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

BRIEF IN OPPOSITION TO THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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AFSP	Annual Filing Season Program
CBC	Criminal Background Checks
CPA	Certified Public Accountant
EA	Enrolled Agent
EAP&M	Enrolled Agent Policy and Management
EFIN	Electronic Filing Identification Number
ERPA	Enrolled Retirement Plan Agent
FTE	Full-Time Equivalent
GAO	U.S. Government Accountability Office
IOAA	Independent Offices Appropriation Act
IRS	Internal Revenue Service
NPRM	Notice of Proposed Rulemaking
OMB	U.S. Office of Management and Budget
OPR	Department of Treasury, Office of Professional Responsibility
PDC	Professional Designation Checks
PTC	Personal Tax Compliance
PTIN	Preparer Tax Identification Number
RPO	Return Preparer Office
RTRP	Registered Tax Return Preparer Program
SDN	Specially Designated National
SUMF	Statement of Undisputed Material Facts
TPPS	Tax Professional PTIN System
VPBR	Vendor Processes and Business Requirements

I. Introduction

Plaintiffs' motion contains bewildering requests for this Court to usurp the discretion of the Commissioner of Internal Revenue by micromanaging the agency and monitoring Internal Revenue Service (IRS) compliance with statutory mandates. These requests contradict the controlling statutes, caselaw, and holdings of the D.C. Circuit. Additionally, while Plaintiffs have moved for summary judgment, their brief shows that they have not met the standard for summary judgment under Rule 56. Plaintiffs' own statement of facts is riddled with contradictions and incorrect assertions, and their argument is based entirely on whether costs are "necessary," which is the incorrect standard and a disputed fact. The Court should therefore deny their motion. *Compare* Dkt. No. 175-2 *with* Def.'s Resp. to Pls.' SUMF.

This Opposition explains that Plaintiffs' arguments fail even if the facts they propose were undisputed and material (which they are not). Then it explains why Plaintiffs' key facts are disputed and others are immaterial.

First, Plaintiffs completely ignore the IOAA and OMB Circular A-25, asking instead for the Court to conduct an audit of the costs included in the PTIN user fee. Second, applying the correct standard mandated by controlling law, the costs Plaintiffs believe are "unnecessary" are in fact direct or indirect costs of providing and renewing PTINs and therefore correctly included in the PTIN user fee. Third, Plaintiffs' theory also requests that the Court rewrite an IRS form, further demonstrating that Plaintiffs are not asking for the Court to review the agency's exercise of discretion (as required under

IOAA and OMB Circular A-25), but rather asking the Court to assume day-to-day agency management.

Broadly, the Plaintiffs ask this Court to determine that the $50 PTIN user fee charged in fiscal years 2011 through 2015 and the $33 PTIN user fee charged in fiscal years 2016 and 2017 were excessive. Dkt. No. 175 at 20–26. Plaintiffs are asking the Court for relief it has already received. As Plaintiffs are aware, the United States conceded costs for fiscal years 2014 and 2015, effectively reducing the PTIN user fee from $50 to $37.75. Dkt No. 178-001 at 23; Dkt. No. 173-002 ¶¶ 87–90; Dkt. No. 175 at 15, n.9. The United States conceded costs for fiscal years 2016 and 2017, effectively reducing the PTIN user fee from $33 to $24. Dkt. No. 178-001 at 24–25; Dkt. No. 173-002 ¶¶ 100–03; Dkt. No. 175 at 15 n.9. Although there has not been a formal concession for fiscal years 2011 through 2013, the United States is not defending certain costs for RTRP Program activities prohibited by *Loving* in those years and is only defending $17 of the PTIN user fee for those years. Dkt. No. 178-001 at 20–22; Dkt. No. 173-002 ¶¶ 68–70. Thus, the actual issues before this Court are whether (1) a $17 user fee charged in fiscal years 2011 through 2013 is reasonable; (2) a $37.75 PTIN user fee charged in fiscal years 2014 and 2015 is reasonable; and (3) a $24 PTIN user fee charged in fiscal years 2016 and 2017 is reasonable.[1]

[1] As explained in the United States' motion for summary judgment (Dkt. No. 178-1), the Court enjoined the IRS from charging a PTIN user fee in 2017. The United States seeks to offset the fees that it was enjoined from collecting against any award to Plaintiffs.

II. Plaintiffs Ask the Court to Apply an Incorrect Standard of Review.

The *Montrois* Court made it clear that the IRS has the legal authority and that the IRS properly exercised its discretion to charge a PTIN user fee under 31 U.S.C. § 9701. *Montrois v. United States*, 916 F.3d 1056, 1062 (D.C. Cir. 2019). The Court of Appeals remanded the case to this Court to determine whether the amount of the PTIN fee charged by the IRS is reasonable and consistent with the IOAA and OMB Circular A-25. *Id*. at 1068. The Court's review on remand is narrow. *Cent. & S. Motor Freight Tariff Ass'n, Inc. v. United States*, 777 F.2d 722, 729 (D.C. Cir. 1985).

With the authority to charge a PTIN user fee firmly established by the D.C. Circuit, Plaintiffs can only prevail on their motion for summary judgment if they can show that the PTIN user fee is arbitrary and capricious. *See Ayuda, Inc. v. Att'y Gen.*, 848 F.2d 1297, 1299 (D.C. Cir. 1988) (Increased fees readily withstood the arbitrary-and-capricious challenge to a fee determined in a biennial review; completed under cost accounting procedures; subject to notice and comment procedures.). Plaintiffs do not address whether the challenged costs are permitted under the IOAA and OMB Circular A-25. Plaintiffs' theory of the case proposes adoption of a new standard that whimsically asks the Court for an up or down vote on whether a cost is, in Plaintiffs' sole discretion, "necessary" and not whether the direct or indirect costs are reasonably related to the PTIN Program as required by the IOAA and OMB Circular A-25. In other words, Plaintiffs want the Court to strip the agency of its discretion in setting a user fee and ignore whether the costs are direct or indirect costs reasonably related to a user fee. The Court should reject Plaintiffs' request to stand in the shoes of the agency.

