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

ORAL ARGUMENT REQUESTED

PLAINTIFFS' MOTION TO VACATE CHALLENGED AGENCY ACTIONS OR, IN THE ALTERNATIVE, FOR A SCHEDULE TO ENFORCE THE COURT'S SUMMARY JUDGMENT ORDER [ECF NO. 222]

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INTRODUCTION

The IRS's work on remand and corresponding refund determinations are fundamentally flawed. On January 24, 2023, this Court ruled on the parties' cross motions for summary judgment and remanded to the agency to "determine an appropriate refund by recalculating [the PTIN] fees" and "excising a reasonable estimate of the portions of those fees that the Court has held unlawful." *Steele v. United States*, 657 F. Supp. 3d 23, 50 (D.D.C. 2023). After a year's delay, the IRS filed a Notice of Refund Estimation setting forth the "'refund it has estimated to be appropriate.'" ECF No. 256 at 1 (quoting the Court's Summary Judgment Order ("Order"), ECF No. 222 at 2). The IRS's refund estimation is implausible on its face.

- For Fiscal Years 2011-2015, the IRS calculated a further refund of less than 1% of the amounts collected, once the 2010 cost model is applied consistently across those five years.
- With respect to IT expenses, the IRS calculated a refund of only 0.5% (or roughly $6,000 per year) of the expenses set forth in the cost model for 2011 through 2015.
- For Fiscal Years 2016-2017, the IRS calculated a revised PTIN fee of $13.89 of which $5.54 (40%) was for compliance activities.
- And where the IRS did attempt to allocate costs between permissible and impermissible activities, it routinely defaulted to a two-thirds/one-third allocation without any explanation of how dozens of disparate activities could have the identical cost allocation.
- For the Accenture fees, the IRS calculated a refund of just 8.6% of the $74.5 million charged, despite "not disput[ing] that a significant portion of the [Accenture] fees went to fund activities that had nothing to do with providing or maintaining PTINs."

As set forth below, there are countless additional examples. In short, the IRS has simply thumbed its nose at the members of the class and the Court.

Because the IRS's work on remand does not comply with this Court's Order, the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.*, or the IOAA, 31 U.S.C. § 9701, the IRS has failed to correct the deficiencies in its original actions (the PTIN fees set in 2010 and 2015).

Accordingly, those actions "shall [be] . . . h[e]ld unlawful and set aside," 5 U.S.C. § 706(2), and the fees returned to the class.

BACKGROUND

It has now been over a decade since the Court of Appeals decided *Loving v. Internal Revenue Service*, 742 F.3d 1013 (D.C. Cir. 2014). And since 2010, tax-return preparers have been making interest-free loans to the IRS in the form of excessive user fees paid for preparer tax identification numbers ("PTINs"). Yet, the IRS remains unbowed. Having built a 100-plus-person Return Preparer Office (RPO) on the mistaken assumption that tax-return preparers would pay for that office, the IRS simply refuses to accept that it may only charge tax-return preparers for issuing PTINs and maintaining a database of those PTINs. Although it has agreed to refund some of the fees unlawfully exacted from tax preparers, the IRS continues to retain nearly half of the total fees collected, including significant amounts that covered the costs of activities unrelated to the issuance and maintenance of PTINs.

I. The IRS has tried—and failed—many times to determine the amount of lawful PTIN fees.

A. The IRS has lowered the IRS portion of the PTIN fees by regulation three times since 2010.

In 2010, the IRS set the PTIN fee for initial registration at $64.25 and the fee for renewal at $63. Despite a 2013 "biennial review" in which the IRS used its actual expenditures two years into the extensive Return Preparer Program to project its expenses for the coming two years, it left the fees unchanged. But following the D.C. Circuit's decision in *Loving*, which invalidated many of the activities funded by the PTIN fees by ruling the backbone of the licensing scheme (31 U.S.C. § 330) "cannot be stretched so broadly as to encompass the authority to regulate tax-return preparers," 742 F.3d at 1015, the IRS lowered the fees for both registration and renewal in 2015

to $50 ($33 to the IRS, $17 to Accenture)—only a 20.6% reduction (from $63 to $50) for renewals. *Preparer Tax Identification Number (PTIN) User Fee Update*, 80 Fed. Reg. 66,792, 66,793-94 (Oct. 30, 2015).

Then, in 2020, in reliance on the D.C. Circuit's decision in this case, it lowered the fees again—this time to $35.95 ($21 to the IRS and $14.95 to Accenture). *Preparer Tax Identification Number (PTIN) User Fee Update*, 85 Fed. Reg. 43,433, 43,434-35 (July 17, 2020). Finally, in reliance on this Court's decision on summary judgment, the IRS lowered the fees last year, to $19.75 ($11 to the IRS, $8.75 to Accenture). *Preparer Tax Identification Number (PTIN) User Fee Update*, 88 Fed. Reg. 68,456, 68,457 (Oct. 4, 2023).

The reduction in the IRS fee from 2010 to 2023 represents a reduction of 78% from the original $50 fee set in 2010. The 2023 Accenture fee represents a reduction of roughly 35% from the 2010 Accenture fees of $14.25 and $13. In reducing the Accenture fee, the government stated, "The amount payable directly to the third-party contractor also takes into account certain costs that were addressed by the district court's February 2023 memorandum opinion in *Steele*. Subsequently, the IRS entered into a modified contract that allows the government to pay those costs rather than the individuals who apply for or renew a PTIN." *Id.* at 68,457-58. These reductions are greater than those calculated by the IRS on remand.

B. On three separate occasions during this litigation, the IRS has made concessions of unlawfully collected PTIN fees, which total over $110,000,000.

On September 29, 2020, the government conceded $17,747,583 in unlawfully exacted PTIN fees. A year later, on September 22, 2021, the government conceded an additional $13,689,106 in unlawfully exacted PTIN fees. Finally, in briefing on summary judgment, the government conceded that it had unlawfully collected another $78,885,328 in PTIN fees. Together, the government's litigation concessions total $110,322,017.

II. The IRS has calculated additional—but still insufficient—refunds on remand, choosing to retain nearly half of PTIN fees collected.

