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

PLAINTIFFS' OPPOSITION TO THE UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT

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Introduction

Over the past decade, the IRS has collected hundreds of millions of dollars from tax-return preparers. These fees originated as part of an unprecedented effort to assert regulatory control over tax-return preparers and were intended to fund a host of new licensing activities that have since been invalidated by *Loving v. I.R.S.*, 742 F.3d 1013 (D.C. Cir. 2014). Even after the IRS was forced to halt those activities, however, it retained a tight grip on the fees collected to fund them.

Thanks to this litigation, two things are now clear. One is that the IRS possessed statutory authority to impose the fees only to the extent necessary to recover the costs of "generating PTINs and maintaining a database of PTINs"—no more. *Montrois v. United States*, 916 F.3d 1056, 1067 (D.C. Cir. 2019). The other is that the IRS has conceded that it transgressed this authority.

Now the question is by how much. Seeking to limit its liability and keep as much of the fees as possible, the IRS takes the extraordinary position that, despite its regulatory overreach, it should be able to decide for itself how much of the fees were lawful. As the IRS sees it, this Court may not "second-guess" the agency's post-hoc determination of its own liability because agencies receive "more than mere deference" in setting fees under the IOAA. Br. in Supp. of United States' Mot. for Partial Summ. J., ECF 178-1 (IRS Br.) at 10, 19. But this Court is not only permitted to scrutinize the excessiveness of the fees—it has an obligation to do so. And the primary authority that the IRS cites in support of its IOAA-specific rule is a case from 1985 that simply refers to the general standard of review under the Administrative Procedure Act.

Under that general standard, the IRS's motion for partial summary judgment must be denied. Although the IRS has conceded that the PTIN fees were excessive because they funded unauthorized regulatory activities, the agency now claims that its "operational support costs" for those unauthorized activities were properly recovered through PTIN fees. Supporting an illegitimate regulatory scheme, however, is not remotely related to generating and maintaining a

database of identifying numbers. The IRS also contends that the fees properly covered the costs of unrelated "professional designation" checks for a subset of return preparers, and for "compliance" work. But these costs don't have anything to do with generating or storing PTINs either—the only service for which a fee was authorized. That service, moreover, was provided almost entirely by Accenture, a third-party contractor, not by the IRS. And it was provided in exchange for a portion of the fee not included in the regulation at all—in violation of both the APA and the IOAA.

Faced with such a wildly excessive fee, the IRS casts about for ways to avoid returning the full amount of the excess. It asserts (at 18 n.6) that the plaintiffs lack standing to contest Accenture's portion of the fee because they were not parties to the contract bidding process. This argument—raised for the first time in a footnote after years of acknowledging the opposite—is as wrong as it is waived. The plaintiffs are not challenging Accenture's contract under the procurement laws; they are challenging the fees that they paid under the IOAA. They plainly have standing to do so.

The IRS also claims (at 28-29) that it is entitled to summary judgment on an "affirmative defense for offset" in an amount equal to the total of all PTIN fees that it did not charge between June 2017 (when this Court enjoined the agency from collecting fees) and late 2020 (a year and a half after the injunction was vacated). But this argument is predicated on one category error after another: An offset is a counterclaim, not a defense to liability. It requires strict mutuality and a valid debt, neither of which is present here. And there is no cause of action for consequential damages caused by an injunction, nor any equitable basis for awarding restitution to the IRS.

At the end of the day, the unmistakable reality is that the IRS overstepped its regulatory authority, collected far more in fees than the law permits, and is now clinging to the last vestige of a failed regulatory scheme (the PTIN requirement) to retain as many of the fees as it can. It is hard

to imagine a case where an agency's position could be less deserving of deference, or less in keeping with the separation-of-powers principles that drive the IOAA's boundary between fees and taxes.

Argument

I. There is no special deference rule for agency actions under the IOAA.

The IRS begins by trying to stack the deck in its favor. It repeatedly asserts that an agency's fee determinations under the IOAA are "entitled to more than mere deference"—language that it snips from a 1985 D.C. Circuit case. *See* IRS Br. at 10, 11, 12, 17, 19 (quoting *Cent. & S. Motor Freight Tariff Ass'n v. United States*, 777 F.2d 722, 729 (D.C. Cir. 1985)). As the IRS construes the statute, a court may determine whether an agency has authority to charge *a* fee under the IOAA—but it may not "second-guess" the *amount* of the fee. IRS Br. at 19. So long as the agency has the bare authority to impose a fee, the IRS argues (at 10), a reviewing court must give "great deference" to the agency's determination that it has "compli[ed] with the statutory requirement" as to the amount.

The IRS is fundamentally mistaken. When the D.C. Circuit used the phrase "more than mere deference" four decades ago, it was not announcing any special rule for IOAA cases. *See Cent. & S. Motor Freight Tariff Ass'n*, 777 F.2d at 729. Just the opposite: It was quoting two earlier decisions, neither of which involved the IOAA, and both of which used the phrase to refer to the general standard of review for agency actions under the Administrative Procedure Act—that a regulation "can be set aside only if the [agency] exceeded [its] statutory authority or if the regulation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Batterton v. Francis*, 432 U.S. 416, 426 (1977); *see also Am. Trucking Ass'ns, Inc. v. United States*, 627 F.2d 1313, 1320-21 (D.C. Cir. 1980) (same). The same, familiar standard governs here.

Nor would an IOAA-only deference rule make any sense. Although the IRS advocates for a special rule of deference only "[w]hen an agency properly exercises its authority to charge a fee under the IOAA," *see* IRS Br. at 11, that just begs the question. An agency has not "properly exercised its authority to charge a fee under the IOAA" if it charges for services beyond those authorized by Congress. As the Supreme Court has explained, "there is no difference, insofar as the validity of agency action is concerned, between an agency's exceeding the scope of its authority" and "its exceeding authorized application of authority that it unquestionably has." *Arlington v. Fed. Commc'ns Comm'n*, 569 U.S. 290, 299 (2013). "To exceed authorized application is to exceed authority." *Id.*

Applying that principle here, the IRS is entitled to *no* deference (let alone "great deference") as to whether it has "compli[ed] with the statutory requirement[s]." IRS Br. at 10. In contrast with agency-specific fee statutes that "exude deference" to the agency, *see Sw. Airlines Co. v. Transp. Sec. Admin.*, 554 F.3d 1065, 1071 (D.C. Cir. 2009), Congress gave the IRS no authority to interpret the IOAA, and a "court does not defer to an agency's interpretation of a statute that it is not charged with administering." *Del. Riverkeeper Network v. Fed. Energy Regulatory Comm'n*, 857 F.3d 388, 396 (D.C. Cir. 2017); *see Sierra Club v. Fed. Energy Regul. Comm'n*, 827 F.3d 36, 49 (D.C. Cir. 2016) ("The court owes no deference to an agency's interpretation of NEPA because NEPA is addressed to all federal agencies and Congress did not entrust administration of NEPA to any one agency alone." (cleaned up)); *Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246, 1253 (D.C. Cir. 2003) (making similar point); *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 913 (D.C. Cir. 1993) (same).

