that "[a] PTIN both confers a special benefit on an identifiable recipient and is a service or thing of value to a tax return preparer. . . . 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." *Id.* at 60,317. At that time – before the RTRP regulations were issued, and before they were invalidated in

Loving – the IRS anticipated that, in the future, only credentialed preparers and RTRPs would be eligible for a PTIN. *See id*. Although the IRS will now issue a PTIN to nearly anyone who requests one, the underlying reasoning for charging a user fee remains the same: without a PTIN, one may not lawfully prepare returns for compensation.

In 2015, as part of a regular review of the PTIN user fee, the IRS recalculated the cost of providing a PTIN. On October 30, 2015, the IRS issued a temporary regulation reducing the PTIN user fee to $33, plus a vendor fee, as well as a notice of proposed rulemaking to the same effect. 80 Fed. Reg. 66,792 (Oct. 30, 2015) (codified at Treas. Reg. §§ 300.13, 300.13T); 80 Fed. Reg. 66,851 (Oct. 30, 2015). In the preamble accompanying the temporary regulation, the IRS reiterated that "[t]he ability to prepare tax returns and claims for refund for compensation is a special benefit, for which the IRS may charge a user fee." 80 Fed. Reg. at 66,794. In other words, "[b]ecause the ability to prepare tax returns and claims for refund for compensation is limited to individuals who have a PTIN, the provision of a PTIN confers a special benefit." 80 Fed. Reg. at 66,852. The IRS further explained that the PTIN requirement "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 final regulations reducing the PTIN user fee to $33 were published on August 10, 2016. 81 Fed. Reg. 52,766 (Aug. 10, 2016) (codified at Treas. Reg. § 300.13).

B. Proceedings in the District Court

The three named class plaintiffs in this case either regularly prepare federal income tax returns for compensation or practice tax law, and each of them has paid the PTIN user fee. (J.A.13-14, 31.) On September 8, 2014, they filed their initial complaint, and on June 30, 2015, the District Court consolidated this case with another matter and appointed interim class counsel. (Docs. 1, 37, 38.) On August 7, 2015, plaintiffs filed an amended complaint (J.A.12-29), in which they sought, on behalf of a class, (1) a declaratory judgment that the IRS does not have the authority to require the use of a PTIN or to charge the PTIN user fee, (2) a declaratory judgment that the fee is excessive, and (3) "[r]estitution or return" of all PTIN fees, or of any fees that the court found to be excessive. (J.A.26.) On August 8, 2016, the District Court certified a 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.'"[10] (Doc. 63.)

The parties filed cross-motions for partial summary judgment on September 7, 2016, with respect to whether the IRS has the authority to impose the PTIN requirement and to charge a PTIN user fee. On June 1, 2017, the District Court resolved the cross-motions, upholding the PTIN requirement but concluding that the IRS may not charge the PTIN user fee. (J.A.200-01.) The court enjoined the Government from charging the fee and ordered it to refund to members of the class all PTIN user fees paid by them from September 1, 2010, to the present. (J.A.202-06.)

The court found the PTIN requirement itself to be lawful under both *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Motor Vehicle Manufacturers Ass'n of U.S., Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983). (J.A.190-91.) Regarding the PTIN requirement, the District Court held that "plaintiffs' arguments fail step one of *Chevron*," because I.R.C. § 6109(d) "specifically says that the Secretary has the authority to specify the

[10] Mr. Buckley and Mr. Rizek are among counsel for the plaintiffs.

required identifying number to be used on prepared tax returns." (J.A.190.) The District Court observed that it "must give effect to the unambiguous intent of Congress that the Secretary may require the use of such a number." (*Id.*)

Turning to the inquiry under *State Farm*, the District Court held that "the decision to require the use of PTINs was not arbitrary or capricious" because the IRS "has articulated satisfactory explanations for its actions." (*Id.*) As the court observed, the IRS "offered several justifications" for the PTIN requirement. (*Id.*) To maintain effective oversight, the IRS has a need to "identify tax return preparers," and "the use of a single identifying number [is] critical to such effective oversight" because, *inter alia*, it aids the IRS in identifying return preparers and matching them with the returns they prepare. (*Id.*) The court found that there is a "rational connection" between the PTIN requirement and the "stated rationales" of "effective administration and oversight," and that the IRS did not commit other errors in promulgating the PTIN requirement. (J.A.190-91.) The District Court, accordingly, held that "the IRS was authorized to issue the regulations requiring tax return preparers to obtain PTINs." (J.A.191.)

As to the PTIN user fee, however, the District Court held that "PTINs do not pass muster as a 'service or thing of value'" under the IOAA. (J.A.192 (quoting 31 U.S.C. § 9701(a).) The court generally viewed the PTIN user fee in the shadow of the later-issued RTRP regulations that were invalidated in *Loving*. The court recognized that the PTIN regulations and the RTRP regulations "were issued separately and at different times" but nonetheless found them to be "clearly interrelated" because obtaining a PTIN was among the requirements to become an RTRP and because the PTIN regulations "indicate[d] a connection to the RTRP regulations." (J.A.192-93.)

Although the District Court readily upheld one regulation on tax return preparers (the requirement that they obtain and use PTINs), it nevertheless went on to state that this Court, in *Loving*, "concluded that the IRS does not have the authority to regulate tax return preparers" and "cannot impose a licensing regime with eligibility requirements on such people as it tried to do in the regulations at issue." (J.A.193.) The District Court recognized only one "stated rationale for requiring PTIN fees – to regulate tax return preparers" and stated that this Court's decision in *Loving* "removed" that rationale. (J.A.191.) Despite the

court's conclusion that the PTIN requirement is valid, the court held that the IRS "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" after *Loving*. (J.A.193.) The court further stated that "[t]he 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." (J.A.194.)

The court stated that, although agencies may charge fees for, *e.g.*, licenses, permits, and compliance tests, such cases "generally concern valid regulatory schemes, as opposed to the situation here where the regulatory scheme [presumably, the RTRP program] was struck down." (J.A.194-95.) The District Court viewed as critical the distinction between fees charged for licensing of regulated entities, versus fees for other services. "If tax return preparers were regulated entities required to obtain licenses," the court wrote, "this case would be very different . . . ." (J.A.197.) The court stated that it was "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." (*Id.*)

The court emphasized "that after *Loving*, anyone can obtain a PTIN," and that "[h]ypothetically, every member of the public" thus could have the benefit of preparing tax returns for others for compensation. (*Id.*) On this reasoning, the court concluded that there is "no special benefit for certain individuals not available to the general public." (*Id.*) Instead, as the court viewed it, any benefit that exists "inures to the IRS." (*Id.*)

The District Court rejected the Government's contention that a PTIN is a thing of value because it protects the confidentiality of preparers' SSNs. The court stated that this justification "is mentioned only briefly" in the regulation requiring the PTIN, and the court stated mistakenly that the issue was not mentioned at all in the PTIN user fee regulation. (J.A.198.) *But see* 75 Fed. Reg. at 60,318 (in the final regulation imposing the PTIN user fee, noting "the identity protection currently provided by PTINs," as compared to SSNs). The court observed that "the regulations fail to even state that SSNs were being

inadvertently disclosed or that their confidentiality was at risk" and concluded that, given the lack of "stated evidence in the administrative record," "[i]t is not at all clear that requiring PTINs was necessary for this reason." (*Id.*) The District Court stated that it would "not defer to these conclusory and unsupported justifications" and held that the IRS could not look to the protection of preparers' SSNs as justification for the PTIN user fee. (*Id.*)

