IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADAM STEELE, et al.,	)	
	)	Case No. 1:14-cv-1523-RCL
Plaintiff,	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

THE UNITED STATES' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The parties have cross-moved for summary judgment as to plaintiffs' first claim, *i.e.*, whether the Internal Revenue Service has "legal authority to charge a fee for the issuance and renewal" of a Preparer Tax Identification Number ("PTIN"). (Am. Compl., Count I, ¶39 (Doc. 41).) The amount of the fee is irrelevant to the current cross-motions. If the Service may charge even $0.01, the United States prevails.

The United States' position is supported by one statute authorizing the PTIN and a second authorizing a user fee for issuing and renewing the PTIN. (*See* Doc. 66.) *First*, under 26 U.S.C. § 6109(a)(4) and (d), Congress authorized the Secretary of the Treasury to require that tax return preparers use an identifying number other than a Social Security number ("SSNs") on tax returns and refund claims prepared for others for compensation. Pursuant to that authority, the Secretary required the PTIN be the exclusive identifying number used by all tax return preparers for such purposes (the "PTIN Requirement"). *See* Furnishing Identifying Number of Tax Return Preparer, 75 Fed. Reg. 60309-01 (Sept. 30, 2010); *see also Loving v. I.R.S.*, 920 F. Supp. 2d 108, 109 (D.D.C. 2013). Because the regulations setting forth the PTIN Requirement were promulgated pursuant to the discretionary authority provided by Congress, the PTIN Requirement is lawful. *Second*, the United States may charge a user fee for issuing and renewing a PTIN (the "PTIN User Fee" or "User Fee") because the PTIN confers a "service or thing of value" upon specific individuals, namely the ability to prepare and file tax returns and refund claims for others for compensation. *See* Independent Offices Appropriations Act ("IOAA"), 31 U.S.C. § 9701. Accordingly, the Service has the legal

authority to charge a fee for issuing and renewing PTINs and the United States is entitled to judgment as to plaintiffs' first claim.

Plaintiffs' motion is an attempt to obfuscate this clear statutory authority. (*See* Doc. 67.) Their argument is predicated on the factual contention that the PTIN Requirement and PTIN User Fee are inextricably intertwined with the Registered Tax Return Preparer ("RTRP") regulations struck down in *Loving*. (*See id.* § I.A. ("Because the IRS justified the PTIN program based entirely on the agency's unauthorized attempt to regulate tax-return preparers, its collection of PTIN fees is (and was) arbitrary and capricious.").) Under their view, the PTIN and User Fee exist *only* as part of a "licensing scheme" for uncredentialed tax return preparers. Plaintiffs conclude the PTIN and User Fee are unlawful under the Administrative Procedure Act because the "original reason for acting has . . . been declared unlawful by the D.C. Circuit." (*Id.* at 1.)

Plaintiffs fundamentally misunderstand the administrative record. The PTIN and User Fee regulations are separate from the RTRP regulations. The PTIN and User Fee, which are authorized by 26 U.S.C. § 6109 and 31 U.S.C. § 9701 respectively, *apply to all* tax return preparers, whether they are attorneys, CPAs, Enrolled Agents, or uncredentialed tax return preparers. By contrast, the RTRP regulations, which were based on 31 U.S.C. § 330, *applied only* to uncredentialed tax return preparers. The PTIN and User Fee remain in effect, even though the RTRP regulations were invalidated. *See Steele v. United States*, 159 F. Supp. 3d 73, 78 (D.D.C. 2016).

Moreover, neither the PTIN Requirement nor the PTIN User Fee violate the APA. Because the Secretary promulgated the PTIN Requirement under its discretionary

authority granted by Congress, the APA does not grant judicial review of the PTIN Requirement. But even if judicial review is available, the PTIN Requirement is justified independently from the RTRP regulations. The Secretary determining that requiring a single identifying number would make it easier to identify all tax return preparers and the returns they prepare, which is a critical step for tax administration. In addition, the PTIN helps protect SSNs from inadvertent disclosure. For these reasons, the PTIN Requirement is rational, not arbitrary or capricious. And since the PTIN is lawful, a user fee may be charged because the PTIN gives a special benefit to tax return preparers not available to the general public.

COUNTER-STATEMENT OF THE FACTS

Concurrently with this opposition to plaintiffs' motion for summary judgment, the United States is filing a response to the Statement of Material Facts As To Which Plaintiffs Contend There Is No Genuine Issue ("Plaintiffs' Statement"). (*See* Doc. 67-1.) Plaintiffs' Statement is filled with factual contentions related only to the RTRP regulations and other matters outside the administrative record that have no bearing on the issue before the Court. The United States' response to Plaintiffs' Statement provides substantive responses to all of plaintiffs' contentions. The United States limits its discussion herein to only those contentions directly related to the question at hand.