The parties agree that for FY 2011 through 2017, class members paid $305,910,808 in PTIN fees—$231,559,850 in IRS fees and $74,350,958 in vendor (Accenture) fees. On remand, the IRS determined that the plaintiffs are entitled to a further refund of $57,444,051—$51,032,080 in additional PTIN fees and $6,411,971 in vendor fees.

In sum, the current numbers are as follows:

	Fees Paid	Concessions Prior to Remand	Refunds Calculated on Remand	Concessions & Refunds Calculated on Remand	Remaining Fees	Percent Conceded/ Calculated on Remand
IRS	$231,559,850	$110,322,017	$51,032,080	$161,354,097	$70,205,753	69.6%
Accenture	$74,350,978	-	$6,411,971	$6,411,971	$67,939,007	8.6%
Total	$305,910,808	$110,322,017	57,444,051	$167,766,068	$138,144,760	54.8%

The IRS thus concludes that it was reasonable for Accenture to charge more than $9,000,000/year to issue PTINs and maintain a PTIN database, and for the IRS to charge more than $10,000,000/year to oversee Accenture, who had sole responsibility for "establish[ing] and maintain[ing] a system for on-line registration and renewal, user fee collection, and issuance of a unique identifying number for all paid tax return preparers." ECF No. 258-3 at 645. Stated another way, the IRS contends that it was appropriate to charge tax-return preparers $138,144,760[1] from

[1] Roughly 74% of this $138,144,760 came from "renewal" fees. Assuming a tax-return preparer filled out the pre-populated renewal form (name, address, email, etc.) correctly and paid the required fee, a "renewal" of his or her existing number was automatically accomplished (A PTIN is like a Social Security Number, a permanent 9-digit number except it starts with a "P."). The renewal was handled exclusively by Accenture. As the Court in *Montrois* stated, the renewal fee relates to the IRS's work in "maintain[ing] a database that allows preparers to continue using their PTINs in subsequent years." *Montrois*, 916 F.3d at 1066. In that regard, the renewal fee must "bear[] an adequate relationship to the continuing cost incurred by the IRS to maintain the PTIN database." *Id.* The IRS made no attempt on remand to determine the cost of "maintain[ing] the PTIN database" much less determine whether the Accenture fees charge bore an "adequate relationship" to the cost.

Fiscal Year 2011 to 2017 for the "provision of PTINs, maintenance of the PTIN database, and in turn, the attendant private benefit" of identity-theft protection. *Steele*, 657 F. Supp. 3d at 43; *see also Montrois v. United States*, 916 F.3d 1056, 1063 (D.C. Cir. 2019) (finding permissible the activities of "generat[ing] a unique identifying number for each tax-return preparer and maintain[ing] a database of those PTINs"). The current fee represents a larger reduction than those estimated by the IRS on remand for the purpose of calculating refunds. On remand, the IRS has determined that 69.6% of the IRS fees—not 78%—should be refunded, and only 8.6% of the Accenture fees—not 35%—should be refunded.

In its summary-judgment Opinion, this Court held that the IRS must "show its work" and "be able to explain with respect to each activity that formed the basis for the PTIN fees how that activity was reasonably related to providing the private benefit that the Circuit identified in *Montrois*: a means of identifying return preparers that protects them from identify theft." *Steele*, 657 F. Supp. 3d at 49, 38. Despite this, the IRS has made no attempt to justify the costs it continues to seek to retain, submitting two declarations of Kimberly Rogers with accompanying exhibits that only serve to highlight the deficiencies in the IRS's unorthodox methodologies. *See* ECF No. 258-2; ECF No. 270-1. In addition, the IRS's cost model recalculation includes activities that are facially unlawful and cannot be remedied by additional information or reasoning. Because the IRS has failed to offer *any* explanation for its work on remand, let alone how the activities "went to providing the PTINs' associated identity-protecting benefit by issuing them and maintaining the PTIN database," *Steele*, 657 F. Supp. 3d at 43, the IRS's remand work is arbitrary and capricious, unlawful under the IOAA, and the 2010 and 2015 PTIN fees must be refunded.

ARGUMENT

I. This Court has the authority to address the deficiencies in the IRS's remand work.

A. This Court has the authority to enforce its own remand order.

An agency facing a remand order "has an affirmative duty to respond to the specific issues remanded by the Court," and the court has the authority to enforce its mandate. *Oceana, Inc. v. Ross*, 321 F. Supp. 3d 128, 136 (D.D.C. 2018) (cleaned up)[2]; *Sierra Club v. McCarthy*, 61 F. Supp. 3d 35, 39 (D.D.C. 2014) (describing district courts' authority to enforce their mandates as "'particularly appropriate' when a case returns to a court on a motion to enforce the terms of its mandate to an administrative agency"); *Defs. of Wildlife v. Kempthorne*, Civ. Action No. 04-1230 (GK), 2006 WL 2844232, at *12 (D.D.C. Sept. 29, 2006) ("[A]n agency faced with a remand order has an affirmative duty to respond to the specific issues remanded."); *Tex Tin Corp. v. U.S. Env't Prot. Agency*, 992 F.2d 353, 355, 356 (D.C. Cir. 1993) (granting relief sought when agency relied not on evidence but on "unsupported assumptions" and in so doing "failed to comply with [the court's] remand order"). "The court is generally the authoritative interpreter of its own remand," and "is guided 'not only by the text' of the Order in question but also 'by its relevant opinions.'" *Resolute Forest Prods., Inc. v. U.S. Dep't of Agric.*, 427 F. Supp. 3d 37, 41 (D.D.C. 2019) (citations omitted).