The District Court acknowledged that the Eleventh Circuit and the Northern District of Georgia, the only courts to have previously addressed the issue, upheld the PTIN user fees. *Brannen v. United States*, 682 F.3d 1316 (11th Cir. 2012), *affirming* 2011 WL 8245026 (N.D. Ga. 2011); *Buckley v. United States*, 2013 WL 7121182 (N.D. Ga. 2013). The District Court declined to follow *Brannen*, however, because it was decided "prior to [the] 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." (J.A.196.) And it "disagree[d] with the *Buckley* court's finding that *Loving* . . . is entirely inapplicable because although the PTIN scheme

was authorized by a different statutory authority, it is . . . interrelated with the RTRP scheme." (J.A.197.)

The District Court later entered a final judgment and permanent injunction, ordering that (1) the IRS "may require the use of PTINs as the exclusive identifying number [for tax return preparers] under 26 U.S.C. § 6109(a)(4)"; (2) all PTIN user fees that have been paid were unlawful; (3) the IRS is permanently enjoined from charging PTIN user fees; and (4) upon the final resolution of this case, the IRS must refund all PTIN fees paid. (J.A.202-06.) The Government filed a motion to stay the permanent injunction (Doc. 84), which the District Court denied on December 18, 2017 (Doc. 94).

SUMMARY OF ARGUMENT

The District Court erred as a matter of law in holding that the IRS was not authorized by the IOAA to charge a fee for issuing or renewing a PTIN. Contrary to the District Court's conclusion, the PTIN is a "service or thing of value," and the IOAA authorizes the IRS to charge the PTIN user fee. A fee may be imposed under the IOAA "only for a service that confers a specific benefit upon an identifiable beneficiary." *Engine Mfrs. Ass'n v. E.P.A.*, 20 F.3d 1177, 1180 (D.C. Cir.

1994). The issuance of a PTIN meets this test, as the Eleventh Circuit held in *Brannen*, 682 F.3d at 1319, in approving the PTIN user fee at issue in that case.

The PTIN provides a special benefit to tax return preparers because, as even the District Court held, it is required by statute and regulation to lawfully prepare returns for compensation. If a return preparer does not obtain a PTIN and provide it on returns he or she prepares, the preparer is subject to penalties of up to $25,000 per year, I.R.C. § 6695(c), as well as to being enjoined from preparing returns, I.R.C. § 7407. Return preparers comprise only a tiny fraction of the U.S. population, and the members of the general public who are not preparers have no occasion to request PTINs and receive no direct benefit from their issuance to those individuals who are return preparers. The issuance of PTINs thus provides a special benefit to the recipients of the PTINs, and therefore the IOAA authorizes the IRS to charge a user fee for PTINs. The PTIN also helps to protect preparers' SSNs, which was Congress's purpose in authorizing the IRS to create and mandate the use of the PTIN. The IRS did not err – much less act

unreasonably, arbitrarily, or capriciously – in concluding that the PTIN confers a special benefit and is authorized under the IOAA.

The District Court suggested that the IOAA limits fees to licenses and regulated entities, but the scope of the IOAA is not so restricted, as illustrated in this Court's opinion in *Ayuda, Inc. v. Attorney General*, 848 F.2d 1297, 1300 (D.C. Cir. 1988), where the Court upheld fees charged for filing documents in the administrative adjudication of immigration matters. But, even if the IOAA were limited in this way, return preparers are regulated entities, to the extent that they are subject to a regulation (upheld by the District Court) that requires them to obtain a PTIN, and are subject to penalties under the Internal Revenue Code for engaging in certain proscribed conduct.

Although almost anyone may obtain a PTIN, only a small portion of the population requests one, and the IRS does not issue PTINs to members of the general public who have not applied for them. In this regard, the issuance of PTINs is analogous to the issuance of passports – almost all citizens are eligible for passports, but only a fraction of the population actually requests one. Nevertheless, the Supreme Court has cited the issuance of a passport as an example of a special benefit

conferred on the recipient thereof for which a user fee may be charged under the IOAA. Contrary to the District Court's view, the IOAA thus does not require that the service or benefit at issue be available only to a limited subset of individuals.

In concluding that the IOAA does not authorize the PTIN user fee, the District Court relied in large part on this Court's decision in *Loving*, in which the Court invalidated different regulations (the RTRP regulations) because it concluded that the IRS lacked authority under a different statute (31 U.S.C. § 330) to issue the RTRP regulations. In *Loving*, this Court did not address, and had no reason to address, the PTIN requirement or user fee. Moreover, although the IRS anticipated that there would be some benefit from combining the PTIN requirement with the anticipated RTRP program, the IRS articulated independent justifications for the PTIN, as the District Court implicitly recognized in upholding the PTIN requirement itself. Following *Loving*, the IRS severed the connection between the PTIN regulatory scheme and the invalidated RTRP regulations. The District Court fundamentally erred by relying on *Loving* as the basis for its holding that the IRS is not authorized by the IOAA to charge a PTIN user fee.

The District Court's decision that the IOAA does not authorize the IRS to charge a fee for issuing or renewing a PTIN is erroneous and should be reversed, with the case remanded for further proceedings.

ARGUMENT

The IOAA authorizes the PTIN user fee because the PTIN provides a "special benefit" to tax return preparers, and is a "service or thing of value" under the IOAA

Standard of review

This Court reviews the District Court's conclusions on summary judgment *de novo*, and, as this is a case in which the District Court reviewed an agency action under the Administrative Procedure Act, this Court "review[s] the administrative action directly according no particular deference to the judgment of the District Court." *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 440-41 (D.C. Cir. 2012) (internal quotation marks omitted). Such review is "limited to assessing the record that was actually before the agency." *Id.* at 441.

A. The framework for review of administrative action

The District Court held that the PTIN does not provide a special benefit and is not a "service or thing of value" under the IOAA. (J.A.199.) It is unclear whether, in doing so, the District Court held

that the IRS's conclusion to the contrary was "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," under 5 U.S.C. § 706(2)(C), or was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," under § 706(2)(A). Under the circumstances of this case, as a practical matter, this likely is a distinction without a difference. The Government submits that this ruling is incorrect, whether this Court employs *de novo* review; an analysis under § 706(2)(C), according to *Chevron*, 467 U.S. at 842-43; or an analysis under § 706(2)(A), according to *State Farm*, 463 U.S. at 43.

With respect to the applicability of *Chevron*, the IOAA explicitly allows agencies to "prescribe regulations establishing the charge for a service of thing of value provided by the agency." 31 U.S.C. 9701(b). Such "express congressional authorization[] to engage in the process of rulemaking" is, the Supreme Court has commented, "a very good indicator of delegation meriting *Chevron* treatment." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). *See also id.* at 230.

