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' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The government's summary-judgment motion largely misses the point. The question before the Court is whether the IRS's collection of PTIN fees—an integral part of its unprecedented effort to impose eligibility requirements on tax-return preparers—is lawful in light of the D.C. Circuit's invalidation of those requirements in *Loving v. IRS*, 742 F.3d 1014 (D.C. Cir. 2014). Although the IRS seeks summary judgment on that question, it makes no attempt to grapple with *Loving* (which does not even appear in its table of authorities), or to explain how the agency's asserted rationales for the PTIN regulations could survive that decision. Nor does the IRS make any attempt to show that it was operating under a proper understanding of its authority during the rulemaking process, as required by the Administrative Procedure Act.

Those issues are central to this case, and they are all teed up in the plaintiffs' motion for summary judgment. As we explain in that motion, "the *sole* reason that the IRS gave for why it was requiring tax-return preparers to obtain and pay for a PTIN—after allowing them for decades to use their social security numbers, and to obtain an optional PTIN for free—was to facilitate and fund the now-invalidated licensing requirements." ECF No. 67, at 2. "Because the

IRS gave no other justification for the PTIN fees, those fees are unlawful under the APA." *Id.* Nothing the IRS says in its competing motion does anything to undercut this fundamental point, and for this reason alone the IRS's motion must be denied.

Rather than defend its own rationale for the PTIN regulations, the IRS's summary-judgment motion makes a single argument for why the IRS thinks the fee is nevertheless permissible: because the Independent Offices Appropriations Act (or IOAA) authorizes agencies to charge a user fee for "each service or thing of value provided by [the] agency," 31 U.S.C. § 9701(a), and the service or thing of value that the IRS provides in issuing a PTIN is "the ability to prepare tax returns and refund claims for compensation," Gov. Mot. 1.

1. The IRS has not identified a legitimate justification that survives *Loving*.

As an initial matter, this argument cannot save a regulation whose justifications have been discredited. Under the APA, courts must "set aside agency regulations" that lack a permissible justification regardless of whether they are "within the agencies' scope of authority." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998); *see* ECF No. 67, at 13, 17.

The IOAA, the statute that the IRS invokes, is if anything even more demanding. It sets out an "essential" clear-statement requirement: An agency must "make clear the basis for a fee it assesses under the IOAA, so that a reviewing court can determine" its legality—that is, whether the agency is truly providing a "service or thing of value" to the recipient. *Nat'l Cable Tel. Ass'n v. FCC*, 554 F.2d 1094, 1100 (D.C. Cir. 1976); *see also id.* OMB Circular A–25, 58 Fed. Reg. 38,142, 38,146 (July 15, 1993) (agencies must "[d]etermine the extent of the special benefits provided" to impose a user fee).

Here, the IRS left no doubt about why it believed a fee was justified under the statute: "By limiting the individuals who may prepare all or substantially all of a tax return or claim for refund to individuals who have a PTIN, the IRS is providing a special benefit to the individuals

who obtain a PTIN"—the ability "to prepare all or substantially all of a tax return or claim for refund." *User Fees Relating to Enrollment and Preparer Tax Identification Numbers*, 75 Fed. Reg. 60,316, 60,319 (Sept. 30, 2010). "Because only attorneys, certified public accountants, enrolled agents, and registered tax return preparers are eligible to obtain a PTIN, only a subset of the general public is entitled to a PTIN and the special benefit of receiving compensation for the preparation of a return that it confers." *Id.* at 60,317. This justification obviously cannot withstand *Loving*, and the IRS does not contend otherwise. It does not deny that, after *Loving*, it lacks any authority to impose eligibility requirements or otherwise regulate who may prepare tax returns for others. As a result, *anyone* may obtain a PTIN.

