

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 24-5076

ADAM STEELE and

KRYSTAL COMER

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA

Defendant-Appellee

On Appeal from the United States District Court

for the District of Columbia

OPENING BRIEF OF

PLAINTIFFS-APPELLANTS ADAM STEELE AND KRYSTAL COMER

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to the Court's order of March 14, 2024, and D.C. Circuit Rule 28(a)(1), Petitioners Adam Steele and Krystal Comer in Case No. 24-5076 hereby submit this certificate as to parties, rulings, and related cases.

The Parties are Adam Steele and Krystal Comer, plaintiffs at the district court and petitioners and appellants in this court, and the United States of America, defendant at the district court and respondent and appellee in this court. Petitioners are not aware of any intervenors or *amici*.

There is one ruling under review. It is the district court's order and related memorandum dated March 14, 2024. The memorandum opinion is Document 24 in Case No. 1:23-cv-00918-RCL. The order is Document 23.

This case has not previously been before this court. A related case is *Steele v. U.S.*, 1:14-cv-1523-RCL. This Court issued a ruling of an appeal in that case in 2019. The citation is *Montrois v. United States*, 916 F. 3d 1013 (D.C. Cir. 2019).

The only law firm that participated in the district court's proceedings is Allen Buckley LLC.

Concerning Circuit Rule 26.1, there are no corporations, associations, joint ventures, partnerships, syndicates, or other similar entities involved in this matter.

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GLOSSARY

Code..... The Internal Revenue Code, 26 U.S.C.

CPAcertified public accountant

DOJU.S. Department of Justice

FRCP Federal Rules of Civil Procedure

I or me (or my) Allen Buckley

IRS Internal Revenue Service

PTIN preparer tax identification number

RPOThe IRS Return Preparer Office

RTRPregistered tax return preparer

SSN Social Security number

STATEMENT OF JURISDICTION

The U.S. District Court had subject matter jurisdiction pursuant to 28 U.S.C. §1331, 5 U.S.C. §§702 and 706. This Court has jurisdiction over this direct appeal from the final judgment of the District Court pursuant to 28 U.S.C. §1291. An appeal from the District Court's grant of the Defendant's motion to dismiss on March 14, 2024 was timely filed on April 4, 2024. This appeal is from that dismissal that disposed of all parties' claims.

STATEMENT OF THE ISSUE

Whether the District Court erred by granting the Defendant's motion to dismiss the case under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

In 2023, Adam Steele filed suit against the United States to stop the Internal Revenue Service (IRS) from performing certain licensing activities. Later in 2023, Krystal Comer became a plaintiff, seeking the same relief. The original complaint was amended to add Ms. Comer. The Defendant filed a motion to dismiss under Rule 12(b)(6) of the Fed. R. Civ. Proc. (FRCP). On March 14, 2024, the district court granted the Defendant's requested relief and dismissed the case with prejudice.

Legal Matters Facts Overview. This case relates to an unlawful licensing system created by the IRS. The system was unlawful from inception because Congress never authorized it. Numerous attempts had been made to enact it. *See* S. 802, *Low Income Taxpayer Protection Act of 2001*, 107th Cong. §2 (2001); H.R. 1528 (incorporating S. 882), *Tax Administration Good Government Act*, 108th Cong. §141 (2004); S. 1321 (incorporating S. 832), *Telephone Excise Tax Repeal Act of 2005*, 109th Cong. §203 (2005); S. 1219, *Taxpayer Protection and Assistance Act of 2007*, 110th Cong. §4 (2007); H.R. 5716, *Taxpayer Bill of Rights Act of 2008*, 110th Cong. §4 (2008). The IRS knew the licensing system was not permitted by statutory law when it created it.¹

¹ IRS Publication 4832, p. 25. IRS Publication 4832 is the “master plan” document created by the IRS during 2010 to advocate for a licensing system even though

The IRS used three statutes to create its licensing system: 31 U.S.C. §330, 26 U.S.C. §6109 and 31 U.S.C. §9701. The backbone was 31 U.S.C. §330. Having given up on changing the law, it interpreted 31 U.S.C. §330's 1880s (pre-income tax) provisions that permitted "regulat[ing] the practice of representatives of persons before the Department of the Treasury" to include regulating return preparation. But *Loving v. Internal Revenue Service*, 742 F.2d 1013, 1015 (D.C. Cir. 2014), ruled "Section 330 cannot be stretched so broadly as to encompass authority to regulate tax-return preparers." The other two statutory provisions, 26 U.S.C. (Code) §6109 and 31 U.S.C. §9701, were complimentary. Code §6109 is an identification requirement and 31 U.S.C. §9701 allows user fees to be charged. Once *Loving* was published, that should have been the end of it. It hasn't been.