The IOAA requires agencies to broadly base any fee on policies prescribed by the President and four factors: (1) the cost to the Government; (2) the value of the service or thing to the recipient; (3) public policy or interest served; and (4) other relevant facts. 31 U.S.C. § 9701(b)(2). The language of the statute makes it clear that the costs to Government are just one factor on which a fee is based. OMB Circular A-25, (a "polic[y] prescribed by the President" under 31 U.S.C. § 9701(b)) provides additional guidance by providing broad categories of direct and indirect government costs that may be included in a fee. Those costs include, but are not limited to, items such as salaries, benefits, physical overhead, supplies, travel, equipment, management and supervisory costs, cost of enforcement, research, etc. OMB Circular A-25 at Sec. 6.d.1(a)-(e).

The recovery of direct and indirect costs to the Government allows "for some range and latitude in effecting a reasonable attribution of costs." *Nat'l Ass'n of Broadcasters v. F.C.C.*, 554 F.2d 1094, 1130 n. 28 (D.C. Cir. 1976). Courts have routinely held that calculating costs to the government under the IOAA is not an exact science. *See e.g.*, *Cent. & S. Motor Freight Tariff Ass'n, Inc.*, 777 F.2d at 736 (Costs need not be "calculated with scientific precision."); *Nat'l Cable Television Ass'n, Inc. v. F.C.C.*, 554 F.2d 1094, 1105 n.40 (D.C. Cir. 1976) (same); *Yosemite Park & Curry Co. v. United States*, 686 F.2d 925, 931 (Ct. Cl. 1982) (same). Any cost computation "must necessarily be based on numerous approximations and can only be expected to be accurate within reasonable limits." *Nat'l Cable Television Ass'n, Inc.*, 554 F.2d at 1105. The fee schedule is "entitled to more than mere deference or weight." *Cent. & S. Motor Freight Tariff Ass'n, Inc.*, 777 F.2d at 729 (quoting *Am. Trucking Ass'n, Inc. v. United States*, 627 F.2d 1313, 1320 (D.C. Cir. 1980). The

fees should be upheld unless they are "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." *Id*.

The *Montrois* Court did not decide the reasonableness of the amount of the PTIN fee under the standards laid out under the IOAA, OMB Circular A-25, or the caselaw standards outlined above. In fact, the *Montrois* Court declined to address the PTIN fee amount, noting it is an issue for the district court to decide whether the amount of the fee is reasonable and consistent with the IOAA on remand. *Montrois*, 916 F.3d at 1063, 1068. The *Montrois* Court did nonetheless recognize that the IRS justified costs that survived *Loving*, including administration, staffing and contract-related costs for activities, and processes and procedures related to the electronic and paper registration and renewal submissions. *Id*. at 1067. These items are firmly rooted in the four factors on which to base a fee under 31 U.S.C. § 9701(b)(2), and, consistent with the IOAA, represent the direct and indirect costs described in OMB Cir. A-25.

Plaintiffs never argue that the fee is unreasonable under the IOAA or contrary to OMB Circular A-25, and instead they impermissibly ask the Court to micromanage the various activities conducted by the RPO. *See, generally*, Doc. No. 175 at 20–31 (listing IRS activities which the Plaintiffs believe are or are not "necessary to managing the PTIN application and renewal process"). Plaintiffs make no attempt to consider whether costs are reasonably related to direct or indirect government costs identified by OMB Circular A-25. Plaintiffs' motion, instead, asks the Court to audit the activities of the IRS, task by task, to determine which activities are "necessary" costs to the IRS "to issue and maintain a database of PTINs." Doc. No. 175 at 2 and *passim*.

The D.C. Circuit *Montrois* decision cannot hold that weight. The issue before and decided by the panel in *Montrois* was whether the IRS has the statutory authority to charge a fee for the PTIN Program. *Montrois*, 916 F.3d 1056. The D.C. Circuit remanded for the district court to examine only "whether the amount of the fee is reasonable and consistent with the [IOAA]." *Id.* at 1068. Nothing in the opinion suggests the panel intended to adopt a new standard by which to measure whether the PTIN user fee is reasonable and consistent with the IOAA.[2] This Court should reject Plaintiffs' attempt to apply a new standard.

Aside from the fact that Plaintiffs' approach lacks any legal support, asking a court to audit an agency's every move sets a dangerous precedent. Plaintiffs ask the Court to review the PTIN user fee *ex post* to determine the amount of the fee. *See, generally*, Doc. No. 175 at 20–31. But user fees are necessarily calculated by the agency using *ex ante* predictive measures. *See* OMB Circular A-25 at Sec. 8(e). Plaintiffs' argument violates the principle that courts should avoid "injecting the judge into day-to-day agency management." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66–67 (2004). The Plaintiffs' motion for summary judgment must be denied because, after the IRS conceded any costs for activities invalidated by *Loving*, its PTIN fee is reasonable. As shown below, the PTIN user fee was determined in accordance with the IOAA and OMB Circular A-25 and is

[2] Indeed, to change the standard by which government user fees are reviewed, the *Montrois* Court would have had to be sitting *en banc*. Fed. R. App. P. 35(a); *Church of Scientology of Cal. v. Foley*, 640 F.2d 1335, 1340 (D.C. Cir. 1981) (*En banc* review "was a special technique designed to eliminate conflicts within a circuit.") (citations omitted).

reasonable. The fee clears the hurdle of the deferential standard courts afford agencies acting within their authority (such as 26 U.S.C. § 6109) to enact a user fee.

