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*.	)	Civil Action No.: 1:14-cv-01523-RCL

UNITED STATES' OPPOSITION TO
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

The Court should deny Allen Buckley's motion to enjoin the IRS from requiring Preparer Tax Identification Number ("PTIN") holders to renew annually their PTINs because he cannot establish (1) a likelihood of success on the merits, (2) that the class will suffer irreparable harm in the absence of a preliminary injunction, or (3) that the balance of equities weighs in favor of injunctive relief.

Plaintiffs, to the extent Buckley brings this motion on their behalf, are unlikely to succeed on the merits because the motion seeks relief outside the scope of this case.[1] The amended complaint only challenges whether the IRS may charge a fee for obtaining and renewing a PTIN

[1] Lead Class Counsel in this action opposes the relief sought in the Buckley motion because "Class Counsel did not authorize the filing of Mr. Buckley's motion, and hence that motion has not been properly made on behalf of the certified class in this case." (Dkt. No. 130 at 2 (class counsel "would have no objection to [Buckley] pursuing an injunction in a separate civil action on his own").) Notably, this is not the first time that Mr. Buckley and Class Counsel have been at odds. In January 2020, Buckley filed a motion to be named sole lead counsel in this case, attempting to usurp authority and control of the case from the other Class Counsel. (See Dkt. No. 118.) In denying that motion, the Court requested professionalism by all counsel for the Class so that they would adequately represent the best interest of their clients. See Dkt. No. 126. Despite the Court's reasonable request, Buckley has decided forge his own path, leaving the United States in the unenviable position of responding to what amounts to be two sets of counsel.

(and if so, whether that fee is excessive); it ***does not challenge or even discuss*** whether the IRS may require ***renewal*** of a PTIN. Plaintiffs, therefore, cannot obtain injunctive relief on an issue that is not part of their amended complaint.

Equally important, Buckley admits that "the *Montrois* opinion states: '[A]s the district court held the IRS's requirement that preparers obtain and renew a PTIN survives *Loving*." (Dkt. No. 128-1 at 4 (quoting *Montrois v. I.R.S.*, 916 F.3d 1056, 1068 (D.C. Cir. 2019).) The United States Court of Appeals for the District of Columbia Circuit determined that the IRS may require tax return prepares to renew PTINs annually. Thus, Buckley cannot challenge or obtain any relief regarding the annual renewal requirement. *See Sherley v. Sebelius*, 776 F. Supp. 2d 1, 15 (D.D.C. 2011) (citing 18B Wright & Miller, Fed. Prac. & Proc., § 4478 (2d ed. 1987)).

Further, Buckley has not established that the class will suffer "irreparable harm" if a preliminary injunction is not issued. Buckley offers no evidence showing "irreparable" harm, which is fatal to his motion. But even if the Court were to consider his claims of harm, neither the loss of money, here at most $35.95, nor being required to spend one hour filling out a PTIN renewal form qualify as "irreparable" harm.

Finally, Buckley has made no attempt to establish that the private and public interests at issue weigh in favor of injunctive relief. Given that Buckley is challenging a requirement authorized by statute and regulation and upheld by this Court and the D.C. Circuit, the equities weigh in favor of denying injunctive relief.

Accordingly, the Court should summarily deny Buckley's motion.

BACKGROUND

On June 1, 2017, the Court granted Plaintiffs' motion for summary judgment in part, holding that the IRS may require the use of PTINs but may not charge fees under the

Independent Offices Appropriations Act ("IOAA") to obtain and renew PTINs. *See* Dkt. No. 79. The United States appealed the decision that it could not charge a user fee to obtain and renew a PTIN. *See* Dkt. No. 90. Plaintiffs did not file a notice of appeal regarding any issue.

