IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Adam Steele, Brittany Montrois, and Joseph Henchman, on behalf of themselves and all others similarly situated, *Plaintiffs*, v. United States of America, *Defendant*.	Case No. 14-cv-01523-RCL

PLAINTIFFS' REPLY IN SUPPORT OF CLASS CERTIFICATION

The government's response to our class-certification motion advances two arguments—both of which the IRS itself rejected five years ago in its final rule requiring PTIN fees. Because the IRS was right to reject these arguments then, class certification should be granted.

Each putative class member has paid the same fees to the IRS. This action challenges the legality of those fees on two grounds. The first is that the fee—which the IRS began charging to fund a licensing scheme that the D.C. Circuit has since struck down, *Loving v. Internal Revenue Serv.*, 742 F.3d 1014 (D.C. Cir. 2014)—is unauthorized because it does not confer "a service or thing of value," but only an identifying number that anyone may obtain. 31 U.S.C. § 9701(b). The second is that, even if the IRS were authorized to charge a PTIN fee, it charges more than is permissible because the fees—which the IRS has now reduced, apparently in direct response to this lawsuit—far surpass "the reasonable cost [the IRS] incurs to provide" a PTIN. *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1180 (D.C. Cir. 1994).

1. With respect to the first claim, the government concedes (at 15) that "a class can be certified." And for good reason: "the class is entirely cohesive." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013). The plaintiffs contend that the IRS lacks authority to charge *anyone* a PTIN fee. For two decades, from 1976 to 1999, tax-return preparers were required to use their social security number on the returns they prepared, and for a decade after that they could use either their social security number or a PTIN for free. It was only in 2010, when the IRS took it upon itself to impose a host of restrictions on preparers (after years of unsuccessfully lobbying Congress to give it the power to do so), that the IRS began requiring a PTIN, limiting who could obtain one, and charging for it. But the D.C. Circuit invalidated this licensing scheme in *Loving*.

The merits question, then, is whether the fee confers "a service or thing of value" on those who pay it, 31 U.S.C. § 9701(b), even though (as the IRS admits) there are no longer any "requirements or restrictions" on who may obtain a PTIN. Opp. 10. Put differently, the question is whether the IRS's original justification for the fee—that "only a subset of the general public is entitled to a PTIN and the special benefit of receiving compensation for the preparation of a return that it confers"—can survive *Loving*. User Fees Relating to Enrollment and Preparer Tax Identification Nos., 75 Fed. Reg. 60,316, 60,318 (Sept. 30, 2010). The plaintiffs argue that it cannot. They might be right about that; they might be wrong. But they "will prevail or fail in unison. In no event will the individual circumstances of particular class members bear on the inquiry." *Amgen*, 133 S. Ct. at 1191. And, as the government acknowledged in last week's joint scheduling motion, should the plaintiffs prevail on this claim, "the members of the putative class will be entitled to a

refund of the PTIN fees they have paid to date, the IRS will cease charging fees in the future, and the case will be largely concluded." Dkt. 51, at 2. Rule 23 requires no more.

2. With respect to the second claim (excessiveness), the government does not dispute that the class meets Rule 23(a)'s prerequisites. So the only question is whether the class can be certified under Rule 23(b). The government gives two reasons why it thinks not.

First, the IRS contends that the class cannot be certified under Rule 23(b)(3) because the excessiveness inquiry turns on "the value of the service or thing to the recipient," and a PTIN recipient "who prepares hundreds of returns derives more value than one who prepares no returns." Opp. 15. As a result, the IRS asserts, "individual issues will necessarily predominate over class issues." *Id.*

This argument misapprehends the nature of the inquiry on the merits. The D.C. Circuit has repeatedly held that "the measure of fees is the cost to the government of *providing* the service, not the intrinsic value of the service to the recipient." *Seafarers Int'l Union of N. Am. v. U.S. Coast Guard*, 81 F.3d 179, 185 (D.C. Cir. 1996) (emphasis added). In setting a fee, "the agency must look not at the value which the regulated party may immediately or eventually derive from the regulatory scheme." *Nat'l Cable Television Ass'n, Inc. v. FCC*, 554 F.2d 1094, 1107 (D.C. Cir. 1976). Instead, the fee must "bear a reasonable relationship to the cost of the services rendered to identifiable recipients." *Capital Cities Comm'ns, Inc. v. FCC*, 554 F.2d 1135, 1138 (D.C. Cir. 1976).

Thus, even in the licensing context, a fee may not "include values created by licensees out of their grants," but is limited to the costs incurred by the agency. *Nat'l Ass'n of Broadcasters v. FCC*, 554 F.2d 1118, 1129 n.28 (D.C. Cir. 1976); *see Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1180 (D.C. Cir. 1994) ("An agency may not charge more than the reasonable cost it incurs to

provide a service, or the value of the service to the recipient, *whichever is less*." (emphasis added)). The reason for this limitation is constitutional: "Once agency charges exceed their reasonable attributable cost they cease being fees and become taxes levied, not by Congress, but by an agency," which is "prohibited." *Id.*; *see Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 340 (1974). To keep fees from becoming taxes, they must be limited to actual costs.

The only way the IRS would be permitted to charge a "variable fee" of the kind it now hypothesizes is if processing one person's PTIN "entail[ed] more work for the agency" than processing another person's PTIN. *Capital Cities Comm'ns, Inc. v. FCC*, 554 F.2d 1135, 1138 (D.C. Cir. 1976). But the IRS itself has admitted that the cost is the same—which is why it created a uniform fee in the first place. Here is what the IRS said when it rejected comments arguing that the fee should be based on the number of returns filed (the very argument its lawyers now deploy in an attempt to defeat certification): "The cost of processing PTIN applications is not affected by the number of tax returns that a tax return preparer prepares during a given tax season. For example, the cost to the IRS to process the PTIN applications of individuals who prepare over 500 tax returns per year, approximately 100 tax returns per year, or under 10 tax returns per year is the same." 75 Fed. Reg. at 60,318.