Furthermore, granting Plaintiffs' motion for summary judgment would open the floodgates of user fee litigation. Plaintiffs ask the Court to rule on individual costs based only on what Plaintiffs like or dislike, without mentioning whether those costs are direct or indirect costs under OMB Circular A-25. Not only would this approach imperil all other government user fees, opening a door for thousands of legal challenges, these user fees, including the PTIN user fee, would be vulnerable to litigation *every two years* when agencies conduct their biennial reviews.

III. The PTIN user fee charged in fiscal years 2011 through 2017 is reasonable after the United States' concessions of costs related to *Loving*.

The PTIN user fee was initially determined based on a larger scale initiative that combined two distinct programs run through the newly stood up Return Preparer Office (RPO): (1) the PTIN Program and (2) the Registered Tax Return Preparer Program (RTRP). The PTIN Program was promulgated under the authority of 26 U.S.C. § 6109(a)(4). Under this statute, the IRS requires return preparers to furnish an identifying number. *Id.* The applicable regulation, in turn, obligates a tax return preparer to obtain a PTIN, renew the PTIN, and to pay a fee for the issuance and renewal of a PTIN. *See* User Fees Relating to Enrollment and Preparer Tax Identification Numbers, 75 Fed. Reg. 60,316 (Sept. 30, 2010).

The RTRP Program was promulgated under the authority of 31 U.S.C. § 330, and required return preparers to either have a credential or to become a "registered" tax

return preparer by (1) completing at least 15 hours of continuing education annually, (2) passing a one-time competency exam, (3) passing a suitability check, and (4) obtaining and renewing annually a PTIN (and pay the amount provided in the PTIN user fee regulations).

The RPO was designed to be a cohesive office, so when the *Loving* decision invalidated some requirements,[3] it took time to untangle the *Loving*-related activities and costs from the PTIN program. The PTIN user fees charged in fiscal years 2014 and 2015 were determined by the 2013 Cost Model, before the *Loving* D.C. Circuit decision in February 2014, and therefore the IRS did not contemplate removing *Loving*-related activities from the Cost Model. In February 2013, during the time the 2013 Cost Model was being prepared, the District Court in *Loving* recognized that the matter was "one of first impression and raises serious and difficult legal questions," so both parties were entitled "to hedge their bets in case of appellate reversal." *Loving v. Internal Revenue Serv.*, 920 F. Supp. 2d 108, 111 (D.D.C. 2013). Following *Loving*, the 2015 Cost Model removed what the IRS identified to be unauthorized costs from the fiscal years 2016 and 2017 fee. But the IRS was still examining the impact of *Loving* on various activities, and whether other costs were being properly allocated to the PTIN user fee. The Government has now conceded additional *Loving*-related costs. Campbell Decl. ¶¶ 8, 10.

[3] The D.C. Circuit in *Loving* found that the IRS could not regulate tax return preparers, specifically the IRS could not require that certain tax return preparers complete continuing education courses or pass certification exams. *Loving v. Internal Revenue Serv.*, 742 F.3d 1013, 1014 (D.C. Cir. 2014). For convenience, this brief collectively refers to those requirements as "*Loving*-related activities" and or activities invalidated by *Loving*.

In 2017, after the D.C. Circuit *Loving* decision, this Court held that the IRS could not charge a PTIN user fee and enjoined the IRS from collecting the PTIN user fee while an appeal of that decision was pending. Dkt. No. 82 (Final Judgment and Permanent Injunction). In 2019, the D.C. Circuit reversed that holding, determined the IRS had the legal authority to charge a PTIN user fee, and remanded the case to determine whether the amount of the PTIN user fee is reasonable under the IOAA. *Montrois*, 916 F.3d at 1068.

With the clarity provided by the Circuit opinion in *Montrois* on the legality of the PTIN user fee, the IRS again followed the statutory requirements of the IOAA and the OMB guidance in Circular A-25 to develop a cost model in 2019 to determine the user fee currently in effect. *See* Preparer Tax Identification Number (PTIN) User Fee Update, 85 Fed. Reg. 21,126 (April 16, 2020) (NPRM); Preparer Tax Identification Number (PTIN) User Fee Update, 85 Fed. Reg. 43,433 (July 17, 2020) (final regulations). Although the 2019 Cost Model generated user fee is not currently before this Court, the parties have stipulated that information about current operations of the IRS Return Preparer Office are relevant to understanding the period 2010 through 2017. Dkt. No. 144 ¶ 4. While all cost models are necessarily prepared *ex ante* under OMB Cir. A-25, the IRS used the 2019 Cost Model as a guidepost to review the fee charged in fiscal years 2011 through 2017 based on previous cost models created in 2010, 2013, and 2015. In other words, the IRS performed a retroactive review of previously charged fees using current information (post-*Loving*).