1. The PTIN Requirement and User Fee Regulations

a. The PTIN Requirement

On September 30, 2010, under the authority conferred by Congress in 26 U.S.C. §§ 6109(a)(4), (d), and 7805(a), the Secretary of the Treasury promulgated final

regulations requiring the use of a PTIN on all tax returns and claims for refund prepared for others for compensation. *See* 75 Fed. Reg. at 60309 ("This document contains final regulations under section 6109 . . . that provide guidance on how the IRS will define the identifying number of tax return preparers and set forth requirements on tax return preparers to furnish an identifying number on tax returns and claims for refund they prepare."). The PTIN Requirement applies to all tax return preparers who are paid to prepare, or assist in preparing, all or substantially all of a tax return or claim for refund for another person (*i.e.*, attorneys, CPAs, Enrolled Agents, and uncredentialed tax return preparers). *See* 26 C.F.R. § 1.6019-2(g).

The preamble to the PTIN Requirement regulations state that the PTIN was "intended to address two overarching objectives":

- "to provide some assurance to taxpayers that a tax return was prepared by an individual who has passed a minimum competency examination to practice before the IRS as a tax return preparer, has undergone suitability checks, and is subject to enforceable rules of practice" and
- "to further the interests of tax administration by improving the accuracy of tax returns and claims for refund and by increasing overall tax compliance." 75 Fed. Reg. at 60310.

While the first objective related to the Service's efforts to regulate uncredentialed tax return preparers, the second objective is unrelated to that effort and constitutes a separate rationale for the PTIN Requirement. The Service received over 200 written comments to the proposed rule and "[m]ost of the comments received . . . support[ed]

the requirement to use a PTIN as the exclusive identifying number for tax return preparers." *Id.* at 60309-60310. Ultimately, the Treasury Department and the Service concluded that requiring the use of a PTIN "will most effectively promote sound tax administration," because "[e]stablishing a single, prescribed identifying number for tax return preparers will enable the IRS to accurately identify tax return preparers, match preparers with the tax returns and claims for refund they prepare, and better administer the tax laws with respect to tax return preparers and their clients." *Id.* at 60314.

The preamble further states that "[i]t is *critical to the IRS' 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 60310 (emphasis added). The regulations conclude that "[t]he requirement to use a PTIN will *allow the IRS to better identify tax return preparers, centralize information, and effectively administer the rules relating to tax return preparers*." *Id.* at 60309 (emphasis added). Similarly, the regulations state:

> The final regulations are necessary for tax administration. The final regulations are needed to identify tax return preparers and the tax returns and claims for refund that they prepare, to aid the IRS's oversight of tax return preparers, and to administer requirements intended to ensure that tax return preparers are competent, trained, and conform to rules of practice. *Mandating a single type of identifying number for all tax return preparers and assigning a prescribed identifying number to registered tax return preparers is critical to effective oversight*.
>
> . . .
>
> Given the important role that tax return preparers play in Federal tax administration, the IRS has a significant interest in being able to accurately identify tax return preparers and monitor their tax

> return preparation activities. *The final regulations, therefore, enable the IRS to more accurately identify tax return preparers and improve the IRS's ability to associate filed tax returns and refund claims with the responsible tax return preparer*. The final regulations are intended to accomplish this result, and thereby advance tax administration, by requiring all individuals who are paid to prepare all or substantially all of a tax return or claim for refund of tax to obtain a preparer identifying number prescribed by the IRS. Pursuant to the final regulations, the IRS will require individuals who sign tax returns or claims for refund to furnish the tax return preparer's PTIN on a tax return or claim for refund when the return or refund claim is signed. The final regulations also provide that the IRS may require tax return preparers to apply for, and regularly renew, their PTINs. Under the final regulations, the IRS may prescribe a user fee payable when applying for a number and for renewal.

Id. at 60313 (emphasis added).

In addition to improving tax administration, the Treasury Department and the Service concluded that requiring the use of a PTIN "will also benefit taxpayers and tax return preparers and help maintain the confidentiality" of SSNs. *Id.* at 60309.

b. The PTIN User Fee

Also on September 30, 2010, under the authority conferred by Congress in 31 U.S.C. § 9701, the Secretary promulgated final regulations requiring the payment of a user fee to obtain and renew a PTIN. *See* User Fees Related to Enrollment and Preparer Tax Identification Numbers, T.D. 9503, 75 Fed. Reg. 60316-01 (Sept. 30, 2010). After considering over 10,000 comments to the proposed regulation, the Treasury Department and the Service adopted a user fee, as authorized under the IOAA, in order to recover the full cost of providing a PTIN. *See id.* at 60316. This fee was based on the determination that "[h]aving a PTIN is a special benefit that allows specified tax return preparers to prepare all or substantially all of a tax return or claim for refund for

compensation." *Id.* at 60317. The Treasury Department and the Service required that all tax return preparers pay the PTIN User Fee – even if they were already required to pay other fees to obtain and maintain other licenses – because "[t]he 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 all tax return preparers. *Id.*

