

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Adam Steele, Brittany Montrois, and Joseph
Henchman, on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

United States of America,

Defendant.

Case No. 14-cv-01523-RCL

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Introduction.....1

Factual Background4

I. Between 2000 and 2010, the IRS issued over one million free, voluntary PTINs.4

II. In 2010 the IRS established plans to fund more than 75 percent of an unauthorized regulatory program and newly created Return Preparer Office with PTIN fees.5

III. Accenture—a government contractor—performed the entire function of issuing and maintaining PTINs through the new PTIN system, at no cost to the IRS.....6

IV. Between 2010 and 2012, the IRS created a vast nine-department bureaucracy within the Return Preparer Office to perform 49 functions carrying out its regulation of return preparers—only one of which was related to issuing and maintaining PTINs.8

 A. The Vendor Department oversees the Accenture contract, the PTIN System, five other IT systems, and three other vendors.11

 B. The Suitability Department “ensures that return preparers comply with program rules” and conducts tax-compliance, professional-designation, and prisoner-list checks.....12

 C. The Compliance & Enforcement Department directs return preparer tax enforcement activities across the IRS and identifies return preparers for enforcement activities.13

 D. The Competency & Standards and Continuing Education Departments are responsible for testing and continuing education, and the remaining departments within the Office provide operational support to the Return Preparer Program.14

V. After *Loving*, “RPO substantially shifted its focus” and lowered the PTIN fee slightly, while keeping the Office’s massive staffing and infrastructure largely intact.....14

Argument16

I. The PTIN fee must be limited to the costs “necessary” to “provid[e] tax-return preparers a PTIN.”16

II. The 2010 PTIN fees were excessive because they included costs beyond those “necessary” to “providing tax-return preparers a PTIN.”17

 A. The Accenture portion of the 2010 PTIN fees was excessive because it included the costs of a system that did more than provide PTINs and of a call center that handled non-PTIN inquiries.18

 B. The IRS portion of the 2010 PTIN fees was excessive because it included 75% of the costs of the RP Program, not just the costs of providing PTINs.20

III. The 2015 PTIN fee was excessive because it included costs beyond the limited labor and IT costs necessary to issue and maintain PTINs.25

IV. Pursuant to 26 U.S.C. § 6109(c), the IRS may only request a PTIN applicant’s name, address, telephone number, social security number and date of birth when issuing a PTIN.....27

Conclusion28

TABLE OF AUTHORITIES

CASES

Cent. & S. Motor Tariff Ass’n v. United States,
777 F.2d 722 (D.C. Cir. 1985)..... 16

Elec. Indus. Ass’n v. F.C.C.,
554 F.2d 1109 (D.C. Cir. 1976)..... 16

Engine Mfrs. Ass’n v. EPA,
20 F.3d 1177 (D.C. Cir. 1994)..... 2

**Loving v. IRS*,
742 F.3d 1014 (D.C. C. 2014)..... *passim*

**Montrois v. United States*,
916 F.3d 1056 (D.C. Cir. 2019)..... *passim*

Nat’l Ass’n of Broadcasters v. FCC,
554 F.2d 1118 (D.C. Cir. 1976)..... 2, 17

Seafarers Intern. Union of N. Am. v. U.S. Coast Guard,
81 F.3d 179 (D.C. Cir. 1996)..... 16, 21

STATUTES

26 U.S.C. § 6109..... *passim*

31 U.S.C. § 9701..... 2

OTHER AUTHORITIES

Office of Mgmt. & Budget, OMB Circular A-25,
User Charges § 6(a)(2) (2017)..... 14

Preparer Tax Identification Number (PTIN) User Fee Update,
80 Fed. Reg. 66,792, 66,794 (Oct. 30, 2015) 15

Introduction

If there's a natural law of bureaucratic inertia, it must be this: *A bureaucracy, once set in motion, tends to stay in motion.* This case is about a bureaucracy that stayed in motion for years after the judiciary ruled that it lacked authority to do so. And, worse still, that bureaucracy charged people hundreds of millions of dollars in fees to fund its failed regulatory scheme.

For decades, the IRS acknowledged that it lacked authority to regulate people who prepare tax returns on behalf of others. Then, in 2010, after many failed attempts to secure specific authority from Congress, the IRS undertook an “extensive regulatory effort” to do just that. Never before had the IRS assumed such authority. As part of this unprecedented effort, the IRS began requiring paid tax-return preparers to pass a qualifying exam and take annual continuing-education courses. The IRS also mandated—for the first time—that all preparers pay an initial \$64.25 fee to obtain an agency-issued “preparer tax identification number” (or PTIN), as well as an annual \$63 renewal fee. The IRS had previously issued over a million PTINs, which did not expire, for free to those who requested them. Now, however, the agency was making PTINs mandatory. The idea was to have the PTIN application process incorporate the new eligibility requirements and to use the PTIN fees to cover the costs of implementing the new licensing regime.

But in 2014, the D.C. Circuit struck down the eligibility criteria—the backbone of the licensing regime—as a “vast expansion” of the IRS’s authority, unauthorized by Congress. *Loving v. IRS*, 742 F.3d 1014, 1021 (D.C. C. 2014). The court held that the agency’s asserted authority, a 125-year-old statute governing the “practice of representatives” before the Treasury, “cannot be stretched so broadly as to encompass authority to regulate tax-return preparers.” *Id.* at 1015. And without such authority, the IRS could not impose *any* eligibility requirements on preparers, thus reinstating the traditional rule that anyone may prepare tax returns for compensation.

Despite *Loving*, the IRS continued to charge the PTIN fees that were intended to fund its failed regulatory scheme—without issuing any refunds for past fees paid. During the period relevant here (2010 to 2017), the IRS collected over \$300 million in PTIN fees. Because these fees were collected to fund an unauthorized scheme, the plaintiffs brought this case to obtain a refund.

This Court held in 2017 that the IRS has no authority to collect any of the fees because it has no licensing authority over tax-return preparers, so preparers receive no “service or thing of value” in exchange for the fees, as is necessary for a fee to be authorized. 31 U.S.C. § 9701. ECF No. 78. Although the D.C. Circuit reversed, holding that the IRS may charge for the service of “providing tax-return preparers a PTIN” to protect the confidentiality of social-security numbers, the court of appeals made clear that the IRS may do so only to the extent necessary to cover the costs of providing *that* service. *Montrois v. United States*, 916 F.3d 1056, 1058 (D.C. Cir. 2019). The D.C. Circuit explained that fees must be “confined” to the costs of “issuing and maintaining a database of PTINs,” and remanded for “an assessment of whether the amount of the PTIN fee unreasonably exceeds the costs to the IRS to issue and maintain PTINs.” *Id.* at 1058, 1063.