B. This Court has the authority to review the IRS's remand work under the APA and provide appropriate relief.

Courts routinely evaluate agency work performed on remand in response to challenges from the plaintiffs who initially brought the action. *See, e.g.*, *Resolute Forest Prods., Inc. v. U.S. Dep't of Agric.*, 187 F. Supp. 3d 100, 102 (D.D.C. 2016) (concluding agency action was "arbitrary

[2] Unless otherwise stated, all internal citations and quotation marks are omitted.

and capricious" after second remand to the agency); *Plunkett v. Castro*, 67 F. Supp. 3d 1, 7 (D.D.C. 2014) (quoting *Bennett v. Donovan*, 703 F.3d 582, 589 (D.C. Cir. 2013)) (considering post-remand summary judgment motions and recognizing if plaintiffs remain "dissatisfied with [an agency]'s remedy [on remand], they would always have the option to seek review on the ground that [the agency]'s actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *Muwekma Ohlone Tribe v. Salazar*, 813 F. Supp. 2d 170, 172 n.2 (D.D.C. 2011) (considering two rounds of summary-judgment briefing—one before remand to the agency and one after); *Bean Dredging, LLC v. United States*, 773 F. Supp. 2d 63, 67 (D.D.C. 2011) (considering parties' "new cross-motions for summary judgment" following agency remand). When considering such challenges, the court applies the same standard to review the agency's action on remand as it had in evaluating the agency's initial action. *See, e.g.*, *Resolute Forest Prods.*, 187 F. Supp. 3d at 102; *Plunkett*, 67 F. Supp. 3d at 7; *Muwekma Ohlone Tribe*, 813 F. Supp. 2d at 189; *Bean Dredging*, 773 F. Supp. 2d at 72.

When courts have found that relief is appropriate on remand, they have either provided the initial relief sought by plaintiffs in lieu of a second remand to the agency or they have remanded to the agency for yet another try, depending on the factual circumstances. *See e.g.*, *Nat'l Ass'n of Regul. Util. Comm'rs v. U.S. Dep't of Energy*, 736 F.3d 517, 520 (D.C. Cir. 2013) (denying government's request for another remand to set fees because Court had "no confidence that another remand would serve any purpose"); *Resolute Forest Prods., Inc. v. U.S. Dep't of Agric.*, 219 F. Supp. 3d 69, 72, 80 (D.D.C. 2016) (finding agency action "arbitrary and capricious," declining further remands and challenges after "half a decade," and ordering "a full refund of [the plaintiff's] assessments"); *Plunkett*, 67 F. Supp. 3d at 18 (remanding for further consideration consistent with opinion on summary judgment).

II. The IRS portion of the fee does not comply with the Court's remand order, and is arbitrary and capricious.

Under the APA, the court "shall hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . . " 5 U.S.C. § 706(2). To satisfy the arbitrary and capricious standard, "the agency must examine the relevant data and articulate a satisfactory explanation for its actions including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This requires the agency to disclose any assumptions that were critical to the decision as well as its methodology used in reaching its conclusion. *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 262 (D.D.C. 2015); *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 204 (D.C. Cir. 2007) ("The agency must cogently explain why it has exercised its discretion in a given manner, and that explanation must be sufficient to enable us to conclude that the agency's action was the product of reasoned decisionmaking."). Otherwise, the agency's "thought process [is] a black box" and "absent some insight into how the conclusion was reached, it is not possible to explain where and why the agency went wrong." *Burwell*, 139 F. Supp. 3d at 265 (recognizing the "vast difference between announcing a conclusion and articulating the reasons for that conclusion"). "To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport." *Conn. Light & Power Co. v. Nuclear Regul. Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982).

In the context of user fees, the D.C. Circuit requires a "public statement of the specific expenses which are included in the cost basis" for the fee, including an "identification of the specific items of cost and the criteria by which they are found to relate in the determined percentage

to the service or benefit for which the fee is assessed." *Nat'l Cable Television Ass'n, Inc. v. Fed. Commc'n Comm'n*, 554 F.2d 1094, 1104, 1106 (D.C. Cir. 1976). Conclusions about percentages of costs recoverable through user fees without sufficient explanation have been found inadequate. In *Engine Manufacturers Ass'n v. Environmental Protection Agency*, 20 F.3d 1177 (D.C. Cir. 1994), for example, the court found the unsupported assertion that "84% of EOD's total costs are considered to be testing-related" to be insufficient and required the agency to "provide some reasonable basis for its conclusions." *Id.* at 1182; *see also Nat'l Cable Television Ass'n*, 554 F.2d at 1106 (rejecting agency's fee computation).

Consistent with this well-established law, this Court directed the IRS to "show its work and set a new fee within the bounds of what the law allows." *Steele*, 657 F. Supp. 3d at 49. According to the Court's opinion, the only activities that could be lawfully supported by PTIN fees are "the provision of PTINs and maintenance of the PTIN database, and thus the conferral of the attendant private benefit of identity protection." *Id*. at 43. The costs of activities that serve an "independent public benefit"—such as, for example, "activities concern[ing] misconduct affecting return preparers' *customers*," activities that "facilitat[e] other agencies' operations," and the maintenance of a "public facing website" of a tax-preparer directory—may not lawfully be covered by PTIN fees. *Id.* at 41. The costs of any such activities that provide an "independent public benefit . . .must be disaggregated" from the costs of preparer-benefitting activities and must be refunded. *Id.*

A. The only additional refunds the IRS calculated for 2011 through 2015 were for professional designation checks, criminal background checks, and 0.5% of all IT costs.

For the vast majority of activities in the 2010 cost model, including all support activities, the IRS's proposed refund percentage *did not change* following the Court's Summary Judgment

Opinion. *Compare* ECF No. 270-2 at Column F of the 2011-2015 cost model recalculations (listing pre-summary judgment concession amount *with id.* at Column G (listing 2011-2013 court ordered refund). For example, the IRS calculated no additional refunds for "OPR/PMO Ops Support," and provided no additional support or explanation for its "OPR/PMO Ops Support" concessions, despite the Court's express determination that "[t]he government has not demonstrated that all of the support costs it continues to defend were reasonably related to the provision of a private benefit." *Steele*, 657 F. Supp. 3d at 43.[3] After applying the 2010 cost model to Fiscal Years 2014 and 2015, the only additional refunds the government calculated on remand for 2011 through 2015 were for professional designation checks (100%),"[c]lerical handling and prioritization of workload driven by self-reported criminal backgrounds" (100%), and a measly 0.5% of all IT costs. In total, the IRS determined on remand that only an additional 0.9% of PTIN costs for 2011 through 2015 should be refunded.