One individual commented that "the proposed regulations do not comply with the provisions of the IOAA because a PTIN is not a service or thing of value to a tax return preparer." *Id.* In response, the preamble states "[a] PTIN confers a special benefit 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.* Further, "while it is anticipated that requiring tax return preparers to obtain a PTIN will benefit tax administration generally, only the tax return preparer who receives the PTIN can take advantage of the special benefit associated with having a PTIN." *Id.* at 60318.

2. The Registered Tax Return Preparer Regulations and *Loving* Decision

Attorneys, CPAs, and Enrolled Agents are all credentialed by a professional organization, state regulator, or the IRS, and obtain their credentials through testing and licensing requirements. No such requirements apply to uncredentialed tax return preparers. The RTRP regulations, issued on June 3, 2011, constituted an attempt by the Service to require uncredentialed tax return preparers to demonstrate competence through testing and continuing education (the "RTRP Program"). *See* Regulations Governing Practice Before the Internal Revenue Service, T.D. 9527, 76 Fed. Reg. 32286-01 (June 3, 2011). The Service relied on 31 U.S.C. § 330 as statutory authority for the

program. The regulations stemmed from the Service's public review of the tax return preparation industry. *See* I.R.S. Publication No. 4832 (Rev. 12-2009) at 1. Attorneys, CPAs, and Enrolled Agents were exempted from the requirement to become a RTRP. *See* 76 Fed. Reg. at 32287.

In *Loving*, the District Court invalidated the RTRP Program's testing and continuing education requirements. 917 F. Supp. 2d 67, 69 (D.D.C. 2013). The Court stated that "[t]o close a gap in the federal oversight of tax professionals, in 2011 the Internal Revenue Service began regulating hundreds of thousands of non-attorney, non-CPA tax-return preparers [*i.e.*, uncredentialed tax return preparers] who prepare and file tax returns for compensation." *Id.* at 68-69. The Court concluded that section 330 did not authorize the Service's attempt to regulate uncredentialed tax return preparers through the RTRP Program. *Id.* at 69. After the Court entered its decision, the United States moved for a stay pending appeal, arguing in part that the Court's order appeared to affect the PTIN Requirement and User Fee. In denying a stay, the district court held that the PTIN Requirement and User Fee were unaffected by its ruling because "Congress has specifically authorized the PTIN scheme by statute." *Loving*, 920 F. Supp. 2d at 109 (citing 26 U.S.C. § 6109(a)(4)).

The D.C. Circuit affirmed the District Court's decision invalidating the RTRP Program. *See* 742 F.3d 1013, 1015 (D.C. Cir. 2014). The D.C. Circuit addressed "whether the IRS's statutory authority to 'regulate the practice of representatives of persons before the Department of the Treasury' [under section 330] encompasses authority to regulate tax-return preparers." *Id.* The D.C. Circuit concluded that section 330 "cannot

be stretched so broadly as to encompass authority to regulate tax-return preparers." *Id.* The D.C. Circuit did not discuss either the PTIN Requirement or User Fee. It also did not discuss either 26 U.S.C. § 6109 or 31 U.S.C. § 9701.

As part of its required biennial review of the PTIN User Fee – and not, as plaintiffs contend, in response to this lawsuit – the Service reduced the amount of the fee from $50 to $33. *See* 26 C.F.R. § 300.13(b); Preparer Tax Identification Number (PTIN) User Fee Update, 81 Fed. Reg. 52766-01 (Aug. 10, 2016); *see also* Office of Management and Budget Circular A-25, 58 Fed. Reg. 38142, 38146 (July 15, 1993) (directing agencies to review user fees biennially).

STANDARD OF REVIEW

In deciding plaintiffs' motion for summary judgment under the APA, this Court "sits as an appellate tribunal." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). As such, "the entire case on review is a question of law, and only a question of law." *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). Consequently, the "complaint, properly read, actually presents no factual allegations, but rather only arguments about the legal conclusion to be drawn about the agency action." *Id.* The district court's review "is based on the agency record and limited to determining whether the agency acted arbitrarily or capriciously" under 5 U.S.C. § 706. *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009). Therefore, the function of a reviewing district court is to determine whether or not, as a matter of law, the evidence in the administrative record permitted the agency to make the decision it did. *See Innovator Enterprises, Inc. v. Jones*, Civ. No. 13-581, 2014 WL 1045975, at *3 (D.D.C. 2014).

