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

REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS" MOTION FOR A PRELIMINARY INJUNCTION

At Stake. At stake is whether approximately 800,000 Americans will have to annually spend one hour and 13 minutes (per instructions to IRS Form W-12—Doc. 128-14) renewing a permanent identification number (a PTIN) and annually pay fees for such number, indefinitely, due to the IRS's conversion of the number into a license pursuant to the following statutory language (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." In a logical and fair world, it's pure insanity.

Under the 2019 *Montrois* ruling of the D.C. Circuit, Plaintiffs will already have to pay renewal fees for pre-2018 years. So, the Defendant is already entitled to an unlawful windfall.

Amended Complaint. At various places in its opposition filing, Defendant argues the "amended complaint" (i.e. the current complaint that amended the original complaint in 2015) does not seek the relief sought in the motion for a preliminary injunction. Since Defendant's response, a motion to amend the complaint has been filed, along with the amended complaint and

related documents. If accepted by the Court, the new complaint will permit the preliminary injunction motion. Also, the current complaint provides in prayer for relief number 5: "A judgement declaring that the IRS may only request information from tax return preparers that is authorized by statute." The pertinent statute (26 U.S.C. §6109(a)(4)) does not permit renewals. So, the current complaint's terms should suffice to permit consideration of injunctive relief sought.

Representative Ability. Like Motley Rice LLC, the Defendant questions my right to represent the class. Similar to the response of my co-counsel, it simply calls me "Buckley" (co-counsel generally called me Mr. Buckley). As I was hired by the class representatives to represent them, and never turned over that responsibility to anyone, prohibiting me from being able to represent them would overturn centuries of accepted norms of the attorney-client relationship. As noted in Doc. 121, p. 2, there is no such thing under the law, regulations or court rules as "lead counsel." Co-counsel exists. Co-counsel is counsel. If the Court deems I am not "class counsel" or "co-counsel," then I should not be representing the class representatives who hired me to represent the class. If I have no control in the case but have legal responsibility for the outcome, I'm in an awful position. In this regard, Mr. Narwold has several times told me that I was "not authorized" to make certain filings. Counsel for the Defendant clearly would prefer not to have to deal with me because of my zealous representation of my clients in matters such as this one.[1]

[1] Mr. Narwold and Mr. Williamson apparently have a warm relationship. My zealous counsel on behalf of the class—in fulfillment of my ethical duties, is not welcome by Mr. Williamson (or Mr. Narwold). On September 25, 2020, I sent an email to both, asking that I be included in all future calls, emails, etc. Mr. Narwold has said he would attempt to endeavor to have me participate in important communications (obviously, with him deciding which ones are important). Mr. Williamson responded by stating he was considering how best to respond. Given that I have been fighting for this cause for almost ten years, I brought this case by being hired class representatives to bring it, and I brought Motley Rice into the case to help, treatment of me as something other than co-counsel by both my co-counsel and the Defendant's counsel is both difficult to stomach and potentially unethical.

Although all three class representatives desire the relief sought in the motion, Defendant bizarrely claims on p. 4 of its brief "the certified class opposes the relief sought." Huh?

As discussed below, the 2017 ruling of this Court did not cover renewals. If the IRS really needed renewal information, it could have continued renewals post-2017 absent the fee charges. As noted in the memorandum in support of the motion, the information is not needed because every significant tax return filed that was prepared by a return preparer provides the IRS with all the information it needs. For all years, Accenture Federal Services, LLC ("Accenture") has been under contract to issue and renew PTINs. So, it would have cost the IRS nothing to continue renewal requirements. Prior to the licensing regime, under the exact same statutory authority, the IRS did not require renewals. It ceased requiring renewals because it could no longer charge fees.