On March 1, 2019, the D.C. Circuit vacated the judgment, finding "that the IRS acted within its authority under the [IOAA] in charging tax-return preparers a fee ***to obtain and renew PTINs***." *Montrois*, 916 F.3d at 1058 (emphasis added). The Court remanded the action "for further proceedings, including an assessment of whether the amount of the PTIN fee unreasonably exceeds the costs to the IRS to issue and maintain PTINs." *Id*. Now on remand, this case is in discovery to determine the appropriate amount that the Service may charge under the IOAA to issue and renew a PTIN.

On July 17, 2020, the IRS published in the Federal Register final regulations setting a new annual PTIN user fee at $35.95 for 2021. *See* 85 Fed. Reg. 43,433 (July 17, 2020). Buckley filed this motion for a preliminary injunction to enjoin the IRS from requiring tax return preparers to renew PTINs.

STANDARD FOR PRELIMINARY INJUNCTION

"Because interim injunctive relief is an extraordinary form of judicial relief, courts should grant such relief sparingly," and "such relief should not be granted unless movant, by clear showing, carries burden of persuasion." *Jackson v. District of Columbia.*, 692 F. Supp. 2d 5, 7 (D.D.C. 2010) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). Federal Rule of Civil Procedure 65 grants courts the authority to issue a preliminary injunction only if certain conditions are met. The Supreme Court has articulated a four-part test to determine whether a preliminary injunction is appropriate. To obtain preliminary injunctive relief, Buckley must show that (1) the class is likely to succeed on the merits, (2) the class is likely to suffer irreparable

harm in the absence of preliminary relief, (3) the balance of the equities tips in class' favor, and (4) an injunction is in the public interest. *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008).

ARGUMENT

The Court should deny Buckley's motion because he has not carried the burden of persuasion for the extraordinary relief he seeks. Buckley has not established either that he is likely to succeed on the merits or that the class will suffer irreparable harm in the absence of preliminary relief. Further, given the fact that the certified class opposes the relief sought, the balance of private and public interest weighs in favor of denying the motion.

I. Buckley cannot establish that he is likely to succeed on the merits.

If a plaintiff "cannot show a likelihood of success on the merits, 'there is no need to consider the remaining factors.'" *Williams v. Brennan*, 285 F. Supp. 3d. 1, 8 (D.D.C. 2017) (citing *Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urban Dev.*, 639 F.3d 1078, 1088 (D.C. Cir. 2011)); *see also Sherely v. Sebelius*, 644 F. Supp. 3d 388, 393 (D.C. Cir. 2011) ("[W]e read *Winter* at least to suggest if not to hold "that a likelihood of success is an independent, free-standing requirement for a preliminary injunction."). In the context of a preliminary injunction "the 'merits' on which plaintiff must show a likelihood of success encompass not only substantive theories but also establishment of jurisdiction." *Obama v. Klayman*, 800 F.3d 559, 565 (D.C. Cir. 2015). In other words, "the 'affirmative burden of showing a likelihood of success on the merits . . . necessarily includes a likelihood of the court's reaching the merits.'" *Thorp v. District of Columbia*, 317 F. Supp. 3d 74, 80 (D.D.C. 2018) (quoting *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 328 (D.C. Cir. 1987) (Williams, J., concurring and dissenting). Buckley cannot meet his burden to show that the class is likely to

succeed on the merits. The amended complaint does not challenge the requirement that tax return preparers annually renew their PTIN. Equally important, both the District and Circuit Courts in this case have already determined that the IRS has the authority to require PTIN renewals. The Court, therefore, should deny Buckley's motion.

A. The Amended Complaint does not challenge the IRS's ability to require annual PTIN renewals.

Buckley acknowledges that he is not challenging the requirement that tax return preparers obtain a PTIN. (*See* Dkt. No. 128-1 at 2.) Rather, he challenges the IRS's statutory authority to require tax return preparers "to annually file IRS Form W-12 (manually or online) or any other form or document for their PTIN to be 'renewed." (*Id*.)