ARGUMENT

I. THE COURT SHOULD CONSIDER ONLY THE ADMINISTRATIVE RECORD

Although plaintiffs have asserted claims under both the APA and the Little Tucker Act, their motion for summary judgment is based entirely on the APA claim. They contend that the PTIN Requirement is arbitrary and capricious because it was based entirely on the invalidated RTRP Program. Further, they claim that, because the PTIN Requirement is unlawful, the PTIN User Fee is also unlawful. Thus, the Court should only consider the administrative record in deciding plaintiffs' motion for summary judgment. *See* L. Civ. R. 7(h)(2); (Doc. No. 45, Ex. B).

Judicial review of agency action is based upon the "full administrative record[1] that was before the agency at the time it made its decision." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). The records must provide contemporaneous explanation of agency action. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). When the challenged agency action is supported by such an explanation, it must "stand or fall on the propriety of that finding." *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973). Courts have a "limited role" in reviewing the administrative record." *ViroPharma, Inc. v. Hamburg*, 916 F. Supp. 2d 76, 79 (D.D.C. 2013). In determining whether an agency action was arbitrary and capricious, courts must judge the agency's action on its stated

[1] The certified record is entitled to a presumption of regularity; courts assume the agency properly designated the record absent clear evidence to the contrary. *See Volpe*, 401 U.S. at 415. Courts may only look beyond the record in narrow circumstances, inapplicable here.

rationale; the decision maker's mental processes and subjective intent are irrelevant. *See Camp*, 411 U.S. at 142-43; *Volpe*, 401 U.S. at 420; *Gen. Elec. Co. v. Jackson*, 595 F. Supp. 2d 8, 18 (D.D.C. 2009) (rejecting argument that agency's record was "skewed" because it did not include pre-decisional deliberative documents in the record). If the reviewing court is unable to evaluate the action on the basis of the record before it, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Fla. Power & Light Co.*, 470 U.S. at 744.

Plaintiffs' Statement, however, impermissibly includes materials outside the administrative record. Exhibits 2, 12, 13, and 15 were not considered by the agency in making its decision and should not be considered in determining the legality of the PTIN Requirement and User Fee. *See Pac. Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006). Similarly, Exhibits 4, 6, 7, 8, 9, 10, 11, 16, 17, 18, 19, 20 and 21 are post-decisional, non-contemporaneous, and not part of the administrative record. *See Fla. Power & Light Co.*, 470 U.S. at 743-44; *Camp*, 411 U.S. at 142-143. The relevant consideration is whether an agency's determination was reasonable *ex ante*, not whether the agency's determination was correct *ex post*. *See Fresno Mobile Radio, Inc. v. F.C.C.*, 165 F.3d 965, 971 (D.C. Cir. 1999). Thus, the Court should not consider any of these materials.

II. THE PTIN REQUIREMENT AND ITS USER FEE EXIST INDEPENDENTLY FROM THE RTRP REGULATIONS STRUCK DOWN IN *LOVING*

Plaintiffs' motion is based entirely on a flawed syllogism. Plaintiffs contend that the PTIN Requirement, the PTIN User Fee, and the RTRP Program constitute a unified

regulatory effort aimed at uncredentialed tax return preparers. They assert that "[a]s part of this unprecedented regulatory effort, the IRS began requiring paid tax-return preparers to pass a qualifying exam and take annual continuing-education courses." (Doc. 67 at 1.) They posit that "[t]he idea was to have the PTIN application process incorporate the new eligibility requirements - meaning only people who met those requirements would receive a PTIN - and to use the fees to cover the costs of implementing the new licensing regime." (*Id.*) After the RTRP Program was invalidated by the D.C. Circuit, "only one vestige of the 2010 regulations remains in effect: the requirement that return preparers obtain and annually pay for a PTIN." (*Id.*) Therefore, plaintiffs argue the PTIN and User Fee must also be invalidated. (*See id.* at 12 ("The question in this case is whether the last vestige of this failed licensing scheme - the PTIN fee intended to fund it - may exist independently of that scheme.").)

This argument fails at the first step. The administrative record shows that the PTIN Requirement and User Fee, which were promulgated *before* the RTRP Program, have an independent basis from the RTRP Program. And, as the *Loving* district court made clear, the PTIN and User Fee were unaffected by its decision. *See* 920 F. Supp. 2d at 109. Accordingly, plaintiffs' motion should be denied.