Code §6109 provides in pertinent part (subsection (a)(4)): "Any return or claim for refund prepared by a tax return preparer shall bear such identifying number for securing proper identification of such preparer, his employer, or both, as may be prescribed." Related Code §6109(c) permits the IRS to "require such information as may be necessary to assign an identifying number." These provisions do not provide licensing powers or permit the IRS to require annual information filings of return preparers. Under our limited system of government,

Congress had specifically rejected such attempts numerous times. (*See* Exh. 10, App. p. 210)

whatever isn't prohibited is permitted. *Thorne v. Jones*, 765 F. 2d 1270, 1274, (5th Cir. 1985). The corollary is agencies cannot restrict freedom absent Congressional authorization to do so. Thus, the IRS cannot lawfully require annual licensing-type filings of return preparers. *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) (“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”); *Sackett v. EPA*, 598 U.S. ___ (2023); *Southwest Airlines v. Saxon*, 596 U.S. ___ (2022); *West Virginia v. EPA*, 597 U.S. ___ (2022).

Plaintiffs’ complaint seeks to prevent the IRS from continuing to require “renewals” of preparer tax identification numbers (PTINs—permanent identification numbers) or, in the alternative, asking questions beyond those necessary to issue PTINs. On the merits, Plaintiffs should win.

Detailed Pertinent Facts

In 2009, the IRS created Publication 4832, titled “Return Preparer Review.” It proposed a licensing system for return preparers, with the IRS in charge of licensing. In 2010 and 2011, the IRS issued regulations implementing the Publication 4832 system. Legally, the IRS mainly relied on 31 U.S.C. §330, an 1880s statute created to protect the public from unscrupulous representatives handling matters for them before the Treasury Department. Secondarily, the IRS relied on Code §6109, an identification requirement. Specifically, Pub. 4832

recommended Code §6109 be interpreted as requiring registration every three years and 31 U.S.C. §330's language concerning representation before the agency to be interpreted to include return preparation. (Exh. 10, App. p. 218)

In 2010, regulations relating to fees and PTINs were issued. The PTIN regulations were issued under Code §6109. The heart of the licensing system, issued as regulations under 31 U.S.C. §330, did not become final until 2011. Both sets provided in their regulations' preambles that they were issued to implement recommendations made in Publication 4832. The same was true of the related user fee regulations, first effective in 2010.²

No new law was enacted to permit licensing of return preparers. Numerous failed statutory attempts to license return preparers existed over the years preceding the new regulatory regime. Publication 4832 concluded that no law change was necessary. (Exh. 10, App. p. 210). Footnote 71 of Publication 4832 noted many of the failed legislative attempts to grant the IRS licensing power. At p. 33 (App. p. 218), the Publication provided: "The IRS believes that increased oversight of paid tax-return preparers does not require additional legislation." The IRS would require registration under Code §6109 and interpret 31 U.S.C. §330 as

² See *Furnishing Identifying Numbers of Tax-return Preparers*, 75 Fed. Reg. 14539, 14540 (March 26, 2010); 75 Fed. Reg. 60309 (Sept. 30, 2010); *Regulations Governing Practice Before the Internal Revenue Service*, 75 Fed. Reg. 51713, 51714 (Aug. 23, 2010); 76 Fed. Reg. 32286, 32286-32287 (June 3, 2011); *User Fees Relating to Enrollment and Preparer Tax Identification Numbers*, 75 Fed. Reg. 43110, 43112 (July 23, 2010); 75 Fed. Reg. 60316, 60318 (Sept. 30, 2010).

supplying it with licensing authority by deeming return preparation to be a form of representation before the IRS.

The new licensing scheme went significantly into effect in 2010 and 2011 through regulations issued in those years. Prior thereto, since 1998, a PTIN was an optional identification number a return preparer could use on a return prepared for compensation instead of using his or her social security number (SSN). In 1976, Congress enacted Code §6109(a)(4) to “to enable the IRS to identify all returns prepared by a specific individual in cases where the IRS has discovered some returns improperly prepared by that individual.”³ It required a compensated return preparer to include his SSN on the return.