2. The IRS's argument has no basis in existing IOAA jurisprudence.

Impermissible justifications aside, the IRS's argument is wrong even on its own terms. Because the IRS lacks licensing authority, it has no power to confer "the ability to prepare tax returns and refund claims for compensation." Gov. Mot. 1. All it may do is require tax-return preparers to disclose an "identifying number" on the returns that they prepare, 26 U.S.C. § 6109(a)(4), and issue regulations changing this number from the one Congress set as the default (the preparer's social security number), *id.* § 6109(d), if there is good reason for doing so, *see* 5 U.S.C. § 706. That is it. These statutory provisions do not in any way grant the IRS licensing power, and the agency does not claim that they do. Instead, it argues that—even in the *absence* of licensing power and any substantive limitations on who may prepare a tax return for others—the bare issuance of an identifying number is a special benefit for which the IRS may charge a fee, because the agency, when creating the fee, also created a requirement that preparers obtain a PTIN in lieu of using their social security number.

None of the D.C. Circuit decisions cited by the IRS supports this argument. They all involved a licensing or permitting scheme created by Congress—with substantive eligibility

requirements—that the agency had authority to implement. One case, for example, upheld fees imposed by the FCC on telecommunications companies for obtaining "operating license[s]," "station construction permit[s]," "equipment testing and approval," and "tariff filings." *Elec. Indus. Ass'n v. FCC*, 554 F.2d 1109, 1115 (D.C. Cir. 1976). These fees conferred "an independent private benefit" because they allowed the companies, by complying with substantive statutory requirements, to gain access to a regulated market and the benefits that come along with that, including "marketing a quality product," "credibility in the market place," and "a means for [each company] to obtain its revenues and to regulate subscriber use of its facilities." *Id.* at 1115–16. Another case upheld fees charged by the EPA to automobile manufacturers for obtaining a statutorily required certificate of compliance showing that their vehicles had satisfied emissions standards set by Congress. *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1179–80 (D.C. Cir. 1994). The court explained that the certificate provided a special benefit because it was "necessary in order [for the manufacturer] to keep its product certified for sale" in the regulated market. The other D.C. Circuit cases hold similarly. *See Seafarers Int'l Union of N. Am. v. U.S. Coast Guard*, 81 F.3d 179, 181, 185–86 (D.C. Cir. 1996) (holding that Coast Guard may charge fees to recoup on those costs "reasonably necessary to fulfill the substantive demands under the licensing procedures authorized by [Congress]"); *Nat'l Cable Tel. Ass'n*, 554 F.2d at 1101–02 ("[T]he FCC has undertaken to regulate this industry and has so far been sustained by the Supreme Court in this endeavor, with the result that a certificate of compliance *has* become a necessary and therefore valuable license.").

This is in keeping with the Supreme Court's recognition that a permit or occupational license is the paradigmatic example of a permissible user fee under the IOAA. *See Nat'l Cable Tel. Ass'n v. United States*, 415 U.S. 336, 341–42 (1974) (explaining that a user fee may be charged when an agency is asked to "permit an applicant to practice law or medicine or construct a house

or run a broadcast station"). And it is in keeping with federal user-fee policy, as set forth in OMB Circular A–25, which states that special benefits are those that enable beneficiaries to obtain "immediate or substantial gains or values," like "a license to carry on a specific activity or business." 58 Fed. Reg. at 38,144. Hence the black-letter rule that, "[i]n a regulated industry," a license or "certificate of approval is deemed a benefit specific to the recipient," because it gives them "the right to sell their products" in the regulated market. *Engine Mfrs. Ass'n*, 20 F.3d at 1180.

But tax-return preparation is not a regulated industry, as *Loving* makes clear. Congress has placed no substantive conditions on who may prepare tax returns on behalf of others for compensation. "These acts can be performed by anyone." *Loving*, 742 F.3d at 1021 (quotation marks omitted). Although the Justice Department may criminally prosecute return preparers who commit fraud or other misconduct, and federal courts may enjoin fraudsters and other wrongdoers from preparing returns, 26 U.S.C. § 7407, Congress has not given the IRS any authority of its own to regulate who may prepare tax returns for others. As *Loving* put the point, quoting from congressional testimony by the agency's own National Taxpayer Advocate: "the IRS currently has no authority to license preparers or require basic knowledge about how to prepare returns." *Loving*, 742 F.3d at 1021.