Nor is there any statutory ambiguity to resolve anyway. The IOAA has already been interpreted to bar fees that exceed the costs of the services for which the fee may be charged—

here, "the costs to the IRS to issue and maintain PTINs." *Montrois*, 916 F.3d at 1058; *see Engine Mfrs. Ass'n v. Env't Prot. Agency*, 20 F.3d 1177, 1180 (D.C. Cir. 1994). That is for separation-of-powers reasons: "Once agency charges exceed their reasonable attributable cost they cease being fees and become taxes levied, not by Congress, but by an agency," which is "prohibited." *Nat'l Ass'n of Broadcasters v. Fed. Commc'ns Comm'n*, 554 F.2d 1118, 1129 n.28 (D.C. Cir. 1976). Drawing this line—and ensuring compliance with it—is thus the work of the judiciary, not the bureaucracy. And that is all the more true here, where the agency, when it first set the fee, was simultaneously engaged in regulatory overreach, operating under an improper understanding of its own authority.

This does not mean that agencies are held to "scientific precision" in calculating costs or allocating fees. *Cent. & S Motor Freight Tariff Ass'n*, 777 F.2d at 736. They need not "calculate the exact cost of servicing each individual," for example, and create a bespoke fee for each user that perfectly corresponds to those costs, because "that would be an all but impossible task." *Nat'l Cable Television Ass'n v. Fed. Commc'ns Comm'n*, 554 F.2d 1094, 1105 (D.C. Cir. 1976). Instead, "[i]t is sufficient for the [agency] to identify the specific items of direct or indirect cost incurred in providing each service or benefit for which it seeks to assess a fee, and then to divide that cost among the members of the recipient class . . . in such a way as to assess each a fee which is roughly proportional to the 'value' which that member has thereby received." *Id.* at 1105–06. An agency is also permitted to make reasonable estimates as to how much of an employee's time is spent doing particular tasks, and to make reasonable future projections of costs and fee revenue (which can be adjusted if they turn out to be too high or too low). *See Cent. & S Motor Freight Tariff Ass'n*, 777 F.2d at 737. But beyond these modest allowances, agencies must work to ensure that any costs on which a user fee is based are reasonable and include only those costs attributable to

the service for which they fee may be charged. In this case, the D.C. Circuit has already identified the universe of permissible costs—namely, "the costs to the IRS to issue and maintain PTINs." *Montrois*, 916 F.3d at 1058.

II. The IRS applies the wrong standard to the wrong cost models.

The IRS asks this Court to apply its mistaken special-deference rule to the analysis of four cost models—2010, 2013, 2015 and 2019. The Court should only consider the 2010 and 2015 cost models in determining whether the PTIN fees were excessive, not the 2013 and 2019 cost models. The 2013 cost model was an internal analysis that was never implemented through a regulation, as the IOAA requires. And the 2019 cost model is irrelevant to the PTIN fees charged prior to 2017—the only timeframe at issue in this motion. Moreover, the parties agreed that plaintiffs would not take discovery on the fee set by the 2019 cost model, and that the parties would first seek adjudication of the disputes relating to the fees from 2010 to 2017. Stipulation Regarding Post-2019 PTIN Fees, ECF 144 (Stip.) ¶¶ 1–4.

A. The Court should disregard the 2013 cost model because no fee based on it was published in the Federal Register.

The IOAA "expressly requir[es]. . . that fees be prescribed by regulation." *New Eng. Power Co. v. U.S. Nuclear Regul. Comm'n*, 683 F.2d 12, 16 (1st Cir. 1982); 31 U.S.C. § 9701(b); Off. of Mgmt. & Budget, OMB Circular A-25, User Charges § 7(a). This requirement ensures that fees are "communicated in advance to those who would have to bear them, thus permitting them to take intelligent action to avoid undesired consequences." *New Eng. Power Co.*, 683 F.2d at 16. The regulation setting the fee must include a "public explanation of the specific expenses included in the cost basis for a particular fee, and an explanation of the criteria used to include or exclude particular items." *Nat'l Ass'n of Broadcasters*, 554 F.2d at 1133; *Diapulse Corp. of Am. v. Food & Drug Admin.*, 500 F.2d 75, 79 (2d Cir. 1974). If the agency imposes a user fee without a

regulation, the user fee is invalid. *New Eng. Power Co.*, 683 F.2d at 15 (explaining that the IOAA "does not provide for charging fees unsanctioned in the first instance by an adequate regulation"); *Alyeska Pipeline Serv. Co. v. United States*, 624 F.2d 1005, 1010 (Ct. Cl. 1980) (holding that fees passed without a regulation were "invalid" and "not in accordance with or authorized by the Independent Offices Appropriations Act."); *Sohio Transp. Co. v. United States*, 5 Cl. Ct. 620, 625-26 (1984) (accord).

In keeping with this statutory requirement, the IRS's own internal policies likewise require it to "implement[] user fees under 31 USC 9701. . . by regulation." Ex. CA[1] at 820 (2016 Internal Revenue Manual); Ex. CL at 166:4-12 ("[W]e would have been required to [pass a regulation]."); Ex. CB at 019 ("Without the regulation published, the IRS will not be able to take money from return preparers. . . ."). If the IRS wishes to change the user fee, the agency must publish a new regulation. Def.'s Ex. 24[2] 168:4-169:9 ("If we don't have the regulation changed, we couldn't change the user fee."); Ex. CM at 190:24-191:6 ("We do [a regulation] every time we change the user fee."); *see also* IRS Br. at 12 ("The PTIN user fee schedule is an agency rule promulgated under statutory authority and entitled to more than mere deference.").