Throughout their brief, plaintiffs conflate the term "tax return preparers" with what they call "unlicensed tax return preparers." Those terms are not identical and the distinction is critical. As discussed above, whereas the PTIN Requirement and User Fee apply to *all tax return preparers* (*i.e.,* attorneys, CPAs, Enrolled Agents, and uncredentialed tax return preparers), *see* 26 C.F.R. § 1.6109-2(g), the RTRP Program

applied *only to uncredentialed tax return preparers*.[2] Thus, plaintiffs' statement that "the IRS began requiring paid tax-return preparers to pass a qualifying exam and tax annual continuing-education courses," as well as all similar statements, is factually incorrect.[3]

Plaintiffs contend that PTIN Requirement is unlawful because the Service lacked "licensing authority" over tax return preparers. (Doc. 67 at 12.) Plaintiffs urge the Court to review the Service's authority to require a PTIN as a "license" to prepare tax returns and claims for refund for others for compensation. The APA defines a "license" as the "whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." 5 U.S.C. § 551(8). A "license" can include any type of agency permission to act. For example, a ticket to enter a national park is a "license" for APA purposes. "Licensing" is defined as the "agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license." *Id.* § 551(9). Even if the PTIN is a "license," the Treasury Department and the Service had statutory authority under section 6109 to require its use. (*See infra*, at 18.)

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[2] The Service uses the term "uncredentialed tax return preparer" to describe tax return preparers who are not attorneys, CPAs and Enrolled Agents and who, unlike credentialed tax return preparers, may engage only in limited practice before the Service. "Unlicensed tax return preparers" is plaintiffs' term only.

[3] Plaintiffs' statement that the "2010 regulations" include the RTRP regulations is also factually incorrect. The PTIN Requirement and User Fee regulations were promulgated on September 30, 2010. The RTRP Regulations were promulgated on June 3, 2011.

Moreover, to the extent the PTIN Requirement is considered to be a "license" under the APA, it is because only those attorneys, CPAs, Enrolled Agents, and uncredentialed tax return preparers who have a PTIN may prepare tax returns and claims for refund for others for compensation. Post-*Loving*, the PTIN "licensing scheme" consists only of an application and payment of the PTIN User Fee. The PTIN Requirement "license" is akin to a national park ticket.

By contrast, the RTRP Program constituted a separate "license" *applicable only to uncredentialed tax return preparers*. Under that program, only uncredentialed tax return preparers who completed the testing and competency requirements were eligible to obtain a PTIN and prepare tax returns and refund claims for others for compensation. The RTRP "license" is more like a driver's license than a national park ticket. The RTRP Program imposed *additional requirements* applicable only to a subset of the total population of tax return preparers (i.e., uncredentialed tax return preparers), and it did not apply to attorneys, CPAs, or Enrolled Agents. *See* 76 Fed. Reg. at 32287. Post-*Loving*, the additional requirements of the RTRP Program related to testing and continuing education no longer apply and essentially everyone (but for those currently incarcerated) may obtain and renew a PTIN, if they apply and pay the PTIN User Fee.

For this reason, multiple courts have already found that *Loving* did not affect either the PTIN Requirement or User Fee. In denying a stay pending appeal, the *Loving* district court held that the PTIN Requirement and its user fee were unaffected by its ruling because "Congress has *specifically authorized* the PTIN scheme by statute." 920 F. Supp. 2d at 109 (citing 26 U.S.C. § 6109(a)(4)) (emphasis added). Nothing in the D.C.

Circuit's opinion affirming the district court is to the contrary. This Court also found that *Loving* did not affect the PTIN Requirement or User Fee. *See Steele*, 159 F. Supp. 3d at 78 ("Although the D.C. Circuit [in *Loving*] invalidated the IRS' more wide-ranging attempts to regulate non-credentialed tax return preparers, the regulations requiring that all compensated tax return preparers – credentialed and non-credentialed alike – obtain and pay for a PTIN are still in effect."). Similarly, the Northern District of Georgia determined that the Eleventh Circuit's holding in *Brannen* was unaffected by *Loving,* because the *Loving* district court "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." *Buckley v. United States*, No. 1:13-cv-1701, 2013 WL 7121182, at *2 (N.D. Ga., Dec. 4, 2013) (discussing *Loving*, 917 F. Supp. 2d 67).

In sum, there is no basis for plaintiffs' argument that the PTIN User Fees were only intended to fund, are inseparable from, and solely justified to support the RTRP Program. (*See* Doc. 67 at 2 ("Despite *Loving*, the IRS has continued to charge the PTIN fees that were intended to fund its failed regulatory scheme" and "the IRS acted unlawfully by collecting fees that were justified solely to support an unauthorized licensing scheme").) Rather, the PTIN Requirement was separately authorized by statute and the PTIN provides users with the benefit of preparing and filing returns and claims for refund for others *for compensation*, which means the Service may charge a PTIN User Fee. Because *Loving* has no effect on that conclusion, plaintiffs' motion for summary judgment must be denied.