In 1998, after identify theft became a concern, Congress amended the law to permit an alternative identification number (i.e., a PTIN) to be used in lieu of a preparer’s SSN. Code §6109(c) authorizes the U.S. Treasury Department to “require [of a return preparer] such information as may be necessary to assign an identifying number to any person.”

The *sole rationale* given in legislative history for creation of PTINs was protection of SSNs. The Senate Finance Committee Report provides in the *Reasons for Change* section: “The Committee is concerned that inappropriate use

³ H.R. Rep. No. 94-658, at 274-282 (1975), reprinted in U.S.C.C.A.N. 2897, 3170-3173. *See also* S. Rep. No. 94-938-PART I at 349-356 (1976), reprinted in U.S.C.C.A.N. 3439, at 3778-3784.

might be made of a preparer's social security number." Sen. Rept. 105-174 (April 22, 1998). The House Bill had no provision. The *Senate Amendment* read: "The Senate amendment authorizes the IRS to approve alternatives to social security numbers to identify tax return preparers." The Conference Agreement followed the Senate amendment. H.R. Rept. No. 105-599 (1998).

Prior to the licensing system, one filing was made to acquire a PTIN, on Form W-7P. The form varied little over the years of its existence. It asked only a few identification questions. The August 1999 version of Form W-7P is Exh. 11, App. p. 240.

Starting in 2010, the new licensing scheme envisioned by Publication 4832 was installed via three sets of related regulations. The core component, issued under 31 U.S.C. § 330 and finalized in June 2011, imposed eligibility requirements on preparers, including competency testing and continuing education. *See Regulation Governing Practice Before the Internal Revenue Service*, 76 Fed. Reg. 32,286 (June 3, 2011); 31 C.F.R. §§ 10.4(c), 10.5(b), 10.6(d)(6), (e)(3). As authority, the IRS invoked a 125-year-old statute that it had "never interpreted . . . to give it the authority to regulate tax-return preparers." *Loving v. IRS*, 742 F.3d 1013, 1021 (D.C. Cir. 2014) (discussing 31 U.S.C. § 330(a)(1)).

The other two regulations were complementary. Together, they would require tax-return preparers to obtain and pay for a PTIN to identify themselves on

returns, while making the new eligibility requirements part of the PTIN application process. PTINs (permanent ID numbers) would need to be annually renewed. Substantively, a PTIN became a license.

With one major exception, the combined regulatory package heavily followed the Publication 4832's recommendations. The major exception was that instead of PTIN being renewed and fees being charged for renewal every three years, renewal and related fee charges would apply annually. The reason for this change is the original cost estimate for the fees under the June 2011 31 U.S.C. § 330 final regulations came in over \$100,000,000, thus necessitating Congressional approval. 5 U.S.C. §§ 801, 804. Rather than go to Congress, the IRS changed the fee renewal period to annual, thus getting the fees under the \$100,000,000 threshold. (Split in thirds, the annual total was \$59,427,633.)

The IRS explained that the reason it changed its longstanding policy was “to address two overarching objectives.” *Furnishing Identifying Number of Tax-return Preparer*, 75 Fed. Reg. 60,309, 60,310 (Sept. 30, 2010). The first objective was “to provide some assurance to taxpayers that a tax-return was prepared by an individual who has passed a minimum competency examination to practice before the IRS as a tax-return preparer, has undergone certain suitability checks, and is subject to enforceable rules of practice.” *Id.* The second objective was “to further the interests of tax administration by improving the accuracy of tax-returns and

claims for refund and by increasing overall tax compliance.” *Id.*; *see also* *Furnishing Identifying Number of Tax-return Preparer*, 75 Fed. Reg. 14,529, 14,540 (Mar. 26, 2010) (“[The PTIN requirement] will increase tax compliance and allow taxpayers to be confident that the tax-return preparers to whom they turn for assistance are knowledgeable, skilled, and ethical.”).