In 2010, the IRS issued a regulation establishing the IRS's portion of the PTIN user fee at $50. *User Fees Relating to Enrollment and Preparer Tax Identification Numbers*, 75 Fed. Reg. 60,316 (Sept. 30, 2010). In 2013, the IRS conducted its biennial review—which would have resulted in a $4.47 increase to the fee—but opted not to change the fee and continued charging

[1] Citations to Ex. A through Ex. BU are to the Exhibits to the March 23, 2022 Declaration of Meghan S. B. Oliver, ECF 176. Citations to Ex. BV through Ex. CQ are to the May 12, 2022 Declaration of Meghan S. B. Oliver.

[2] Citations to Def.'s Ex. __ are to the Exhibits listed in the Appendix to United States' Motion for Summary Judgment, ECF 173-3.

$50.[3] So the IRS did not publish a new PTIN-fee regulation in 2013 and the $50 fee set in 2010 remained operative.[4]

Because the IOAA requires fees to be "authorized by regulation," and because the only PTIN fees at issue that were set by regulation were based on the 2010 and 2015 cost models, the 2013 cost model is irrelevant and cannot be used as part of the IRS's recalculation methodology. *Diapulse Corp. of Am.*, 500 F.2d at 79. Instead, the Court should use the 2010 cost model to assess the fee implemented in 2010 for fiscal years 2011 through 2015. As we demonstrated in our summary-judgment motion, Pls.' Mot. for Summ. J., ECF 177-29 (Pls.' Br.) at 17-25, when only the 2010 cost model is used to determine the fees that should have been charged between 2010 and 2015, the fees are substantially less than those now proposed by the IRS. Even if the Court chooses to consider the 2013 cost model, the fee as set by the 2013 cost model was excessive for the same reasons that the 2010 and 2015 PTIN fees were excessive. Pls.' Br. at 20–27. All three cost models—2010, 2013 and 2015—include costs beyond the costs of issuing and maintaining PTINs. Defendant is not entitled to summary judgment because the PTIN fees, based on any of the cost models, include impermissible costs.

[3] Ex. BT at 5 of 55 (2013 cost model); Def.'s Ex. 24 at 171:6-16; IRS Br. at 19 n.8 ("The 2013 biennial review was not implemented to change the PTIN User Fee and, therefore, was not published in the Federal Register. The 2013 biennial review suggested an increase to $54.47 in the fee was needed to cover all costs. The IRS chose to maintain the $50 fee developed pursuant to the 2010 model."); Ex. CC at 630; Def.'s Ex. 24 at 171:9-16 ("[I]t was a minimal increase and the burden of changing the regulation gave us some leeway in not changing it."); Ex. BS at 81:9-15.

[4] IRS Br. at 22 n.11; *compare* 26 C.F.R. 300.13 (2015) (listing effective date of September 30, 2010), *with* 26 C.F.R. 300.13T (2016) (listing effective date of November 1, 2015); *see also Preparer Tax Identification Number (PTIN) User Fee Update*, 80 Fed. Reg. 66,792, 66,793-94 (Oct. 30, 2015) (discussing the preceding 2010 regulation).

B. The Court should disregard the 2019 cost model because it is irrelevant and because the IRS's reliance on it violates the parties' stipulation and prejudices the plaintiffs.

For two reasons, this Court should reject the IRS's improper reliance on the 2019 cost model as the basis for its user-fee recalculations and offset argument.

First, the 2019 cost model is irrelevant to the 2013 to 2017 PTIN fees. "[A] federal agency calculates user fees using an *ex ante* approach." IRS Br. at 14. Its fee schedule then must be judged based on the work and assumptions used to set the fee, not a post hoc examination of the agency action. Factually, in this instance, it also makes little sense to use the 2019 cost model to assess the fees charged in earlier years because, as the IRS has acknowledged, the work performed by the Return Preparer Office has changed over the years. *See, e.g.*, The United States' Statement of Undisputed Material Facts, ECF 173-2 (IRS SUMF) ¶¶ 99, 110 (describing changes to the Suitability Department's work, including an increase in work related to professional designation checks, and a reduction in work related to personal tax compliance checks and criminal background checks). Yet the IRS has developed what it calls a "more granular methodology" in its 2019 cost model that it applies, looking backward, to earlier years. Under this "more granular methodology," the IRS makes percentage allocations of labor costs to the PTIN fee based on the types of work being performed by the Return Preparer Office in 2019. Def.'s Ex. 44 at 27. It then applies those same percentage allocations to the earlier cost models, even though it admits that the nature of the work performed by the Return Preparer Office changed after *Loving*. *See, e.g.*, IRS SUMF ¶¶ 99, 110. In addition, the 2019 cost model is replete with costs that are prohibited by *Montrois* and *Loving*. The Court should therefore disregard the 2019 cost model, reject the "2019 Cost Model's more granular methodology," and deny the IRS's summary-judgment motion.

Second, the Court should reject the IRS's use of the 2019 cost model because it violates the parties' stipulation and prejudices the plaintiffs. On November 13, 2020, the parties entered a

stipulation informing the Court of their agreement to limit the relevant time periods for initial adjudication and discovery, as follows:

> (1) "The plaintiffs and the United States agree and stipulate that this litigation will also encompass claims relating to the amount of the PTIN user fees charged by the Internal Revenue Service ("IRS") during 2020 and for each year thereafter during the pendency of this case (the 'Post-2019 Claim')";
>
> (2) "The parties agree that they will first seek adjudication and a partial final judgment – by way of summary judgment, trial, appeal, and/or settlement – of the disputes relating to the 2010-17 Claim (the 'Initial Adjudication')"; and
>
> (3) "The parties agree that plaintiffs will not undertake discovery relating to the Post-2019 Claim prior to the Initial Adjudication."

Stip. ¶¶ 2–4. In accordance with this stipulation, the plaintiffs did not conduct any discovery on their Post-2019 Claim, including the 2019 cost model that was used to set the post-2019 fee. On March 23, 2022, the IRS filed its summary-judgment motion, which relied almost entirely on the 2019 cost model, and requested an Order "that the current PTIN user fee of $21 is reasonable and consistent with the IOAA." Uncorrected Br. in Supp. of United States' Mot. for Partial Summ. J., ECF 173-1 at 20-28, 33. Five days later, the IRS filed a Notice of Partial Withdrawal and Errata informing the Court that "[t]he Government has determined it cannot move for Summary Judgment as to the current PTIN fee at this stage in the proceedings. The Government therefore withdraws its request for relief as to the current PTIN fee. . . ." Notice of Partial Withdrawal and Errata, ECF 178 at 1. Nonetheless, the IRS continued to rely on the purported reasonableness of the 2019 cost model as the basis for its recalculations of the user fee in earlier fiscal years and claim of offset, thus effectively seeking a ruling on the reasonableness of the Post-2019 PTIN fee.[5] *Id.* at 1 ("However, this partial withdrawal does not impact the methodology or analysis in the

[5] Although the IRS states that "a federal agency calculates user fees using an *ex ante* approach," IRS Br. at 14, it calculates the amount of offset it is entitled to using the post-hoc 2019 cost model.