Based on the 2019 Biennial Review and its 2019 Cost Model, the IRS in mid-2020 issued a Notice of Proposed Rulemaking (85 Fed. Reg. 21,126) and then Final Regulations

imposing a new PTIN user fee (85 Fed. Reg. 43,433). The regulations set the PTIN user fee to be charged after August 17, 2020, at $21.00, plus an amount payable to a vendor. 85 Fed. Reg. at 43,436; *see also* Dkt. No. 178 at 25–28 (further detailing activities used to calculate the 2019 Cost Model). Submitted with this opposition is the Declaration of Carol A. Campbell, Director of the RPO, which describes the IRS's retroactive review of the fee charged in fiscal years 2011 through 2017. Ms. Campbell's declaration includes two tables that break down the stipulated concession for fiscal years 2014 and 2015, and fiscal years 2016 and 2017. Campbell Decl. ¶¶ 8, 10. Those tables identify the RPO department or RPO activity from which the concession was made, the amount of the concession, and the activities or other costs conceded. The concessions align with the 2019 Cost Model which included costs as described in the notice of proposed rulemaking and final regulations. *Compare* Campbell Decl. ¶¶ 8, 10 *with* Doc. No. 173-24 (Def. Appx. Ex. 44, 2019 Cost Model).

Plaintiffs claim the PTIN fee is excessive for two reasons. First, Plaintiffs argue that the IRS charged too much during fiscal years 2011 through 2017 because the fees included certain costs attributable to the RTRP program that *Loving* invalidated. Dkt. No. 175 at 20–27. The United States does not dispute costs associated with activities invalidated by *Loving* cannot be charged. The Plaintiffs' overbroad interpretation of *Loving*, however, sweeps in activities properly charged under the PTIN user fee.

Second, Plaintiffs argue that costs determined by the 2015 Cost Model and charged in fiscal years 2016 and 2017 were "excessive because it included costs beyond the limited labor and IT costs necessary to issue and maintain PTINs." *Id.* at 25–27. Plaintiffs'

argument, however, must be rejected because it is unsupported by law and fails to show how any of the costs are unreasonable under the IOAA and OMB Circular A-25. The United States will address these issues in turn.

A. The Plaintiffs' identification of "*Loving*" costs is overbroad.

Loving invalidated activities conducted under the RTRP Program requirements that obligated uncredentialed return preparers to fulfill fifteen hours of continuing education, pass a qualifying return preparer exam, and clear certain suitability requirements as a prerequisite to obtaining a PTIN necessary to prepare returns for compensation. With the RTRP Program invalidated, the IRS could no longer condition eligibility to obtain a PTIN on being credentialed. But *Loving* did not affect the IRS's ability to charge a fee under the IOAA for costs associated with the PTIN Program. The PTIN user fee included costs that "would improve tax compliance and administration" on which "*Loving* did not cast doubt" and "which are independent of the registered tax-return preparer program [the D.C. Circuit] considered and invalidated" in *Loving*. *Montrois*, 916 F.3d at 1067.

Plaintiffs contend that despite the above-quoted language, only a narrow set of costs is reasonable and comply with OMB Circular A-25. For example, Plaintiffs argue that all activity costs listed under "RPO Program Compliance" identified in the 2010 Cost Model and included in the PTIN user fee for fiscal years 2011 through 2015 were invalidated by *Loving*. Dkt. No. 175 at 20–21. RPO Program Compliance costs, as identified in Plaintiffs' Appendix, include costs associated with the RPO Compliance Department (developing a process for identifying and treating return preparers filing

without a PTIN or incorrect PTIN) and the RPO Suitability Department (PDCs, Prisoner List checks, SDNs, and Suitability Referrals). *Id.*; Dkt No. 173-2 ¶¶ 30–44.

The Plaintiffs' only support for this assertion that all costs associated with RPO Program Compliance were invalidated by *Loving* is based on quotes taken out of context from the panel opinion in the *Montrois* Court. Dkt. No. 175-2 at 21. The Plaintiffs' specific argument, purporting to be from *Montrois*, reads:

> All items in "RP Program Compliance," which comprised the lion's share of the 2010 PTIN fee, are activities "deemed in *Loving* to fall outside the IRS's statutory authority."

Id. (citing *Montrois*, 916 F.3d at 1068). The quoted language suggests that this issue has already been decided by the D.C. Circuit. It was not. Plaintiffs misrepresent *Montrois*. The *Montrois* Court explicitly declined to determine which costs in the PTIN fee may be excessive because "no court has yet considered the claim." *Montrois*, 916 F.3d at 1063. Not found in the *Montrois* opinion is any holding that RPO Compliance consists of activities determined by the *Loving* Court to fall outside the IRS's statutory authority as Plaintiffs' brief claims. Plaintiffs misappropriated the entire quote to somehow justify the exclusion of RPO Compliance activities, while the full quote actually states as follows:

> The tax-return preparers' concerns that the justifications for the PTIN fee might encompass functions deemed in *Loving* to fall outside the IRS's regulatory authority can be addressed on remand, when the district court examines whether the amount of the fee is reasonable and consistent with the Independent Offices Appropriations Act.

Id. at 1068.

The *Montrois* holding remanded this case to determine which costs are reasonable and consistent with the IOAA. Compliance activity costs were not invalidated by *Loving*

because the Compliance activities were not part of the RTRP Program, and Compliance activity costs are direct or indirect costs reasonably related to the PTIN Program. Likewise, Plaintiffs, using distorted language from *Montrois*, claim that "all of the activities" identified in the 2015 Cost Model and included in the PTIN user fee for fiscal years 2016 and 2017 related to the RPO Suitability Department must be excluded because they fall outside the IRS's regulatory authority. Dkt. No. 175-2 at 26–27. Those costs include PDCs, Prisoner List checks, SDNs, Suitability Referrals, Former Employee EA Enrollment Applications, and Electronic Filing Identification Number (EFIN) Adjudication[4] and Appeals. *Id*. Although the United States does not dispute that many Suitability activity costs are *Loving* costs associated with the invalidated RTRP Program, not all of them are, and again, *Montrois* never makes such a holding. *Montrois*, 916 F.3d at 1068.