B. The IRS arbitrarily conceded or set the proposed partial refund percentage for 2011-2015 at 33.3%.

For twenty-four activities in the 2010 cost model, the IRS conceded at or before summary judgment exactly 33.3% of the costs of the activity. *See, e.g.*, ECF No. 270-2 at rows 6-8, 11, 17, 65-66, 78-82, 84-86, 88, 89-92, 94-96 & 107. There is not now nor has there ever been any explanation of how this figure was determined or how the remaining 66.7% "was reasonably related to providing the private benefit that the Circuit identified in *Montrois*: a means of identifying return preparers that protects them from identity theft," *Steele*, 657 F. Supp. 3d at 38.

[3] In its Opinion, this Court held that "the government is wrong to rely on the 2013 Cost Model to differentiate FY 2011 through 2013 from FY 2014 and 2015," *Steele*, 657 F. Supp. 3d at 39, and ordered the IRS to use the 2010 cost model to determine the amount of the refund for 2011 through 2015. Order at 2. Although the government provided refund amounts for 2014 and 2015 using the 2010 cost model, it also provided, in defiance of the Court's order, "alternative" calculations for FY 2014 and 2015 using the 2013 cost model. The Court should disregard these "alternative" calculations as contrary to its holding and contrary to the law.

This is a violation of the Court's remand order and the APA. *See* Order at 1-3; *Engine Mfrs.*, 20 F.3d at 1182 (finding inadequate conclusory assertions such as "approximately 63% of Certificate Division's costs are determined to be recoverable through fees" and "84% of EOD's total costs are considered to be testing-related"); *Nat'l Cable Television Ass'n*, 554 F.2d at 1105 (remanding for recalculation a fee set to recover "44.6 percent" of the bureau's budget when "there was no explanation of the criteria used in eliminating certain costs and retaining others").

When ordered to use the 2010 cost model to calculate the appropriate refunds, rather than the 2013 cost model, the IRS simply applied the same mysterious 33.3% to the same 24 activities for 2014 and 2015. It provided no additional support or explanation for the conclusion that two-thirds of each of those 24 activities provides an independent benefit to return preparers. *Compare* ECF No. 270-2 col. F (listing pre-summary judgment concession amount for 2011-2013 *with id.* at col. H (listing remand refund determination for 2014 and 2015).

Not only does it "strain the limits of credulity" to accept that 66.7% of each of these activities relates to PTIN issuance and maintenance, *see Elec. Indus. Ass'n, Consumer Elecs. Grp. v. Fed. Commc'ns Comm'n*, 554 F.2d 1109, 1116 (D.C. Cir. 1976), but in many instances, descriptions of activities provided by the 2010 cost model itself also call into question the validity of the IRS's assumed one-third/two-thirds split. For example, the government proposes refunding only 33.3% of "Government/Stakeholder Liaison," which is described in the cost model as "[i]nclud[ing] Liaison with TIGTA, GAO, Congressional, Audit Requests, etc.," ECF No. 270-2 at 1, even though the Court expressly held that "facilitating other agencies' operations is not reasonably related to the private benefit of protecting return preparers' identities," *Steele*, 657 F. Supp. 3d at 41. In a similar vein, the IRS proposes refunding only 33.3% of "Business Analysis," which "[i]ncludes Performance Management, Strategic Planning, Program Policy, Research and

Dashboard Reporting"; and 33.3% "Program Compliance & Policy," which "[i]ncludes Compliance and Policy Oversight from an Enterprise-Wide Perspective." ECF No. 270-2 at 1. On their face, these activities seem to provide only an independent benefit to the agency, not to tax preparers, and the IRS has provided no information or explanation to the contrary. For OPR/PMO Ops Support, the IRS proposes only a 33.3% refund of program-wide support categories such as "Budget/Workplanning," "Training (Internal)" and "Personnel," and "Communications" even though this Court held that wide swaths of activities performed by the RPO provided an independent public benefit and thus could not be included in the PTIN fee. *Steele*, 657 F. Supp. 3d. at 41, 43-44.

C. For other activities, the IRS's decision to refund only a de minimis amount (IT) or nothing at all is inconsistent with descriptions in the cost model.

For other categories, the calculated refund or concession (or lack thereof) is belied by the description of the activities in the 2010 cost model, and is thus arbitrary and capricious. An "agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 43. For example, the IRS failed to refund any amount attributable to "Vendor/IT Management"—described as "Vendor Mgmt. (not strictly IT) for Reg., Testing, and CE and Business Owners of System Implementation" even though the Court held that testing and continuing education were "not reasonably related to the provision of a private benefit." ECF No. 270-2 at rows 72-75 (emphasis added); *Steele*, 657 F. Supp. 3d at 44.

As another example, the IRS refunded only 0.5% of IT costs, despite the Court's recognition that "[g]iven the breadth of the RPO program before *Loving* and the 2010 cost model's failure to separate out the different work that the supporting departments were supporting, it is virtually certain that some RPO IT activities between FY 2011 and 2015 supported substantive

activities invalidated by *Loving*." *Steele*, 657 F. Supp. 3d at 43. Indeed, the IRS chose to refund none of the costs of the "'Ideal' internal database to support RP registration tracking and analytics," ECF No. 270-2 at row 104, which sounds, on its face, like part of the IRS's planned "broader information-gathering system" and an independent benefit to the IRS, not to tax preparers. *See Steele*, 657 F. Supp. 3d at 29 (describing "retool[ing]" of "PTIN program . . . as a broader information-gathering system regarding preparers"). As with the other activities, the IRS has not explained how "registration tracking" and "analytics" "protect[] the confidentiality of [the tax preparers'] personal information." *Steele*, 657 F. Supp. 3d at 32-33.