Government's memorandum."). Because they were complying with the parties' stipulation, the plaintiffs have not had the opportunity to take discovery on the 2019 cost model, including its assumptions and methodology, and specifically have not inquired into how work being performed in 2019 differed from the work being performed in earlier years. The plaintiffs are now forced to respond to arguments about the "reasonableness" of the 2019 methodology, which the IRS urges the Court to apply to the fee in 2014 through 2017, without the benefit of discovery.

For both of these reasons, the Court should disregard the 2019 cost model in assessing the excessiveness of the 2013 through 2017 PTIN fees, and should rely instead on the 2010 cost model for the 2010 to 2015 PTIN fees, and the 2015 cost model for the 2015 to 2016 PTIN fees.

III. The PTIN fees from 2010 to 2017 were excessive because they included costs beyond those of "issuing and maintaining PTINs."

The 2010 to 2015 PTIN fees: The IRS has identified and conceded certain "*Loving* costs" from the PTIN user fee implemented in 2010. IRS Br. at 20–21. The remaining fee is still excessive. The IRS has conceded that it lacked authority to charge fees with respect to the categories shaded blue:

Capability	Cost Category	Activities Description	Est. 3 year Costs	Est. 1 Year Cost
Communications & Customer Support	Customer Suppport	Includes all inquiry response to taxpayers about the program (TAS, W&I, EPSS, etc)	$ 2,532,717	
	Marketing & Branding	Development of television and radio commercials, the use of paid advertisers and communication tools for both interna and external stakeholders	$ 8,797,598	
	Forms / Publications	Publication/forms updates	$ 449,920	
	Communications	Includes contacting current PTIN holders, webinars and shipping of applications inadvertently sent to the IRS	$ 325,193	
		Communications & Customer Support: Registration Fee Related Costs - Subtotal:	**$ 12,105,428**	**$ 4,035,143**
IT (Amortized)	Amortized IT Development & Implementation	Includes the initial procurement of the "ideal" database, retiring of the existing PTIN system, development of interfaces, development of automated tax compliance checks, IV&V testing, security and acceptance testing, and the creating of a secure tunnel on IRS.gov	$ 6,785,772	
		IT: Registration Fee Related Costs - Subtotal:	**$ 6,785,772**	**$ 2,261,924**
RP Program Compliance	Verify claimed Professional Designation for CPAs, Attorneys Etc	Sampling, checking, and reviewing of self reported professional designation to ensure accuracy of claims. Also includes all appropriate actions to resolve any instances of mismatches of self reported and actual professional designation	$ 219,405	
	Conduct Background Check on Return Preparers' Criminal History (Review of Self Reported in Yr1, Random Sampling in Years 2 & 3)	Includes reviewing of self reported felonies in year one, and continued sampling of return preparers in subsequent years to conduct background checks. Also includes the manual reviews of history to determine acceptability into the program and resolution of exception cases	$ 22,673,856	
	Verify Return Preparers' Self Reported Tax Compliance	Includes reviewing of self reported tax compliance issues and resolution of cases of non-compliance (Year One only)	$ 7,755,502	
	Verify Return Preparers' Personal Tax Compliance	Includes the systemic identification of tax compliance issues for entire population of return preparers and determining the appropriate treatment for any preparers with persistent compliance issues	$ 84,235,416	
	Develop Process for Identifying and Treating Return Preparers Filing w/o PTIN or Incorrect PTIN	Includes the development of a process / systems for identifying, locating and treating return preparers not using a PTIN, or utilizing an invalid PTIN. Also includes initial implementation of the developed process in years 2 and 3.	$ 8,439,265	
	Verify Return Preparers' Self Certified Continuing Education	Includes sampling, identification, and initial treatment of return preparers that have not certified their continuing education.	$ 2,041,331	
	Administrative Support	Administrative support staff for program compliance functions	$ 6,606,570	
		Compliance: Registration Fee Related Costs - Subtotal:	**$ 131,971,345**	**$ 43,990,448**
OPR / PMO Ops Support	Post RP Review Report Implementation Team	Includes the RP Project Implmentation Team	$ 2,699,287	
	PMO Operations	Includes cost associated with : - Programmatic Executive Management / Oversight - Vendor / IT Mgmt - Operations Support - Business Analysis - Government / Stakeholder Liaison - Program Compliance & Policy - Communications - Contractors and Administrative Support ***Note**: Some of the staff activities can be peformed by existing staff	$ 23,744,355	
		SUBTOTAL: RPR Program Costs:	**$ 26,443,642**	**$ 8,814,547**
Registration	Foreign Preparer Registration Processing	Includes costs associated with validating location and identity of preparers without an SSN	$ 976,712	
		SUBTOTAL:	**$ 976,712**	**$ 325,571**
		Registration User Fee Totals:	**$ 178,282,900**	**$ 59,427,633**

Figure 1

These concessions account for 93% of the substantive, non-administrative Return Preparer Program Compliance costs[6] and 65% of all Return Preparer Office costs included in the 2010 cost