As the Court is no doubt aware, the analysis under the *Chevron* framework proceeds in two steps. First, the Court asks "whether Congress has directly addressed the precise question at issue," *Chevron*,

467 U.S. at 842, *i.e.*, whether Congress has "unambiguously foreclosed the agency's statutory interpretation," *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 659 (D.C. Cir. 2011) (internal quotation marks omitted). The inquiry at *Chevron* step one "is strictly confined, in that the Supreme Court intended that the term 'precise question at issue' be interpreted tightly." *Soc'y of Plastics Indus., Inc. v. I.C.C.*, 955 F.2d 722, 727 (D.C. Cir. 1992). The IOAA does not, of course, address the "precise question," "strictly confined," as to whether the PTIN is a "service or thing of value" under the IOAA, and the District Court did not conclude otherwise.

As the IOAA does not "unambiguously foreclose" the IRS's conclusion that the PTIN provides a special benefit, and thus is a "service or thing of value," this Court should proceed to the second *Chevron* step, 467 U.S. at 843-44:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Review under *Chevron* step two often "overlaps" with the Court's "arbitrary and capricious review under 5 U.S.C. § 706(2)(A)." *Pharm.*

Research & Mfrs. of Am. v. FTC, 790 F.3d 198, 204 (D.C. Cir. 2015). In the Government's view, it makes no difference in this case whether the Court views the PTIN user fee through the lens of *Chevron* or *State Farm* because, under the circumstances here, the frameworks are "functionally equivalent" and "produce the same result." *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996).

This Court, in 1985, reviewed for arbitrariness or capriciousness an inquiry analogous to the central question here: whether the service for which an agency charged a fee under the IOAA "produce[d] *private* benefits." *Cent. & S. Motor Freight Tariff Ass'n v. United States*, 777 F.2d 722, 735 (D.C. Cir. 1985) (emphasis added). As explained *infra* at § B.1, this Court has since clarified that the concept of a "private benefit" is irrelevant under the IOAA, which instead requires that "services [are] conferred upon an identifiable recipient" which provide a "special benefit." *Seafarers Int'l Union of N. Am. v. U.S. Coast Guard*, 81 F.3d 179, 183, 185 (D.C. Cir. 1996). But an agency's conclusion that a service produces a "special benefit" should be reviewed under the same standard that this Court employed in *Central & Southern*: for arbitrariness or capriciousness. *Phillips Petroleum Co. v. Fed. Energy*

Regulatory Comm'n, 786 F.2d 370, 377 (10th Cir. 1986) ("We hold that the Commission did not act arbitrarily or capriciously in demonstrating that its services confer a benefit on fee payors.").[11] *See also Neb. Trails Council v. Surface Transp. Bd.*, 120 F.3d 901, 906 (8th Cir. 1997) (requiring only that the agency "*demonstrate[] adequate grounds* for its conclusion that a party requesting [the service] is an identifiable recipient of services provided by the [agency] from which that party derives a special benefit" (emphasis added)).

B. The PTIN is a "service or thing of value," and the PTIN user fee is lawful under the IOAA

All tax return preparers, whether credentialed or uncredentialed, must obtain a PTIN and provide it on all prepared returns (*i.e.*, on their clients' returns), to lawfully prepare tax returns for compensation. I.R.C. § 6109(a)(4); Treas. Reg. § 1.6109-2. In other words, a person who lacks a PTIN cannot lawfully prepare tax returns for compensation. By providing return preparers what they need (*i.e.*, a

[11] In *Phillips Petroleum*, the Tenth Circuit reviewed *de novo* the question whether the existence of a public benefit from the agency's services invalidated the fee under the IOAA. 786 F.2d at 374-77. But that court reviewed for arbitrariness or capriciousness the question at issue here, which is whether the agency properly concluded that the services conferred a benefit on those who paid the fee. *Id.* at 377.

PTIN) to lawfully earn a living – and to avoid substantial penalties under I.R.C. § 6695(c) and an injunction under § 7407 – the IRS provides a special benefit to tax return preparers that the general public does not receive.

The PTIN user fee thus helps to meet the stated goal of Congress "that each service or thing of value provided by an agency . . . to a person . . . is to be self-sustaining to the extent possible." 31 U.S.C. § 9701(a). The PTIN is requested by an individual, provided to an individual, and not received by the members of the general public (who for the most part are not return preparers and hence do not request PTINs).[12] Issuing a PTIN is precisely the kind of service that Congress expected would be self-sustaining under the IOAA, rather than falling on the shoulders of the general taxpaying public. The IRS thus did not err – much less act unreasonably, arbitrarily, or capriciously – in concluding that the PTIN provides a "special benefit" to return preparers and is a "service or thing of value" under the IOAA.

[12] As indicated, *see supra* at 13-14 n.9, only a minute percentage of the U.S. population is comprised of return preparers.

1. The PTIN user fee is charged for a service provided to an identifiable individual, and weighing "private" versus "public" benefits is irrelevant

The District Court incorrectly stated that the IOAA should be read "narrowly" (J.A.189), whereas this Court has explained that its "cases teach unmistakably that the phrase 'service or thing of value'" – the key phrase at issue in this appeal – "is to be construed broadly." *Ayuda*, 848 F.2d at 1300. The District Court compounded its error of narrowly reading the IOAA by neglecting to review the PTIN user fee through the deferential standard appropriate for judicial review of administrative action. But, under any standard of review, the District Court incorrectly concluded that the PTIN user fee is outside the broad umbrella of the IOAA.

Courts have, in fact, approved a wide range of fees imposed under the IOAA, as long as each fee is "for a service that confers a specific benefit upon an identifiable beneficiary." *Engine Mfrs.*, 20 F.3d at 1180. The Supreme Court focused on the concept of specificity in a pair of opinions that the Court issued in 1974. In *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336 (1974), the Court explored the difference between taxes, which only Congress may impose, and fees,

which federal agencies may impose under the IOAA. The Court held unlawful a charge that the FCC imposed on cable television companies, which was calculated based on each company's number of subscribers. The Court explained that, in imposing a tax, "Congress . . . may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income." *Id.* at 340. "A fee," by contrast, "is incident to a voluntary act," and agencies "may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society." *Id.* at 340-41. In the companion case to *National Cable Television*, the Supreme Court explained that "the thrust of the [IOAA] reach[es] only specific charges for specific services to specific individuals or companies." *Fed. Power Comm'n v. New England Power Co.*, 415 U.S. 345, 349 (1974).

The District Court did not focus on the specificity inquiry, as these cases instruct, but appeared to look to the outdated, and irrelevant, concept of comparing the public and private benefit of the PTIN. *Seafarers*, 81 F.3d at 184-85. Having rejected the Government's explanation of the special benefit that return preparers receive from

obtaining a PTIN, discussed *infra* at §§ B.2 and B.3, the District Court stated that "[i]t 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." (J.A.197.) This Court has repeatedly held that a fee may be charged for a service that results in some public benefit, although some of these cases also suggested that there must be some "private benefit" for the person paying the fee – or that the private benefits should be weighed against the public benefits. *E.g.*, *Central & Southern*, 777 F.2d at 729; *Nat'l Cable Television Ass'n, Inc. v. FCC*, 554 F.2d 1094, 1103 (D.C. Cir. 1976).