Because the amended complaint does not challenge the renewal requirement (*see* Dkt. No. 41), the class is not entitled to any relief, let alone a preliminary injunction.[2] The amended complaint raises two claims: (1) the IRS lacks the authority to *charge a fee* for the issuance or renewal of a PTIN; and (2) the *fees charged* are excessive. (*Id.*, ¶¶ 41 and 46) The prayer for relief, likewise, only sought relief from the fees, not the annual requirement. (*See id.* at 15 (seeking judgment that the IRS lacked the authority to charge a fee; judgment declaring fees excessive; restitution for fees charged; restitution for excessive fees charged).) The amended complaint does not the challenge, or even discuss, the IRS' statutory authority to require an annual renewal under 26 U.S.C. § 6109, which Buckley admits. (Dkt. No. 131 at 3 ("current complaint does not seek to stop annual filings").) The amended complaint's failure to challenge

[2] Buckley's Motion notes that the class intends to file a motion to amend the complaint "soon." (Dkt. No.128-1 at 1). In that event, the United States will oppose any request to further amend the complaint five years after the original amended complaint was filed, and after this case has been appealed, and remanded. As explained, *infra*, the law of the case precludes such an amendment. Further, to the extent that his motion relies on the class' intent to amend the complaint that has not been filed, let alone accepted by this Court, it is premature.

the annual PTIN renewal requirement under section 26 U.S.C. § 6109 and its regulations forecloses any relief regarding that issue.

B. Because the District Court and the D.C. Circuit have determined the PTIN requirement regulation is valid, the requested relief is precluded by the law of the case doctrine.

Because the class chose not to appeal this Court's decision upholding the regulations requiring tax return preparers to obtain and renew PTINs, the law of case doctrine (sometimes called the mandate rule) precludes the current attempt to challenge the renewal requirement. When "matters are decided by an appellate court, its rulings, unless reversed by it or by a superior court, bind the lower court." *Sherley*, 776 F.Supp.2d at 15 (citing 18B Wright & Miller, *Fed. Prac. & Proc.*, § 4478 (2d ed. 1987) ("'[t]he very structure of a hierarchical court system demands' that a lower court on remand be bound by the law of the case established on appeal")). Because the D.C. Circuit upheld this Court's decision that the renewal requirement was valid, that issue has been resolved and is now law of the case.

Section 6109 specifically authorizes the Secretary of the Treasury to issue regulations regarding the identifying number for tax return preparers that must be included on any return. *See* 26 U.S.C. § 6109(a)(4) ("Any return or claim for refund prepared by a tax return preparer shall bear such identifying number for securing proper identification of such preparer, his employer, or both, as may be prescribed."); 26 U.S.C. § 6109(d) ("The social security account number issued to an individual . . . 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."). Accordingly, the Secretary issued regulations mandating the use of PTIN as the identifying number to be used on prepared tax returns under section 6109 ("PTIN Requirement Regulations"). Treas. Reg. § 1.6109-2(d).

The PTIN Requirement Regulations further permit the IRS to designate an expiration date and a renewal process for the PTIN. Treas. Reg. §1.6109-2(e) ("The Internal Revenue Service may designate an expiration date for any preparer tax identification number or other prescribed identifying number and may further prescribe the time and manner for renewing a preparer tax identification number or other prescribed identifying number, including the payment of a user fee, as set forth in forms, instructions, or other appropriate guidance.") The IRS issued instructions, pursuant to those regulations, which require annual renewal of the PTIN. *See* Form W-12, *IRS Paid Preparer Tax Identification Number (PTIN) Application and Renewal*, and the Form W-12 Instructions.

This Court upheld the validity of that the PTIN Requirement Regulations requiring tax return preparers obtain, use, and renew PTINs. *See Steele*, 250 F. Supp. 3d at 62-63. It further held that the United States could not charge a user fee in connection with obtaining and renewing a PTIN. *Id.* The United States appealed the decision that it could not charge a user fee. The class did not appeal any issue. The D.C. Circuit, in turn, upheld the District Court's holding that the PTIN Requirement Regulations, including the annual renewal requirement, were valid and reversed the holding that the United States could not charge a user fee to obtain and renew the PTIN. *See Montrois*, 916 F.3d at 1060, 66.