[6] These substantive, non-administrative "RP Program Compliance" costs, as listed in the table above, are: (1) "Verify claimed Professional Designation for CPAs, Attorneys Etc," (2) "Conduct Background Check on Return Prepares' Criminal History (Review of Self Reported in Yr1, Random Sampling in Years 2 & 3)," (3) "Verify Return Preparers' Self Reported Tax Compliance," (4) "Verify Return Preparers' Personal Tax Compliance," (5) "Develop Process for

model. Yet the IRS continues to include ***all*** operational support costs and does not reduce those costs to account for the conceded activities. Although none of the "RP Program Compliance" costs were necessary to provide PTINs and all should be excluded from the fee (Statement of Material Facts as to Which Pls.' Contend There is No Genuine Issue, ECF 177-30 (Pls.' SUMF) ¶ 34; App. in Supp. of Pls.' Mot. for Summ. J., ECF 177-31 (Pls.' App.) at 5), the inclusion of all operational support costs despite extensive concessions is excessive. For example, the IRS continues to include 100% of the original $6,606,570 in "Administrative Support" for "RP Program Compliance," even though only 7% of the substantive non-administrative compliance work remains. It continues to include 100% of the original $26,443,642 in "PMO [Program Management Office] Ops Support" even though well over half of the Office's anticipated work has been conceded. IRS Br. at 21 (explaining that the conceded costs "represent approximately 65% of the 2010 Cost Model's expected costs."). As another example, it also continues to include ***all*** IT costs, including the development and maintenance of an interface between Accenture and the IRS for "Tax Compliance Checks," which have been conceded by the IRS. *Compare* fig.1 *with* Ex. U at 16 of 26 (IT TAB in 2010 cost model). Also, the IRS continues to include ***all*** Communications and Customer Support costs even though the declaration prepared by the Head of the Communications Department identifies the work that related exclusively to the PTIN requirement and the work that related to the broader program. Even accounting for the IRS's concessions, the PTIN fees from 2010 to 2015 remain excessive because they include costs not necessary to "issue and maintain PTINs." *Montrois*, 916 F.3d at 1058.

Identifying and Treating Return Preparers Filing w/o PTIN or Incorrect PTIN," and (6) "Verify Return Preparers' Self Certified Continuing Education."

The 2016 to 2017 PTIN fees: The IRS has also conceded costs included in the 2015 cost model, which was used to set the revised fee in the 2015 regulation. It is not clear exactly what costs have been conceded. But, at a minimum, the conceded costs include the costs of the personal tax-compliance checks, criminal-background checks, and amounts that subsidized the enrolled-agent program to keep the enrolled-agent registration fee at $30. IRS Br. at 24-25; IRS SUMF ¶¶ 99–100. The IRS does not explain where in the cost model those costs can be found. Nor does it explain how it calculated the per-PTIN fee reduction. The IRS's statement of facts also refers to "certain other labor costs," but does not identify them. IRS SUMF ¶ 99.

Relying on the information provided, it seems that the IRS has wrongly included much of the Return Preparer Office's operational-support costs even though it has now conceded the unlawfulness of fees for over a quarter of the Return Preparer Office's activities. This is excessive in violation of the IOAA because it includes costs beyond those of "issuing and maintaining PTINs."

The IRS has also included the costs of professional-designation checks on practitioners, or credentialed preparers (i.e., attorneys, CPAs, enrolled agents). IRS Br. at 24-25. After *Loving*, rather than terminating members of the Suitability Department who had performed personal tax-compliance checks and criminal-background checks, the Return Preparer Office reallocated work within the department and increased the number of professional-designation checks that it conducted. IRS Br. at 27; IRS SUMF ¶ 110. The IRS argues that because it is entitled to regulate tax practitioners, it is allowed to include some of the costs of regulating them (i.e., professional-designation checks) in the PTIN fee. IRS Br. at 27. But, as *Loving* recognized, "practice . . . before the Department of Treasury . . . is quite different from the process of filing a tax return." *Loving*, 742 F.3d at 1017-18. That the IRS is separately authorized to regulate tax practitioners does not

mean that it can recover those costs through the PTIN fee. Professional designation checks are not necessary to issue (or renew) PTINs. The IRS can no more include the costs of tax-practitioner regulation through the PTIN fee than it can the cost of enrolled-agent registration, which it has already rightfully conceded. IRS Br. at 23 n.12 (conceding portion of PTIN fee used to subsidize enrolled agent registration). Because the PTIN fee includes the costs of professional-designation checks for tax practitioners, it is excessive and in violation of the IOAA.

The Suitability Department also continued to run the suitability checks that were performed on all PTIN applicants before *Loving* on applicants to the Annual Filing Season Program, the voluntary certification program that the IRS created as a result of *Loving*. Application to the Annual Filing Season Program was free and the cost of running the suitability checks was included in the PTIN fee. Including the cost of these Annual Filing Season Program suitability checks was excessive and in violation of the IOAA.

The IRS has also included 100% of its Compliance Department's costs, arguing that these costs are properly included because "enforcement" costs are permitted by OMB Circular A-25. IRS Br. at 28. Including these costs violates the IOAA for at least two reasons.

First, the Compliance Department had no enforcement authority. *See, e.g.*, Ex. CN at 4 of 4 ("Compliance does not have the authority to assess penalties."); Ex. CO at 12:2–5; 59:21–60:5; Ex. BK at 178 ("[T]he organization is unable to issue penalties and depends largely on stakeholders across the IRS to deliver the C&E's core mission (e.g., visitations, penalty assessments)."). Because it lacked authority to enforce the tax code or the PTIN requirement, any purported "enforcement" costs were not used for enforcement and must be excluded from the PTIN fee.

Second, much of the Compliance Department's work included in the 2015 cost model had nothing to do with issuing or renewing PTINs. As *Seafarers* made clear, costs may only be

included in a user fee if they are "materially related to" the underlying requirement. *Seafarers, Int'l Union of N. Am. v. U.S. Coast Guard*, 81 F.3d 179, 186 (D.C. Cir. 1996). Costs related to ensuring the preparation of compliant tax returns, proper use of the earned income tax credit, and compliance with e-file requirements, for example, are completely unrelated to issuing or renewing PTINs. Any such costs must be excluded from the PTIN fee.

The primary objectives of the Compliance Department were to ensure that return preparers (1) "compl[ied] with regulations and requirements," including e-file rules, the earned income tax credit, and the Certified Acceptance Agent program rules; (2) "register[ed] and timely renew[ed] PTINs"; (3) "properly identif[ied] themselves on tax returns"; and (4) "prepared accurate and compliant tax returns." Ex. BV at 005-007. Beginning in 2014, the Compliance Department also handled complaint referrals, which included "all disciplinary decisions related to a return preparer not rising to the threshold requiring an official review by the Office of Professional Responsibility," and "preliminary case development on Circular 230 issues." Ex. BW at 132. All of this work was handled by three groups within the Department: Enforcement Planning and Direction; Unidentified Preparer ("Ghost") Group; and [Complaint] Referral Group 1. IRS SUMF ¶ 31. Because the IRS included (and continues to include) all costs for this work in the 2016 to 2017 PTIN fees, the fees are excessive and in violation of the IOAA.