More recently, however, this Court rejected any suggestion "that a specific service to an identifiable beneficiary can form the basis for a fee *only* if the service confers . . . a private benefit." *Seafarers*, 81 F.3d at 184 (emphasis in original). This concept "finds no support" in the Supreme Court's opinions in *National Cable Television* or *New England Power*, and this Court characterized its reference to "private benefits" in another IOAA case as "misguided." *Id.* This Court also held that "it does not matter whether the ultimate purpose of the regulatory scheme

. . . is to benefit the public." *Id.* at 183. In weighing the benefit that the IRS (and the general public) receives from the PTIN, the District Court thus considered an irrelevant factor.[13]

In *Seafarers*, this Court returned to the fundamentals of *National Cable Television* and *New England Power*, which focused on whether there are "*identifiable recipients* of a government service for which charges are being assessed, without regard to whether the services are perceived by the recipient to be personally beneficial." *Seafarers*, 81 F.3d at 184-85 (emphasis in original).[14] The recipients of such services

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[13] Moreover, even if the weighing of public versus private benefits were appropriate, which it is not, the benefits received by return preparers from the issuance of PTINs to them, *i.e.*, the ability to lawfully prepare returns for compensation, plainly outweighs the incidental benefit to the general public from the PTIN scheme, which allows the IRS to track returns and regulate the conduct of return preparers through penalties and injunctive suits.

[14] The District Court cited *Seafarers* (J.A.189, 196) but did not apply the relevant test that this Court set forth in that case. The District Court's discussion of *Seafarers* instead focused on an issue not present here: whether the fees charged matched the licensing requirements set out by Congress. *See Seafarers*, 81 F.3d at 185-86. Here, the only licensing-type requirement is that return preparers obtain a PTIN, which § 6109(a)(4) authorizes. In the event this Court were to hold that the IOAA authorizes the IRS to charge a user fee for a PTIN, a remand would be necessary for the District Court to address the plaintiffs' alternative claim that the amount of the PTIN fee is excessive.

must "'derive[] a special benefit'" from the services. *Id.* at 183 (quoting *New England Power*, 415 U.S. at 349 (quoting Circular A-25 (1959)). Circular A-25 explains that a "special benefit" is "derived from Federal activities beyond those received by the general public." 58 Fed. Reg. at 38,144 (Circular A-25 (1993)).

The PTIN meets the test set out in *Seafarers*. Issuing a PTIN is a "government service," and those who request a PTIN are "identifiable recipients" of that service. And, as discussed immediately below, the PTIN provides a "special benefit" to tax return preparers.

2. The PTIN provides a special benefit because it aids tax return preparers in complying with statutory and regulatory duties

In *Electronic Industries Ass'n v. FCC*, 554 F.2d 1109, 1115 (D.C. Cir. 1976), this Court held that the FCC could charge fees under the IOAA for "services which assist a person in complying with his statutory duties." Because the fees at issue were "justified by . . . statutory requirement[s]," this Court held that the IOAA authorized the fees at issue in that case. *Id.* at 1116. *See also Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 148 (D.C. Cir. 1993) (under the IOAA, the meaning of "service or thing of value" "includes,

perhaps oxymoronically, 'regulatory services' such as permit processing"). In reviewing several fees that the Federal Energy Regulatory Commission imposed for agency review, the Tenth Circuit similarly explained that "the term 'special benefit' is broadly defined to include even assisting regulated entities in complying with regulatory statutes." *Phillips Petroleum*, 786 F.2d at 376 (citing *Electronic Indus.*, 554 F.2d at 1115). And "as long as [the special benefits] are identified the regulatory agency is authorized to assess fees for its costs in conferring these 'benefits.'" *Id.* The Tenth Circuit observed that the Commission "identifie[d] the benefits which it believes are conferred upon the regulated entity for the Commission's services," "gave careful consideration to the requirements of the IOAA," and "did not act arbitrarily or capriciously in demonstrating that its services confer a benefit on fee payors." *Id.* at 377. The court, therefore, upheld the fees. *Id.*

Applying the reasoning of *Electronic Industries* and *Phillips Petroleum*, the IOAA authorizes the PTIN user fee. In I.R.C. § 6109(a), Congress required tax return preparers to include an identifying number on prepared returns, and in § 6109(d), Congress authorized the

IRS to prescribe the identifying number that preparers must use. Congress has, in other words, empowered the IRS to regulate all tax return preparers with respect to the required identifying number, and the IRS has issued a regulation requiring the use of a PTIN. Treas. Reg. § 1.6109-2. In issuing the PTIN regulations, the IRS explained that the PTIN aids preparers in complying with this statutory and regulatory requirement, which the District Court upheld. 75 Fed. Reg. at 43,112, 60,317; 80 Fed. Reg. at 66,794, 66,852. Complying with § 6109(a), in turn, helps return preparers avoid up to $25,000 in annual penalties under § 6695(c), as well as an injunction under § 7407. As the Eleventh Circuit reasoned in upholding the PTIN user fee, "a tax return preparer cannot prepare tax returns for others for compensation without having the required identifying number." *Brannen*, 682 F.3d at 1319. The PTIN thus provides a "special benefit" for purposes of the IOAA.

3. The PTIN requirement further benefits preparers by protecting their social security numbers, which was Congress's express motivation in amending § 6109 to allow for the PTIN requirement

In addition to allowing return preparers to comply with their statutory and regulatory duties and avoid thousands of dollars in penalties, the PTIN is a "special benefit" because it protects preparers' social security numbers ("SSNs"). The District Court declined to consider this benefit to tax return preparers because it is "mentioned only briefly in the regulations requiring the use of PTINs" and because the District Court mistakenly concluded that "it is not discussed in the regulation specifically addressing user fees." (J.A.198.) But, in the final PTIN fee regulation, the IRS noted "the identity protection currently provided by PTINs," as compared to SSNs. 75 Fed. Reg. at 60,318.

The District Court also stated that "[t]here is no stated evidence in the administrative record that permitted the IRS to make . . . a determination" that the confidentiality of SSNs was at risk. (J.A.198.) The District Court's analysis on this point misses the mark. In 1998, Congress became "concerned that inappropriate use might be made of a

preparer's social security number." S. Rep. No. 105-174, at 106 (1998). And this concern was the *raison d'etre* for the 1998 amendment to § 6109 that granted the IRS authority to create, and ultimately require, the PTIN. In responding to this specified congressional concern, the IRS need not have conducted additional research or provided evidence on the subject. By declining to consider the Government's contention that return preparers benefit from the PTIN through protection of their SSNs, the District Court improperly overlooked the concerns that Congress expressed when it amended § 6109 and paved the way for the PTIN requirement.