The D.C. Circuit’s limitation on the amount of the PTIN fees reflects the general rule that an agency “may not charge more than the reasonable cost it incurs to provide [the] service” for which the fee is authorized. *Engine Mfrs. Ass’n v. EPA*, 20 F.3d 1177, 1180 (D.C. Cir. 1994). This rule, in turn, is grounded in separation-of-powers concerns. “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. FCC*, 554 F.2d 1118, 1129 n.28 (D.C. Cir. 1976). While the IRS may have the power to collect taxes, it does not itself have the power to impose them. The question now is whether the fees charged by the IRS during the applicable period exceeded the costs necessary to issue and maintain a database of PTINs.

The IRS has effectively conceded that they did, dropping the fees from \$64.25 and \$63 to \$50 while this litigation was pending. But the record produced during discovery reveals that the fees are far more excessive than the IRS has previously acknowledged, and that even the reduced fee vastly exceeds the costs of issuing and maintaining PTINs.

The plaintiffs have learned that, when the IRS launched its failed effort to regulate return preparers in 2010, it planned to fund more than 75% of the Return Preparer Office with PTIN fees—even though [REDACTED]

[REDACTED] The plaintiffs have also learned that, before lowering the fees in 2015, the government collected \$50 of the total fee for every PTIN issued or renewed even though their issuance and maintenance was performed entirely by a government contractor, Accenture Federal Services (“Accenture”), which received its own separate share of the fee for its services (\$14.25 and \$13 for issuance and renewal, respectively). And the plaintiffs have learned that the calculations on which the IRS based its original fee included costs for the entire “regulatory apparatus” struck down in *Loving*, which comprised the overwhelming majority of the costs recouped by PTIN fees.

Even the fee reduction in 2015 didn’t go nearly far enough. The IRS lowered its portion of the fee to \$33 while raising Accenture's portion to \$17. Yet the IRS continued to include the costs of activities that go well beyond the issuance and maintenance of PTINs. It decided to keep in place the entire nine-department bureaucracy it had established to regulate return preparers, even though now it was supposed to be charging only for issuing random nine-digit numbers with no eligibility criteria. That bureaucracy continued to perform suitability and compliance checks, only now for just a subset of preparers—wholly unrelated to PTINs. And the cost model for the revised fee continued to account for these regulatory functions, even though they may not be recovered.

All told, the record reveals a wildly excessive fee—an order of magnitude more than the amount necessary to issue and maintain PTINs. But at this stage, the plaintiffs move only for an order granting summary judgment as to liability—that is, to hold that the fees were excessive under the D.C. Circuit’s decision in *Montrois* while reserving the amount of the excess fees for trial. Suffice it to say, maintaining a database of random identifying numbers is not a \$300 million project.

Factual Background

I. Between 2000 and 2010, the IRS issued over one million free, voluntary PTINs.

Before 2010, return preparers were largely unregulated. Rule 56(c) Statement ¶ 13¹. They

[REDACTED]

[REDACTED]

Id. ¶ 18. Nor were PTINs required. Instead, they were available for free on a voluntary basis and could be used in lieu of a social security number to identify the preparer. *Id.* ¶¶ 7-8. [REDACTED]

[REDACTED]

[REDACTED] *Id.* ¶ 8. The voluntary PTIN application process was handled by the existing Wage & Investment business operating division within the IRS, which issued all other identifying numbers (such as ITINs, ATINs, and EINs). *Id.* ¶ 10. The application required only a social security number, name, phone number, and date of birth. *Id.* ¶ 9. Preparers could submit their applications online, or by mailing or faxing a paper application. *Id.* [REDACTED]

[REDACTED] *Id.* ¶ 10. Under this system, which was not capable of collecting user fees in exchange for PTINs, *Id.*, over one million free, voluntary PTINs were issued between 2000 and 2010. *Id.* ¶ 11.

¹ Accompanying this motion is a statement of material facts as to which plaintiffs contend there is no genuine issue (Rule 56(c) statement).

II. In 2010 the IRS established plans to fund more than 75 percent of an unauthorized regulatory program and newly created Return Preparer Office with PTIN fees.

In 2009, “[t]o address the problem of incompetent and unscrupulous preparers,” the IRS initiated an effort to regulate tax-return preparers. *Id.* ¶ 19. This “extensive regulatory effort” followed at least ten failed legislative attempts to regulate return preparers between 1997 and 2009. *Id.* ¶¶ 30, 14-17. The program would be run by a new office within the IRS, the Return Preparer Office (Office or RPO, for short), whose [REDACTED]

[REDACTED]

Id. ¶ 72. Lacking Congressional approval for the effort, the IRS decided to fund the new program and office not with appropriations, but with user fees, which did not have to be approved by Congress. *Id.* ¶¶ 27-29.

PTINs were critical to this effort, largely for the funds they supplied. Requiring the payment of a PTIN application fee as the first step of the regulatory process “ensure[d] the timely collection of financial resources needed to operate the program.” *Id.* ¶ 31. PTINs also would “allow the IRS to better identify tax return preparers, centralize information, and effectively administer the rules relating to tax return preparers.” *Id.* ¶ 68. At first, in accordance with IRS Publication 4832 (the Return Preparer Review), the IRS planned to require renewal and the payment of a \$156 fee every three years. *Id.* ¶ 39. After learning that a \$156 user fee would be “economically significant” and a “major rule” requiring congressional approval, however, the IRS changed the renewal requirement to an annual requirement and the government’s portion of the fee to \$50 every year. *Id.* By requiring annual renewal instead of renewal every three years, the IRS effectively tripled the renewal work.

Even though their PTINs did not change, all individuals who previously had obtained free PTINs were required to apply again for the same PTIN and pay the same \$64.25 initial issuance

fee as everyone else. *Id.* ¶ 46. Now, though, rather than serving as an “identifying number” “for securing proper identification of such preparer,” as provided for by 26 U.S.C. § 6109(c), the PTIN became a license number that could not be obtained without satisfying certain qualifications. Only return preparers who satisfied the new program requirements, generally including passing a competency exam and suitability checks, would be eligible for a PTIN. *Id.* ¶ 50.

