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 RECONSIDERATION

The government does not oppose our motion for reconsideration: It does not deny that class certification of the plaintiffs' monetary claims is warranted. Nor does it deny that the Court has subject-matter jurisdiction over those claims. To the contrary, the government begrudgingly concedes (at 2) that the Court "may have subject matter jurisdiction" over the claims under the Little Tucker Act, which confers jurisdiction and waives sovereign immunity over non-tort claims against the United States of no more than $10,000. 28 U.S.C. § 1346(a)(2). The government gives no reason why the monetary claims in this case would not fit that description.

Instead, the government asks this Court to hold that the *other* jurisdictional statute cited in the amended complaint—the Administrative Procedure Act, 5 U.S.C. § 702—does not confer jurisdiction over those claims. *See* Resp. 15. But, as we explained in our motion (at 2 & 7), this Court need not decide that question. Regardless of whether the APA applies here, the Court indisputably has jurisdiction over the claims and should therefore certify the class.

Should this Court nevertheless decide to reach the question, we ask that it base its jurisdiction on the APA, which the Court has already recognized is the "primary statute that

plaintiffs specifically invoke." Dkt. 55, at 21. Alternatively, should the Court find the APA inapplicable, we ask that it base its jurisdiction over the monetary claims on section 1346(a)(2) of the Little Tucker Act.[1]

1. Jurisdiction under the APA. The government claims (at 2) that the APA does not apply because "the remedy sought is money damages, and the APA cannot provide subject matter jurisdiction over such relief." As the government sees it, the "monetary claims are for damages[,] not specific relief," because the plaintiffs "ask this Court for money," and the "general rule" is that "a claim seeking monetary relief is a claim for damages." Resp. 5–6, 9.

But "[n]ot all forms of monetary relief are money damages." *Am.'s Cmty. Bankers v. FDIC*, 200 F.3d 822, 829 (D.C. Cir. 2000). The term "money damages" refers to money "given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies"—even specific *monetary* remedies—"'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he is entitled.'" *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988) (quoting *Md. Dep't of Human Resources v. Dep't of Health & Human Servs.*, 763 F.2d 1441, 1446 (D.C. Cir. 1985)). Although the APA does not cover suits for money damages, *Bowen* holds that it authorizes suits for specific relief—notwithstanding the fact that this may "require the payment of money by the federal government." *Id.* at 894.

As we explained in our motion (at 4–5), the D.C. Circuit has since applied that holding to a case virtually indistinguishable from this one, in which the plaintiffs (an association of bankers) sought an order that they were "entitled to a refund" of allegedly unlawful payments made to the

[1] Although both parties discuss, in a footnote, the hypothetical possibility that a different subsection of the Little Tucker Act could apply here, 28 U.S.C. § 1326(a)(1), neither party contends that the Court's jurisdiction in this case rests on that subsection. And the government points out (at 10 n.2) that the PTIN fees challenged here are "collected under 31 U.S.C. § 9701, not the internal revenue laws"—meaning that subsection (a)(1), relating to taxes, does not apply. *See also Wyodak Res. Dev. Corp. v. United States*, 637 F.3d 1127, 1134–35 (10th Cir. 2011).

government. *Am.'s Cmty. Bankers*, 200 F.3d at 826. Reversing the district court's ruling that "the refund sought by Bankers was not available under [the APA]," the D.C. Circuit held that "the remedy sought by Bankers does not constitute money damages," and thus the court had "power under [the APA] to consider the merits of Bankers's claim." *Id.* at 826, 831. The court explained its reasoning as follows: "[T]his case questions whether the government can retain funds which originally belonged to Bankers's members. . . . Bankers is not seeking compensation for economic losses suffered by the government's alleged wrong-doing; Bankers wants the FDIC to return that which rightfully belonged to Bankers's member institutions in the first place." *Id.* at 830. If "the FDIC improperly collected money from Bankers's members," the court concluded, "they are entitled under the statutory scheme to get their money back." *Id.*

The government's only response to these binding cases is to attempt to confine them to their "specific facts and circumstances." Resp. 9. The government contends that "*Bowen* and *Bankers* are examples of a narrow exception" that applies only when plaintiffs request "'adjustments' to an ongoing relationship" and do not "explicitly seek money damages." *Id.* at 6. But the D.C. Circuit did not so much as mention the need for an "ongoing relationship" in *Bankers*, let alone make its holding turn on that feature. And even were that not so, the plaintiffs here *have* an ongoing relationship with the IRS—which is why they seek declaratory and injunctive relief under the APA. It is true that, as in *Bankers*, they also seek return of the money that was illegally taken from them. But that does not mean that they "explicitly seek money damages." And although the government claims (without authority) that "restitution or return" of the illegal charges constitutes money damages, it simply ignores *Holly Sugar Corp. v. Veneman*, cited in our motion (at 5), which held that the APA authorized "[a]n award of restitution for the surcharges that were allegedly illegally collected." 355 F. Supp. 2d 181, 192–93 (D.D.C. 2005),

rev'd on other grounds, 437 F.3d 1210 (D.C. Cir. 2006).