And that is no accident, because Congress knows how to confer licensing authority when it wants to do so. It expressly authorized the IRS, for example, to regulate what are known as "enrolled agents"—tax practitioners who represent taxpayers in adversarial proceedings—to ensure that they are "properly licensed to practice" before the agency. 31 U.S.C. § 330(b). Congress even specified the licensing criteria, requiring enrolled agents to demonstrate "good character," "good reputation," and that they possess the "necessary qualifications" and "competency to advise and assist persons in presenting their cases." *Id.* § 330(a). Enrolled agents thus pay a $30 fee every three years to maintain what the IRS describes as "the highest credential

the IRS awards." IRS, *Enrolled Agent Information*, http://bit.ly/2da19je; *see also id.* ("Individuals who obtain this elite status must adhere to ethical standards and complete 72 hours of continuing education courses every three years.").[1] In a similar vein, Congress expressly granted the IRS licensing power over people in the business of collecting "foreign payments of interest or dividends by means of coupons, checks, or bills of exchange," specifically requiring them to "obtain a license" from the IRS. 26 U.S.C. § 7001(a). By sharp contrast, Congress did nothing remotely similar for tax-return preparers.

So even if an agency, as a general matter, "is entitled to charge for services which assist a person in complying with his statutory duties" in a regulated industry, that is not what's going on here. *Elec. Indus. Ass'n* 554 F.2d at 1115. The requirement that a return preparer obtain a PTIN is not a *statutory* requirement with substantive standards designed to confer a benefit on the recipient; it is a *regulatory* requirement with no standards, designed to benefit the IRS (if it benefits anyone at all). Indeed, when Congress first enacted section 6109(a)(4), return preparers were required to disclose their social security numbers "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." ECF No. 67–1 (Rule 56 Statement) ¶ 7 (emphasis added). Congress provided for this "[d]isclosure requirement[]," in other words, "to *aid the Internal Revenue Service* in detecting incorrect returns prepared by tax return preparers"—not to bestow a benefit on those preparers. H.R. Rep. No. 94–658, at 275, 277 (1975), *reprinted in* U.S.C.C.A.N. 3171, 3173. Congress gave no other reason for the requirement. And the IRS, in its rulemaking, likewise claimed that PTINs would "be used to collect and track data on tax return preparers," which "will provide important *benefits to the IRS*." 75 Fed. Reg. at 43,113 (emphasis added); *see also id.* at 43,110 ("Requiring

[1] In performing the requisite "special benefit" analysis and justifying the PTIN fee in the 2010 rulemaking process, the IRS likened a PTIN holder to an enrolled agent. 75 Fed. Reg. 60,317–18. But that analogy breaks down after *Loving*.

registration through the use of PTINs *will enable the IRS* to better collect and track data on tax return preparers.").

Seemingly aware of this problem, the IRS tries to smuggle in a different supposed "special benefit," claiming (at 4, 8) that a PTIN "protects the confidentiality of tax return preparer SSNs." But the IRS cites nothing in the record showing that this "confidentiality" concern was a driving consideration in imposing a PTIN requirement, and there is no reason to believe that it was. *See* ECF No. 67, at 16–17. Nor does the IRS endeavor to explain why, if this concern were really the reason for the PTIN regulations, the old regulatory regime—allowing preparers to use *either* their social security number *or* a PTIN, and to omit this number from the taxpayer's copy of the return—failed adequately to safeguard the confidentiality of social security numbers.