To conduct these new suitability checks, the PTIN application was expanded to require *eleven* additional pieces of information, including information on an applicant’s past felony convictions, the applicant’s tax filing status and history, the applicant’s federal tax compliance, details regarding an applicant’s business, and the applicant’s professional credentials. *Id.* ¶ 49. A

[REDACTED]

[REDACTED] so current PTIN holders who satisfied the new requirements could keep their current PTINs. *Id.* ¶ 46.

III. Accenture—a government contractor—performed the entire function of issuing and maintaining PTINs through the new PTIN system, at no cost to the IRS.

Because the Return Preparer Program was to be entirely user-fee funded and the current “system” had no way to collect fees, the IRS entered a no-cost contract with Accenture for the

[REDACTED]

[REDACTED] *Id.* ¶ 10,

40. The contract specifically provided that Accenture would [REDACTED]

[REDACTED] and instead would have to “[REDACTED]

[REDACTED] *Id.* ¶¶ 42-43. Through

this contract, the PTIN became the *first and only* IRS identifying number not issued by the IRS’s Wage & Investment division, and the only one not provided for free.² *Id.* ¶¶ 8, 10.

Accenture’s fee was designed to cover [REDACTED]

[REDACTED] *Id.* ¶¶ 40-43. Accenture’s fee for initial issuance of a PTIN was \$14.25, and its renewal fee was \$13—fees that were charged in addition to the \$50 fee paid to the IRS to fund its new effort to regulate return preparers.³ *Id.* ¶ 37.

At initial launch, the Accenture-run PTIN system, known as the Tax Professional PTIN System (which we will call PTIN System) was capable of [REDACTED]

[REDACTED] *Id.* ¶ 51. Accenture subcontracted with a software vendor for a license to its COTS (Commercial Off-the-Shelf) software, which was used by licensing authorities around the country. *Id.* ¶ 44. Most of the contracted-for PTIN System functionality that provided for the issuance and maintenance of PTINs was part of the standard COTS software and required no additional customization. *Id.*

Beginning in 2011, later “releases” for the PTIN System would provide for [REDACTED]

[REDACTED] *Id.* ¶ 52. The renewal process was a simpler process than initial PTIN issuance. Because [REDACTED]

² Unlike PTINs, all other identifying numbers—Individual Taxpayer Identification Numbers (ITINs), Adoption Tax Identification Numbers (ATINs), Electronic Filing Identification Numbers (EFINs), and Employer Identification Numbers (EINs)—are issued by the IRS for free. *Id.* ¶ 10.

³ The shift from renewal every three years to annual renewal and an annual fee avoided the need for Congressional approval, but [REDACTED]

[REDACTED] *Id.* ¶ 38. [REDACTED]

[REDACTED] *Id.*

Shortly after the PTIN System went live in 2010, it became clear that the IRS had [REDACTED] [REDACTED] (only part of which related to PTIN issuance). *Id.* ¶ 54. The IRS also began to demand “enhancements” to the PTIN System that the parties agreed were not covered by the scope of the original contract. *Id.* ¶¶ 53-54. Some of these “enhancements” affected [REDACTED]

[REDACTED] *Id.* ¶ 53. Beginning in the spring of 2011, [REDACTED]

[REDACTED] *Id.* ¶ 54.

IV. Between 2010 and 2012, the IRS created a vast nine-department bureaucracy within the Return Preparer Office to perform 49 functions carrying out its regulation of return preparers—only one of which was related to issuing and maintaining PTINs.

The data and funds collected by the PTIN System through the PTIN application process were used to implement the remainder of the Return Preparer Program, starting in 2011. *Id.* ¶ 59. There was no formal Office—only a “core team” and minimal staff—when the PTIN System “went live” and began issuing PTINs and collecting fees on September 30, 2010. *Id.* ¶ 57. This

[REDACTED] *Id.* ¶ 24. The core team worked with Booz Allen Hamilton, a management consultant that served as a “thought partner,” to plan the “organization of RPO” and the Return Preparer Program. *Id.* ¶ 25. The Commissioner did not approve the formal “stand up” of the new Return Preparer Office until February 2011. *Id.* ¶ 61. [REDACTED]

[REDACTED]

[REDACTED] *Id.* ¶ 62. Return Preparer Program hiring finally began in earnest [REDACTED] *Id.* ¶ 63.

When the PTIN fee was finalized in July 2010, it was based on a worksheet of calculations developed by Booz Allen Hamilton with direction from the IRS, a worksheet that this brief will refer to as the 2010 cost model. *Id.* ¶ 32. This model divided the work to be funded with PTIN fees into five main categories: (1) Return Preparer Program Compliance, (2) Registration (limited to “Foreign Preparer Registration Processing”), (3) IT, (4) Communications and Customer Support, and (5) Program Management Office Support. *Id.* ¶ 33. The 2010 cost model assumed that PTIN fees would fund 100% of the first two categories—Return Preparer Program Compliance (later “Suitability” and “Compliance”) and Registration—and 75% percent of the last three (IT, customer support and marketing, and program management office). *Id.* A total of \$59,427,633 in annual costs was expected. *Id.* Apportioned among the estimated return-preparer population, the IRS portion of the fee was set at \$50. *Id.* ¶ 36. A separate cost model was created for testing and continuing education. *Id.* ¶ 33.

While the details of the Office’s organizational design evolved over time, *Id.* ¶ 69, its expected functions remained constant. *Id.* Roughly in line with the 2010 PTIN cost model’s categories, the Return Preparer Program was organized around [REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
Id. ¶ 73. [REDACTED] *Id.* ¶ 70.

Testing and continuing education were partly funded by PTIN fees. The Program also performed the following [REDACTED] 75% of which were funded with PTIN fees: [REDACTED]

[REDACTED] *Id.* ¶ 73.⁴ [REDACTED]
[REDACTED] were included within the “Program Management Office” category of the 2010 PTIN cost model. *Id.* ¶ 35.

An analysis of RPO’s “current state” performed in September 2013 broke down these ten core and supporting functions into even more specific subcategories. It identified [REDACTED]

[REDACTED]
[REDACTED]

Id. ¶ 74. But the analysis acknowledged that the first of these [REDACTED] was not performed by RPO, but by Accenture. *Id.* ¶ 75; Compare App. Fig. 1 and Fig. 2 with Fig. 3 (overview slides show [REDACTED])

[REDACTED]

[REDACTED] The second function— [REDACTED] (that is to say, minimal operations support for Accenture)—was the [REDACTED] performed by RPO that pertained to PTIN issuance and maintenance. App. Fig. 1.