The Plaintiffs have entirely ignored the mandate in the fully quoted passage from *Montrois*, and their reliance on it to sweep up additional costs as *Loving*-invalidated activities is misplaced. The United States has conceded *Loving* costs and continues to defend only those costs that it has determined are direct and indirect costs reasonably related to the PTIN Program. When RPO Compliance costs and certain Suitability Department costs are analyzed to determine whether the associated costs are reasonably

[4] An EFIN is not the same as a PTIN. An EFIN is required to electronically file tax returns and is assigned to identify firms that have completed the necessary requirements to become Authorized IRS e-file Providers. *See* Internal Revenue Service, FAQs About Electronic Filing Identification Numbers (EFIN) https://www.irs.gov/e-file-providers/faqs-about-electronic-filing-identification-numbers-efin (last visited May 11, 2022).

related to the PTIN Program, the resulting conclusion is that the costs consist of direct or indirect costs of the PTIN Program in accordance with the IOAA and OMB Circular A-25. Each of these costs will be addressed in turn.

1. The RPO Compliance Department activities are direct or indirect costs permitted to be recovered in the PTIN user fee under the IOAA.

The RPO Compliance Department processes taxpayer complaints against return preparers, identifies return preparers who require enforcement, and conducts enforcement activities against return preparers who misuse or who do not use a PTIN. Dkt. No. 173-002 ¶ 31. Compliance enforcement activities more specifically include (1) investigating "ghost preparers" (return preparers that do not list their PTINs on returns they prepared for compensation as required by law); (2) handling complaints from return preparers that a client's prior return preparer may have acted improperly by using a compromised PTIN or committed identity theft to obtain a PTIN; and (3) composing the data to refer complaint cases to IRS business units outside the RPO for further enforcement if necessary. *Id*. ¶¶ 32–38. Under OMB Circular A-25, the cost of enforcement is a direct or indirect cost of a valid program. OMB Cir. A-25 at Sec. 6(d)(1)(d). These permissible enforcement activities are reasonably related to the PTIN Program. The PTIN Program enacted under 26 U.S.C. § 6109 authorizes the Secretary to require the use of a PTIN as an identification mechanism and advances the goals of protecting against identity theft recognized by *Montrois* as a special benefit justifying the PTIN user fee. *Montrois*, 916 F.3d at 1064. The costs are, accordingly, reasonable. Plaintiffs addressed none of these issues.

Because RPO Compliance is a cost of enforcement which is permitted under OMB Circular A-25, and because the costs are reasonable under the IOAA, the Court should deny Plaintiffs' request to exclude RPO Compliance from the PTIN user fee.[5]

2. Certain RPO Suitability Department activities are direct or indirect costs permitted to be recovered in the PTIN user fee under the IOAA.

The United States has conceded or otherwise does not defend certain RPO Suitability Department costs charged in fiscal years 2011 through 2017. Those costs include RTRP Program activities invalidated by *Loving* (PTCs, CBCs, and verification of self-certified continuing education) or costs not related to the PTIN Program (Former Employee EA Enrollment Applications, and EFIN Adjudication and Appeals).[6] However, as explained further below, costs associated with PDCs, Prisoner List checks, SDNs, and Suitability Referrals show that they are direct or indirect costs reasonably related to the PTIN Program.

a. Professional Designation Checks

The Suitability Department runs Professional Designation Checks (PDCs) to verify the self-reported credentials of CPAs and attorneys. This cost is reasonable as a direct or indirect cost of the PTIN user fee because the PTIN is fundamentally about identification under 26 U.S.C. § 6109(a)(4) (requiring an "identifying number" for return preparers). The IRS also maintains on its website a Directory of Federal Tax Return Preparers with

[5] The United States conceded for fiscal years 2014 through 2017 a minor cost connected to education in the allocation of the Compliance Department's work to PTIN activities because that cost relates to "victim assistance" work unrelated to PTINs. Campbell Decl. ¶¶ 8, 10.

[6] Carol Campbell Decl. ¶¶ 8, 10.

Credentials and Select Qualifications.[7] Section 6109(c) of Title 26 authorizes the IRS "to require such information as may be necessary to assign an identifying number to any person." 26 U.S.C. § 6109(c). PDCs verify that a CPA or an attorney has the credentials they claim on their PTIN application. PDCs are directly related to and support the directory, which is authorized under 26 U.S.C. § 7803(a)(2)(A). *Am. Inst. of Certified Pub. Accts. (AICPA) v. Internal Revenue Serv.*, 746 Fed. App'x 1 (D.C. Cir. 2018).

The IRS has an interest in verifying the identity of PTIN holders and verifying this same identifying information is correctly displayed on its public facing website. Verification of the identifying information of return preparers is reasonably related to the PTIN Program. PDCs were not invalidated under *Loving* because PDCs are unrelated to the credentialing process. Instead, as previously stated, PDCs merely verify a preparer's credentials on their PTIN application. Because PDC checks do not impermissibly regulate uncredentialed return preparers, but merely confirm the identity of already credentialed return preparers, the PDC checks are direct or indirect costs of administering the PTIN Program, and the costs associated with this activity are reasonable under the IOAA.

b. Prisoner list checks and Specially Designated Nationals

Prisoner list checks and Specially Designated National (SDN) checks are also direct or indirect costs of the PTIN program and justified under the IOAA because both aim to prevent interference or contradiction with other important federal programs. PTINs are not to be issued or renewed to incarcerated individuals. The Suitability

[7] Available at https://irs.treasury.gov/rpo/rpo.jsf.

