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 SUMMARY JUDGMENT

At issue in the cross-motions for summary judgment is whether the IRS has lawfully charged PTIN fees to tax-return preparers. The plaintiffs' motion challenges these fees on two independent grounds. The first is that the IRS's own justifications for the PTIN regulations are impermissible in light of *Loving v. IRS*, 742 F.3d 1014 (D.C. Cir. 2014), which invalidated the IRS's parallel attempt to impose eligibility criteria on return preparers. This makes the fees unlawful under the APA. The second is that, even setting the IRS's justifications aside, the agency lacks statutory authority to charge the fees because—in the absence of licensing power—it confers no "service or thing of value" in exchange for them. 31 U.S.C. § 9701(a). This makes the fees unlawful under the IOAA. The IRS offers no persuasive response to either argument.

1. On the APA, the IRS's first move is to seek immunity from judicial review. Invoking a "very narrow" exception to the "strong presumption of the reviewability of agency action," *Cobell v. Babbitt*, 30 F. Supp. 2d 24, 32 (D.D.C. 1998) (Lamberth, J.), the IRS takes the remarkable position (at 17–18) that Congress made the regulation requiring a PTIN entirely "unreviewable." Congress provided that return preparers shall use their social security numbers to identify

themselves on prepared returns "except as shall otherwise be specified under [IRS] regulations." 26 U.S.C. § 6109(d). Through that simple delegation of rulemaking authority, the IRS argues, Congress "specifically committed discretion to the agency to determine whether a different number should be used." Congress did no such thing, and the IRS doesn't even attempt to meet the demanding standard required for this exception: "show[ing] by clear and convincing evidence that Congress intended to restrict access to judicial review." *Cobell*, 30 F. Supp. 2d at 32. The statutory language on which the IRS relies "falls well short of evidencing a congressional intent to preclude judicial review by any standard, much less under the exacting clear and convincing standard provided by the Supreme Court." *Id.* The committed-to-agency-discretion exception, moreover, encompasses primarily "agency refusals to institute investigative or enforcement proceedings"—not garden-variety rulemaking. *Heckler v. Chaney*, 470 U.S. 821, 838 (1985). The IRS does not cite a single case in which a court abstained from reviewing a *regulation* on the theory that the mere delegation by Congress of authority to write that regulation somehow insulated it from the usual principles of APA review. And that is not surprising: to restate the IRS's argument is to refute it.

The agency's next bid for short-circuiting APA review is to invoke *Chevron* deference. It asserts that, because it had statutory authority to require a PTIN, "under *Chevron*, the matter is at an end." Opp. 19. Here, too, the IRS fundamentally misunderstands basic principles of administrative law. This is not a *Chevron* case. "*Chevron* is principally concerned with whether an agency has authority to act under a statute," as opposed to the concern of traditional APA review that is at issue here: "whether the [agency's] discharge of that authority was reasonable." *Arent v. Shalala*, 70 F.3d 610, 616–17 (D.C. Cir. 1995). The IRS tries to conflate these standards. But, under the APA, an agency may not evade judicial review of its *reasons* for issuing a regulation simply by citing the statute delegating rulemaking authority. Quite the opposite: Courts must "set

aside agency regulations"—even if those "within the agencies' scope of authority"—if they "are not supported by the reasons that the agencies adduce," or if those reasons are impermissible. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998). On this question, then, it makes no difference if the IRS, in its PTIN regulations, relied on "a different statutory authority than the testing and competency requirements" invalidated in *Loving*. Opp. 15. Having delegated authority is not a justification for exercising it.

That said, even the IRS's assumption that it acted within its delegated statutory authority is belied by the text of the rule itself. The regulation imposing the PTIN requirement—which is still on the books—expressly states that, to obtain a PTIN, "a tax return preparer must be an attorney, certified public accountant, enrolled agent, or registered tax return preparer authorized to practice before the Internal Revenue Service under 31 U.S.C. 330 and the regulations thereunder." 26 C.F.R. § 1.6109–2(d). The same regulation also expressly states that "the IRS may conduct a Federal tax compliance check on a tax return preparer who applies for or renews a preparer tax identification number or other prescribed identifying number." *Id.* § 1.6109–2(f). There is no serious argument that either of these provisions survives *Loving*. Whatever authority the IRS might have to "decide whether to specify a different number" than a social security number as the "identifying number" under 26 U.S.C. § 6109(d), *see* Opp. 19, it has no authority to restrict who may receive a PTIN or to conduct compliance tests in the wake of *Loving*. If it did, then a statute entitled "Identifying numbers" would be transmuted into a regulation conferring licensing authority on the IRS—rendering *Loving* a dead letter.[1]

[1] To be clear, we do not challenge the IRS's statutory authority—in the abstract—to require a PTIN in lieu of a social security number if it has a sensible reason for doing so. But the IRS may not create eligibility requirements for obtaining a PTIN that are not authorized by statute, nor may it charge an unauthorized fee. And in this case, the IRS did not identify a permissible, independent justification during rulemaking for the requirement that tax-return preparers obtain and pay for a PTIN.