According to the IRS, the regulations under 31 U.S.C. §330 and Code §6109 would help achieve these twin goals by using the PTIN as an occupational license—a way “to administer requirements intended to ensure that tax-return preparers are competent, trained, and conform to rules of practice,” and thus “to aid the IRS’s oversight of tax-return preparers.” 75 Fed. Reg. at 60,313. Unlike in the past, when anyone could obtain a PTIN or use their SSN, the agency would now create a host of “qualifications [and] other requirements necessary to obtain a valid number,” and these requirements would be imposed “[a]s part of the process of applying for a PTIN.” 75 Fed. Reg. at 14,541–42. The IRS laid out how it envisioned this new licensing scheme would work: “Under the final regulations and the additional guidance described, the IRS will establish a process intended to assign PTINs only to qualified, competent, and ethical tax-return preparers. The testing requirements [imposed by parallel regulations] will establish a benchmark of minimum competency necessary for tax-return preparers to obtain their professional credentials, while the purpose of the continuing education provisions

is to require tax-return preparers to remain current on the Federal tax laws and continue to develop their tax knowledge.” 75 Fed. Reg. 60314–15.

The 31 U.S.C. §330 regulations limited those eligible to prepare returns for compensation to attorneys, CPAs, enrolled agents (a relatively small group) and “registered tax return preparers” (RTRPs). To become an RTRP, one would have to pay for and pass the IRS’s exam and annually pay for and take IRS-approved continuing education (CE) courses. Only these four groups of persons could acquire a PTIN, with a PTIN “conferring the right to prepare returns for compensation.” *Regulations Governing Practice Before the Internal Revenue Service*, 76 Fed. Reg. 32286, 32228 (“preparation of a tax return is practice before the IRS”), 32201 (June 3, 2011) The preamble to the 2010 final PTIN regulations provides: “Having a PTIN is a special benefit that allows specified tax return preparers to prepare all or substantially all of a tax return or claim for refund for compensation.” *Furnishing Identifying Numbers of Tax-return Preparers*, 75 Fed. Reg. 60309, 60312⁴, 60317 (Sept. 30, 2010). (With this licensing power, fees could be charged.) Both of these regulations’ preambles cited IRS Publication 4832.

The first complementary regulations were issued under Code §6109. In pertinent part, Code § 6109(a)(4) provides:

⁴ “[T]o obtain a PTIN or other prescribed identifying number, a tax return preparer must be an attorney, certified public accountant, enrolled agent, or registered tax return preparer authorized to practice under 31 U.S.C. 330 and Circular 230.”

Any return or claim for refund prepared by a tax-return preparer shall bear such identifying number for securing proper identification of such preparer, his employer, or both, as may be prescribed.

Consistent with a licensing system but inconsistent with this statute, the 2010 final PTIN regulations, 26 C.F.R. §1.6109-2(e), provided for a *potential* expiration date for PTINs, including a December 31, 2010 expiration for existing PTINs:

The Internal Revenue Service may designate an expiration date for any preparer tax identification number or other prescribed identifying number and may further prescribe the time and manner for renewing a preparer tax identification number or other prescribed identifying number, including the payment of a user fee, as set forth in forms, instructions, or other appropriate guidance. The Internal Revenue Service may provide that any identifying number issued by the Internal Revenue Service prior to the effective date of this regulation will expire on December 31, 2010, unless properly renewed as set forth in forms, instructions, or other appropriate guidance, including these regulations.

Most return preparers had a (permanent) PTIN in 2010.

The second complimentary regulation established the requirement that preparers pay a fee to obtain and renew their PTINs. 26 C.F.R. § 300.13. These fees were originally set at \$64.25 to obtain a PTIN, and \$63 to renew it. *Id.* This policy, too, was a sharp departure from what the IRS had done in the past. Since creating PTINs in 1998, the IRS had issued them “without charging a user fee.” 75 Fed. Reg. at 43,111. But now, “[t]he PTIN application, issuance, and renewal process” were set to “become significantly more expansive and intricate with the implementation of the registered tax-return preparer program.” *Id.* Processing these applications would entail far more work than before: “Federal tax compliance

checks [would] be performed on all individuals who apply for or renew a PTIN. Suitability checks [would] be performed. The IRS [would] further investigate individuals when the compliance or suitability check suggests that the individual may be unfit to practice before the IRS. These checks were not previously performed as a prerequisite to obtaining a PTIN,” and they would “significantly increase the intricacy of the application process.” *Id.* at 43,111, 43,113. The IRS then treated PTINs as licenses and refused to issue them to certain people it deemed unqualified to prepare returns.⁵