Whether because it could not, or because it would not, the IRS simply has not complied with this Court's directive that it "explain with respect to each activity that formed the basis for the PTIN fees how that activity was reasonably related to . . . identifying return preparers [and] protect[ing] them from identify theft." ECF No. 222 at 2; *Steele*, 657 F. Supp. 3d at 38. Without the required explanation of these costs, plaintiffs and the Court are unable to assess whether the refund determination was the product of "reasoned decisionmaking" or that the process by which the IRS reached its conclusions was "logical and rational." *Allentown Mack Sales & Serv., Inc. v. Nat'l Lab. Rels. Bd.*, 522 U.S. 359, 374 (1998). The estimated refunds are thus arbitrary and capricious.

D. The IRS provides insufficient support and explanation for its concessions and refund calculations for 2016 and 2017.

The IRS also provides no explanation for its 2016-2017 fee recalculations despite refunding only a portion of five of the seven PTIN funded departments. *See* ECF No. 270-3 at row 6 (refunding 60% of the Office of the Director); *id.* at row 7 (refunding 60% of strategy and finance); *id.* at row 8 (refunding 48.8% of communications); *id.* at row 9 (refunding 38.1% of VPBRM); *id.* at row 12 (refunding 28% of compliance). Again, the IRS has failed "to explain with

respect to each activity that formed the basis for the PTIN fees how that activity was reasonably related to . . . identifying return preparers [and] protect[ing] them from identify theft." As with the 2010-2015 fees, the IRS cannot merely assert costs are reasonable without articulating any basis for that determination particularly given that many of these departments were performing functions wholly unrelated to PTIN issuance and maintenance. *See Engine Mfrs.*, 20 F. 3d at 1182. Although the 2015 cost model is based on the salaries and benefits of each RPO employee, the IRS has not explained which employees were performing permissible activities, and what portion of their time was spent on those activities. Nor has it explained why it did not perform this analysis.

For example, the IRS proposes refunding only 28% of the Compliance department. But, the Court's opinion explicitly limited the permissible Compliance department activities to "(1) investigating ghost preparers; (2) handling complaints regarding improper use of a PTIN, use of a compromised PTIN, or use of a PTIN obtained through identity theft; and (3) composing the data to refer those specific types of complaints to other IRS business units." *Steele*, 657 F. Supp. 3d at 43. According to the 2015 cost model, "Compliance: UnID [Unidentified] Preparer Detection" accounts for only 34.7% of Compliance department's costs. ECF No. 177-27 at 15. The IRS does not explain its basis for retaining over two-thirds of the costs of the department. "[U]nadorned by any attempt at explanation or justification, the court can have no confidence that the agency determined with reasonable care the sum of its costs that the fees are supposed to recover." *Engine Mfrs.*, 20 F.3d at 1182. The IRS "has not demonstrated that all of the support costs it continues to defend were reasonably related to the provision of a private benefit." *Steele*, 657 F. Supp. 3d at 43. Given that "the agency has failed to provide even [a] minimal level of analysis, its action [on remand] is arbitrary and capricious and so cannot carry the force of law." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).

III. The Accenture portion of the PTIN fee is arbitrary and capricious and must be refunded in its entirety.

A. The IRS's approach and the resulting refund calculation are arbitrary and capricious.

"There are cases where an agency's failure to state its reasoning or to adopt an intelligible decisional standard is so glaring that we can declare with confidence that the agency action was arbitrary and capricious. This is one of them." *Select Specialty Hosp.-Bloomington, Inc. v. Burwell*, 757 F.3d 308, 312 (D.C. Cir. 2014). In its Memorandum Opinion, this Court stated that "[t]he government does not dispute that a significant portion of the [Accenture] fees went to fund activities that had nothing to do with providing or maintaining PTINs." *Steele*, 657 F. Supp. 3d. at 44. Approximately eight months later, the IRS issued a final interim regulation revising the IRS portion of the PTIN fee. 88 Fed. Reg. 68,456. In the preamble, the IRS noted that the vendor portion of the fee was reduced to $8.75 per application—a $5.50 difference when compared to the initial registration fee and a $4.25 difference compared to the initial renewal fee. *Id.* at 68,457. The IRS stated that the revised fee "takes into account certain costs that were addressed by the district court's February 2023 memorandum opinion in Steele" and that "the IRS entered into a modified contract that allows the government to pay those costs rather than the individuals who apply for or renew a PTIN." *Id.* at 68,457-58. This reduction comprised approximately 40% of the initial Accenture fees. Yet, on remand, the IRS determined that only (8.6% ($6,411,971)) of the $74,350,958 in Accenture fees paid by the plaintiffs from 2011 to 2017, ECF No. 176-73 at 2, was for activities other than issuing and maintaining PTINs. ECF No. 258-2 ¶ 60. Furthermore, the IRS acknowledged that it "does not have access to Accenture's exact costs," *id.* ¶ 30, and so calculated the refund amounts by (i) using cherry-picked information from outside the administrative record to justify the $1.25 differential between the initial and renewal fee and the

call center costs; and (ii) arbitrarily counting the number of sentences in the two Accenture contracts that (in the IRS's view) related to activities other than issuing and maintaining PTINs and then comparing those numbers (18 and 14), on a percentage basis, to the majority of the remaining sentences in the contracts. *Id.* ¶¶ 43-46, 55-57.

1. The $1.25 differential

The IRS's explanation of the $1.25 differential between initial registrations and renewals is based solely on a declaration provided by an Accenture employee in December 2021 in response to discovery requests in this litigation—more than ten years after Accenture started collecting the fees. *Id.* ¶ 30; ECF No. 258-5. Based on this declaration, the IRS alleges that the differential [redacted] But subsequent Accenture fees set in 2015, 2020, and 2023, are the same for initial registrations and renewals ($17 in 2015; $14.95 in 2020; $8.75 in 2023), [redacted]

In addition, the information contained in the declaration is not in the Accenture contracts and was not in existence when the fees were established. Under D.C. Circuit law, it should be disregarded. *See, e.g.*, *Rodway v. U.S. Dep't of Agric.*, 514 F.2d 809, 816 (D.C. Cir. 1975) ("Thus we see no reason to depart from the well settled rule that litigation affidavits are an unacceptable basis for appellate review of agency decision-making."). This Court's remand order was clear: "In determining the lawful amount charged and the corresponding refund, the IRS shall use its initial contract with Accenture . . . and the subsequent contract." ECF No. 236 at 2 (emphasis added). Because the IRS relies on a declaration prepared for litigation that is contradicted by the fee history, and because there is nothing in the "initial contract with Accenture" [redacted] the IRS's work must be disregarded.