IV. The plaintiffs have standing to challenge the Accenture portion of the PTIN fee, which should be refunded in full.

In a footnote citing two inapposite cases, the IRS contends for the first time that the plaintiffs lack standing to challenge the Accenture portion of the PTIN fee because they are not "interested parties to the bidding processes" under the Administrative Dispute Resolution Act. IRS Br. at 18 n.6. But ADRA governs bid-and-procurement protests and therefore has no bearing at all in this case challenging excessive user fees. The plaintiffs do not argue that Accenture's contract

with the IRS was invalid or improperly awarded under the procurement laws. Instead, they simply challenge the excessive fees that each plaintiff paid and that were charged by the IRS on its own behalf and on Accenture's behalf.

This footnote argument is the first time the IRS has argued the plaintiffs may not challenge the Accenture fee. For seven years, the IRS has not once argued the plaintiffs may not challenge the Accenture portion of the fee. Rather, during that time, the IRS has repeatedly acknowledged that it may have to refund the entirety of the PTIN fee, including the Accenture portion.[7] The plaintiffs took discovery on the Accenture fee, filing a motion to compel document production from Accenture and subsequent document production and a deposition of Accenture. The IRS did not object and even reviewed the entire Accenture production before producing it to the plaintiffs. In its final judgment, this Court stated that "the PTIN fee is comprised of an amount payable to the Internal Revenue Service and an amount payable to a third-party vendor, which processes initial and renewal PTIN applications." Final J. & Permanent Inj., ECF 82 (Final J.) at 1.

As noted, the IOAA grants agencies the authority to "prescribe regulations establishing the charge for a service or thing of value provided by the agency." 31 U.S.C. § 9701. Under *Montrois*, the service provided in exchange for PTIN fees is the service of "generat[ing] a unique identifying number for each tax-return preparer and maintain[ing] a database of those PTINs." 916 F.3d at 106. The IRS chose to provide that service through Accenture. "The IRS contracted with Accenture to develop the computer system responsible for issuing PTINs to tax return preparers," and tasked Accenture with "maintaining and operating" that system. IRS SUMF ¶ 113; *see* Pls.'

[7] *See, e.g.*, Def.'s Opp'n to Pls.' Mot. for Prelim. Inj., ECF 132 at 2 (acknowledging that the maximum monetary harm is $35.95, the total of the IRS portion of $21 and the Accenture portion of $14.95); Def.'s Mot. to Stay, ECF 84 at 2 ("By contrast, if a stay is granted, plaintiffs can be made whole through a refund of the $50 [$33 to the United States and $17 to Accenture] paid per year by each class member during the pendency of the appeal.").

SUMF ¶ 75 (PTIN application processing "outsourced to Accenture which was responsible for issuing and maintaining PTINs"). So, even though the IRS imposed the PTIN requirement and could have issued the PTINs itself (as it had done for years), it assigned that responsibility to Accenture once it started requiring all preparers to obtain and pay for a PTIN. *See* Ex. X at 62:1–3. Accenture also "store[d] all of th[e] information provided on the applications" and "the PTINs that had been issued to particular individuals." *Id.* at 61:18–23. And Accenture was responsible for "call center operations," Ex. BD at 306:14–18, and processing paper PTIN applications. Pls.' SUMF ¶ 41. Thus, Accenture—not the IRS—directly performed the service identified by *Montrois* as the "service or thing of value" for which a fee may be charged under the IOAA. 916 F.3d at 1063.

But that doesn't mean that the IOAA is inapplicable. From the perspective of the IOAA, Accenture's portion of the fees is treated no differently than the IRS's portion. Although Accenture is a private party, providing an IRS-approved PTIN to tax-return preparers is a "'quintessential' government service." *Thomas v. Network Sols., Inc.*, 176 F.3d 500, 511 (D.C. Cir. 1999). PTINs are required by the government and are used for tax forms submitted to government. And the fees are set by the government, required by the government, and charged by the government. They are government fees through and through. Indeed, when this Court issued its judgment, it covered "fees paid to a third-party vendor," and enjoined "the defendant . . . from charging PTIN fees," which the IRS understood to encompass Accenture's fees. Final J. at 2-3; *see also* Ex. CG at 073 (deficiency letter referring to the "PTIN application fee" as "$63.00" and stating: "We're unable to process your application . . . We received your application for a PTIN, but: A payment is missing. Submit a check to IRS Tax Pro PTIN Fee for the correct amount ($63.00) along with the payment voucher below"); Ex. CH at 009 (similar). Hence, there is no serious dispute that the

Accenture fee is part of the PTIN fees charged by the government and must therefore satisfy the IOAA.[8]

Accenture's portion of the fee violates the IOAA. The IOAA requires that all user fees be published in regulations, and Accenture's portion was not included in any PTIN-fee regulation. *See* 31 U.S.C. § 9701 (authorizing agencies to "prescribe regulations establishing the charge"); Even though Accenture performed the service identified by *Montrois* as justifying a user fee under the IOAA, the PTIN-fee regulation expressly omits the portion of the fee paid to Accenture. The preamble to the final 2010 PTIN-fee regulation states: "These regulations do not include any fees charged by the vendor, which vendor fee is now calculated to be $14.25." 75 Fed. Reg. 60,316, 60,317. It does not mention the $13 renewal fee. Consistent with the express exclusion in the preamble, the final 2010 PTIN-fee regulation provides that "[t]he fee to apply for or renew a preparer tax identification number is $50 per year, which is the cost to the government . . . and ***does not include any fees charged by the vendor***." 26 C.F.R. 300.9(b) (2011). The final 2015 PTIN-fee regulation included the same exclusion: "The fee to apply for or renew a preparer tax identification number is $33 per year, which is the cost to the government . . . and ***does not include any fees charged by the vendor***." 26 C.F.R. 300.13T(b) (2016). By not including the vendor portion of the PTIN fee in either its 2010 or 2015 regulation, the IRS violated the IOAA and the

[8] Nor is it relevant that the IRS decided, as a matter of administrative convenience, to allow Accenture to collect the fees and then send the government its portion rather than the other way around. Either way, the entire fee must satisfy the IOAA's requirements to be authorized by the statute, and any unlawful portion may be recovered through an illegal-exaction claim. *See Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1573 (Fed. Cir. 1996); *see also* SBA's Imposition of Oversight Review Fees on PLP Lenders, B-300248, 2004 WL 77861, at *9 (Comp. Gen. Jan. 15, 2004). And if the government's argument were that Accenture's fee is not subject to the IOAA on the theory that the fee isn't charged for a service directly "provided by the agency," that would leave the IRS with *no* statutory authority supporting its decision to require all return preparers to pay a fee to Accenture in exchange for a government-mandated service, rendering the fee ultra vires.