Several lawsuits attacked the licensing system. The first case, brought in 2011, was *Brannen v. United States*, 682 F.3d 1316 (11th Cir. 2012). It attacked the fees. In 2012, *Loving v. Internal Revenue Service*, 917 F. Supp. 2d 67 (D.D.C. 2013), *aff'd* 742 F.3d 1013 (D.C. Cir. 2014), was filed, attacking the licensing system with respect to three “uncredentialed” tax-return preparers. (Uncredentialed return preparers were those who were not attorneys, CPAs or enrolled agents.) The *Loving* case was successful in striking down the licensing scheme with respect to the uncredentialed return preparers. A second fee challenge, *Buckley v. United States*, 2013 WL 7121182 (N.D. Ga. Dec. 4, 2013) was filed while *Loving* was pending. *Brannen* was decided under Rule 12(b)(6) of the FRCP, with the Eleventh Circuit finding Code §6109 grants licensing power. *Buckley*’s result was consistent

⁵ See IRS Newsletter Issue Number IR-2011-47 and IRS Notice 2011-6.

with the *Brannen* precedent, although *Buckley* was withdrawn on appeal after the *Steele* class action (described below) was filed. None of these cases challenged the requirement that a PTIN be acquired by a return preparer.

In 2014, affirming the 2013 decision of the D.C. District Court, the D.C. Court of Appeals struck down the licensing regime as a “vast expansion” of the IRS’s authority, i.e., unauthorized by Congress. *Loving v. IRS*, 742 F.3d 1014, 1022 (D.C. Cir. 2014). The court held that the backbone of the licensing regime, 31 U.S.C. § 330, which permits the IRS to “regulate the practice of representatives of persons before the Department of 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 lawfully impose *any* eligibility requirements on preparers—thus reinstating the traditional rule that anyone may prepare tax-returns for compensation.

“If we were to accept the IRS’s interpretation of Section 330,” the D.C. Circuit reasoned, “the IRS would be empowered for the first time to regulate hundreds of thousands of individuals in the multi-billion-dollar tax-preparation industry. Yet nothing in the statute’s text or the legislative record contemplates that vast expansion of the IRS’s authority.” *Id.* at 1021. And, for more than a century “the IRS never interpreted the statute to give it authority to regulate tax-return preparers. Nor did the IRS ever suggest that it possessed this authority.” *Id.* To the

contrary, as recently as 2005, “the National Taxpayer Advocate—the government official who acts as a kind of IRS ombudsperson—stated to Congress that ‘the IRS currently has no authority to license preparers or require basic knowledge about how to prepare returns.’” *Id.* The D.C. Circuit agreed. Finding that “[t]he IRS may not unilaterally expand its authority through such an expansive, atextual, and ahistorical reading of Section 330,” the D.C. Circuit affirmed the district court’s judgment “permanently enjoin[ing] the tax-return preparer regulations.” *Id.* at 1016, 1022.

While successful, the *Loving* decision did not state whether PTIN *renewal* could continue. Rather, it simply struck down the section 330 regulations.⁶ So, with 31 U.S.C. §330 and its regulations nixed from the scheme, the licensing scheme was left with only Code §6109—a simple identification requirement. One would think the IRS would simply then drop the scheme. It didn’t. It continued doing virtually all it had been doing except it replaced mandatory testing with a voluntary testing program. It has kept its “Return Preparer Office” (RPO) intact. *See* IRM 1.1.28, Organization and Staffing, Return Preparer Office (May 21, 2021). In response to *Loving*, in 2015, the IRS reduced PTIN renewal fees by a mere 20.6 percent. *Preparer Tax Identification Number (PTIN) User Fee Update*, 80 Fed. Reg. 66792, 66794 (Oct. 30, 2015).

⁶*Loving* could have gone further and ruled all aspects of the licensing scheme unlawful. While it didn’t, it voided the backbone of the licensing scheme.

The *Loving* decision made clear a PTIN is not a license. Expiration of PTINs was not consistent with the terms of the remaining statute (Code §6109). The *Loving* panel apparently assumed the IRS would act in good faith when interpreting and applying the ruling. The IRS has not done so. Rather, it has interpreted the case in the narrowest way conceivable, and in a manner that is inconsistent with the spirit of *Loving*. To this day, the regulations issued under Code §6109(a)(4) continue to include the provision about RTRPs (although the IRS has dropped the term) and expiration of PTINs. Each year, the IRS has continued requiring PTIN renewal filings and asking licensing questions of return preparers on Form W-12. (Exh. 9 has all versions of Form W-12.)