⁴ These functions within RPO were in addition to the freestanding IRS offices that already existed. IRS also had a separate office of [REDACTED] a separate office of procurement, which negotiated and executed all contracts and approved contract expenses; and a Chief Financial Officer, whose office typically “coordinate[d] any activities involving user fees.” *Id.* ¶ 73 n.4. These separate offices were not funded by PTIN fees.

By late 2011, [REDACTED]

[REDACTED]

4. [REDACTED]

[REDACTED] *Id.* Fig. 3.

A. The Vendor Department oversees the Accenture contract, the PTIN System, five other IT systems, and three other vendors.

The Vendor Department was responsible for “[c]oordination among RPO departments, third-party vendors, and relevant business owners to ensure business and system operations are coordinated, formalized, and efficient”; “[o]versight of existing RPO contracts with third-party vendors, including development of Quality Assurance Plans”; and “[m]anagement and maintenance of all RPO systems, including identification of technical requirements and oversight of system design and development.” Rule 56(c) Statement ¶ 77. The following six RPO systems or projects were managed by the Vendor Department, but only one related to the issuance or maintenance of PTINs: (1) the PTIN System, which was run by Accenture; (2) Continuing Education Provider Application and Renewal System (CEPARS); (3) Academic, Professional, and Corporate (AP&C) Testing System; (4) e-trak Practitioner (e-trak); (5) RP360 project; and (6)

5

[REDACTED] App. Fig. 4.
[REDACTED] 75% of which was funded with
PTIN fees. *Id.*

PTIN Security Code project.⁶ *Id.* ¶ 78. One or two individuals in the Vendor Department spent a portion of their time supervising Accenture and addressing contractual issues, and one or two individuals in the Vendor Department spent a portion of their time handling technical aspects of the PTIN System. *Id.* ¶ 79. The remaining time spent by those individuals and others in the Vendor Department was spent on non-PTIN-related, non-Accenture contracts and systems. *Id.*

B. The Suitability Department “ensures that return preparers comply with program rules” and conducts tax-compliance, professional-designation, and prisoner-list checks.

The other RPO Departments tasked with implementing the Office’s [REDACTED]

[REDACTED]
[REDACTED].⁷ *Id.* ¶ 80. The Suitability department was “responsible for checking personal tax compliance, checking professional designation, matching prisoner lists, checking compliance of Enrolled Agents and Enrolled Retirement Plan Agents, checking compliance with the Annual Filing Season Program,⁸ Former Employee EA Enrollment Applicants, and matching Specially Designated Nationals lists.” *Id.* ¶ 81 (acronyms removed). It was fully funded by PTIN fees. *Id.* ¶ 34 n.3.

⁶ The PTIN Security Code project was intended to provide a separate code to tax-return preparers to protect their PTINs. It was never implemented.

⁷ [REDACTED]
[REDACTED] *Id.* ¶ 80.

⁸ The Annual Filing Season Program was a voluntary certification program started by the IRS after *Loving*. Rev. Proc. 2014-42, 2014-29 I.R.B. 192, 2014 WL 2931528. Through the AFSP, preparers could voluntarily submit to the RP Program requirements struck down by *Loving*. Participation in AFSP was free and the program was operated by Accenture through the PTIN System and PTIN-funded RPO employees. *Id.* ¶¶ 97-99.

C. The Compliance & Enforcement Department directs return preparer tax enforcement activities across the IRS and identifies return preparers for enforcement activities.

Compliance & Enforcement was eventually renamed “Compliance” because RPO lacked enforcement authority. *Id.* ¶ 82. At first, there were two “workstreams” within Compliance: (1) Enforcement Planning & Direction and (2) Unidentified Return Preparers (Ghosts). Later, Complaint Referrals, which “collect[ed], catalog[ed] and buil[t] preliminary case files for programmatic disciplinary cases,” theft-of-refund cases, tax preparation complaints, and e-file violations was eliminated as a standalone RPO department and incorporated into Compliance. *Id.* ¶¶ 82-83. The Enforcement Planning & Direction group was responsible for developing techniques to detect return preparer errors, developing compliance treatments to correct preparer behavior, and coordinating these efforts with other business operating divisions within the IRS. *Id.* ¶ 84. This group was [REDACTED]

[REDACTED] *Id.* It employed several individuals, including a social scientist who performed research and penalty analytics regarding preparer patterns and behavior. *Id.* The group often worked with employees from other business operating divisions in order to address tax noncompliance. *Id.*

The Unidentified Return Preparer group was responsible for identifying preparers who failed to report their PTIN, used another individual’s PTIN, or used an invalid identifying number, such as a social security number. *Id.* ¶ 85. This group targeted individuals who “may choose to go ‘underground’ rather than comply with new requirements,” understanding that “[s]everal of these Return Preparers are non-filers” and “[t]here is a high probability some cases will turn into fraud cases.” *Id.* Indeed, one of the goals of this program was to “[b]ring Return Preparers into income tax compliance (many are non-filers or are failing to report income from tax preparation”). *Id.*

D. The Competency & Standards and Continuing Education Departments are responsible for testing and continuing education, and the remaining departments within the Office provide operational support to the Return Preparer Program.

Competency & Standards was responsible for the testing portion of the Return Preparer Program, while Continuing Education was responsible for the Program's continuing-education requirement. *Id.* ¶ 87. The remaining departments (Strategy & Finance, Communications, and the Office of the Director) provided operational support to the Office as a whole. Strategy & Finance provided human resources, strategic planning, and financial planning support for the Program and RPO. *Id.* ¶¶ 88, 89. Communications developed communications about program requirements, and communications for taxpayers and other "stakeholders." *Id.* ¶ 88.

V. After *Loving*, "RPO substantially shifted its focus" and lowered the PTIN fee slightly, while keeping the Office's massive staffing and infrastructure largely intact.

The work performed by these departments remained relatively stable until the decision in *Loving*. After that, RPO's organization remained the same, but it "substantially shifted its focus away from unregulated preparers towards tax professionals and voluntary participants in the [Annual Filing Season Program]." *Id.* ¶ 96. For example, continuing education and testing requirements were no longer lawful, and the universe of people on whom suitability checks could be run was substantially curtailed. *Id.* ¶¶ 93-94. Nonetheless, RPO's size remained roughly the same, shrinking only through natural attrition. *Id.* ¶ 95. At least one department, Suitability, in fact grew after *Loving*. *Id.* ¶ 95. Most of the work performed by RPO continued to be funded by PTIN fees. *Id.* ¶ 99.