2. Call center costs

Once again, in attempting to disaggregate costs, the IRS ignores the Accenture contracts themselves and relies entirely on the same December 2021 Accenture declaration, ECF No. 258-2 ¶ 30, and a one-page *ex post* "Phone & Chat" document summarizing the "substantive content of return preparer calls handled by Accenture's Call Center for Fiscal Years 2013-2015." *Id.* ¶ 31. From this, the IRS concludes that (i) [redacted] and (ii) 97.31% of the calls to the call center are for PTIN renewal or registration activities. *Id.* ¶¶ 39-41. This later-generated data was not part of the administrative record or even in existence at the time the 2010 and 2015 Accenture fees were set. Moreover, many of the category descriptors in the Phone & Chat log appear to be of mixed purpose that cannot be disaggregated. *See* ECF No. 258-6 (listing categories including "Account Assist & Change," "General Questions," "Communications" and "Program Requirements"). Finally, the conclusion is unreasonable on its face. It defies common sense to conclude that over 97% of the calls from 2010-2015 were on how to fill out a form to be assigned a number (or how to renew on a prepopulated form) and under 3% were directed to the licensing regime of continuing education, testing, certification, background checks, and the like. This is especially true because the data does not cover the years before the *Loving* decision when testing and CE requirements were in place. It is no surprise then that such cherry-picked data supports the notion that an exceedingly small portion of the calls handled related to requirements invalidated in early 2014. The government does not explain why it chose not to rely on call-center data covering the pre-*Loving* time period of 2010 to 2013.

3. Sentence counting

To determine the costs associated with the non-call center Accenture activities, the IRS concocted a sentencing-counting approach, fabricated for purposes of remand, and contradicted

by Section II of the contracts, [redacted] ECF No. 258-2 ¶¶ 44-46; ECF No. 177-11 at 838 [redacted] Under this novel and unsupported approach to government contracting, each sentence is a CLIN, and all sentence-CLINs cost the same amount. Aside from the facial absurdity of this "sentence-counting" approach, the IRS provides no explanation for its assumptions that each sentence is a CLIN and all sentences cost the same amount. *Id.* ¶ 45.

The IRS also has provided no explanation for its wholesale elimination from the calculation of certain sentences that it has deemed "not unique." ECF No. 271-2. It has not explained how it identified such "not unique" items, or why the exercise is anything other than an attempt to avoid refunding certain items. When an item is classified as "not unique," it is eliminated from the denominator (or total activities performed) used to calculate the percentage of impermissible and thus refundable activities. For example, [redacted]

[redacted]

[redacted]

B. The Accenture fees should be refunded in full.

1. The Accenture fees are arbitrary and capricious.

The IRS's nearly unintelligible and entirely unsupported sentence-counting "methodology" is arbitrary and capricious. *See Select Specialty Hosp.-Bloomington*, 757 F.3d at 313. The IRS therefore has failed to justify any portion of the Accenture fees, and has admitted twice that it cannot do so, ECF No. 257 at ¶ 30; Ex. 1 at Answer 15 ("The basis for Accenture's pricing. . . is exclusively in the possession, custody and control of Accenture."). The only just remedy at this point is to refund the Accenture fees in full. *Nat'l Ass'n of Regul. Util. Comm'rs*, 736 F.3d at 521(vacating fees when "the Secretary is apparently unable to conduct a legally adequate fee assessment"); *Tex Tin*, 992 F.2d at 355-56 (rejecting agency decision on remand because it was based on "unsupported assumptions" and granting plaintiffs' requested relief); *Checkosky v. Sec. & Exch. Comm'n*, 139 F.3d 221, 227 (D.C. Cir. 1998) (determining remand would be futile in light of the agency's "repeated failure to articulate a discernable standard for violations. . . , the extraordinary duration of these proceedings, and the apparent unlikelihood of a clear resolution on remand"); *U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n*, 227 F.3d 450, 461-62 (D.D.C. 2000) (vacating agency action as arbitrary and capricious when agency failed to provide "a rational connection between the facts found and the choice made"); *Am. Pub. Gas Ass'n v. U.S. Dep't of Energy*, 72 F.4th 1324, 1343 (D.D.C. 2023) ("The DOE's failure to comply with our remand order also counsels toward vacatur, since it has yet again come up with insufficient

support."). There is "no useful purpose to be served by allowing the [IRS] another shot at the target," *Greyhound Corp. v. Interstate Com. Comm'n*, 668 F.2d 1354, 1364 (D.C. Cir. 1981), after it has already admitted it "does not have access to Accenture's exact costs" and thus cannot comply with the Court's Order, ECF No. 257 at ¶ 30. Furthermore, "no regulated party should be trapped in a hamster wheel of perpetual administrative process." *Huff v. Vilsack*, 195 F. Supp. 3d 343, 364 (D.D.C. 2016). The Court is statutorily empowered to "compel agency action unlawfully withheld or unreasonably delayed" and plaintiffs have waited long enough for resolution. *See* 5 U.S.C. § 706(1). The vendor portion of the fee should be vacated and refunded in full.