As the district court correctly noted in its March 14, 2024 memorandum, what has transpired in *Steele v. United States* (Case No. 1:14-cv-01523-RCL—the class action) (hereafter the “*Steele I*”) is pertinent to analysis of this case.

Soon after *Loving* became final, in September 2014, the *Steele I* class action was brought challenging fees and the remainder of the licensing system not specifically shut down by *Loving*.⁷ The district court has handled all of *Steele I* except for the appeal of the defendant to this Court in 2017. The requirement that a

⁷ I was retained by Adam Steele, CPA to file suit in February 2014. To be conservative, I recommended he file a refund claim to see if the IRS would drop the licensing effort and return his money. The IRS did not respond within the statutory six-month period under Code §7422; suit was filed in September 2014.

PTIN be obtained was not challenged in *Steele I*.⁸ I was a primary drafter of the *Steele I* complaint.

In December 2014, shortly before a group of law firms including class action law firms attempted to take control of the case via filing of a separate lawsuit and consolidating the two cases, I contracted with Motley Rice LLC to serve as co-counsel in the litigation—with *joint control* over all major matters. Motley Rice had significant class action litigation experience, and it could fund the litigation. Practically, to be able to continue to represent the plaintiffs in light of the competition (that included two major class action law firms), under FRCP 23, a class action firm very likely had to be added as co-counsel.

While the competition was ongoing, Motley Rice placed language in a document to be filed with the district court naming it as sole class counsel (inconsistent with our signed written agreement). I emailed Motley Rice and inquired if nothing would change in our legal relationship if I let Motley Rice have such a named titled with the court. I was strongly assured via email that would be

⁸ Likewise, the PTIN requirement was never challenged in *Brannen* or *Buckley*. In this regard, while *Loving* was pending, I wrote had published in *Tax Notes* the article attached as Exh. 13. It states at the end (App. p. 256): “[W]ith the PTIN acquisition requirement exception, the scheme is unlawful.” Based on the U.S. Code and Supreme Court precedents, I believe that’s (still) the law.

the case. The email exchange is enclosed as Addendum 1. Thereafter, Motley Rice has continuously attempted to control the litigation.⁹

In June 2015, after roughly six months of competition, the district court chose “the Motley Rice Group” to handle *Steele I*. The district court found both groups to be qualified. My past experience was the deciding factor.¹⁰

The original complaint in *Steele I* sought the comprehensive relief noted above. Prayer relief requests 2 and 12, if ruled upon as requested, would have stopped PTIN renewals or, in the alternative, stopped excessive questioning with respect to renewals.¹¹ After joining the action, Motley Rice said it wished to amend

⁹ It has attempted to do so even though the class representatives hired only Allen Buckley LLC to represent them. My firm’s engagement letter permits me to bring in other firms to help out. Never did I let Motley Rice have control of the case. And, as evidenced by Addendums 2-5, the two original class representatives want me (the lawyer they hired) making the major decisions.

¹⁰ At p. 8 of ECF 37 in *Steele I*, the court said: “While three of the four factors set forth in Rule 23(g)(1)(A) would support either group of attorneys, the Court finds that due to Mr. Buckley’s extensive work laying the groundwork that made this case possible, his group is the most qualified to further the interests of all putative class members. Mr. Buckley has conducted thorough and extensive pre-filing investigation and testing of potential claims and initiated legal action months in advance of the other applicants. Consideration of ‘work counsel has done in identifying or investigating potential claims in the action’ leads the Court to determine that the Motley Rice Group is better suited to represent the putative class. *See Fed. R. Civ. P. 23(g)(1)(A)(i).*”

¹¹ Original complaint prayer relief count 2 sought: A declaratory judgment by the Court that Treasury is without statutory authority to charge user fees for renewal of a PTIN, and that all renewal requirements should cease. Prayer relief count 12 sought: An injunction prohibiting Treasury from asking more information than is

and shorten the (33-page) complaint. However, at no time did it say it wished to reduce the relief sought.