This is hardly surprising, for there can be no serious dispute about the real motivation for the rulemaking: The agency wanted to use the PTIN as a kind of occupational license—with the PTIN application incorporating the now-invalidated eligibility requirements—and to use the fee as a way to fund the costs of administering the licensing regime. But *Loving* held that the IRS never had any licensing authority in the first place. And "it should be clear that an agency is not free to add [unauthorized] licensing procedures and then charge a user fee" for carrying out those procedures. *Seafarers*, 81 F.3d at 186.

It is this feature—the IRS's utter lack of any licensing authority—that makes this case fundamentally different from all the precedent cited by the agency in its motion. That includes the Eleventh Circuit's decision in *Brannen v. United States*, 682 F.3d 1316 (11th Cir. 1012), on which the IRS heavily relies. That case, decided on a motion to dismiss, came well before the D.C. Circuit's decision in *Loving*, and was thus decided against the backdrop of a licensing regime that was still in effect, and whose lawfulness the Eleventh Circuit did not question. *See, e.g.*, *id.* at 1320 (noting that the IRS "contemplated enhanced services for tax return preparers upon the

implementation of the regulations and the fee"). That alone distinguishes that case from this one. The *Brannen* court, moreover, had no occasion to examine whether the IRS's asserted rationale for the PTIN regulations could satisfy APA review or the IOAA's clear-statement requirement—questions that turn on the illegality of the larger scheme, and are squarely presented here.[2]

3. In any event, without licensing authority, the bare issuance of an identifying number is not a "service or thing of value" under the IOAA.

Even assuming that *Brannen* could be read to support the IRS's novel argument that the bare issuance of an identifying number confers a special benefit for which the agency may charge a fee, that broad reading should be rejected. The court was laboring under the mistaken belief that, "because § 6109(a)(4) expressly authorizes the [IRS] to assign [identifying] numbers, a person cannot prepare tax returns for another for compensation unless that person obtains from the [IRS] the required identifying number." 682 F.3d at 1319. That is incorrect. It equates the authority to issue and require an identifying number (which is the only authority the IRS has over tax-return preparers after *Loving*) with the authority to confer a license.

But, again, section 6109 is not a licensing statute; it is an identification provision that serves to assist the IRS by authorizing the agency to require the disclosure of certain information. If someone violates that requirement, the IRS has *no authority* to prevent them from preparing returns for others, and it is not unlawful for them to prepare returns for others. So how can the IRS be said to confer "the privilege of preparing tax returns for others for compensation," *id.*, when it lacks licensing power? *Cf. Horn Farms, Inc. v. Johanns*, 397 F.3d 472, 479 (7th Cir. 2005) (Easterbrook, J.) ("[W]hen no agency stands as a gatekeeper to a proposed private activity, there

[2] The same is true of the unpublished district court decision in *Buckley v. United States*, No. 13–cv–1701, 2013 WL 7121182 (N.D. Ga. Dec. 4, 2013), which also predated the D.C. Circuit's decision in *Loving*, and did not address the primary argument we have advanced here: that the PTIN regulations were part and parcel of a failed regulatory regime, and lack any independent justification that would allow them to survive the invalidation of that regime.

is no 'license' either."); 5 U.S.C. § 551(8) (defining "license" under the APA as "an agency permit, . . . approval, . . . or other form of permission."). Granted, a preparer who violates the disclosure requirement could have to pay a $50 penalty for each return that failed to include an identifying number, but that penalty would be assessed for failing to disclose the number—not for the unauthorized filing of returns.[3] Avoiding the payment of a modest penalty—a penalty that exists to compel people to provide the IRS with information that is useful only to the agency—is the *sole* "benefit" that someone receives when they obtain a PTIN. That is not the kind of a service or special benefit conferred in response to a "voluntary act" that Congress had in mind when it authorized user fees under the IOAA. *Nat'l Cable Tel. Ass'n*, 415 U.S. at 340. The IRS cites no precedent (and our research discloses none) where a court has found that charging a user fee solely for the issuance of an identifying number—in the absence of any valid licensing scheme with eligibility requirements—passes muster under the IOAA. Indeed, the IRS does not cite another example of any agency even attempting to impose a user fee for issuing an identifying number. And the IRS itself issues several other identifying numbers for free, including Electronic Filing Identification Numbers (or EFINs), which allow the holder to electronically file tax returns.