Department checks to see whether a PTIN applicant is a prisoner. And when the Suitability Department learns that an incarcerated person has a PTIN, it revokes the PTIN.[8]

Similarly, PTINs are not issued to individuals who appear on the SDN list because SDNs should not have a PTIN. Dkt. No. 173-3 (Def. Appx. Ex. 41, Rogers Decl.) ¶ 72. The SDN list is created by the Treasury Department's Office of Foreign Assets Control (OFAC) and contains the names of individuals or entities owned or controlled by certain targeted countries. Dkt. No. 173-3 (Def. Appx. Ex. 40, King Decl.) ¶ 129; Dkt. No. 173-3 (Def. Appx. Ex. 41, Rogers Decl.) ¶ 64. This list also contains names of individuals, groups, or entities such as terrorists or drug traffickers that are not country specific. Dkt. No. 173-3 (Def. Appx. Ex. 40, King Decl.) ¶ 130; Dkt. No. 173-3 (Def. Appx. Ex. 41, Rogers Decl.) ¶ 65. Collectively, the individuals on these lists are called SDNs, their assets are blocked, and U.S. citizens are blocked from doing business with them. Dkt. No. 173-3 (Def. Appx. Ex. 40, King Decl.) ¶ 131–32; Dkt. No. 173-3 (Def. Appx. Ex. 41, Rogers Decl.) ¶ 66–76.

Checking both the Prisoner Lists and the SDN Lists are direct and indirect costs to administer the PTIN program. It is reasonable for the IRS to determine that the PTIN Program should be administered in compliance with, and without undermining, other important federal programs and regulations. The IOAA broadly provides that a fee

[8] The Federal Bureau of Prisons regulations prohibit incarcerated individuals from earning income outside of work release programs. 28 C.F.R. § 541.3 (Prohibited Acts and Available Sanctions; Def. Appx. Ex. 40 (Dkt. No. 173-03, King Decl.) ¶¶ 59–61; Def. Appx. Ex. 41 (Dkt. No. 173-03, Rogers Decl.) ¶¶ 113–16.

should not only consider government costs but also "other relevant facts." 18 U.S.C. § 9701(b)(2)(D). It is reasonable that the IRS would not issue a PTIN that allows someone to prepare returns for compensation when the person is either a prisoner (and thus forbidden to work for outside compensation by the Bureau of Prison regulations) or an SDN (and thus U.S. citizens are prohibited from doing business with him or her).

c. Suitability Referrals

Suitability Referrals handles certain complaints related to PTIN holders that are referred to the Suitability Department. Referrals may originate internally (*i.e.,* from another IRS business unit) or externally (*i.e.*, from other return preparers or TIGTA). For example, Suitability Referrals might open a case following a complaint about a return preparer who continues to prepare returns despite being legally enjoined from return preparation and from obtaining or renewing a PTIN.[9] This is a reasonable direct cost to administering the PTIN Program because it relates to the cost of enforcement for misuse of the PTIN contemplated under OMB Circular A-25. These costs are therefore reasonable under the IOAA.

In summary, although the United States has conceded or does not defend certain costs associated with the Suitability Department because they were either invalidated by *Loving* or not related to the PTIN Program, the Plaintiffs' argument that all costs associated with the Suitability Department must be denied under *Loving* is simply wrong.

[9] *See* 26 U.S.C. §§ 7407 & 7408; *see also United States v. Brenes*, 2020 WL 8994924 *4 (S.D. Fla. 2020) (enjoining return preparer from, for example, "maintaining, assigning, holding, using, or obtaining a [PTIN]).

PDCs, Prisoner List checks, SDNs, and Suitability Referrals are direct or indirect costs reasonably related to the PTIN Program and are therefore reasonable under the IOAA.

B. The IRS may charge for direct and indirect costs beyond those costs Plaintiffs contend are "necessary" for running a database.

As shown above and in the Government's opening brief in support of its motion for summary judgment (Dkt. No. 178-1), the IOAA and OMB Circular A-25 provide for the recovery of all costs related to a program and broadly imagine costs beyond what the Plaintiffs contend are "necessary." Contrary to Plaintiffs' claims, the allowable costs to create and maintain the PTIN Program include more than just the necessary costs for running a database. For example, the Plaintiffs argue that the only costs that should be allowed as part of the 2015 Cost Model and charged in the PTIN user fee for fiscal years 2016 and 2017 are "a small portion of labor and IT costs" because those costs were the only ones "necessary to issue and maintain PTINs."[10] Dkt. No. 175 at 26. Plaintiffs' brief then proceeds to simply list costs they consider necessary. *Id*. Other than saying what they believe is permitted as a cost, Plaintiffs failed to establish why the Court should only favor these costs and provide no explanation about disfavored costs. *See generally,* Dkt. No. 175. Plaintiffs make no attempt to describe how the IRS's cost approximations are not reasonable or are related to activities invalidated by *Loving*. *Id.* Plaintiffs' theory

[10] Although not explicitly stated, it can be inferred that Plaintiffs are making the same argument that the fee charged for fiscal years 2011 and 2015 is "excessive" because most of the RPO staff was not hired until after the TPPS PTIN System issued almost 700,000 PTINs. Dkt. No. 175 at 25. Essentially, the Plaintiffs argue that any costs incurred after TPPS went live are excessive. *Id*. Their position is unsupported and imposes a completely arbitrary timeline.

articulates no standard by which a determination can be made about whether a cost should be allowed. Plaintiffs go no further than to identify certain costs as necessary, and others, implicitly, as unnecessary. *Id.*

Necessity is not the standard set by the IOAA or OMB Circular A-25, or by the D.C. Circuit in *Montrois*. Plaintiffs fail to adhere to the correct legal standard. In fact, their brief does not mention direct or indirect costs at all, *id.*, even though OMB Circular A-25 expressly provides for both direct and indirect costs. Plaintiffs' standard would transform the Court into a receivership substituting itself in place of the agency to exercise discretion and expertise when making decisions on how to run the agency. The IOAA and OMB Circular A-25 direct the agency to look at costs related to the implementation and running of the program, and also direct the agency to look at direct and indirect costs. The Plaintiffs fail to show that the IRS did not perform this analysis.