The IRS is required to review all IRS user fees (not contractor user fees) every two years to ensure that they are set at the appropriate level. Office of Mgmt. & Budget, OMB Circular A-25, User Charges § 6(a)(2) (2017). RPO conducted these reviews in 2013, 2015 and 2017. Rule 56(c) Statement ¶ 101. The cost models used for these reviews were not organized by function as

2010 cost model was, [REDACTED]. App. Fig. 10; Rule 56(c) Statement ¶ 105. As a result of the 2013 biennial user fee review, the IRS determined that the PTIN user fee of \$50 was the correct amount. Rule 56(c) Statement ¶ 101. In 2015, however, the IRS concluded the fee should be reduced. *Id.* ¶ 102. The IRS portion of the PTIN fee was reduced from \$50 to \$33, and the Accenture portion of the PTIN registration/renewal fee was increased from \$14.25/\$13 to \$17. *Id.* ¶¶ 102, 106. According to the regulation:

The reduction in the fee amount [wa]s attributable to several factors, which include the reduced number of PTIN holders (approximately 700,000) from the number originally projected (1.2 million) in 2010, which reduced associated costs; the absorption of certain development costs in the early years of the program; and the fact that certain activities that would have been required to regulate registered tax return preparers will not be performed. In particular, the determination of the user fee no longer includes expense for personnel who perform functions primarily related to continuing education and testing for registered tax return preparers. Additionally, expenses related to personnel who perform continuing education and testing for enrolled agents and enrolled retirement plan agents were also removed from the user fee.

Preparer Tax Identification Number (PTIN) User Fee Update, 80 Fed. Reg. 66,792, 66,794 (Oct. 30, 2015). The cost model used to set the 2015 fee shows that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁹ Rule 56(c) Statement ¶ 104. A [REDACTED]

[REDACTED]

[REDACTED] *Id.* [REDACTED]

[REDACTED] *Id.* [REDACTED]

⁹ The IRS has conceded partial liability for unspecified costs. *Id.* ¶ 112. To date, \$31,436,689 has been deposited in an interest-bearing escrow account for the benefit of the class and will be applied to any final judgment or resolution of the case. *Id.*

█ In fact, following *Loving*, the suitability department “grew a little bit with the addition of a temporary team” to “process [testing fee] refunds and to answer questions regarding those refunds.” *Id.* ¶ 95. The testing-fee refunds were for testing fees that the IRS had collected and were declared unlawful in *Loving*. *Id.* Remarkably, the IRS funded this temporary refund team (which lasted over a year) with PTIN fees. *Id.*

█ *Id.* ¶ 104. █ and rather than continuing to pay Accenture directly for PTIN System enhancements, the IRS agreed to increase Accenture’s portion of the fee. *Id.* ¶¶ 104, 106-08. There were also expected to be fewer PTIN System “enhancements” because the system had been fully developed by this point.

Argument

I. The PTIN fee must be limited to the costs “necessary” to “provid[e] tax-return preparers a PTIN.”

In *Montrois*, the D.C. Circuit remanded this case back to this Court “for further proceedings, including an assessment of whether the amount of the PTIN fee unreasonably exceeds the costs to the IRS to issue and maintain PTINs.” That assessment is conducted under the Independent Offices Appropriations Act, which provides that a user fee may not “recover from regulated industries the full costs of the agencies’ regulatory apparatus.” *Cent. & S. Motor Tariff Ass’n v. United States*, 777 F.2d 722, 725 (D.C. Cir. 1985). Instead, there must be a connection between the precise service being provided and the user fee. A user fee may include only the costs “necessary” to provide the specific service being provided to the fee-payer. *Elec. Indus. Ass’n v. F.C.C.*, 554 F.2d 1109, 1115 (D.C. Cir. 1976) (“This principle also requires that a fee only charge for those expenses which are necessary to service the applicant or grantee.”); *see also Seafarers Intern. Union of N. Am. v. U.S. Coast Guard*, 81 F.3d 179, 186 (D.C. Cir. 1996) (fee limited to

costs “sufficiently related to the interests underlying” the requirement); *Cent. & S. Motor Tariff Ass’n v. United States*, 777 F.2d 722, 729 (D.C. Cir. 1985) (citing *Nat’l Cable Television Ass’n v. F.C.C.*, 554 F.2d 1094, 1104, 1107 (“the fee may not exceed the agency’s cost of providing the service”)); *Nat’l Ass’n of Broadcasters v. F.C.C.*, 554 F.2d 1118, 1133 (D.C. Cir. 1976) (fee must “reasonably reflect[] the cost of the services performed or value conferred upon the payor”).

According to the D.C. Circuit, the “service” is “providing tax-return preparers a PTIN.” *Montrois*, 916 F.3d at 1063. Consistent with the IOAA and *Montrois*, the IRS may recover the costs of “providing tax-return preparers a PTIN,” and the specific “PTIN-related functions” identified by *Montrois*: “managing the PTIN application and renewal process and developing and maintaining the database of PTINs.” 916 F.3d at 1063. The IRS may not recover between seventy-five and one hundred percent of the total costs of regulating tax-return preparers, as it has done here. Nor may it recover the costs of its “extensive regulatory effort” struck down by *Loving*. It is limited to recovering the costs of providing return preparers an identifying number, whose only function is to “secur[e] proper identification of [a] preparer,” not to mark a preparer as qualified or suitable. *See* 26 U.S.C. § 6109.

In order to determine whether the “PTIN fee unreasonably exceeds the costs to the IRS to issue and maintain PTINs,” the Court must determine whether the PTIN fee includes the costs of activities beyond those specified “PTIN-related functions” necessary to “provid[e] tax-return preparers a PTIN.” *Montrois*, 916 F.3d at 1063. As explained below, it does.

II. The 2010 PTIN fees were excessive because they included costs beyond those “necessary” to “providing tax-return preparers a PTIN.”

Both the \$64.25 initial issuance fee and the \$63 renewal fee include a \$50 portion received by the IRS, and a portion retained by Accenture (\$14.25 of the initial issuance fee and \$13 of the renewal fee). A small fraction of these costs were PTIN-related functions necessary to “provid[e]

tax-return preparers a PTIN.” The remaining costs were for the Return Preparer Program, the broader regulatory effort struck down by *Loving*. They cannot be lawfully included in the PTIN fee. To the extent the 2010 PTIN fees include such costs, they are excessive as a matter of law.