Buckley argues that the D.C. Circuit, in determining that the United States could charge a user fee for issuing and renewing PTINs, did not find that the renewal requirement was valid in reaching that determination. (*See* Dkt. 128-1 at 2.) There is no basis for his argument because it ignores the underlying opinion of this Court and the D.C. Circuit's clear opinion and remand instructions. The D.C. Circuit, by holding that the IRS could charge for renewals, implicitly upheld the PTIN Requirement Regulations. The D.C. Circuit noted that the District Court found

that the PTIN requirement (and renewals) were valid. *See Montrois*, 916 F.3d at 1060. In fact, the D.C. Circuit remanded this case with specific instructions regarding renewals:

> To be sure, the tax-return preparers might question whether the amount of the renewal fee bears an adequate relationship to the continuing costs incurred by the IRS to maintain the PTIN database. But those concerns pertain to the amount of the fee, not the antecedent question of whether the fee generally lies within the IRS's statutory authority under the Independent Offices Appropriations Act. On remand, the district court is free to consider arguments concerning the alleged excessiveness of the fee, including whether the renewal fee is "reasonably related" to the "costs which the agency actually incurs" in providing the service, *Nat'l Cable Television Ass'n*, 554 F.2d at 1107, and "the value of the service to the recipient," *Cent. & S. Motor*, 777 F.2d at 729. For purposes of the issue we consider at this stage of the proceedings, though, it is enough for us to conclude that the PTIN requirement specifically benefits tax-return preparers by helping to protect the confidentiality of their personal information.

Id. at 1066.

Because this Court and the D.C. Circuit already determined that the IRS can require return preparers to annually renew their PTIN, Buckley cannot show a likelihood of success on the merits and his motion must be denied.

II. The Class will not suffer irreparable harm.

A showing of irreparable harm "is a threshold requirement for a preliminary injunction." *City of Moundridge v. Exxon Mobil Corp.*, 429 F.Supp.2d 117, 127 (D.D.C. 2006). And the D.C. Circuit "has set a high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). For purposes of obtaining a preliminary injunction, "irreparable harm is an imminent injury that is both great and certain, and that legal remedies cannot repair." *City of Moundridge*, 429 F. Supp. 2d at 127 (citing *Wis. Gas Co. v. Fed. Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir.1985)).

> The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation,

weighs heavily against a claim of irreparable harm.

City of Moundridge, 429 F. Supp.2d at 127–128 (quoting *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

Buckley's motion acknowledges that if the injunction is denied and the Class members are required to pay a $35.95 renewal fee, the preparers may be able to get a portion of that money back. (*See* Dkt. 128-1 at 6.) He therefore explicitly acknowledges that his alleged harm can be remedied in the absence of injunctive relief. Moreover, monetary harm rarely, if ever, qualifies as "irreparable harm." *Wisc. Gas. Co.*, 758 F.2d at 674 ("It is also well settled that economic loss does not, in and of itself, constitute irreparable harm."); *accord Davis v. Pension. Ben. Gaur. Corp.*, 571 F.3d 1288, 1295 (D.C. Cir. 2009).

Buckley also claims that class members would be irreparably harmed because they would be "forced to annually waste their time (spend over one hour, per IRS instructions) to renew a permanent identification number." (Dkt. 128-1 at 6-7.) But being required to spend approximately ***one hour*** to fill out a form does not qualify as a "great" injury that might be irreparable. *See Wis. Gas Co.*, 758 F.2d at 674; *compare American Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) ("injury resulting from attempted compliance with government regulation ordinarily is not irreparable harm") and *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) (same) *with District of Columbia v. Dep't of Agriculture*, 444 F. Supp. 3d 1, 43 (D.D.C. 2020) ("Going without food is irreparable harm."); *Lee v. Christian Coal. of Am., Inc.*, 160 F.Supp.2d 14, 31 (D.D.C. 2001) ("[A]n employer's discharge or constructive discharge of an employee will rarely constitute irreparable harm" [unless] "an employee is so poor that if she stopped working, the consequences would be severe.").