Beyond the *Loving*-related activity costs, Plaintiffs failed to show that the IRS abused its discretion in determining which direct and indirect costs relate the establishment and maintenance of the PTIN Program. The Court is not tasked with micromanaging how a government agency complies with statutes and implements regulations. *Cent. & S. Motor Freight Tariff Ass'n, Inc.*, 777 F.2d at 729.

The IRS conceded the costs initially included in any PTIN user fee which were *Loving*-related, and Plaintiff failed to show the remaining amounts of the PTIN user fee are unreasonable and inconsistent with the IOAA. The Court need not undergo the tedious process of evaluating individual RPO tasks, and Plaintiffs' astonishing demand for the Court to do so contradicts the IOAA, OMB Circular A-25, the controlling caselaw,

and holdings of the D.C. Circuit as to this Court's standard of review. Plaintiffs are wrong to ask this Court to substitute the Plaintiffs' or the Court's judgment for that of the IRS. *Id.* As the D.C. Circuit has stated, "We do not sit as a board of auditors, steeped in accountancy and equipped to second-guess an estimate which seems on its face to be reasonable." *Id.* at 738. Plaintiffs' argument amounts to a mere grievance that Plaintiffs would have made different decisions on which costs to include, even offering a proposed order of Plaintiffs' approved activities,[11] but only in undefined (and therefore unrulable) "portions." Dkt. No. 175-003. Like *Central and Southern Motor Freight Tariff Association,* Plaintiffs' approach[12] here is "quibbling over trifles at its worst." *Id.*

Because Plaintiffs have failed to explain how any of the costs charged as part of the PTIN fee in fiscal years 2016 and 2017, beyond those *Loving*-related cost conceded by the IRS, are not direct or indirect costs related to the creation and maintenance of the PTIN Program, and thus authorized under the IOAA and OMB Circular A-25, the Court should deny Plaintiffs' motion for summary judgment.

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[11] Plaintiffs' proposed order asks the Court to find "that the IRS portion of the PTIN fees from 2010 to 2015 was excessive because it included costs for activities beyond the following activities necessary to issue and maintain PTINs," and "that the IRS portion of the PTIN fees from 2015 to 2017 was excessive because it included costs in excess of the following cost necessary to issue and maintain PTINs" Dkt. No. 175-3. But in the list of Plaintiffs' proposed "approved" activities, seven of the nine items listed are "portions" of full items: "A portion of the pre-September 2010 implementation costs," "A portion of the Vendor Department," and "A portion of IT costs." *Id.* Plaintiffs provide no specificity as to what these "portions" might include or how much of the PTIN user fee these "portions" might relate. *Id.*

[12] Plaintiffs approach also disputes material facts (i.e., which activities are includable in the PTIN use fee) and therefore must be denied. Fed. R. Civ. P. 56(c).

IV. The vendor fee charged by Accenture included in the inaugural PTIN user fee is not excessive.

As a threshold matter, Plaintiffs lack standing to challenge the amount of the Accenture fee agreed to in the contract between Accenture and the IRS. Plaintiffs were not an interested party to the bidding processes. Interested parties my challenge the contract via bid protests under the Administrative Dispute Resolution Act (ADRA). *See Orion Tech., Inc. v. United States*, 704 F.3d 1344, 1348 (Fed. Cir. 2013) (To be an interested party, the challenger "must show 1) that it is an actual or prospective bidder and 2) that it has a direct economic interest."). Jurisdiction to resolve ADRA claims only exists in the Court of Federal Claims. *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1079 (Fed. Cir. 2001).

Under the Federal Acquisition Regulations, which institute policies and procedures for acquisition by executive agencies, the competition of the bids establishes price reasonableness. 48 C.F.R. § 15.305(a)(1). The Procurement Office, in collaboration with RPO, executed a Request for Proposal and solicited bids. Dkt. No. 173-13 (Def. Appx. Ex. 16, Goudey Depo. Tr. Vol. I), 305:11–22. RPO then evaluated whether the bidders met the technical requirements of the Request for Proposal. *Id.*, 306:4–9. The Accenture contract was awarded through the competitive bid process and therefore the price is presumptively reasonable. Dkt. No. 173-02 ¶ 114; *see also Femme Comp Inc. v. United States*, 83 Fed. Cl. 704, 754 (2008) ("Typically, price reasonableness is established by competition, which occurs in a best value procurement when two or more responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed

requirements and the successful awardee's price is not unreasonable." (internal citations and quotations omitted)). Consequently, the only challenge Plaintiffs can raise in this proceeding is whether the product or service for which the IRS contracted is a direct or indirect cost of the PTIN Program that can be charged consistent with the IOAA and OMB Circular A-25.

The inaugural PTIN user fee included a vendor fee of $14.25 (for registrations) or $13.00 (for renewals) charged by Accenture to process and renew the PTINs. 75 Fed. Reg. 60,316 (Sept. 30, 2010). The Plaintiffs argue the vendor fee charged by Accenture under the contract is excessive because later software releases between the fall of 2011 and 2015 added capabilities *after the fee was determined in 2010*, that were unrelated to issuing and maintaining PTINs. Plaintiffs' argument is flawed.