In late July 2015, a Motley Rice attorney circulated a proposed amended complaint. It excluded much of the relief sought in the original complaint. The draft mainly attacked fees.¹² I sent four sets of comments on the initial draft and subsequent drafts, requesting the anti-renewal and excessive questioning provisions be included. When the requested changes weren't made, with the third set of comments, similar to the two preceding sets, a relief prayer calling for "[a] judgment declaring that tax return preparers need only apply for a PTIN once, and that the PTIN application will require no more information than that necessary for Treasury to issue a PTIN" was requested. Next to the comment, I wrote: "discussed with Bill N [Motley Rice attorney Bill Narwold] when we renegotiated our agreement awhile back." (Our agreement had been renegotiated earlier in July.) When the change wasn't made, my fourth set of comments requested similar relief prayer language, with the following note: "I need to discuss with Bill if you won't add." Instead of holding a call, Motley Rice added only an excess information

necessary to issue a PTIN, and requiring Treasury to ask for such necessary information only once. *See* Exh. 5, App. pp. 92-94.

¹² The parallel case that tried to take over the case was *Dickson v. United States*, 1:14-cv-02221-RCL. It challenged only fees in its prayer for relief.

relief prayer, and filed the amended complaint.¹³ The right to amend was gone.¹⁴ Afterward, I questioned Bill Narwold of Motley Rice regarding the matter. He said he thought renewals would cease if fees ceased.

In 2019, in *Montrois v. United States*, 916 F. 3d 1056 (D.C. Cir. 2019), this Court ruled user fees could be charged with respect to issuance and renewal of PTINs. This Court did not consider whether renewals were lawful. It said the district had ruled such were lawful. However, in its March 14, 2024 memorandum, the district court stated it did not so rule. (Exh. 2, App. pp. 19-22) *Montrois* also stated (at p. 1063): “[T]he agency’s PTIN-related services are now confined to generating and maintaining a database of PTINs.” But just as it did post-*Loving*,

¹³ On July 17, 2015, in *Steele I*, Judge Lamberth ordered an amended complaint to be submitted no later than August 7, 2015. (ECF 40.) The 2015 amended complaint included the following relief prayer (number 5) regarding information requested: “A judgment declaring that the IRS may only request information from tax return preparers that is authorized by statute.” (Exh. 6, App. p. 110)

¹⁴ As counsel who brought this action in 2014, what were my options at that point? I was not a seasoned litigator. (I mainly do tax, employee benefits and estate planning work.) Only I was retained by the class representatives to file suit. Under the D.C. and Georgia ethics rules, I had (and have) an ethical obligation to serve my clients to the best of my ability. The district court has expressed displeasure with supplemental filings I have made (which I wish I did not feel I had to make), and even rejected a motion I made in 2022 and a brief I filed in 2024 because they were not approved by Motley Rice. I have hired an attorney, who I must pay substantially, to attempt to wrestle back joint control without court involvement. My first supplemental filing came at the D.C. Court of Appeals in 2018 after my co-counsel largely shut me out of the brief being prepared. The brief I filed, explaining why *Brannen* was wrongly decided, is attached as Exh. 12.

the IRS has continued its RPO and continued doing virtually all of its licensing activities post-*Montrois*. IRM 1.1.28 (May 21, 2021)

In early 2020, realizing renewals would mean renewal fees, I took action to attempt to amend the complaint to add back the anti-renewal relief prayer. When Motley Rice refused to take such action, I sought to have my firm replace it as “class counsel.” Motley Rice fought that effort. When the district court rejected my motion, I sought to amend the complaint to add back the relief prayer on my own. Motley Rice and the IRS fought that effort. At some point later in 2020, Motley Rice agreed to join me and seek amendment of the complaint to add back the anti-renewal relief prayer and to seek other relief making whatever costing method was determined by the court as to past fees also apply prospectively (thus negating the need for future litigation with respect to future fees).¹⁵ The IRS contested add back of the anti-renewal relief prayer, but not addition of the relief prayer relating to future fees. The district court ultimately ruled in ECF 145 for the IRS, prohibiting

¹⁵ Via ECF 139 and 139-1 in *Steele I*, two provisions of the draft second amended complaint dealt with the matter. Paragraph 50 provided: The Plaintiffs are further entitled to a judgment declaring that a tax return preparer need apply for a PTIN only once, and that the application relating to a PTIN request only the information necessary to issue a PTIN, as was required before the IRS licensing scheme, previously described, was implemented (i.e. name, SSN, date of birth and current address). Relief prayer 6 sought: A judgment declaring the IRS may only require a tax return preparer to make one filing to acquire and maintain a PTIN.

the anti-renewal prayer from being added back to the complaint.¹⁶ In its March 14, 2024 memorandum at p. 7 (App. p. 8), the district court (incorrectly) stated the uncontested amendment relating to future fees “would have added allegations that the PTIN fees charged after 2020 were excessive.”