I offered co-counsel the opportunity to participate in this reply. Similar to the certiorari petition to the U.S. Supreme Court I filed last year, they declined. Them "getting onboard" with a motion that, if granted, would tremendously benefit the class, could have benefited the class.[2]

Response to Argument. Much of Defendant's argument turns on what this Court ruled on the renewal issue in 2017. Having read the opinion (260 F. Supp. 3d 52 (D.D.C. 2017)) numerous times and received input from other counsel, the undersigned is certain it did not discuss, in any manner, the issue of whether the IRS can require a tax return preparer to renew a PTIN. It requires tax return preparers to get a PTIN. Plaintiffs have never questioned this requirement.

As stated in the memorandum in support of the motion for a preliminary injunction, it is the belief of the undersigned that no reasonable person who is attempting to do justice could read the pertinent statutory language (and its legislative history), and conclude it authorizes the IRS to

[2] Another example of Mr. Narwold's "my way or the highway" approach, to the potential detriment of the class, recently occurred with respect to investment of surplus PTIN fees for two years. The Defendant let Plaintiffs invest the funds. The undersigned did significant research and found a potential ladder FDIC-insured CDs investment option. Rather than consider it, Mr. Narwold rejected it out of hand and invested the funds however he chose (I have no idea).

force people to annually renew a permanent identification number. I don't think the Court meant, in issuing its 2017 ruling, that the IRS could require annual renewals of PTINs, but rather only that it could require preparers to have a PTIN.

Concerning the D.C. Circuit's interpretation of this Court's 2017 ruling, the undersigned submits: (a) this Court did not rule in the manner the D.C. Circuit Court said it ruled, and thus the D.C. Circuit's ruling is improperly premised; (b) what the D.C. Circuit said was dicta; and (c) pertinent statutory law (i.e. the Code's language) is superior to whatever the D.C. Circuit said that is inconsistent with the statute. (Regarding not following a superior court, the D.C. Circuit "blew off" U.S. Supreme Court precedent (i.e. *Nat'l Cable Tel Ass'n Inc. v. United States*, 415 U.S. 336, 340 (1974), holding that "a fee is incident to a voluntary act") in order to rule fees could be charged.)

If the Court ruled in 2017 that renewals can be required, then the undersigned admits renewal fees can be charged (in accordance with the D.C. Circuit's *Montrois* opinion). In such event, the reader need read no further. Otherwise, please read on.

Plaintiffs did not appeal the Court's 2017 ruling because they did not disagree with any of its conclusions. If the 2017 opinion had said that renewals could be required, Plaintiffs (or, at least the undersigned, on their behalf) would have contested it. At issue in *Montrois* was whether this court erred in ruling no fees could be charged. Whether PTINs could be required was not in issue. The sentence at the end of *Montrois* (p. 1068) that I noted in my filing and Defendant noted in its response is dicta because the renewal issue was not under consideration. There is no analysis of the issue in the *Montrois* opinion whatsoever. As such, it is dicta, and it is not controlling. *Kastigar v. U.S.*, 406 U.S. 441, 454-455 (1972) (dicta cannot be considered binding authority).

The D.C. Circuit's act of misstating what this Court ruled is akin, in a criminal matter wherein the trial court found the defendant committed a single theft, to the appellate court ruling:

"As the trial court ruled, the defendant committed theft and a number of other crimes as well." And, it is an example of a court legislating—expanding a simple requirement created by Congress.

In at least two places, the Defendant cites *Sherley v. Sebelius*, 776 F. Supp. 2d 1, (D.D.C. 2011) to discard the issue due to the "law of the case" rule. However, in that case, the court applied the mandate rule based on a ruling of the D.C. Circuit. The distinguishing factor is that in the *Sherley* case, the D.C. Circuit's opinion (644 F. 3d 388, (D.C. Cir. 2011)) was a lengthy analysis of the issue there at hand (i.e. interpretation of the Dickey-Wicker Amendment). Here, there was absolutely no analysis of the renewal issue by the D.C. Circuit.[3]

There is no reasonable basis for renewal of a PTIN for the same reason there is no reasonable basis to require annual renewal of a Social Security number or an employer identification number (EIN). So, statutory interpretation and reason favor Plaintiffs' position.