A. The Accenture portion of the 2010 PTIN fees was excessive because it included the costs of a system that did more than provide PTINs and of a call center that handled non-PTIN inquiries.

Accenture [REDACTED]

[REDACTED] *Id.* ¶ 40-41. The [REDACTED]

[REDACTED] *Id.* ¶ 41. Only a portion of the PTIN System’s functionality and a portion of the PTIN call center’s activities are necessary to issue and maintain PTINs. To obtain a PTIN, the return preparer must submit a PTIN application and pay the applicable user fee through the PTIN System. *Id.* ¶ 47. After verifying the return preparer’s identity through a real-time electronic connection with IRS computer systems, the PTIN System issues the return preparer a PTIN [REDACTED] *Id.* ¶ 48. All that is necessary to issue a [REDACTED]

[REDACTED] *Id.* [REDACTED]

[REDACTED] *Id.* ¶ 38. The PTIN System also maintains the tax return preparer’s information, and [REDACTED]

[REDACTED] an Accenture subcontractor. *Id.* ¶ 44.

All of that functionality was present when the system launched in September 2010. *Id.* ¶ 51. The PTIN System’s [REDACTED] *Id.*

Between the fall of 2011 and 2015, subsequent “releases” added capabilities to the PTIN System unrelated to issuing and maintaining PTINs. *Id.* ¶¶ 51-52. (describing [REDACTED] [REDACTED] as some of the required PTIN

System functionalities); Releases 2, 3, and 4 [REDACTED]

[REDACTED] including [REDACTED]

[REDACTED]¹⁰ *Id.* ¶ 52. A portion of these releases was included in Accenture’s portion of the PTIN fee. *Id.* ¶ 51. The IRS paid for the remainder of the expenses, which were not anticipated when the user fees were set. *Id.* ¶¶ 52-54. The cost of the PTIN registration and renewal functionality was properly included in the PTIN fee as the cost of “developing and maintaining the database of PTINs,” which *Montrois* recognized as a PTIN-related function necessary to providing tax-return preparers a PTIN. Any additional PTIN System functionality included in the Accenture portion of the PTIN fee was not necessary to providing PTINs and cannot be included in the PTIN fee.

The contract also required Accenture [REDACTED]

[REDACTED]. *Id.* ¶ 41.

[REDACTED]. *Id.* [REDACTED]

Id. [REDACTED]

[REDACTED]. [REDACTED] specific to the issuance or renewal of PTINs, as opposed to those related to the RP Program, were part of the “manag[ement of] the PTIN application and renewal process.” *Id.* ¶ 41. As such, they were “necessary” to “providing tax-return preparers a

10 [REDACTED]

PTIN,” and were properly included in the PTIN fee. [REDACTED] were not necessary to providing PTINs and cannot be included in the PTIN fee.

The only things properly included in Accenture’s portion of the user fees were [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] Because it is undisputed that Accenture’s portion of the user fee includes costs beyond these, Accenture’s portion of the PTIN fee is excessive as a matter of law.

B. The IRS portion of the 2010 PTIN fees was excessive because it included 75% of the costs of the RP Program, not just the costs of providing PTINs.

The IRS portion of the 2010 PTIN registration and renewal fees were set at \$50 based on a detailed cost model and FTE analysis completed in the summer of 2010. *Id.* ¶¶ 32-36. Annotated excerpts of the 2010 cost model are in the Appendix and the entire, unannotated cost model is Ex. U to the Oliver Declaration. The 2010 cost model includes costs for the entire “regulatory apparatus”—all RP Program activities RPO was expected to perform, except testing and continuing education which would be covered by separate user fees. *Id.* ¶ 33. Without explanation, seventy-five percent of “certain costs for the entire program . . . [we]re allocated to the PTIN sign-up user fee.” *Id.* The PTIN fee would cover one-hundred percent of the costs of the RP Program’s suitability checks and compliance activities. *Id.* To the extent the PTIN fee includes such suitability and compliance costs, it is excessive as a matter of law.

As shown in the summary sheet of the 2010 cost model, the only costs “necessary” to providing PTINs were part of the following categories: Communications & Customer Support, IT (Amortized), and OPR/PMO Ops Support. App. at Fig. 5. Subcategories and additional detail are shown in the supporting pages of the cost model. *Id.* at Figs. 6-8. The activities listed as

“Registration” activities were limited to foreign preparer registration processing. *Id.* at Fig. 5. Because the special benefit identified by *Montrois* as justifying a user fee was the protection of the confidentiality of social security numbers, the costs of “validating the location and identity of preparers without social security numbers” are not properly included in the PTIN fee. *Montrois*, 916 F.3d at 1063; *Elec. Indus.*, 554 F.2d at 1115; *Seafarers*, 81 F.3d at 186.

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.” *Montrois*, 916 F.3d at 1068. None of these activities were “necessary” to “providing tax-return preparers a PTIN,” and all costs associated with them must be excluded from the PTIN fee as a matter of law because they “range beyond the IRS’s authority after *Loving*.” *Montrois*, 916 F.3d at 1056, 1067.

The following activities were (and are) necessary to provide tax-return preparers a PTIN: (1) a small portion of customer support costs; (2) a small portion of communications costs; (3) a small portion of IT costs; (4) a small portion of “OPR/PMO Ops Support” costs. App. at Fig. 5. These summary categories are subdivided into specific activities in the supporting pages of the cost model.