III. THE PTIN REQUIREMENT DOES NOT VIOLATE THE APA BECAUSE CONGRESS COMMITTED THE DECISION TO AGENCY DISCRETION AND THE AGENCY PROVIDED A REASONABLE JUSTIFICATION FOR THE REQUIREMENT

Plaintiffs concede that Congress authorized the Secretary of the Treasury to require tax return preparers use identifying numbers other than their SSN on the tax returns and refund claims they prepare for others. (*See* Doc. 67 at 17 ("although Congress set the default identifying number as a person's social security number, it authorized the IRS to modify that policy by issuing regulations") (citing 26 U.S.C. § 6109(d)). Nevertheless, plaintiffs assert that the PTIN Requirement is unlawful because they contend the Service did not provide "an acceptable reason" for the requirement "that is consistent with its delegated authority." (Doc. 67 at 13.) Accordingly, plaintiffs argue the PTIN Requirement is arbitrary and capricious.

This argument fails for two reasons. *First*, the PTIN Requirement is unreviewable under the APA because Congress gave discretion to the Secretary to determine whether a number other than an SSN should be required. *Second*, in promulgating the final rule, the Treasury Department and the Service provided adequate reasons - independent of those related to the RTRP regulations - for imposing the PTIN Requirement. Specifically, the preamble to the regulations states that requiring a number other than a SSN would: (a) improve tax administration by making it easier to identify tax return preparers and the returns they prepare; and (b) safeguard SSNs from inadvertent disclosure. Because either of these reasons is sufficient to justify the final regulation, the PTIN Requirement is neither arbitrary nor capricious.

A. Judicial review of the PTIN Requirement is precluded under the APA because the decision was committed to agency discretion by law.

The APA precludes judicial review of any action committed to agency discretion by law. *See* 5 U.S.C. § 701(a)(2). Section 6109(d) states that the "social security account number issued to an individual . . . shall, *except as shall otherwise be specified under regulations of the Secretary*, be used as the identifying number for such individual for purposes of this title" (emphasis added). Thus, section 6109 gives the Secretary discretion to issue regulations requiring tax return preparers to obtain an identifying number, other than an SSN, in order to prepare tax returns or refund claims for compensation. *See Steele*, 159 F. Supp. 3d at 77 (section 6109(d) "allows the agency to require tax return preparers to provide a personal identifying number other than their [SSNs] on the returns they prepare"). Accordingly, the PTIN Requirement is presumptively unreviewable. *See Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985).

To determine whether a matter has been committed to agency discretion by law, the court considers both the nature of the administrative action at issue and the language and structure of the statute that supplies the applicable legal standards for reviewing that action. *See Sierra Club v. Jackson*, 648 F.3d 848, 855 (D.C. Cir. 2011). Review is unavailable if the statute is drawn so that a court would have "no meaningful standard" against which to judge the agency's exercise of discretion. *Heckler*, 470 U.S. at 830. In such case, the statute absolutely "committed" the decision making authority to the agency's judgment and the action is presumptively unreviewable, unless the statute provided enforcement guidelines to the agency. *Id.* at 830, 832–33.

Congress required that an identifying number be used on "any return or claim for refund preparer by a tax return preparer." 26 U.S.C. § 6109(a)(4). Congress designated the SSN as the identifying number for tax return preparers "*except as shall otherwise be specified under regulations of the Secretary*." 26 U.S.C § 6109(d) (emphasis added). The language of section 6109(d) specifically committed discretion to the agency to determine whether a different number should be used. In 2010, after a notice and comment process, the Service exercised its discretion and issued regulations requiring the use of the PTIN as the sole identifying number, thereby replacing the SSN. The statute provides no meaningful standard against which to judge the Service's exercise of its discretion; rather, the decision whether to replace the SSN with a different number was entirely committed to the Service's judgment. Because no standard of review exists, the decision to require the PTIN is unreviewable.

B. The Treasury Department and the Service provided adequate reasons to justify the PTIN Requirement that are entitled to deference.

Even if judicial review is available, the preamble to the PTIN Requirement regulations provides a reasonable explanation of the decision to mandate the use of the PTIN, which means the PTIN Requirement is neither arbitrary nor capricious.

"[W]hen an agency is authorized by Congress to issue regulations and promulgates a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous and if the agency's interpretation is reasonable." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124 (2016) (discussing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). If the court

determines that Congress has "directly spoken to the precise question at issue . . . that is the end of the matter [because] the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. If Congress has not directly spoken, "the court must defer to the agency's interpretation if it is 'reasonable.'" *Encino*, 136 S. Ct. at 2125 (quoting *Chevron*, 467 U.S. at 844).

Here, Congress directly authorized the Secretary to require the use of an identifying number other than a SSN. *See* 26 U.S.C. § 6109(d) ("*except as shall otherwise be specified under regulations of the Secretary*") (emphasis added). Thus, under *Chevron*, the matter is at an end because the PTIN Regulation gives effect the clear, unambiguous intent of Congress to let the Secretary decide whether to specify a different number.