One would expect that Buckley would file affidavits from class members purporting to show irreparable harm to them from the PTIN renewal requirement, *see* Local Rule 65.1(c), Buckley has instead submitted their emails that "[n]aturally I would prefer to no longer have to pay PTIN fees or renew annually." *See* Dkt. No. 131-4 (J. Henchman email); *accord* Dkt. Nos. 131-1 & 131-3 (A. Steele & B. Montrois emails). Buckley's own filings show the ***absence*** of irreparable harm to the Class.

Finally, the history of this lawsuit also shows the absence of "irreparable" harm. This suit was filed in September 2014. Return preparers have been required to renew their PTIN every year since, even after this Court enjoined the United States for charging a user fee in connection with obtaining and renewing PTINs. The amended complaint was filed on August 7, 2015. His failure to explain why the relief sought is suddenly urgent is fatal to the motion, filed five years after the amended complaint.

III. Buckley's Motion fails to demonstrate that the balance of equities weigh in favor of the class or that the injunction is in the public interest.

The third and fourth *Winter* factors also support dismissing Buckley's motion. These factors inquire whether "'a balance of the equities [weighs] in [the plaintiffs'] favor, and accord with the public interest.'" *Nat. Fair Housing All. v. Carson*, 330 F. Supp. 3d 14, 63 (D.D.C. 2018) (citing *League of Women Voters v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016)). "In exercising their sound discretion, courts . . . should [also] pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Gilliard v. McWilliams*, 315 F. Supp. 3d 402, 418 (D.D.C. 2018) (quoting *Winter*, 555 U.S. at 24). These considerations merge into one factor when the government is the non-movant. *Gillard*, 315 F. Supp. 3d at 418. Buckley has made no colorable attempt satisfy his burden to demonstrate either of those factors; instead, he

merely states the legal conclusion that those factors have been met. (Dkt.. No. 128-1 at 7.) This is not sufficient.

"It is in the public interest for courts to carry out the will of Congress and for an agency to implement properly the statute it administers." *Mylan Pharmaceuticals, Inc. v. Shala*, 81 F. Supp. 2d. 30, 45 (D.D.C. 2000). As noted above, this case does not question whether the IRS has the legal authority under section 6109 and its implementing regulations to require annual renewals of the PTIN – the D.C. Circuit already held that the IRS has such authority. In holding that the IRS has such authority to require a PTIN, the D.C. Circuit explained the IRS' rational for requiring a PTIN "would benefit "tax return prepares and help maintain the confidentiality of [social security numbers]." *Montrois*, 916 F.3d at 1065. In so explaining, it observed:

> The IRS's view is consistent with the concern animating Congress's grant of authority to the IRS to mandate the use of PTINs: "that inappropriate use might be made of a preparer's social security number" under the pre-PTIN scheme. S. Rep. No. 105-174, at 106. And when the IRS reissued the PTIN fee regulations in 2015 after our decision in Loving invalidated the registered tax-return preparer program, the agency again explained that "[r]equiring the use of PTINs ... benefits tax return preparers by allowing them to provide an identifying number on the return that is not an SSN." 80 Fed. Reg. at 66,793.

Id. Because it is in the public interest for the Court's to carry out the will of Congress, Buckley's Motion should be denied.

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CONCLUSION

For the reasons stated above, the Court should deny Buckley's Motion.

Dated: September 25, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 25, 2020, I filed the foregoing OPPOSITION with the Clerk of Court using the CM/ECF system, which will serve counsel for the plaintiffs.

/s/ Christopher J. Williamson
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