Data supporting the “Communications & Customer Support” category are in the “Customer Support & Marketing” sheet and the PMO Operations Support sheet of the 2010 cost model. Of the costs included in the Communications & Customer Support category, five are permissible as a matter of law:

- A portion of costs for “Inquiry Response – Taxpayer & Return Preparers”;
- A portion of costs for “EPSS help desk to handle customer help inquiries”;
- A portion of “[p]ublications/forms updates”;
- All costs of “[c]ontacting current PTIN users” relating to mandatory PTIN issuance and renewal; and

- All costs of “[p]ackag[ing] and ship[ping] applications inadvertently sent to IRS.”¹¹

Id. at Fig. 6. Although Accenture [REDACTED]

[REDACTED] the IRS expected to receive calls about the Return Preparer Program and the PTIN requirement through its general help lines until preparers learned to use the dedicated PTIN System help line. Rule 56(c) Statement ¶ 35. Those costs are listed as “Inquiry Response – Taxpayer & Return Preparers” and “EPSS help desk to handle customer help inquiries.” Because a portion of those activities were part of “managing the PTIN application and renewal process” and were necessary to providing tax-return preparers a PTIN, they may be covered by PTIN fees, consistent with *Montrois*. The remainder of “Inquiry Response” and “EPSS help desk” were activities performed to respond to inquiries from taxpayers and return preparers, and inquiries regarding the RP Program requirements other than the mandatory PTIN. Those costs, in an amount to be determined at trial, are not recoverable by PTIN fees. Work done by the IRS to contact current PTIN holders to notify them of the new PTIN requirement was part of “managing the PTIN application and renewal process.” The costs of that activity are “necessary” to the issuance of PTINs, and may be recovered through PTIN fees. Last, “[p]ackage and ship applications inadvertently sent to IRS” includes the costs incurred by the IRS to ship paper applications mistakenly sent to an IRS processing center instead of the PTIN Contact Center run by Accenture. These costs are “necessary” to the issuance and renewal of PTINs and may be recovered by PTIN fees.

The remaining activities shown on the “Cust Support & Marketing” sheet are not necessary to the issuance or maintenance of PTINs. As such, they sweep beyond the IRS’s statutory

¹¹ PMO Operations Support costs are addressed below at 24-25.

authorization under the IOAA, and the costs associated with them may not be included in the PTIN fee. Because the PTIN fee includes those costs, it is excessive as a matter of law.

The supporting page for IT activities shows nine activities, seven of which potentially relate to PTIN issuance and renewal. Two of the seven are wholly permissible, and five are partly permissible. The other two items are not necessary to issue or maintain PTINs, are in support of the broader regulatory program, and extend beyond the IRS's statutory authority. Specifically, the costs of the following items are wholly or partly permissible:

1. Retiring the existing PTIN system;
2. A one-time data extract from the existing PTIN system to reassign current PTIN-holders the same PTIN;
3. Developing interfaces with vendor and IRS's Masterfile (Links to OPR, others) to the extent such interfaces were related to identify verification;
4. Authentication address of record, which was part of identity verification;
5. Independent verification and validation testing to test system and connection between vendor and IRS;
6. Security and acceptance testing of vendor system; and
7. Create security tunnel on IRS.gov.

App. at Fig. 7. Items 1 and 2 are part of the transition from the IRS's legacy PTIN system to Accenture's PTIN System. They are necessary to providing PTINs and may be included in the fee. Items 3 and 4 are part of the identity verification process for PTIN applicants. A portion of those costs are necessary to providing PTINs to return preparers, and may be covered by the PTIN fee. Items 5 through 7 relate to implementation of various IRS IT security requirements associated with the PTIN System. A portion of those costs are necessary to the PTIN-related function of "developing and maintaining the database of PTINs," and may be included in the PTIN fee. The remaining two activities ("[p]rocur[e] initial development of 'Ideal' internal database to support RP

registration tracking and analytics” and “[d]evelop / maintain interface for Tax Compliance Checks”) are to support IRS enforcement efforts or the RP Program requirements. Costs associated with these two activities are not necessary to providing PTINs and must be excluded from the PTIN fee.

Finally, certain costs from the “OPR/PMO Ops Support” category reflect work performed by the implementation team to oversee and assist in the launch of the PTIN System, and by RPO after the launch of the PTIN System to oversee and supervise Accenture and to communicate with preparers. These activities were necessary to “the service of providing tax-return preparers a PTIN,” *Montrois*, 916 F.3d at 1063, and therefore are costs that may be included in the PTIN fee.

Specifically, as shown in the “OPR_PMO Ops Support” sheet, the following costs may be included in the PTIN fee:

- A portion of pre-September 2010 Program Implementation Staff;
- A portion of Vendor/IT Management;
- A portion of the COTR (Contracting Officer Technical Representative, a procurement function located within RPO); and
- A portion of Communications.

App. at Fig. 8. A portion of the pre-September 2010 Program Implementation Staff may be included because the Program Implementation Staff worked to implement the PTIN requirement. The remainder of pre-September 2010 Program Implementation relates to implementation of the other Return Preparer Program requirements and must be excluded. Communications about the new PTIN requirement and PTIN-System-related work were “necessary” to issue the now mandatory PTINs, and were properly included in the fee.

A portion of the costs of the “Vendor / IT Management” subcategory may be included in the PTIN fee. Vendor/IT Management “[i]ncludes vendor mgmt. (not strictly IT) for

Reg[istration], Testing, and CE and bus[iness] owners of system implementation.” Only management of the registration vendor (Accenture) may be included in the PTIN fee. Those costs were “necessary” to “managing the PTIN application and renewal process,” and to the issuance or maintenance of PTINs. *Montrois*, 916 F.3d at 1063. Also, a portion of the costs of the “COTR,” a Contracting Officer Technical Representative, who managed Accenture, is permissible. These are the only “OPR_PMO Ops Support” costs necessary to issue and maintain PTINs. The remaining work, including “performance management, strategic planning, program policy, research and dashboard reporting,” “compliance and policy oversight from an enterprise-wide perspective,” and “budget/workplanning and training” was not necessary to “providing tax-return preparers a PTIN.” The work was either planning and policy development done to design and implement the rest of the Return Preparer Program, or was administrative work done to support the Return Preparer Program and a much larger office than was necessary to provide PTINs to return preparers (e.g., budgeting, coordinating travel, development of training materials, hiring). Most of the staff hired for “operational support” roles were not hired until after the PTIN System had been issuing mandatory PTINs for more than six months. At that point, [REDACTED] [REDACTED] RPO still consisted of a “core team” and minimal staff. Rule 56(c) Statement ¶ 62. The team still had not [REDACTED] [REDACTED] *Id.* Only the portion of “PMO Ops Support” costs necessary to issue and maintain PTINs was properly included in the PTIN fee.

III. The 2015 PTIN fee was excessive because it included costs beyond the limited labor and IT costs necessary to issue and maintain PTINs.

The IRS lowered its portion of the PTIN fee in 2015 to eliminate some impermissible costs following *Loving*. The 2015 cost model used to set the 2015 PTIN user fee [REDACTED] [REDACTED]

Even though the 2010 and 2015 cost models are organized differently, the allowable costs are the same—those necessary to the provision of PTINs.