4. The IOAA is not limited to licenses and regulated entities, but even if it were so narrowly focused, return preparers are "regulated entities" with respect to the PTIN requirement

The District Court incorrectly interpreted the IOAA as distinguishing between fees imposed for licenses on regulated entities, which the court viewed as permissible, and fees charged for other government services. The District Court stated, in this regard, that "[i]f tax return preparers were regulated entities required to obtain licenses, this case would be very different." (J.A.197). The IOAA, however, does not authorize fees only with respect to licenses and other services

provided to "regulated entities." In *Ayuda*, 848 F.2d at 1298, this Court upheld several fees for filing various documents during the administrative adjudication of immigration matters. The plaintiffs in *Ayuda* contended that none of the fees at issue was for a "service or thing of value," and like the District Court in this case, contrasted the administrative adjudication services with "such classic examples of user fees as fees for licenses and registrations." *Id.* at 1299.

Although this Court regarded the imposition of the fees in *Ayuda* to be "odd," it nonetheless concluded that the IOAA authorized the fees. *Id.* at 1299. This Court has applied "a consistently generous reading" of the "broad terms" of the IOAA. *Id.* The IOAA "by its express terms sweeps with considerable breadth," as "'service or thing of value' is broad language indeed." *Id.* at 1300 (brackets omitted). This Court explained that its "prior cases teach unmistakably that the phrase 'service or thing of value' is to be construed broadly." *Id.* "So long as the service provides a special benefit, above and beyond that which accrues to the public at large, to a readily-identifiable[ ] individual, the fee is permissible." *Id.* at 1301 (citing *New England Power*, 415 U.S. at 349-51). The fees at issue in *Ayuda* were for "specific procedural

devices" that directly benefited the "individuals who have themselves invoked these procedures," and this Court, therefore, concluded that the IOAA authorized the fees. *Id.*

As discussed *infra* at § B.5, the Supreme Court has cited a passport as an example of a service for which a fee may be charged under the IOAA. *New England Power*, 415 U.S. at 349 n.3 (quoting Circular A-25 (1959)). Like the fees at issue in *Ayuda*, a passport is not a license bestowed on a regulated entity, yet the Supreme Court has acknowledged that the IOAA authorizes fees for passports. *See also New England Power Co. v. U.S. Nuclear Regulatory Comm'n*, 683 F.2d 12, 14 n.2 (1st Cir. 1982) ("There is no indication that the [Supreme] Court even considered, much less meant to prohibit, fees in the absence of such grants [of licenses]."). Contrary to the District Court's view, whether the PTIN grants a license, or whether return preparers are regulated parties, is irrelevant.

But even if the IOAA is limited to licenses and regulated entities, which it is not, tax return preparers are "regulated entities" in that they are required, by statute and regulation, to obtain and use PTINs. Moreover, as discussed *supra* at 10, the conduct of return preparers is

subject to regulation in that they are subject to monetary penalties under the Internal Revenue Code for engaging in certain proscribed conduct and, in addition, can be enjoined from continuing to engage in such conduct or from continuing to prepare returns for compensation. The District Court found the PTIN user fee objectionable because the court viewed the charging of the fee – though not the PTIN requirement itself – as "equivalent to imposing a regulatory licensing scheme," and the District Court interpreted *Loving* as holding that "the IRS does not have such regulatory authority." (J.A.193.) It is difficult to reconcile the District Court's implicit conclusion that, on the one hand, the PTIN *requirement* is not a "regulatory licensing scheme," while concluding on the other hand that charging a *fee* for the PTIN is, in fact, such a scheme, which the District Court viewed as impermissible. At all events, the District Court's uncontested holding that the IRS has the "regulatory authority" to require return preparers to obtain and use a PTIN establishes that return preparers are "regulated entities."

As indicated, this Court's decision in *Ayuda* makes clear that fees may be charged outside of licensing and regulatory matters. In any case, the PTIN requirement may be viewed as a very simple "licensing

scheme," in the sense that an individual may not prepare for compensation tax returns without a PTIN. In *Seafarers*, 81 F.3d at 181, this Court held that the IOAA permitted the Coast Guard to charge fees for several documents that "serve as occupational licenses, because an individual must possess one to work in the merchant marine."[15] This Court observed that "[t]he Supreme Court has made it clear that, as a general matter, a person who seeks to obtain an occupational license may be charged a fee to reimburse the licensing agency for the cost of processing the license." *Id.*

The licensing scheme at issue in *Seafarers* was, to be sure, more comprehensive than the PTIN requirement. But there is a key similarity: to work in the merchant marine, a person must possess the appropriate occupational license, and to prepare tax returns for compensation, a person must have a PTIN. Just as the Coast Guard may charge fees for the occupational licenses at issue in *Seafarers*, the IRS may charge a fee for the PTIN. Each government service is provided to an identifiable individual and allows that individual to

[15] The specific statute authorizing the Coast Guard's fees at issue in *Seafarers* required that the fees meet the standards of the IOAA. 81 F.3d at 181.

lawfully earn a living as a merchant marine or tax return preparer, which members of the general public – who do not have merchant marine licenses or PTINs – cannot do.

5. The PTIN is a "service or thing of value," even though almost anyone may obtain one

As a result of this Court's decision in *Loving*, which held that the IRS lacks the authority to require return preparers to meet ethical, competency, or continuing education requirements, almost all individuals who want a PTIN may receive one. Although the District Court thus correctly stated, "[h]ypothetically, every member of the public could obtain a PTIN," it then erroneously concluded that "[t]here is therefore no special benefit for certain individuals not available to the general public." (J.A.197.) It does not follow from the fact that PTINs are readily available to almost every individual who wants one that those individuals who actually apply for and obtain a PTIN receive no special benefit within the meaning of the IOAA. Indeed, under the reasoning of the District Court, the IOAA would not authorize a fee for the issuance of passports, since almost every U.S. citizen who wants a passport is entitled to receive one. The Supreme Court, however, expressly cited the issuance of a passport as an example of a special

benefit for which a user fee may be charged under the IOAA.[16] *New England Power*, 415 U.S. at 349 n.3 (quoting Circular A-25 (1959)). *See also* 58 Fed. Reg. at 38,144 (Circular A-25 (1993) (continuing to include passports among examples of services for which the IOAA authorizes a fee)).

The District Court here failed to appreciate that only a small fraction of the general population – far less than one percent – are return preparers who have actually received a PTIN. The more than 99 percent of the U.S. population who are not return preparers do not want a PTIN and receive no direct benefit from the issuance of PTINs to those individuals who are return preparers. It is return preparers, who need a PTIN to lawfully prepare returns for compensation, who receive

[16] In addition to the authority to assess passport fees under the IOAA, as noted in *New England Power* and Circular A-25, passport fees have been separately authorized by statute since at least 1920. *See, e.g.*, 22 U.S.C. § 214; Diplomatic and Consular Appropriations Act for Fiscal Year 1921, Pub. L. 66-238, ch. 223 § 1, 41 Stat. 739, 750 (1920). In imposing passport fees, however, the State Department relies on both the IOAA and more specific statutes. *See* 75 Fed. Reg. 36,522 (June 28, 2010). Moreover, as the Supreme Court and Circular A-25 both cite a passport fee as clearly permissible under the IOAA, the similarities between the PTIN and the passport are relevant to understanding the breadth of the IOAA as it applies to the PTIN user fee.

a special benefit from the issuance of PTINs to them. It therefore is appropriate that return preparers, not the general public, bear the cost of the issuance of PTINs. Indeed, this is the very purpose for the IOAA – to require that recipients who receive a special benefit in the form of a thing of value pay the cost incurred by the agency in question in providing that benefit.