The government also obliquely refers to the fact that the plaintiffs "are challenging the taking of their money" without an express statutory requirement that it be returned to them—as if that provides the critical distinction. Resp. 6. The circuits, however, have held otherwise. The Second Circuit, for example, has found that the APA authorizes a claim for reimbursement even when "no statute explicitly requires [the government] to re-pay" the plaintiffs for "improperly incurred expenses." *Linea Nacional de Chile S.A. v. Meissner*, 65 F.3d 1034, 1043–44 (2d Cir. 1995). "[T]he lack of [an express] statutory requirement," the court explained, "does not bar relief" under the APA, because "it is clear that Congress . . . intended that [the government] reimburse" all payments made under a policy that is later determined to be unlawful. *Id.* The government acknowledges that the same is true here: If the plaintiffs prevail in arguing that the PTIN fees are unlawful, "the members of the putative class will be entitled to a refund of the PTIN fees they have paid to date." Dkt. 51, at 2. That is specific relief authorized by the APA. As the Second Circuit explained, "the precise nature of the mechanism by which a plaintiff receives that to which a statute entitles him cannot defeat his entitlement" or "transform[] the character of the relief [sought] into a substitute remedy" barred by the APA. *Linea Nacional de Chile S.A.*, 65 F.3d at 1044 (internal quotation marks omitted).

The Third Circuit has reached the same conclusion. In an opinion issued two years after *Bowen*, it allowed tenants who had overpaid for federal housing to bring suit under the APA for "reimbursement [of] the excess rent they were forced to pay," even though the government had argued that the statute on which their claims were based could not "fairly be interpreted" as requiring that result. *Zellous v. Broadhead Assocs.*, 906 F.2d 94, 96, 98 (3d Cir. 1990). The court held (like the D.C. Circuit in *Bankers*) that the government was "incorrect in characterizing the

requested reimbursement as damages" unauthorized by the APA, finding its holding "mandated by *Bowen*." *Id.* at 98. It elaborated: "the tenants do not seek compensatory damages for injuries they allegedly suffered as a result of [the government's] failure" to comply with the law; rather, "[t]hey seek to enforce both prospectively and retrospectively" the statutory restriction on how much they could be charged. *Id.* Just so here.

Finally, the government tries to make something of the fact that illegal-exaction claims may be brought under the Little Tucker Act "even though the basis for such a claim is entitlement to funds under a statute." Resp. 8. That is true, but beside the point: "some claims may be phrased legitimately in a way that would invoke either [APA] jurisdiction or [Little Tucker Act] jurisdiction," with the plaintiff having the choice between the two. *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1779 n.1 (Fed. Cir. 1996) (Nies, J., concurring). This is such a case. Just as the Third Circuit in *Zellous* held that APA jurisdiction existed despite the "possibility that the district court could have asserted Tucker Act jurisdiction over a claim for money damages," 906 F.2d at 96, this Court should hold similarly.

2. Jurisdiction under the Little Tucker Act. If the Court determines that the APA does not apply, it should then hold that there is jurisdiction under section 1346(a)(2) of the Little Tucker Act. Indeed, the government, far from arguing to the contrary, effectively concedes that it does not "challenge whether the Court has subject matter jurisdiction" over an "illegal exaction claim" predicated on the government's imposition of PTIN fees that are not sanctioned by law (specifically, 31 U.S.C. § 9701). Resp. 13. Nor does the government dispute that such a claim is cognizable, as we discussed in our motion (at 6). *See Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572–74 (Fed. Cir. 1996) (allowing illegal-exaction claim challenging excessive user fees); *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005).

Where the parties disagree is on whether the Little Tucker Act is limited to claims "for *money damages*" (the government's position), or whether it includes claims for monetary relief however characterized (our position). Resp. 10. We argued in our motion (at 5) that binding precedent from the U.S. Supreme Court and the D.C. Circuit makes clear that the Act "is not expressly limited to actions for 'money damages,'" *Bowen*, 487 U.S. at 900 n.31, and "include[s] claims for money arising out of equitable as well as . . . legal demands." *Md. Dep't of Human Resources*, 763 F.2d at 1447 (quoting *United States v. Jones*, 131 U.S. 1, 18 (1889)). The government's only comeback is to assert in a footnote, without elaboration, that "[n]either of these cases supports plaintiffs' argument." Resp. 10–11 n.3. That response speaks for itself. And even if the Little Tucker Act were limited to claims for money damages, that would not defeat this Court's jurisdiction; it would simply underscore further why the APA applies.

CONCLUSION

As the government does not dispute, *see* Resp. 15, the plaintiffs' motion for reconsideration should be granted, and the Court's February 9, 2016 class-certification order should be revised to certify a class as to the plaintiffs' claims for monetary relief, just as the Court did as to their claims for non-monetary relief.

Respectfully submitted,
/s/ William H. Narwold

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March 14, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2016, I electronically filed this motion for reconsideration 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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