In the 2015 cost model, a small portion of labor and IT costs are the only permissible IRS costs. Of the labor costs, the only costs that were necessary to issue and maintain PTINs were a portion of the work performed by employees included in the Vendor Department, or [REDACTED] [REDACTED] App. at Fig. 10. These employees managed the Accenture relationship and PTIN-System-related work, which was “necessary” to “managing the PTIN application and renewal process” and “providing tax-return preparers a PTIN.” These costs had been included in the “OPR / PMO Ops Support” section of the 2010 cost model. The permissible customer support activities and communications from the 2010 cost model were no longer performed in 2015 (i.e., contacting current PTIN-holders about mandatory PTINs, updating forms) or were not included in the 2015 cost model (i.e., packaging and shipping paper applications inadvertently sent to the IRS).

The IT costs necessary to issue and maintain PTINs are shown in the [REDACTED] [REDACTED] *Id.* at Fig. 9. Specifically, a portion of [REDACTED] [REDACTED] *Id.* [REDACTED] [REDACTED] and were not necessary to providing PTINs. Everything beyond these IT and vendor support activities is excessive as a matter of law. *See supra* at 23-26.

Among the impermissible costs in the 2015 user fee are [REDACTED] [REDACTED] App. at Fig. 10. All of the activities performed by the Suitability department “range beyond the IRS’s authority after *Loving*” and must be excluded. Specifically, they include the following suitability checks and activities: “a. Professional Designation Checks;

b. Personal Tax Compliance; c. Prisoner Lists; d. Specially Designated Nationals; e. Former Employee EA Enrollment Applicants; f. Criminal Background Checks; g. Referrals; and h. Electronic Filing Identification Number Adjudication and Appeals.” Rule 56(c) Statement ¶ 34 n. 3.

IV. Pursuant to 26 U.S.C. § 6109(c), the IRS may only request a PTIN applicant’s name, address, telephone number, social security number and date of birth when issuing a PTIN.

As set forth at pages 4-5 *supra*, from 2000 to 2010, the IRS only required that a tax-return preparer provide his or her name, social security number, date of birth, address and telephone number in order to obtain a PTIN. *Id.* ¶ 9. Once assigned, the number did not change. Nor was renewal required prior to 2010. Without problem, the IRS issued over 1 million voluntary PTINs based on these five pieces of information. *Id.* ¶ 11. The IRS also maintained an active database that contained this information for each of the PTINs it had issued. At no time prior to 2010 did the IRS ever determine that it needed additional information in order to issue a PTIN or to maintain its then-existing PTIN database. Every major tax return provides all the information the IRS needs regarding a preparer. *See, e.g.*, ECF 128-9.

Starting in 2010, and continuing to the present, the IRS required that PTIN applicants supply eleven additional categories of information, including information on an applicant’s past felony convictions, the applicant’s tax filing status and history, the applicant’s federal tax compliance, details regarding an applicant’s business, and the applicant’s professional credentials. Rule 56(c) Statement ¶ 49. These categories of information were added in 2010 and thereafter as part of the IRS’ failed regulatory regime. None of these additional categories of information is necessary to the issuance of the PTIN. Any person can apply for and receive a PTIN, regardless of status or qualifications. Indeed, no matter how an applicant responds to these eleven additional requests for information, the IRS (Accenture) will issue the applicant a PTIN.

26 U.S.C. § 6109(c) provides that, in connection with the issuance of a PTIN, the IRS “is authorized to require such information as may be *necessary* to assign an identifying number [e.g., a PTIN] to any person.” (Emphasis added.) “No matter how it is framed, the question a court faces when confronted with an agency’s interpretation of a statute it administers is always, simply *whether the agency has stayed within the bounds of its statutory authority.*” *Loving v. I.R.S.*, 742 F.3d 1013, 1016 (D.C. Cir. 2014) (quoting *City of Arlington v. FCC*, 569 U.S. 290 (2013)). As noted above, the only information necessary to assign a PTIN is the information necessary to verify the applicant’s identity: name, social security number, date of birth, address and phone number. This is what the IRS required from 2000 to 2010, before it rolled out its RP Program. The balance of the information that the IRS has been requiring in PTIN applications since 2010 is not necessary to the issuance of the PTIN. It was added by the IRS as part of its failed return-preparer licensing program; it is no longer relevant to the PTIN application process. Plaintiffs seek a judgment declaring that the IRS’ current PTIN application process exceeds the IRS’ statutory authority under Section 6109(c). Plaintiffs request that the pre-2010 PTIN application process be re-instituted in its place.¹²

Conclusion

Plaintiffs respectfully request that the Court grant Plaintiffs’ motion for summary judgment as to liability on their Second Claim and the § 6109(c).

Specifically, Plaintiffs request that the Court hold that the Accenture portions of the PTIN user fees from 2010 to June 1, 2017 were excessive because they included PTIN System costs and Contact Center costs that were not necessary for the issuance and maintenance of PTINs. Plaintiffs

¹² The current PTIN application requires a PTIN applicant’s email address. Plaintiffs are not challenging the IRS’s right to collect that additional piece of information as part of the PTIN application process.

further request that the Court hold 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:

- A portion of pre-September 2010 implementation costs;
- A portion of communications and customer support, including certain IRS-provided customer support costs and the costs of contacting current PTIN holders to notify them of the new PTIN requirement;
- Packaging and shipping applications inadvertently sent to the IRS;
- Retiring the existing PTIN system;
- A portion of IT costs necessary to verify the identity of PTIN applicants and ensure the PTIN System met certain IRS security requirements;
- The portion of vendor management dedicated to managing Accenture's PTIN-related work; and
- The portion of the COTR that managed the PTIN-related aspects of Accenture's contract.

Plaintiffs further request that the Court hold that the IRS portion of the PTIN fees from 2015 to 2017 was excessive because it included costs in excess of the following costs necessary to issue and maintain PTINs:

- A portion of the Vendor Department; and
- A portion of IT costs.

Plaintiffs also request that the Court order find that the current W-12 requires more information than is permitted by 26 U.S.C. § 6109(c) and the PTIN application must be limited to identifying information, specifically name, address, date of birth, social security number, and email address.

Dated: March 23, 2022

Respectfully submitted,

/s/ William H. Narwold

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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2022 I electronically filed Plaintiffs' Motion for Summary Judgment through this Court's CM/ECF system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

Dated: March 23, 2022

/s/ William H. Narwold

William H. Narwold