APA. As such, the 2010 and 2015 Accenture portions of the fees collected were unauthorized and must be refunded to return preparers in full. *See, e.g., New Eng. Power Co.*, 683 F.2d at 15; *Alyeska Pipeline Serv. Co.* , 624 F.2d at 1010.

Even if the Court determines that an agency user fee may be charged under the IOAA *without* promulgating a regulation, the Accenture fee would nevertheless be excessive because it includes activities beyond those necessary to "issu[e] and maintain[] a database of PTINs." *Montrois*, 916 F.3d at 1058; *see also* Pls.' Br. at 18-20, 28.

V. The IRS is not entitled to offset its liability.

Finally, the IRS asserts (at 28) that it is entitled to summary judgment on an "affirmative defense for an offset." It contends that its total liability should be reduced by the aggregate amount of PTIN fees that it did not charge between June 2017 (when this Court entered its injunction) and late 2020 (a year and a half after the injunction was vacated). This argument is based on a cascade of independent category errors and should be rejected in its entirety. An offset is a counterclaim, not a defense, and it requires strict mutuality and a valid debt, neither of which exists here. Further, there is no such thing as an action for consequential damages caused by an injunction, nor is there any equitable basis for awarding restitution to the IRS. As the agency itself admitted earlier in this litigation: There is "no case where a court granted restitution to the federal government in a case involving the injunction of a user fee." Mem. in Supp. of United States' Mot. to Stay, ECF 84-1 at 16. This case should not become the first.

An offset is a counterclaim, not an affirmative defense. To start, the IRS's offset argument is not a defense at all. Liability in this case is predicated on fees paid between 2010 and 2017, and the class consists of people who paid them. Whether the IRS is entitled to fees for subsequent years is a question that involves a different set of transactions for a different group of people, and thus cannot serve as a defense to the plaintiffs' claims. *See, e.g.*, *J.G.B. Enters., Inc. v. United States*,

497 F.3d 1259, 1261–62 (Fed. Cir. 2007) ("[S]etoff is not a . . . *defense*" but "a device that facilitates the efficient reconciliation of competing *claims* between the same parties."); *Fin. One Pub. Co. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 336 (2d Cir. 2005) ("Because setoff does not destroy the plaintiff's right of action, a claim for setoff is not an affirmative defense. Instead, a claim for setoff embodies a counterdemand based on some transaction entirely extrinsic to the plaintiff's cause of action," so it "is properly characterized as a permissive counterclaim."); *Fed. Deposit Ins. Corp. v. F.S.S.S.*, 829 F. Supp. 317, 322 n.11 (D. Alaska 1993) ("Defendants' affirmative defense of setoff is actually a separate claim against the plaintiff" and thus "is properly considered a counterclaim.").

An offset requires strict mutuality and a valid debt, neither of which exists here. This distinction means that "the government must itself have a valid *claim* against the party subject to the setoff." *J.G.B. Enters.*, 497 F.3d at 1261–62. As the Supreme Court has explained, "[t]he right of setoff (also called 'offset') allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding the absurdity of making A pay B when B owes A." *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 18 (1995). The phrase "mutual debts," in turn, has two requirements. "Mutuality requires that the debt in question" is "between the same parties," and it must also be "valid and enforceable." *Meyer Med. Physicians Grp., Ltd. v. Health Care Serv. Corp.*, 385 F.3d 1039, 1041 (7th Cir. 2004); *see Agility Pub. Warehousing Co. K.S.C.P. v. United States*, 969 F.3d 1355, 1364 (Fed. Cir. 2020) ("[Offset] requires a pre-existing debt owed to the offsetting party."). The IRS has made no attempt to satisfy either of these requirements, and it cannot do so.

As to mutuality: The IRS seeks to offset its liability to the class with all the fees that it would have collected—even from non-class members who were issued a PTIN when there was no

fee. It also seeks to use these non-class members' alleged debt to offset its liability even as to class members who did *not* renew their PTINs after July 2017 (and so could not have been subject to a fee). Because these are two distinct groups of people, the IRS cannot show the mutuality required for an offset. *See Boatmen's Nat'l Bank of St. Louis v. Sears, Roebuck & Co.*, 106 F.3d 227, 230 (8th Cir. 1997) ("Sears does not have a common law right to setoff because there is no mutuality of obligation and the parties are not the same."); *J.G.B. Enters., Inc. v. United States*, 83 Fed. Cl. 20, 28 (2008) ("[T]he legal theory underlying the use of offset is that two parties have competing claims; if there is no mutuality of indebtedness, there can be no right of offset.").

As to the validity of the debt: The IRS cites no authority for the proposition that it is legally entitled to the claimed PTIN fees. Because it lacks regulatory authority over tax-return preparers, the IRS may charge fees only for services rendered to those who voluntarily decide to incur them. Consistent with due process, this requires giving notice of the fees ahead of time. Here, however, the IRS provided no notice to anyone who obtained or renewed a PTIN from June 2017 to late 2020 that a fee could later be charged, and what that fee might be. Even after this Court indicated that it might be possible for the IRS to "retroactively charge PTIN holders who were not required to pay a fee during the pendency of the appeal," *Steele v. United States*, 287 F. Supp. 3d 1, 5 (D.D.C. 2017), the IRS declined to provide *any* notice that, were this Court's injunction later reversed, a fee would then be charged for the issuance or renewal of a PTIN. Having chosen not to do so, there is no valid and enforceable debt owed to the government—and thus no counterclaim for such debt.