The IRS's wholly inadequate attempts to justify the Accenture fees at this late date highlight the problems posed by the secrecy and lack of information that have plagued the Accenture fees from the outset. "Congress 'expressly requir[ed] in the IOAA that fees be prescribed by regulation.'" *Steele*, 657 F. Supp. 3d at 39 (quoting *New Eng. Power Co. v. U.S. Nuclear Regul. Comm'n*, 683 F.2d 12, 16 (1st Cir. 1982)); *see also* 31 U.S.C. § 9701(b) (authorizing agencies to "prescribe regulations establishing the charge"); *Alyeska Pipeline Serv. Co. v. United States*, 624 F.2d 1005, 1010 (Ct. Cl. 1980) (holding fees passed without a regulation "invalid" as they were "not in accordance with or authorized by the [IOAA]"); Office of Mgmt. & Budget, OMB Circular A-25, User Charges § 7(a) (2017) ("The general policy is that user charges will be instituted through the promulgation of regulations."). Those regulations "should provide an explanation, in intelligible if not plain English, that at a minimum reveals how [the IRS] determined which of its costs are recoverable, the justification(s) underlying its choice of cost allocation methods, and a reasoned basis" for its conclusions. *Engine Mfrs.*, 20 F.3d at 1183. Without "an accurate picture of the reasoning that has led the agency to the proposed [action], interested parties will not be able to comment meaningfully upon the agency's proposals." *Conn.*

Light & Power, 673 F.2d at 530. Thus, an "agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed [action]." *Id.* at 530–31.

2. The Accenture fees are unauthorized.

Not only has the IRS failed to provide any of that information its remand determinations of the Accenture refunds, but it never provided any of the information to begin with. Instead, it expressly *excluded* the Accenture fee from the regulation it published authorizing the IRS portion of the PTIN fee: "These regulations do not include any fees charged by the vendor [Accenture] which vendor fee is now calculated to be $14.25." *User Fees Relating to Enrollment and Preparer Tax Identification Numbers*, 75 Fed. Reg. 60,316, 60,317 (Sept. 30, 2010). Neither the final 2010 rule nor the preamble mentions the $13 renewal fee. The 2015 PTIN-fee regulation contains the identical exclusion. *See* 26 C.F.R. § 300.13T(b) (2016). Although the preamble to both the 2010 and 2015 regulations mention the Accenture fees, a "preamble does not create law; that is what a regulation's text is for." *Tex. Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 237 (D.D.C. 2014); *see also AT&T Corp. v. Fed. Commc'ns Comm'n*, 967 F.3d 840, 847 (D.C. Cir. 2020) (rejecting as "mistaken" the agency position that "explanatory statements, published in the Federal Register, should be treated as part of the binding regulation" because "the real dividing point" is "designation for publication in the Code of Federal Regulations").

Plaintiffs previously challenged the legality of the Accenture fee during summary-judgment briefing. The Court held that the plaintiffs had waived the argument by raising it in a reply brief. *Steele*, 657 F. Supp. 3d at 44. Although it is true that Plaintiffs made this argument in a reply brief, ECF No. 207-4 at 16-17, Plaintiffs also raised this argument in opposition to the IRS's motion for summary judgment, ECF No. 185 at 19-20, and the IRS fully responded to the argument in its reply brief, ECF No. 203 at 18-21. Thus, the issue was properly raised and not waived. Nonetheless, as set forth above, because the IRS's action on remand is a new agency

action, the Court is now empowered—and indeed required—to decide this issue. Given that the legality of the IRS's work on remand is a new agency action subject to *de novo* review for errors of law, plaintiffs' challenge to the Accenture fee is properly raised now. *See, e.g.*, *Air Transp. Ass'n of Canada v. Fed. Aviation Admin.*, 323 F.3d 1093, 1094 (D.C. Cir. 2003) (recognizing the APA applies to new agency action post remand); *Plunkett*, 67 F. Supp. 3d at 12 (evaluating under arbitrary and capricious standard on summary judgment "determinations on remand which constitute 'final agency action'"). Moreover, as it did before, the government will have a full opportunity to brief it. *See United States ex rel. Hockett v. Columbia/HCA Healthcare Corp.*, 498 F. Supp. 2d 25, 35 (D.D.C. 2007). As the IRS continues to this day to permit Accenture to charge a portion of the PTIN user fee without an authorizing regulation, the issue should be resolved now.

The Accenture fee was *ultra vires* from the start, and because all information regarding specific costs are in the exclusive possession of a third party, not even the IRS's sentence-counting approach can rescue the fee—even on an impermissible post-hoc basis. As a result, the Accenture fees should be refunded in their entirety, and the IRS should be enjoined from continuing to charge vendor fees without proper regulatory authorization. *See Alyeska Pipeline*, 624 F.2d at 1010; *Nat'l Ass'n of Regul. Util. Comm'rs*, 736 F.3d at 520-21.

IV. The Court should refund the PTIN fees in full, or, in the alternative, should refund the Accenture fees in full and remand only the IRS portion of the fees for further consideration.

Nearly ten years have passed since the filing of this case. The IRS has lowered the fee three times as a result of developments in this litigation. It has made concessions throughout this litigation on three separate occasions. *See* ECF No. 173-22 at 1 (Stipulation Regarding Remittance of Certain Identified Funds for the 2014 and 2015 Fiscal Years conceding $17,747,58); ECF No. 173-23 at 1 (Stipulation Regarding Remittance of Certain Identified Funds for the 2016 and

2017 Fiscal Years conceding $13,689,106); ECF No. 203-1 at 3 (Second Declaration of Carol A. Campbell conceding $78,885,328). And still it refuses to justify its retention of $138,144,760 in PTIN fees collected since 2010 to issue and maintain permanent 9-digit identification numbers with anything more than unsupported assumptions and bare conclusions.

Because the IRS has defied this Court's order (for a second time) and failed to adequately justify its purportedly "permissible" costs covered by the PTIN fees, its actions in setting the fees and in estimating the refunds are arbitrary and capricious. The Court gave the IRS the opportunity provide the information that would be needed to uphold some portion of the fees that it collected under the D.C. Circuit's user-fee precedents, and it utterly failed to do so. As such, the IRS's actions setting the fees should be vacated under the APA and the fees should be refunded in full. *See, e.g.*, *Tex Tin*, 992 F.2d at 356; *Resolute Forest Prods.*, 187 F. Supp. 3d at 123. That is the "normal remedy" for unlawful agency action, *Eagle Cnty., Colo. v. Surface Transp. Bd.*, 82 F.4th 1152, 1196 (D.C. Cir. 2023), and the Court has ample discretion to provide it here. The Court need not give the IRS "a second bite of the apple just because it made a poor decision," or else "administrative law would be a never ending loop from which aggrieved parties would never receive justice." *McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin.*, 895 F. Supp. 316, 319 (D.D.C. 1995) (Lamberth, J.).