But even assuming that the IRS acted within its statutory authority when it issued the regulation requiring PTINs, that is not the end of the inquiry, and the IRS effectively admits as much. It concedes (at 20) that its PTIN regulations must not only be "permissible under the statute," but there must be "good reasons" for them—that is, good reasons for requiring return preparers to obtain and pay for a PTIN beginning in 2010 after doing neither for decades. And the IRS also concedes (at 4) that one of the two "overarching" reasons it gave for this new requirement is plainly impermissible under *Loving*.[2]

The IRS contends, however, that the PTIN regulations can nevertheless be "justified independently" of the regulatory regime struck down by the D.C. Circuit. *Id.* at 20–21. It proposes two justifications. First, the IRS says that the agency believed that having a "single number" was "critical to the IRS's tax administration efforts." Opp. 20. Maybe so. But the question is *why*. That is: Why was having "a single type of identifying number"—a PTIN, not a social security number—"critical to effective oversight"? *Id.* at 5. The IRS's brief does not say. The answer, of course, is that the PTIN was designed to facilitate the unauthorized regulatory scheme, which required return preparers to do one of two things: either establish their professional credentials (as a licensed lawyer, CPA, or enrolled agent) or else demonstrate competency by passing a test and meeting continuing-education demands. Only people who did one of these things would be eligible for a PTIN, as the regulatory text makes clear. *See* 26 C.F.R. § 1.6109–2(d). In this way, the PTIN took on a "revised purpose" as an occupational license. *User Fees Relating to Enrollment and Preparer Tax Identification Numbers*, 75 Fed. Reg. 43,110, 43,113 (July

[2] The IRS asks this Court (at 10–11) to ignore any evidence we cited that is outside the administrative record. In our view, this evidence provides helpful context, and may eventually be necessary to the bifurcated question of excessiveness, should the case ever get that far. But we agree that the question now before the Court can be decided on the administrative record alone. (The plaintiffs initially sought to bifurcate this case and have the issues briefed in these motions decided solely on the basis of the administrative record.)

23, 2010). By incorporating the eligibility criteria into the application process, the PTIN would be converted from an optional identifying number (its original purpose) into a new "threshold requirement" that would enable the IRS to "enforce the regulation of tax-return preparers." *User Fees Relating to Enrollment and Preparer Tax Identification Numbers*, 75 Fed. Reg. 60,316, 60,318–19 (Sept. 30, 2010).

That is why the IRS viewed the PTIN as critical to effective oversight. Yet the IRS now ignores this obvious purpose. It acts as if the PTIN regulations were entirely "separate from" the regulation struck down in *Loving*, and were thus "unaffected by [that] decision," Opp. 2, 12—even though the regulation imposing the PTIN requirement leaves no doubt about the degree of interconnectedness. *See* 26 C.F.R. § 1.6109–2(d) ("[T]o obtain a [PTIN], a tax return preparer must be an attorney, certified public accountant, enrolled agent, or registered tax return preparer authorized to practice before the Internal Revenue Service under 31 U.S.C. 330 and the regulations thereunder."). The IRS acts, in other words, as if it were simply faced with the need to prohibit "the use of more than one number"—without saying why this was so important to the agency. Opp. 21. But if the desire for a "single number" were really a driving motivation apart from the failed regulatory effort (and there is nothing to suggest that it was), then there should have been a tried-and-true solution to the problem. And it would have cost nothing: The IRS could have just gone back to requiring return preparers to use their social security numbers, as envisioned by Congress. After all, the statute itself provides that the preparer's social security number "shall . . . be used as the identifying number" unless "otherwise be specified under [IRS] regulations." 26 U.S.C. § 6109(d). So how can having a single identifying number—on its own—be a good reason for exercising rulemaking authority and issuing a costly regulation?[3]

[3] The IRS fails explain how "the use of more than one number" made it "more difficult for the IRS to collect accurate tax return prepare data and to identify an individual return