The IOAA does not require that the "service or thing of value" for which an agency charges a fee must be a limited commodity, available solely to a small subset of people. As the Office of Management and Budget explained in Circular A-25, "[a] user charge . . . will be assessed against each identifiable recipient for special benefits derived from Federal activities beyond those *received* by the general public." 58 Fed. Reg. at 38,144 (emphasis added). The proper focus, therefore, is not whether the PTIN is hypothetically *available* to the general public, but rather whether the PTIN is *received* by the general public – which, of course, it is not. *Brannen*, 682 F.3d at 1319 (PTIN user fee "clearly confers a benefit which is not received by the general public").

The Ninth Circuit upheld an analogous fee under the IOAA[17] for copying one's Selective Service file – a service that anyone with a file could request, but that not every such person does request. *Reinoehl v. Hershey*, 426 F.2d 815, 815 (9th Cir. 1970). *See also* 32 C.F.R. § 204.9 (imposing fees under the IOAA for "services related to copying, certifying, and searching records rendered to the public by DoD Components"); 49 C.F.R. § 1002.1 (similar fees for searching records and copying charged by the Surface Transportation Board); 7 C.F.R. § 504.2 (imposing fees for depositing or requesting microbial cultures from the Department of Agriculture). As with passports and the other services referenced above, almost anyone may apply for and receive a PTIN, but only a very small portion of the population chooses to do so. As a result, only a very small portion of the population receives the benefit of a PTIN issuance or renewal, and Congress intended that the recipients of this benefit bear its cost. *See* 31 U.S.C. § 9701(a).

The Fifth Circuit rejected essentially the same type of reasoning employed by the District Court here in *Mississippi Power & Light Co. v.*

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[17] In *Reinoehl*, 426 F.2d at 815, the court applied 31 U.S.C. § 483a (1964 Ed. Supp. IV), the predecessor to the current version of the IOAA (31 U.S.C. § 9701).

U.S. Nuclear Regulatory Comm'n, 601 F.2d 223, 228-29 (5th Cir. 1979). In that case, licensees challenged fees imposed by the Nuclear Regulatory Commission and urged the Fifth Circuit to distinguish such fees from the licensing fees at issue in *National Cable Television*. *Id.* They argued that the FCC fees in *National Cable Television* conferred a special benefit on the applicants "[b]ecause of the limited number of broadcast frequencies" and "protect[ion] against interference from competing stations." *Id.* at 228. But they claimed that there was no such benefit from the Nuclear Regulatory Commission licenses because "anyone with sufficient capital and initiative can construct and operate a nuclear reactor, fuel reprocessing plant or waste disposal facility." *Id.* at 229. The Fifth Circuit rejected this argument because, *inter alia*, "[a] license from the NRC is an absolute prerequisite to operating a nuclear facility, and as such, is a benefit 'not shared by other members of society.'" *Id.* (quoting *National Cable Television*, 415 U.S. at 341).

Of course, the PTIN requirement is quite simple, compared to the more comprehensive licensing scheme that the Nuclear Regulatory Commission employs with respect to a nuclear facility. But the Fifth Circuit's reasoning still applies: a PTIN "is an absolute prerequisite" to

lawfully prepare tax returns for compensation. I.R.C. §§ 6109(a)(4), 6695(c). Even though anyone, theoretically, could seek a license for a nuclear facility, not everyone does, and the Nuclear Regulatory Commission thus could impose fees under the IOAA on those who sought such a license. Similarly, even though almost anyone, theoretically, could seek a PTIN, only a tiny fraction of the population would have a reason to do so. The IRS thus is authorized by the IOAA to charge a user fee to those individuals who apply for a PTIN so that they may lawfully prepare returns for compensation.

C. This Court's decision in *Loving* does not foreclose the imposition of the PTIN user fee

The heart of the District Court's rationale for its invalidation of the PTIN user fee stems from this Court's decision in *Loving*, but, in *Loving*, this Court did not address the PTIN requirement or PTIN user fee. The district court in *Loving* expressly made clear that the PTIN requirement remained in force, and was unaffected by its decision invalidating the RTRP regulations, as long as it was severed from the RTRP program (which it was). *Loving*, 920 F. Supp. 2d at 109. Moreover, the plaintiffs did not contest the court's ruling in this regard on appeal.

The District Court in this case acknowledged that "the PTIN scheme was authorized by a different statutory authority" from that at issue in *Loving* (31 U.S.C. § 330) but nonetheless viewed *Loving* as relevant to the PTIN user fee issue because the "PTIN scheme" is "interrelated with the RTRP scheme." (J.A.197.) But, this Court's decision in *Loving*, that the IRS lacked authority to issue the RTRP regulations under 31 U.S.C. § 330, has nothing to do with the IRS's authority to require the use of a PTIN under I.R.C. § 6109(a)(4) and to charge a PTIN user fee under the IOAA. The District Court failed to recognize that, following *Loving*, there no longer is *any* connection between the invalidated RTRP program and the issuance of a PTIN. The District Court also failed to independently analyze the PTIN user fee regulation and, despite having upheld the PTIN requirement itself, incongruously stated that "the situation here" is one in which "the regulatory scheme was struck down." (J.A.195.) This is patently incorrect, as the District Court in both *Loving* and in the instant case *upheld* the PTIN regulatory scheme (the requirement that all return preparers obtain a PTIN and use it on returns prepared by them). And

this Court, in affirming the district court's decision in *Loving*, had no occasion to even address the validity of the PTIN regulatory scheme.

The District Court here nonetheless framed this matter as "revolv[ing] around a group of 2010-2011 regulations" (J.A.178) – not only the PTIN regulations challenged in this case, but also the later-promulgated RTRP regulations – and viewed the PTIN regulations as "clearly interrelated" with the regulations this Court invalidated in *Loving* (J.A.192). By incorporating the PTIN user fee into the invalidated RTRP regulations, the District Court muddled the precise issue before it: whether the IOAA authorizes the PTIN user fee.[18]

To be sure, it is evident from the administrative record that the IRS both articulated independent reasons supporting the PTIN requirement and also anticipated some connection between the PTIN regulations and the future RTRP program. The PTIN regulations mentioned the anticipated RTRP program, *see supra at* 11-19, and

[18] As further evidence of the District Court's comingling of the PTIN regulations with the RTRP regulations, the court included the regulation containing the PTIN requirement as among the regulations for which the IRS relied on 31 U.S.C. § 330. (J.A.180.) This is, of course, incorrect, as the IRS relied on I.R.C. § 6109 in establishing the PTIN requirement.

having a PTIN was one of a number of requirements for a person to become an RTRP under the RTRP program. 76 Fed. Reg. at 32,301 (codified at 31 C.F.R. § 10.4(c)). But the RTRP program no longer exists, and any connection between the RTRP program and the PTIN requirement was severed following *Loving*. This severance is evident in the preambles to the 2015 and 2016 PTIN user fee regulations, in which the IRS expressly acknowledged that the RTRP program no longer exists, 80 Fed. Reg. at 66,793-94, and also explained that the special benefit return preparers receive from a PTIN is "[t]he ability to prepare tax returns and claims for refund for compensation," 81 Fed. Reg. at 52,766.