The IRS had it right the first time. Because the fee may not go "beyond the cost to process PTIN applications"—and "[b]ecause the cost to the IRS is not dependent on the quantity of returns that an individual tax return preparer prepares," *id.*—the question of excessiveness is common to the class. Should the Court eventually reach that question, it will hinge on whether the "[f]ull cost to the government to administer the PTIN application and renewal program" is really "$50 per application or renewal," plus a third-party vendor fee of either $14.25 or $13 (as the IRS initially

calculated before *Loving*), or whether it is less (as the IRS calculated in reducing the PTIN fees just last month). *Id.* Indeed, the IRS has now "determined that the full cost of providing the special benefit conferred by a PTIN ha[s] been reduced to $33 for each application and each annual renewal." Preparer Tax Identification Number (PTIN) User Fee Update, 80 Fed. Reg. 66,851, 66,852 (Oct. 30, 2015). On the merits, if the case is not resolved on the first claim, the parties will doubtless argue about whether this amount is still too high, and the plaintiffs will have the opportunity to inquire about how the IRS arrived at these figures. For class certification, however, all that matters is that the answers will be the same across the class, and hence that common issues predominate and Rule 23(b)(3) is satisfied.

Second, the government contends (at 18) that certification under Rule 23(b)(2) is improper because the class is not "sufficiently cohesive to warrant class treatment" given that some class members are licensed and must therefore "pay fees and dues to state oversight bodies on a regular basis." The government's argument is frankly difficult to follow, and the government never explains how fees paid to state governments could possibly be relevant to the analysis under federal law. As best we can tell, the government's argument here seems to be that the named plaintiffs, by alleging that the fees are excessive as to *all* people who pay them, have pursued a "narrow theory of the case" that impermissibly "restrict[s] hundreds of thousands of absent [licensed class members], who will be bound by the result of this case because they cannot opt out of the class." Opp. 18, 21.

But here, too, the IRS is at war with itself. Back in 2010, when it wanted to justify charging a fee to *everyone* (and not just unlicensed preparers), the IRS rejected "numerous comments" arguing that licensed preparers should not have to pay a PTIN fee because of the licensing fees

they already pay. 75 Fed. Reg. at 60,317. The agency rejected those pleas because, in its view, "[h]aving a PTIN is a special benefit," and this "same special benefit is conferred on *all* persons who obtain a PTIN, and the cost to the government is the same for providing PTINs to attorneys, certified public accountants, and enrolled agents as it is for providing PTINs to formerly unenrolled tax return preparers." 75 Fed. Reg. at 60,319 (emphasis added).

Does the IRS now think that it was wrong when it said that "the cost to the government is the same for providing PTINs"? Or is it just shedding crocodile tears, feigning concern about the plaintiffs' strategic decision to not press an argument that the agency itself has already rejected? The bottom line is this: If the IRS's defense on the merits is that the identifying number *on its own* is the special benefit, and the cost for each number is the same, then this class could not be more cohesive. And the plaintiffs are entitled to certification under Rule 23(b)(2) as well as under (b)(3).

3. That leaves the question whether this Court should certify the class under just one prong of Rule 23(b) or as a hybrid. Because this case seeks both injunctive relief and monetary relief, as explained in our class-certification motion, the Court may wish to "adopt a 'hybrid' approach, certifying a (b)(2) class as to the claims for declaratory or injunctive relief, and a (b)(3) class as to the claims for monetary relief, effectively granting (b)(3) protections including the right to opt out to class members at the monetary relief stage." *Bynum v. District of Columbia*, 214 F.R.D. 27, 38 (D.D.C. 2003) (Lamberth, J.) (quoting *Eubanks v. Billington*, 110 F.3d 87, 96 (D.C. Cir. 1997)). "[O]r it may certify a (b)(2) class and afford individual class members the due process protections afforded to (b)(3) class members." *Id.* at 39. Either approach would be sensible here.

For the Court's convenience, we are attaching an amended proposed order that conforms with this Court's order in *Bynum*. We respectfully request that the Court enter it. We also

respectfully request that the Court adopt our class-notice proposal, which we informed the government of nearly three weeks before it filed its response. The government has not indicated that it objects to the proposal. Specifically, as required by Local Rule 23.1(c), we propose that, should the Court certify the class, class counsel would retain a national, reputable class-action-administration firm to provide class notice. To the extent possible, email notice would be sent to each class member within 90 days of the Court's certification order using the contact information that the IRS has maintained for each person who has paid a PTIN fee. If the IRS does not have an email address on file for someone, or if follow-up notice is required, notice would be sent through U.S. mail. The parties would file an agreed-upon proposed form of notice (or, if the parties cannot agree, separate forms of notice) within 30 days of the Court's certification order. Class counsel would pay all costs incurred to send the notice, and all responses would go to the class-action-administration firm.

CONCLUSION

The plaintiffs' motion for class certification should be granted.

Respectfully submitted,

/s/ William H. Narwold

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December 23, 2015

Counsel for Plaintiffs Adam Steele, Brittany Montrois, Joseph Henchman, and the Putative Class

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2015, I electronically filed this class-certification motion through this Court's CM/ECF system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ William H. Narwold
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