To read section 6109(a)(4) as conferring regulatory authority on the IRS to bestow the "privilege of preparing tax returns and refund claims for others," as the IRS does (at 8), is akin to reading the statute as granting licensing authority—in plain contravention of basic principles of statutory interpretation. Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 469 (2001). And, by the same token, it does not grant important

[3] There is only one way for someone to be stripped of their ability to prepare tax returns for others: If the IRS seeks an injunction in federal court—the only enforcement authority it has over return preparers—and the court determines that the person had "continually or repeatedly" violated the tax code such that "an injunction prohibiting [that] conduct would not be sufficient" to prevent future violations. 26 U.S.C. § 7407. Only then could the court "enjoin [that] person from acting as a tax return preparer." *Id.*

regulatory powers (like the power to license "hundreds of thousands of individuals in the multi-billion dollar tax-preparation industry," *Loving*, 742 F.3d at 1021) "in so cryptic a fashion." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). To the contrary, as *Loving* confirms, Congress created a system in which anyone may prepare tax returns, while permitting federal prosecutors and courts to penalize return preparers who commit fraud or misconduct. That is Congress's scheme.[4] If the IRS wants to create a requirement that tax-return preparers obtain a different identifying number than their social security number, it may do so (assuming that its rationale can survive APA review). But it may not begin charging a fee for that number on the theory that it operates as an occupational license, because that would convert an identification requirement into a licensing requirement.

The central flaw in the IRS's argument can be illustrated by a simple question: If anyone may prepare tax returns for others—as has been the general rule in this country since the federal income tax was established a century ago—then what concrete special benefit do tax-return preparers receive from the PTIN regulations and the accompanying fees?[5] If the IRS's regulatory scheme were all that was needed to justify itself, then agencies across the federal government would feel free to raise revenue by attaching fees to regulatory requirements that provide no real

[4] The legislative history bears this out. As already discussed, Congress enacted section 6109(a)(4) as a basic disclosure provision designed to help the IRS, with modest penalties for those who fail to provide information. *See* H.R. Rep. No. 94–658, at 275, 277 (1975) (explaining that the statute exists "to aid the Internal Revenue Service in detecting incorrect returns prepared by tax return preparers"). And other provisions of section 6109 confirm that it is aimed at the disclosure of identifying information—nothing else. Subsection (c), for instance, authorizes the IRS "to require such information as may be necessary to assign an identifying number to any person." And another section permits the IRS to share information with governmental bodies that are actually "charged under any State or local law with the licensing, registration, or regulation of tax return preparers." 26 U.S.C. § 6103(k)(5); H.R. Rep. No. 94–658, at 278. When Congress amended section 6109 in 1998 to allow the IRS to require alternative identification numbers, it did nothing to change the limited scope of subsection (a)(4).

[5] Indeed, it is hard to imagine why *any* tax-return preparer would pay money (year in and year out) to receive and retain a PTIN but for the penalty-backed PTIN requirement.

benefit to any identifiable recipients. That would thwart the purposes of the IOAA, marking "a sharp break with our traditions" and encouraging agencies to stray "far from [their] customary orbit" and seek out "revenue in the manner of an Appropriations Committee of the House." *Nat'l Cable Tel. Ass'n*, 415 U.S. at 341. This Court should not permit that result.

At bottom, the IRS is attempting to defend its collection of fees to support a failed licensing regime—even after the basis for that regime has been declared unlawful. Because the government's motion doesn't even confront that reality, it should be denied.

CONCLUSION

The government's motion for summary judgment should be denied and the plaintiffs' motion for summary judgment should be granted.

Respectfully submitted,

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October 11, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2016, I electronically filed this opposition to defendant's motion for summary judgment 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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