As succinctly stated in *Loving v. IRS*, 742 F.3d 1013, 1016 (D.C. Cir. 2014), citing *City of Arlington v. FCC*, 569 U.S. 290, 297-298 (2013): "No matter how framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." Here, it did not do so.

There is a hierarchy of law in our U.S. federal legal system. The ultimate king is the U.S. Constitution. Nothing can lawfully override it. Statutes are second in line—king. *See Loving v. Internal Revenue Service*, 917 F. Supp. 2d 67, 79 (D.D.C. 2013) ("[i]n the land of statutory interpretation, statutory text is king . . . regulations promulgated by an agency cannot transform the meaning of a statute"). Simply put, the statute in issue, and its surrounding statutory scheme, do not provide for renewals of PTINs. And, "an administrative agency's power to regulate must

[3] A *Chevron* analysis was applied by the D.C. Circuit. (*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)) Here, the statutory language is clear. The IRS can require preparers to get a PTIN. So, step one should apply. If not, there is no reasonable basis to require annual renewal of a PTIN.

always be grounded in a valid grant of authority from Congress. Courts must take care not to extend a statute's scope beyond the point where Congress indicated it would stop." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 123 (2000). *See also Loving* at 1021, noting the "IRS is surely free to change (or refine) its interpretation of a statute it administers. . . [b]ut the interpretation, whether old or new, must be consistent with the statute."

THE FOUR PARTS TEST

Success on the Merits. Assuming the issue is whether renewals can be required, and further assuming the judging person or group is fair, intelligent and reasonable, then for the reasons supplied in the memorandum in support of the motion for a preliminary injunction, Plaintiff has virtually no chance of losing on the merits. Thus, Plaintiffs easily meet the Supreme Court's "likely to succeed" standard. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). *See also Brown & Williamson Tobacco Corp.*, at pp. 132-133 (federal statutes must be interpreted by giving words their ordinary meanings, with words, phrases and sentences examined in context). Even if the IRS's scheme is better than Congress's scheme, it cannot apply. *MCI Telecommunications Corp. v. American Telephone, Telegraph Co.*, 512 U.S. 218, 234 (1994).

At the top of p. 7 of its response, Defendant gets into regulations that were not considered by the Court or the D.C. Court of Appeals. The statutory scheme permits PTINs to be required. It does not permit annual renewals. Query why annual renewals were not required before the licensing scheme was created in 2010-2011? The same statutory scheme existed. The renewal provision is what converted the PTIN into a license, a power the IRS and Defendant refuse to relinquish. Lawfully, it has been gone since the *Loving* decision became final.

The value the D.C. Circuit assigned to the special benefit is identity theft protection. Once the number is issued, whatever protection it grants has been conferred. Thereafter, the PTIN is simply a 9-digit number, identical to a Social Security number, except it starts with a P. The IRS

database for tax preparers would exist whether the ID number is a PTIN or a Social Security number (or any other number). All of the licensing-type costs are IRS costs.

Irreparable Harm. Plaintiffs must demonstrate irreparable injury is *likely* in the absence of an injunction. *Winter*, at p. 22. Irreparable harm is an "injury for which a monetary reward cannot be adequate consideration." *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F. 2d 70, 72 (2nd Cir. 1979). Here, a monetary award is not even possible. The D.C. Circuit has ruled renewal fees can be charged. (Thus, Plaintiffs are stuck having to pay them for pre-2018 years.) So, if renewals continue to take place, renewals charges will continue. Plaintiffs' only defense will be to try to minimize them (and it will very likely need to go through the D.C. Circuit in the process).