First, the $14.25 registration fee and $13 renewal fee were determined in 2010 before subsequent releases with functions not included in the scope of the original contract. *See* Dkt. No. 177-8 (Pl. Ex. Y) at 3. Second, the first release only includes costs that Plaintiffs agree are allowed. *Compare* Dkt. No. 177-8 (Pl. Ex. Y) (*see* answer contained in question two) at 3 and Dkt. No. 175 at 20 (arguing that the "only things properly included in Accenture's portion of the user fees were [*see* remainder of redacted quote filed under seal at Dkt. No. 177-29]"). Although subsequent software releases contained different database functions, the price was only determined in 2010 based on the function of the first release, and thus the later releases were not included. *Id*.

While later software releases included additional capabilities, those all came after the 2010 fee was established. The 2010 fee only included the limited capabilities the Plaintiffs agree should be permitted. Accordingly, Plaintiffs' argument must be denied.

V. Plaintiffs are Not Entitled to Judgment as to the Information Requested on a PTIN Application.

Nothing highlights the problematic nature of Plaintiffs' theory more acutely than their request for the Court to rewrite an IRS form. Section 6109(c) of Title 26 authorizes the IRS "to require such information *as may be necessary* to assign an identifying number to any person." 26 U.S.C. § 6109(c) (emphasis added). Plaintiffs ignore the phrase "as may be," and they instead argue, without any legal basis, that the Court should limit the IRS to request "only information necessary to assign a PTIN." Doc. No. 175 at 28. Yet again, Plaintiffs' request that the Court "inject[] the judge into day-to-day agency management" runs contrary to law. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66–67 (2004). Asking the Court to direct the IRS on how to prepare its PTIN application represents the epitome of micromanaging an agency. [13]

But even if it were proper for the Court to review the PTIN application form under the guise of reviewing whether a cost is reasonably related (*Montrois*, 916 F.3d at 1066) to the PTIN Program, Plaintiffs' demand ignores all the established principles of statutory

[13] When drafting the form, the IRS estimates that PTIN applicants would spend fourteen minutes learning about, preparing, and sending the form. Instructions for Form W-12, Internal Revenue Serivce, https://www.irs.gov/pub/irs-pdf/iw12.pdf (last visited May 11, 2022). For an individual who is entrusted to prepare tax returns for compensation, the IRS is reasonable to request fourteen minutes of information which may be necessary to verify their identity. Any argument that the fourteen-minute PTIN application unduly burdens tax return preparers is unfounded.

interpretation. Courts "begin by analyzing the statutory language," and if the words of the statute are unambiguous, "this first step of the interpretive inquiry is [the] last." *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019). The plain language of § 6109(c) authorizes collection of information that *may be* necessary, not, as Plaintiffs argue, *is definitively* necessary. The phrase "may be" allows for collection of any information that could potentially be necessary and grants the IRS discretion in determining what information it might require. *See Cheney R.R. Co., Inc. v. Interstate Com. Comm'n*, 902 F.2d 66, 69 (D.C. Cir. 1990 ("Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved.") (citing *Chevron, U.S.A., Inc. v. Na'l Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984)).

Furthermore, when interpreting a statute, "absent provision[s] cannot be supplied by the courts." *Rotkiske*, 140 S. Ct. at 360–61 (citing A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 94 (2012)). Courts not only are prohibited from adding terms to statutes, but courts are also not permitted to impose "limits on an agency's discretion that are not supported by the text." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020). Plaintiffs unreasonably ask the Court to impose limits on the IRS's discretion over the information it deems *may be necessary* for PTIN applications. Doc. No. 175 at 28. Congress has eliminated the phrase "as may be necessary" from other statutes to "exorcise . . . any hint of discretion not intended to be conferred on [an agency]." *See, e.g.*, H.R. Rep. No. 102-205 at 10–11 (1991) (amending the Federal Railroad Safety Act). For example, Congress amended Section 202 of the Federal Railroad Safety Act of 1970 by striking the phrase "as may be necessary" to clarify its

original intent for refusing the Federal Railroad Administration discretion in determining whether a rulemaking was needed. *Ass'n of Am. R.R. v. Dep't of Transp.*, 38 F.3d 582, 587 (D.C. Cir. 1994). If Congress wished to limit the IRS's discretion, it could have done so by eliminating the phrase "as may be necessary," but Congress chose not to. By introducing this arbitrary limitation, which is not found in the statute, Plaintiffs ask the Court "to alter, rather than to interpret," § 6109(c). *Little Sisters of the Poor Saints Peter & Paul Home*, 140 S. Ct. at 2381 (citing *Nichols v. United States*, 578 U.S. 104, 109–10 (2016)).

Finally, the principles of interpretation require a court to "give effect . . . to every clause and word" of the statute, giving the IRS discretion in this area. *See, e.g.*, *Setser v. United States*, 566 U.S. 231, 239 (2012) (citations omitted). Plaintiffs' misguided interpretation runs contrary to this principle, as they ask the Court to ignore the phrase "may be." Doc. No. 175 at 28. Reading § 6109(c) as authorizing the collection of only definitively necessary information would render superfluous the phrase "may be," and courts hesitate "to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (citations and quotations omitted). To accept Plaintiffs' interpretation would leave meaningless an important phrase which Congress saw fit to include. *Id.*

VI. Conclusion

The Court should deny the Plaintiffs' motion for summary judgment because they failed to meet their burden to demonstrate that the PTIN user fee includes costs that are

not direct or indirect costs reasonably related to the PTIN Program in violation of the IOAA.

Dated: May 12, 2022

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF IN OPPOSITION was filed with the Court's ECF system on May 12, 2022, which system serves electronically all filed documents on the same day of filing to all counsel of record.

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