Were there such a claim, moreover, it would mean that the IRS could sue even non-class members (those issued a PTIN during the period when there was no fee). If the IRS believes that it has such a right, it can bring its own class action against everyone who was issued or renewed a

PTIN when there was no fee, or simply charge them for the fees claimed to be validly owed. That would be a more equitable and efficient course of action than what the IRS asks this Court to do here—more equitable because it would treat all PTIN holders equally, rather than seek recovery only from those who already had PTINs as of July 2017 and elected to participate in this lawsuit; more efficient because any case could be prosecuted after the proceedings in this case, which will determine the maximum amounts that the IRS could charge for issuing or renewing PTINs. Conversely, if the IRS acknowledges that it does not have valid claims against non-class members, there is no basis for asserting valid claims against class members either, and hence no offset.[9]

There is no action for consequential damages caused by an injunction. Nor may the IRS assert a claim for consequential damages based on the uncharged fees.[10] The general rule is that a "party injured by the issuance of an injunction later determined to be erroneous has no action for

[9] The alternative to a separate class action—certifying a counterclaim against a defendant class—is impermissible. Even assuming (contrary to the weight of the case law) that absent class members count as "opposing parties" for purposes of Rule 13 (which governs counterclaims), that reading cannot extend to *non*-class members. *See In re Bank of N.Y. Mellon Corp. Forex Transactions Litig.*, 42 F. Supp. 3d 520, 527 (S.D.N.Y. 2014) (holding that absent "class members are not properly considered 'opposing parties' under Rule 13"); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985) (noting that absent class members "are almost never subject to counterclaims or cross-claims"). As this Court long ago explained: "[T]he concerns which counsel against permitting members of a plaintiff class to be subject to counterclaims—concerns rooted in due process and the proper interpretation of Rule 13—are qualitatively enhanced under these circumstances, where the counterclaims, to afford the relief they seek, demand the simultaneous creation of a defendant class against whom they may be raised. Under these circumstances, the establishment of such a class of counterclaim defendants would push the language of Rule 13, as well as the policies underlying its limitation of counterclaims to 'opposing parties,' beyond the breaking point." *Frederick Cnty. Fruit Growers Ass'n*, *v. Dole*, 709 F. Supp. 242, 246 (D.D.C. 1989).

[10] During the period of the injunction, the IRS continued to require the renewal of permanent identification numbers and continued to pay for those renewals. Pls.' Resp. to the United States' Statement of Undisputed Material Facts ¶ 130. The IRS also modified its contract with Accenture to provide for full payment to Accenture in exchange for the issuance and maintenance of PTINs, rather than modifying its contract with Accenture to suspend service or modify the fees in light of the injunction. *Id.* ¶ 128.

damages in the absence of a bond." *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 770 n.14 (1983); *see Klein v. Califano*, 586 F.2d 250, 256 n.9 (3d Cir. 1978) ("In general, . . . erroneously granted injunctions do not give rise to causes of action for consequential damages suffered by a defendant who complies with an injunction pending appeal."). The IRS cites no authority that would allow a court to create an exception to this rule.

There is no basis in equity to award an offset. Nor would the IRS's requested offset be justified as a matter of equity. Because a "cause of action for restitution is a type of the broader cause of action for money had and received," *Atl. Coast Line R.R. Co. v. Florida*, 295 U.S. 301, 309 (1935), courts may order restitution of money "paid under compulsion of a [reversed] judgment" if "justice requires," *United States v. Morgan*, 307 U.S. 183, 197 (1939). But class members here do not have money to which they're not entitled, nor do they owe money to the IRS. Were it otherwise, the IRS (which isn't shy about going after unpaid debts to the government) could have sent them a bill at some point since the injunction was vacated over three years ago. That it has not done so is strong evidence that no debt is legally owed. And there is no equitable justification for retroactively requiring unregulated entities to pay money to the government when they (a) were not notified of that possibility ahead of time, (b) were given no opportunity to avoid it, and (c) received only the ability to keep an ID number that had already been assigned to them. Quite the opposite: Basic constitutional principles, like due process and separation of powers, cut strongly in the other direction. In addition, "although [the IRS] was denied a stay of injunction pending appeal by the district court, [it] did not pursue a stay" on appeal, which further counsels against granting its extraordinary request. *See FilmTec Corp. v. Hydranautics*, 67 F.3d 931, 940 (Fed. Cir. 1995). If the IRS wanted to preserve its ability to retroactively charge PTIN fees, it could

have appealed the stay denial or at least given notice of the possibility of a retroactive fee. It did neither.

Instead, the IRS is now claiming a lump-sum offset for all fees that it says could have been charged over a period that extends more than a year and half beyond the injunction's end date. On top of everything else, that request (even if it were somehow permissible) would be premature and inappropriate for summary judgment. *See Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1259 n.14 (11th Cir. 2003) ("[When permissible,] the appropriate time for a class action defendant to raise affirmative defenses and set-off claims is during the damages phase."). At a minimum, there would have to be a trial to determine the appropriate amounts of any post-2017 fees, and those amounts would then have to be applied on an individual basis in the claims process. And because the injunction ended in March 2019, any offset could not include hypothetical fees from that point forward—meaning that, were the IRS permitted to pursue its offset theory, it would result in a further inequity because people who happened to renew their PTINs in February 2019 would be retroactively charged while those who happened to do so in April 2019 would not be.

The IRS's own chief authority (at 29) demonstrates how far afield this case is from cases in which an offset is appropriate. *See Williams v. Wash. Metro. Area Transit Comm'n*, 415 F.2d 922 (D.C. Cir. 1968). In that case, the D.C. Circuit held that the Washington Area Transit Commission had collected certain fares under an unlawful order, and therefore required the Commission "to make appropriate restitution for the increased fares it collected." *Id.* at 942. The court held that it "could not permit [the Commission] to retain [all] the increased fares, since to do so would be to give legal effect to the Commission's invalid order." *Id.* at 943. But the court also recognized that, because the challengers had "conceded" that a portion of the increased fares was lawful, the Commission was "permitted to retain [that] portion of the higher fares." *Id.* at 943–46.

In other words, the Commission was able to assert a partial defense justifying collection of some of the fees, just as the IRS is asserting a partial defense that some of the PTIN fees collected from 2010 to 2017 were lawful. But *Williams* provides no authority for the proposition that fees *not* charged—fees that would have been on a separate set of transactions initiated by a separate group of people—could be used to offset liability for fees unlawfully collected. To the contrary, the case stands simply for the non-controversial proposition that the government may be required to make restitution for fees that it has unlawfully collected, but only to the extent that the fees were unlawful. Without any case even remotely justifying its novel position, the IRS is unable to establish that it is entitled to an offset.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2022 I electronically filed Plaintiffs' Opposition to the United States' Motion for Partial 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.

Dated: May 12, 2022

/s/*William H. Narwold*
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