Assuming roughly 800,000 return preparers (as the IRS generally does), at one hour and 13 minutes to prepare per year, and a cost of $35.95, as a group, return preparers will *annually* waste 973,333 hours and spend $28,760,000 to renew their permanent ID numbers.[4] The plaintiffs should be considered as a group for this purpose. It is likely it will take several more years for this case to ultimately come to a close. Assuming four years, the total hours would be 3,893,332 hours and fees of $115,040,000. None of those hours of human life can be "gotten back." And, because the D.C. Circuit has ruled that renewal fees can be charged, less than all of the charges will be recouped in future litigation. Legal remedies cannot repair these potential losses. Defendant will not pay return preparers for their time (as the law doesn't provide for such), and it is unlikely Plaintiffs will be able to recoup interest on excessive payments made. Irreparable harm will exist if an injunction is not granted.

[4] As of September 2, 2020, there were 786,141 individuals with a current PTIN. If 786,141 people have to renew at $35.95 per person, the IRS would charge renewing PTIN holders a total of $28,261,768.95. IRS's Return Preparer Office Federal Tax Return Preparer Statistics. (Doc. 129)

Concerning the timing of the (new) amended complaint, the Court's ruling in 2017 produced all the relief Plaintiffs were seeking. Specifically, the IRS stopped charging PTIN fees, stopped requiring annual filings (i.e. renewals stopped), and was ordered to pay back all fees paid by the Plaintiffs. There was no need then to amend. When the D.C. Circuit issued its ruling in 2019, Plaintiffs did not know what the IRS would do in terms of interpretation. It was possible a new regulatory supervisor would read the statute and the *Montrois* opinion, and decide that renewals were not consistent with the statutory scheme (i.e. would do the right thing). The regulations that were issued on July 15th could have eliminated the issue at hand. Instead, those regulations continued the licensing activities that were taken away by *Loving*.

Balance of the Equities. The balance of the equities favors the 800,000 or so tax return preparers, a large percentage of whom are U.S. citizens. Equity means fairness. It is not fair to require anyone to annually file something with the government and annually pay fees for a permanent identification number. If the statutory scheme was written to require such, then Plaintiffs would have to "live with it." It does not do so. *Compare* 26 U.S.C. §§5111-5112, requiring manufacturers to "register annually with the Secretary" in order to "drawback" (recoup) alcohol tax when the alcohol is used in production of non-alcoholic products.

Injunction is the Public Interest. Defendant couples this requirement with the balance of the equities part of the test. Defendant cites *Mylan Pharmaceuticals, Inc. v. Shala*, 81 F. Supp. 2d 30, 45 (D.D.C. 2000) for the proposition that "[i]t 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." **BINGO!** The undersigned could not agree more. Requiring annual renewals of PTINs clearly is not the will of Congress, and the IRS is not implementing properly the statute it administers.

Unlawful Government Growth. Consider what has happened. In 2010-2011, with no statutory authority whatsoever, the IRS created a licensing system and subjected tax return

preparers to it. As part thereof, it made PTINs mandatory, and converted them from simple identification numbers to licenses. A successful lawsuit (*Loving*) completely shut down the licensing power. The IRS immediately stopped testing "registered tax return preparers," dropped the concept altogether, and refunded testing fees. But, it continued requiring annual PTIN filings, continued to treat PTINs as licenses, and reduced recurring PTIN fees by a mere 20.6 percent (from $63 to $50). Recently, it said it will continue requiring annual filings, while reducing the annual fee to $35.95. A fair and logical reading of the pertinent statute shows (under the assumption a fee can be charged—based on ignoring the voluntary act requirement and assuming a special benefit is granted) the only lawful charges are PTIN issuance charges (i.e. peanuts, and most return preparers already had a PTIN—that didn't change—when the licensing scheme started) and costs of maintaining the PTINs on an IRS computer (i.e. less peanuts).

The federal government is broke. However things turn out here, it will be broke. The justice system needs to remain pure. The undersigned is trying to get back to the intent of Congress and existing Supreme Court precedents as much as possible.

Dated: September 30, 2020

Respectfully submitted,

/s/ Allen Buckley

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