Perhaps sensing the absurdity of this argument, the IRS makes sure to identify another reason in an attempt to supply the missing justification: an isolated snippet in the preamble speculating that requiring PTINs will "also . . . help maintain the confidentiality of SSNs." *Id.* at 3, 20–21. The IRS claims (at 21) that these seven words, by themselves, are "sufficient to meet the standard required to justify agency action" under the APA. That is not remotely true. For starters, as we explained in our summary-judgment motion, *see* ECF No. 67, at 16–17, this justification was not one of the two "overarching justifications" for the PTIN requirement that the IRS identified in its rulemaking. Nor is it plausible that the agency would have issued the PTIN regulations based on this concern alone. *See id.* And the IRS makes no effort to answer the question posed in our summary-judgment motion, *id.*, asking how the old regime—which permitted return preparers to omit their social security numbers from the taxpayer's copy of the return, and to obtain an optional PTIN—failed to safeguard the confidentiality of social security numbers. It blinks reality to think that the IRS would have issued the PTIN regulations in their current form purely to help maintain the confidentiality of social security numbers.

In short, the IRS has not offered a plausible justification for the regulations that withstands *Loving*—let alone a good reason for them. The fees are thus unlawful under the APA.

2. On the IOAA (should the Court reach that question), the IRS argues that it may charge fees for issuing a PTIN because the number confers a "service or thing of value" on return preparers by acting as an occupational license. *See* Opp. 13–14, 23–24. But, as we explained in detail in our opposition to the IRS's summary-judgment motion, the IRS has *no* licensing authority after *Loving*. *See generally* ECF No. 70; *Loving*, 742 F.3d at 1021 ("[T]he IRS currently has no authority to license preparers."). The statute on which the agency now relies, 26

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preparer." Opp. 21. It is not at all apparent how issuing a PTIN to a small minority of return preparers—whose social security numbers the IRS *already had on file* because they are required for the PTIN application—could have interfered with the IRS's ability to identify return preparers.

U.S.C. § 6109(a)(4), does not in any way grant the IRS authority to decide who may prepare tax returns for compensation, nor does it make issuing an identifying number a "service or thing of value" for which the agency may charge a fee. To the contrary, it is a disclosure provision designed solely to help *the IRS*. (The IRS has not identified any reason why preparers would pay money each year to receive and retain an identification number but for the penalty-backed requirement. And it is hard to imagine why anyone would.)

Nor does the IRS show how it satisfied the IOAA's "essential" clear-statement requirement during rulemaking—that is, the requirement that an agency "make clear the basis for a fee it assesses under the IOAA, so that a reviewing court can determine" its legality. *Nat'l Cable Tel. Ass'n v. FCC*, 554 F.2d 1094, 1100 (D.C. Cir. 1976); *see also SEC v. Chenery Corp.*, 332 U.S. 194 (1947). As we explained in our motion, and again in our opposition, the IRS justified the fee in its rulemaking as an occupational license. *See* ECF No. 67, at 19, 23; ECF No. 70, at 2–3. It said: "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." 75 Fed. Reg. at 60,319; *see also id.* at 60,317 ("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."). This justification cannot withstand *Loving*, and the IRS makes no argument to the contrary.

Instead, the IRS claims (at 14, 24) that it may charge a PTIN fee because it is "akin to a national park ticket." But that analogy dissolves upon scrutiny. For one thing, people do not have an inherent right to be in a national park. The federal government owns and maintains the land, and makes it available to the public during certain hours, for certain purposes. Tax-return

preparation, by sharp contrast, is an unregulated industry. All citizens have a right to prepare tax returns on behalf of others for compensation. Absent congressional approval, the Executive Branch cannot restrict that right. *Cf. Thorne v. Jones*, 765 F.2d 1270, 1274 (5th Cir. 1985) ("Whatever is not forbidden on our blessed shores is permitted."). At any rate, Congress specifically authorized the Secretary of the Interior to "establish, modify, charge, and collect recreation fees at Federal recreational lands and waters"—an authorization that would have been unnecessary on the government's reading of the IOAA. 16 U.S.C. § 6802. Unlike the general user-fee statute, this authorization does not require that the agency provide a special benefit in exchange for the fee. Congress did not include a similar authorization in this context. It granted the IRS only the limited ability to require an identifying number and to change that number from the default (social security) to something else if there is good reason for doing so. That is not a "service or thing of value" for which an agency may charge a fee under the general user-fee statute. Thus, after *Loving*, not only are the IRS's justifications for the fee impermissible under the APA, the fee itself is also unauthorized by the IOAA.

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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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2016, I electronically filed this reply in support of plaintiffs' 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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