The IRS provided independent justifications for the PTIN requirement, moreover, that have nothing to do with the RTRP regulations, as discussed *supra* at 11-19. Rather than fairly evaluating these independent justifications, the District Court quoted, out of context, a statement regarding "overarching objectives" that the court found "indicate[d] a connection to the RTRP regulations." (J.A.193.) But the "overarching objectives" were part of a response to a specific comment about the PTIN requirement, and immediately following the

text quoted by the District Court, the IRS explained that a broadly applicable PTIN requirement "is critical to the IRS's tax administration efforts that, *in the first instance*, the IRS is readily able to identify all individuals who are involved in preparing all or substantially all of a tax return or claim for refund." 75 Fed. Reg. 60,310 (emphasis added). The connection with the RTRP program was only an "[a]dditional[]" benefit. *Id.*

The ancillary nature of the relationship between the PTIN requirement and the RTRP program is further illustrated by the fact that the PTIN requirement and user fee applied to *all* return preparers – both credentialed preparers, who were unaffected by the RTRP regulations, and uncredentialed preparers, who were the subject of the RTRP regulations. Indeed, by upholding the PTIN requirement, after the RTRP program was held to be invalid, the District Court here necessarily acknowledged that the PTIN requirement was justified for reasons independent from the RTRP program. (*See* J.A.190-91.)

Despite having upheld the authority of the IRS to impose the PTIN requirement, which constitutes a regulation of return preparers, the District Court stated that *Loving* stands for the broad proposition

that "the IRS does not have the authority to regulate tax return preparers." (J.A.193.) That statement flies in the face of this Court's observation in *Loving* that the conduct of return preparers is subject to scrutiny by the IRS pursuant to various provisions of the Internal Revenue Code. Contrary to the District Court's view that, following *Loving*, "the IRS may not regulate in this area" (J.A.197), this Court specifically noted in *Loving* that "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," *Loving*, 742 F.3d at 1020. The Court pointed to the following examples: (1) I.R.C. § 6694, which imposes penalties on tax return preparers who prepare returns with an understatement of liability due to an unreasonable position; (2) I.R.C. § 6695, which imposes penalties on tax return preparers who, *inter alia*, fail to sign a tax return or "fail[ ] to comply with § 6109(a)(4)," *i.e.*, fail to provide the identifying number that the IRS prescribes (the PTIN); and (3) I.R.C. § 6713, which imposes a penalty on tax return preparers who disclose or use information provided for or in connection with the preparation of a return. *Loving*, 742 F.3d at 1020. Congress

also provided the IRS with the authority to request the Department of Justice to file a civil action to enjoin a tax return preparer who has engaged in specified misconduct, including conduct that could subject a preparer to penalties under § 6694 or § 6695. I.R.C. § 7407. Although this Court concluded in *Loving* that the IRS was not authorized by 31 U.S.C. § 330 to include tax return preparers under the umbrella of regulating the practice of representatives of persons before the Treasury, the examples cited by this Court show that the IRS, indeed, retains significant authority after *Loving* to regulate tax return preparers under a number of other statutes, including I.R.C. § 6109(a)(4).

To the extent that *Loving* may be said to shed any light on the issue here, this Court's citation of § 6695 emphasizes the point that an individual must comply with § 6109(a)(4) to lawfully prepare tax returns for compensation, and thereby avoid the penalties under § 6695(c). In providing a PTIN, the IRS enables the individuals to lawfully prepare returns for compensation – a special benefit for each tax return preparer who receives a PTIN – and for which the IOAA

authorizes the IRS to charge a user fee. Nothing in *Loving* suggests – much less compels – a different conclusion.

D. Other courts – both before and after *Loving* – have concluded that the IOAA authorizes the PTIN user fee

Other courts that have addressed challenges to the PTIN user fee – both before and after *Loving* – have held that the IOAA authorizes the fee. In accord with the District Court here, the Eleventh Circuit observed that § 6109 "expressly grants authority to the Secretary to prescribe by regulation the particular identifying number required," and also requires that returns prepared by "tax return preparers" – *i.e.*, for compensation – bear that identifying number. *Brannen*, 682 F.3d at 1318. When the Secretary assigns a PTIN to a tax return preparer, "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. The court "readily conclude[d] that, under the plain language of § 6109(a)(4), the PTIN is issued to tax return preparers for a special benefit," and also "readily conclude[d] that the benefit—the privilege of preparing tax returns for others for compensation—is the kind of 'special benefit' that qualifies under *New England Power*." *Id.* The PTIN "clearly confers a benefit which is not received by the general

public," *id.*, as "a tax return preparer cannot prepare returns for others for compensation without such number," *id.* at 1320. The Eleventh Circuit, therefore, concluded that the IOAA authorizes the PTIN user fee. *Id.*

The District Court in this case rejected the reasoning in *Brannen* because that decision was "made prior to [the] D.C. Circuit's *Loving* decision, *i.e.*, prior to the finding that [as the District Court viewed *Loving*,] the IRS lacks the authority to regulate tax return preparers and the striking down of the regulations attempting to do so." (J.A.196.) But, as we previously pointed out, the District Court's reasoning in this regard is internally inconsistent, because the court upheld the PTIN regulatory requirement itself. *Loving* had nothing to do with the PTIN regulations, and *Brannen* had nothing to do with the RTRP regulations. The plaintiffs in *Brannen* were an individual, who was a lawyer and CPA, as well as his firm. 682 F.3d at 1316. Because Brannen was a credentialed preparer who long had been subject to the requirements of Circular 230, the RTRP regulations would not have affected Brannen, and this Court's decision in *Loving* did not afford him any relief. *Loving* thus does not call *Brannen* into question.

After the district court issued its opinion in *Loving* – but before this Court issued its opinion in that case – the Northern District of Georgia revisited the validity of the PTIN user fee, and again upheld the fee under the IOAA. *Buckley v. United States*, 2013 WL 7121182 (N.D. Ga. 2013). The court in *Buckley* primarily looked to *Brannen* for guidance and concluded that both the initial and renewal PTIN user fees "confer[ ] a special benefit upon tax return preparers, *i.e.*, the ability to file tax returns on behalf of others for compensation." *Id.* at *2. Like the plaintiffs here, the plaintiffs in *Buckley* relied on *Loving* for support of their contention that the PTIN user fee is invalid. *Id.* at *1. But the Northern District of Georgia properly "conclude[d] that the *Loving* case ha[d] no applicability" to the PTIN user fee because *Loving* addressed the RTRP regulations, which were not at issue in *Buckley* – and, similarly, are not at issue in this case. *Id.* at *2. The court in *Buckley* also noted that the district court in *Loving* "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.* The

district court in *Buckley*, therefore, correctly concluded that the IOAA continues to authorize the PTIN user fee.