But even if this Court continues the inquiry, the Treasury Department and Service's interpretation of section 6109 is reasonable and entitled to deference. While "an agency must give adequate reasons for its decisions," it need only provide an explanation "clear enough that its 'path may reasonably be discerned.'" *Encino*, 136 S. Ct. at 2125 (quoting *Bowman Transp., Inc. v. Arkansas–Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)). A decision is arbitrary and capricious where the agency "failed to provide even that minimal level of analysis." *Encino*, 136 S. Ct. at 2125. The reasons given by the agency "need not be elaborate or even sophisticated." *T-Mobile S., LLC v. City of Roswell, Ga.*, 135 S. Ct. 808, 815 (2015).

Plaintiffs contend that the PTIN Requirement was a change in existing policy, which required the Service to demonstrate a "good reason" for the new policy. (Doc. 67 at 12.) An agency is not required to provide a greater level of explanation if it is

changing a policy, but "must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino*, 136 S. Ct. at 2125-6 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). And it is not required that "the reasons for the new policy are *better* than the reasons for the old one." *Fox*, 556 U.S. at 515 (emphasis in original). Rather, "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Id.* (emphasis in original).

The Service previously allowed tax return preparers to use either their SSN or an alternative number prescribed by the Service as their section 6109 identifying number. Even assuming the PTIN Requirement constitutes a change in policy, the administrative record shows that the PTIN Requirement was justified independently from the RTRP Program. The Service performed an in-depth review of the return preparer industry, considered and responded to comments to the proposed rules, and ultimately determined that *all* tax return preparers an required to obtain and use a PTIN as the exclusive preparer identifying number.

As discussed above, the Service concluded that requiring the use of a single number would improve tax administration. (*See supra*, at 5.) The regulations state that "[i]t is *critical to the IRS' 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. at 60314 (emphasis added). The Service concluded that a single number would "enable the IRS to accurately identify tax

return preparers, match preparers with the tax returns and claims for refund they prepare, and better administer the tax laws with respect to tax return preparers and their clients." *Id.* The Service expressed this view throughout the rule-making process. For example, in connection with its review of the tax return preparer industry, the Service noted that the use of more than one number "makes it more difficult for the IRS to collect accurate tax return preparer data and to identify an individual tax return preparer." I.R.S. Pub. No. 4832 at 33.

The Service also concluded that requiring a number other than a SSN would help safeguard SSNs from inadvertent disclosure. Plaintiffs concede this explanation. (*See* Doc. 67 at 16 ("the preamble contains a passing reference to how PTINs might 'help maintain the confidentiality of SSNs'" (quoting 75 Fed. Reg. 60309)).) The District Court in *Brannen* relied in part on this reason in determining that the PTIN provided a benefit to tax return preparers. *See Jesse E. Brannen, III, P.C. v. United States*, No. 4:11-CV-0135-HLM, 2011 WL 8245026, *6 n. 7 (N.D. Ga. Aug. 26, 2011) ("Given the likelihood of human error by preparers, who may not always redact their Social Security numbers from returns provided to clients, coupled with the very real threat of identity theft, the Court cannot conclude that the Secretary's determination that the use of PTINs will protect confidentiality of Social Security numbers is unreasonable"). The Eleventh Circuit also noted this benefit. *See Brannen*, 682 F.3d 1316, 1320 n. 7 (11th Cir. 2012).

Either of these reasons is sufficient to meet the standard required to justify agency action. *See Encino*, 136 S. Ct. at 2125-26; *T-Mobile*, 135 S. Ct. at 815. Accordingly, the PTIN Requirement is neither arbitrary nor capricious.

IV. THE PTIN ENTITLES TAX RETURN PREPARERS TO PREPARE FEDERAL TAX RETURNS AND REFUND CLAIMS FOR COMPENSATION, WHICH IS A SERVICE OR THING OF VALUE

Plaintiffs maintain that any amount paid for a PTIN is unjustified because the PTIN Requirement itself is unlawful. (*See* Doc. 67 at 17 ("The separate regulation authorizing the fee is also inextricably tied to the IRS' failed bid to regulate tax-return preparers. *See* 26 C.F.R. § 300.13.").) Under plaintiffs' view, "[t]he IRS cannot use an unauthorized regulatory scheme to bootstrap a registration requirement, and then use that registration requirement to bootstrap a fee." (Doc. 67 at 18.) Plaintiffs conclude that the PTIN User Fee is not authorized under the IOAA because "Congress did not grant the IRS *any* licensing authority, so tax-return preparers receive no special benefit in exchange for the fees." (*Id.* at 2.)