Should the Court decide instead to grant another remand—giving the agency a third chance to comply with the law—that remand should be limited in scope and duration. As to the scope: There is no point in including the Accenture portion of the fee in any remand. The government has conceded on two separate occasions, most recently on remand, ECF No. 258-2 ¶ 30, that it does not have the data it needs to determine how much of the Accenture fees relate to "issuing and maintaining a database of PTINs," *Montrois*, 916 F.3d at 1058. Further remand on the question of

how much of the Accenture fee "went to support the provision of PTINs and maintenance of the PTIN database," *Steele*, 657 F. Supp. 3d at 43, would be to demand the impossible, and thus would be entirely futile. The only appropriate remedy for plaintiffs' challenge to the Accenture fees is vacatur and a full refund.

So even assuming that any of this action were properly remanded to the agency at this juncture, the only part that should be remanded is the question of how much of the remaining IRS fees supported the "provision of PTINs and maintenance of the PTIN database." *Steele*, 657 F. Supp. 3d at 43. As to the duration: Should the Court order any remand, after nearly ten years of litigation and giving the IRS many bites at the apple, the Court should order the remand to be completed within 60 days of its order.[4] S*ee Nw. Forest Workers Ass'n v. Lyng*, No. Civ. A. 87-1487, 1988 WL 268171, at *1 (D.D.C. June 29, 1988) (recognizing "a remanding court possesses broad equitable powers" and may "establish[] time limits by which an agency must act" and setting six-month deadline); *Anglers Conservation Network v. Ross*, 387 F. Supp. 3d 87, 91 (D.D.C. 2019) (issuing several directives, including several interim deadlines); *Defs. of Wildlife*, 2006 WL 2844232, at *13 ("[T]he Court expects and hopes that FWS can accomplish its task within 90 days.").

V. Alternatively, if the Court determines that it is appropriate to use Co-Counsel Buckley's methodology employing actual, as-incurred (i.e., historical) cost data and IRS projected costs to the extent actual costs aren't available for the Fiscal Years 2011-2017, restitution to the Class would be $278,506,301.

As set forth above, class counsel believes that the proper manner in which to analyze the IRS's work on remand would be to follow traditional APA principles limiting the Court's review

[4] Notably, it took the IRS a year to come up with revised PTIN fee calculations on remand, but only eight months to promulgate an interim final regulation reducing the fees (but still excluding the vendor fees) following the Court's Summary Judgment Opinion.

to the extant administrative record—the 2011 and 2015 cost models and the two Accenture contracts. Plaintiffs' co-counsel, Attorney Allen Buckley, believes that under the unique circumstances of this case—retrospectively setting a user fee and the availability of material produced in discovery regarding actual costs—the Court should also utilize information produced in discovery, including the actual costs and IRS projected costs (to the extent actual costs don't exist in the record) in issuing and renewing PTINs and maintaining a PTIN database during Fiscal Years 2011-17. He believes that it is not possible to reasonably estimate the costs of issuing PTINs and maintaining a PTIN database without using information outside the administrative record and, further, this approach is not inconsistent with the remand in *Montrois* and this Court's Memorandum Opinion. Specifically, Attorney Buckley believes that because neither *Montrois* nor this Court foreclosed the use of information obtained in discovery (including actual cost and IRS projected cost data), the Court should analyze the cost models and the Accenture contracts in conjunction with the information developed in discovery concerning the IRS's and Accenture's costs. Should the Court agree that such actual and IRS-projected cost data approach is an appropriate approach, Attorney Buckley (a CPA) has undertaken that analysis and it is set forth in the attached Exhibit 2. The attached exhibit (filed under seal) combines three documents: (1) a 20-page memo analyzing the costs of issuing and renewing PTINs and maintaining a PTINs database; (2) a 10-page memo analyzing the ghosts, etc. costs specified in the second bullet point of page 1 of the Court's order of January 24, 2033; and (3) a 6-page EXCEL document providing the results of applying the two memos' conclusions (with Part A covering PTINs costs and Part B covering ghosts, etc. costs). ECF No. 267-3 supplies a one-page summary of how the PTINs issuance and

renewals costs were calculated. Attorney Buckley's analysis produced average annual total PTIN costs of approximately $5 per PTIN.[5]

CONCLUSION

The IRS established the PTIN fee in 2010 to fund an expansive regulatory regime and office of over 100 people. Over fourteen years, three revised fees, and three separate sets of concessions later, the IRS has determined that 54.8% of the fees collected between 2011 and 2017 should be refunded to tax-return preparers. Despite guidance from this Court and the D.C. Circuit, the IRS still cannot articulate—as it must—how the remaining 45.2% of fees it continues to retain "reasonably relate[s] to providing the private benefit that the Circuit identified in *Montrois*: a means of identifying return preparers that protects them from identity theft."

Because the IRS has repeatedly failed to "show its work" and "disaggregate with respect to each charged-for activity the cost of providing the service to private beneficiaries from the cost of doing work that benefits the agency and the general public," the PTIN fees are arbitrary and capricious. They should be set aside and refunded in their entirety. The Accenture fees should be refunded in full for the additional reason that they were charged without statutory or regulatory authorization and were thus *ultra vires*. Should the Court decide that a remand is the appropriate remedy, it should not include the Accenture fees, and should require that the remand be completed within sixty days from the entry of the remand order.

[5] In its Order of April 20, 2020, the Court stated its desire "that all counsel for plaintiffs work cooperatively in the best interests of their clients." ECF No. 126 at 1. It is in this spirit that class counsel consents to the inclusion of this section of the brief. This section was authored by Attorney Buckley without input from class counsel.

Dated: April 5, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2024, I electronically filed Plaintiffs' Motion to Vacate Challenged Agency Action or, in the Alternative, for a Schedule to Enforce the Court's Summary Judgment Order [ECF No. 222] 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.

/s/ William H. Narwold
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