CONCLUSION

The judgment of the District Court, to the extent it invalidated the PTIN user fee, is erroneous and should be reversed, and the case should be remanded to the District Court so that it can address the plaintiffs' alternative claim that the amount of the user fee is excessive.

Respectfully submitted,

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(s) /s/ Norah E. Bringer

Attorney for United States of America

Dated: February 21, 2018

STATUTORY AND REGULATORY ADDENDUM

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31 U.S.C. § 9701. Fees and charges for Government services and things of value

(a) It is the sense of Congress that each service or thing of value provided by an agency (except a mixed-ownership Government corporation) to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible.

(b) The head of each agency (except a mixed-ownership Government corporation) may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be--

(1) fair; and

(2) based on--

(A) the costs to the Government;

(B) the value of the service or thing to the recipient;

(C) public policy or interest served; and

(D) other relevant facts.

* * *

I.R.C. § 6109. Identifying numbers

(a) Supplying of identifying numbers.--When required by regulations prescribed by the Secretary:

* * *

(4) Furnishing identifying number of tax return preparer.--Any 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. For purposes of this paragraph, the terms "return" and "claim for refund" have the respective meanings given to such terms by section 6696(e).

For purposes of paragraphs (1), (2), and (3), the identifying number of an individual (or his estate) shall be such individual's social security account number.

* * *

(d) Use of social security account number.--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.

Treas. Reg. § 1.6109-2. Tax return preparers furnishing identifying numbers for returns or claims for refund and related requirements.

(a) Furnishing identifying number. (1) Each filed return of tax or claim for refund of tax under the Internal Revenue Code prepared by one or more tax return preparers must include the identifying number of the tax return preparer required by § 1.6695–1(b) to sign the return or claim for refund. In addition, if there is an employment arrangement or association between the individual tax return preparer and another person (except to the extent the return prepared is for the person), the identifying number of the other person must also appear on the filed return or claim for refund. For the definition of the term "tax return preparer," see section 7701(a)(36) and § 301.7701–15 of this chapter.

(2)(i) For tax returns or claims for refund filed on or before December 31, 2010, the identifying number of an individual tax return preparer is that individual's social security number or such alternative number as may be prescribed by the Internal Revenue Service in forms, instructions, or other appropriate guidance.

(ii) For tax returns or claims for refund filed after December 31, 2010, the identifying number of a tax return preparer is the individual's preparer tax identification number or such other number prescribed by the Internal Revenue Service in forms, instructions, or other appropriate guidance.

(3) The identifying number of a person (whether an individual or entity) who employs or associates with an individual tax return preparer described in paragraph (a)(2) of this section to prepare the return or claim for refund (other than a return prepared for the person) is the person's employer identification number.

(b), (c) [Reserved]. For further guidance, see § 1.6109–2A(b) and (c).

(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 in forms, instructions, or other appropriate guidance. Except as provided in paragraph (h) of this section, beginning after December 31, 2010, to obtain a preparer tax identification number 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.

(e) The Internal Revenue Service may designate an expiration date for any preparer tax identification number or other prescribed identifying number and may further prescribe the time and manner for renewing a preparer tax identification number or other prescribed identifying number, including the payment of a user fee, as set forth in forms, instructions, or other appropriate guidance. The Internal Revenue Service may provide that any identifying number issued by the Internal Revenue Service prior to the effective date of this regulation will expire on December 31, 2010, unless properly renewed as set forth in forms, instructions, or other appropriate guidance, including these regulations.

(f) As may be prescribed in forms, instructions, or other appropriate guidance, the IRS may conduct a Federal tax compliance check on a tax return preparer who applies for or renews a preparer tax identification number or other prescribed identifying number.

(g) Only for purposes of paragraphs (d), (e), and (f) of this section, the term tax return preparer means any individual who is compensated for preparing, or assisting in the preparation of, all or substantially all of a tax return or claim for refund of tax. Factors to consider in determining whether an individual is a tax return preparer under this paragraph (g) include, but are not limited to, the complexity of the work performed by the individual relative to the overall complexity of the tax return or claim for refund of tax; the amount of the items of income, deductions, or losses attributable to the work performed by the

individual relative to the total amount of income, deductions, or losses required to be correctly reported on the tax return or claim for refund of tax; and the amount of tax or credit attributable to the work performed by the individual relative to the total tax liability required to be correctly reported on the tax return or claim for refund of tax. The preparation of a form, statement, or schedule, such as Schedule EIC (Form 1040), "Earned Income Credit," may constitute the preparation of all or substantially all of a tax return or claim for refund based on the application of the foregoing factors. A tax return preparer does not include an individual who is not otherwise a tax return preparer as that term is defined in § 301.7701–15(b)(2), or who is an individual described in § 301.7701–15(f). The provisions of this paragraph (g) are illustrated by the following examples:

* * *

(h) The Internal Revenue Service, through forms, instructions, or other appropriate guidance, may prescribe exceptions to the requirements of this section, including the requirement that an individual be authorized to practice before the Internal Revenue Service before receiving a preparer tax identification number or other prescribed identifying number, as necessary in the interest of effective tax administration. The Internal Revenue Service, through other appropriate guidance, may also specify specific returns, schedules, and other forms that qualify as tax returns or claims for refund for purposes of these regulations.

(i) Effective/applicability date. Paragraph (a)(1) of this section is applicable to tax returns and claims for refund filed after December 31, 2008. Paragraph (a)(2)(i) of this section is applicable to tax returns and claims for refund filed on or before December 31, 2010. Paragraph (a)(2)(ii) of this section is applicable to tax returns and claims for refund filed after December 31, 2010. Paragraph (d) of this section is applicable to tax return preparers after December 31, 2010. Paragraphs (e) through (h) of this section are effective after September 30, 2010.

Treas. Reg. § 300.9 (2010) Fee for obtaining a preparer tax identification number.
[Original PTIN user fee regulation]

(a) Applicability. This section applies to the application for and renewal of a preparer tax identification number pursuant to 26 CFR 1.6109–2(d).

(b) Fee. The fee to apply for or renew a preparer tax identification number is $50 per year, which is the cost to the government for processing the application for a preparer tax identification number and does not include any fees charged by the vendor.

(c) Person liable for the fee. The individual liable for the application or renewal fee is the individual applying for and renewing a preparer tax identification number from the IRS.

(d) Effective/applicability date. This section is applicable beginning September 30, 2010.

Treas. Reg. § 300.13 (2017) Fee for obtaining a preparer tax identification number.
[Current PTIN user fee regulation]

(a) Applicability. This section applies to the application for and renewal of a preparer tax identification number pursuant to 26 CFR 1.6109–2(d).

(b) Fee. The fee to apply for or renew a preparer tax identification number is $33 per year, which is the cost to the government for processing the application for a preparer tax identification number and does not include any fees charged by the vendor.

(c) Person liable for the fee. The individual liable for the application or renewal fee is the individual applying for and renewing a preparer tax identification number from the IRS.

(d) Applicability date. This section will be applicable for applications for and renewal of a preparer tax identification number filed on or after September 9, 2016.

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on February 21, 2018. Counsel for appellees will be served with this brief through the appellate CM/ECF system.

/s/ Norah E. Bringer
NORAH E. BRINGER
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