As discussed above, the decision to require the PTIN is both unreviewable and justified under the APA. The PTIN allows the Service to better identify tax return preparers, which effectuates the purpose underlying 26 U.S.C. § 6109(a)(4), namely "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. 658 at 251, 94th Cong., 2d Sess. 274, reprinted in 1976 U.S.C.C.A.N. 2897. Accordingly, the PTIN is "sufficiently related to the statutory criteria [underlying the license] to justify assessing a fee." *Seafarers Int'l Union of N. Am. v. United States Coast Guard*, 81 F.3d 179, 185 (D.C. Cir. 1996).

Because the PTIN is lawful, the only question is whether it is a "service or thing of value" for which the Service may charge a fee. The answer is yes. "Having a PTIN is

a special benefit that allows specified tax return preparers to prepare all or substantially all of a tax return or claim for refund for compensation." 75 Fed. Reg. at 60317. Moreover, "[t]he 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 all tax return preparers. *Id.* Plaintiffs do not contest that the ability to prepare tax returns and refund claims for others for compensation is a "service or thing of value." (*See* Doc. 67 at 19.) Thus, the United States may charge the PTIN User Fee. *See Brannen*, 682 F.3d at 1320.

Plaintiffs argue that this Court should ignore the Eleventh Circuit's holding in *Brannen* because "[t]hat case predated *Loving*, and did not involve a challenge to the larger regulatory regime, as *Loving* did." (Doc. 67 at 19.) Plaintiffs assert, "the Eleventh Circuit had no occasion to consider the question here: whether the fee could lawfully be charged in the absence of the IRS' attempt to regulate preparers more broadly." (*Id.*) Plaintiffs conclude that the Eleventh Circuit's holding only has merit "if the licensing requirements are taken as a given (as they apparently were in *Brannen*)." (*Id.*)

There is no indication that the Eleventh Circuit took the "licensing regime . . . as a given," or that it even considered the RTRP Program in connection with its decision. In fact, the opinion does not mention the RTRP Program. Plaintiffs' argument was already considered and rejected by the Northern District of Georgia. *See Buckley*, 2013 WL 7121182, at *2 (concluding *Loving* was inapplicable, because it "specifically held that Congress authorized the PTIN scheme via a different statutory authority than the testing and competency requirements for registered tax return preparers") (discussing *Loving*, 920 F. Supp. 2d 108). This Court should likewise reject the argument.

Plaintiffs also argue that the PTIN User Fee is unlawful because the "[*a*]*nyone* can get a PTIN" and "they can do so in a matter of minutes," meaning that the PTIN is no longer available to only a subset of the general public. (Doc. 67 at 24 (citation omitted).) The fact that anyone can apply for a PTIN is irrelevant for purposes of section 9701. Although anyone can enter a national park if they buy a ticket (*i.e.*, the user fee), only those individuals who choose to take advantage of the special benefit provided by the park are subject to the user fee. Likewise, an individual who possesses a PTIN has a special benefit that is not available to an individual without a PTIN, namely the ability to receive compensation for preparing tax returns and refund claims for others. Only those specific individuals who apply for a PTIN may take advantage of the special benefit provided; thus, the Service is permitted to charge a user fee. *See Seafarers*, 81 F.3d at 183 ("fees are valid so long as the agency levies 'specific charges for specific services to specific individuals or companies'") (quoting *Fed. Power Comm'n v. New England Power Co.*, 415 U.S. 345, 349 (1974)).

Finally, plaintiffs appear to argue that the amount of PTIN User Fee, including the method by which the fee was determined, somehow demonstrates that the fee was only used to fund the invalidated RTRP Program, meaning that the PTIN User Fee is unlawful. (*See* Doc. 67 at 18-25.) As the parties previously agreed, plaintiffs' contention that the amount of PTIN User Fee is excessive is not currently before the Court with respect to the current cross-motions. As plaintiffs' concede, discovery will be necessary on that issue before it can be presented to the Court for adjudication. (*See id.* at 10-11; 25-26.) Thus, all facts related to the costs associated with the PTIN relate solely to

plaintiffs' second claim regarding the excessiveness of the PTIN fee and are irrelevant for purposes of this motion. Plaintiffs, therefore, cannot support their summary judgment motion based on the amount of the fee.

In sum, because the PTIN confers a "service or thing of value," the Service may charge a user fee for issuing and renewing PTINs.

CONCLUSION

For the foregoing reasons, this Court should deny plaintiffs motion for partial summary judgment and determine that the Service is statutorily authorized to charge a PTIN User Fee.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing THE UNITED STATES' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT was filed with the Court's ECF system on October 7, 2016, which system serves electronically all filed documents on the same day of filing to all counsel of record including upon:

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