At p. 8 of its March 14, 2024 memo (App. p. 9), the district court identified my efforts at stopping renewals as an attempt to “circumvent the D.C. Circuit’s ruling in *Montrois* that the IRS can charge fees for PTIN renewals.” However, stopping renewals is different than stopping renewal fees.

In January 2023, the district court in *Steele I* issued a lengthy memo, directing the IRS to produce an estimate of: (a) the costs of issuing and renewing PTINs; and (b) certain other costs. I understood the memo to be the district court’s attempt to carry out the *Montrois* mandate regarding determining chargeable costs. Although thoroughly briefed by both parties (the IRS never questioned the excess questioning relief prayer), at pp. 35-36 of *Steele I* ECF 226 (Addendum 6), the district court said the amended complaint in *Steele I* did not include a relief prayer relating to excess questioning. Had it considered the issue, *Steele I* plaintiffs surely would have prevailed on the matter if justice prevailed because the pertinent statute

¹⁶ In addition to seeking amendment of the complaint, because annual renewals were due to begin in a few months, I also filed an injunction request (ECF 128) to cause renewal activities to cease. When the district court ruled the complaint could not be amended to add back the anti-renewal prayer, it also ruled against the injunction request on the basis the complaint did not request such relief.

(Code § 6109(c)) merely permits the IRS to request only information necessary to identify a person. In such event, *this case would not have been brought* because the IRS gets much more information about return preparers from prepared income tax returns than it did from Form W-7P (Exh. 11).¹⁷ Renewals would have ceased.

With the exception of the specific details of dealings with co-counsel, I believe the district court knows the above facts.

SUMMARY OF THE ARGUMENT

The district court dismissed the case by using its own “claim-splitting” rule. This rule is not found in FRCP Rule 12(b)(6), so it’s not a basis to dismiss. And as part of the “nucleus” rule, its validity is highly suspect after the U.S. Supreme Court’s *Hellerstedt* decision, noted below. To the extent it is valid (and this Court has not ruled on its validity), it shouldn’t apply to the facts of this case.

ARGUMENT

The case was dismissed under Rule 12(b)(6) of the FRCP. A *de novo* standard of review applies. *Wiley v. Glassman*, 511 F.3d 151, 155 (D.C. Cir. 2007).

Rule 12(b)(6) allows dismissal for “failure to state a claim upon which relief can be granted.” According to *Moore’s Federal Practice* ¶12-34[1][a] (3d ed.

¹⁷ All major income tax returns, including Forms 1040, 1041, 1065, 1120 and 1120S, require the return preparer to include the following information on returns prepared for compensation: PTIN, self-employed status, firm name, firm address, phone number and firm’s employer identification number (EIN). See Addendum 7.

2020), “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” For this statement, *Moore’s* cites *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678-679 (2009). Citing numerous cases via an immediately following footnote, Wright & Miller, *Federal Practice and Procedure*, Civil 3d ¶ 1356 provides regarding the Rule 12(b)(6):

As the numerous illustrative cases from throughout the federal judicial system cited in the note below make clear, the purpose of a motion under Federal Rule 12(b)(6) is to test the formal sufficiency of the statement of the claim for relief; the motion is not a procedure for resolving a contest between the parties about the facts or the substantive merits of the plaintiff’s case.

The complaint survives a Rule 12(b)(6) challenge under the authorities cited above. The challenge is to federal regulations and IRS acts, and the Administrative Procedure Act (5 U.S.C. §§ 702, 706) permits such a challenge by those adversely affected by agency action. “Claim-splitting” is not a basis for dismissal.

In its motion to dismiss, the IRS argued three things: (1) the Paperwork Reduction Act; (2) res judicata; and (3) the statute of limitations. The district court considered only res judicata. It ruled it didn’t apply. Yet, it applied a D.C. district court-made rule (claim-splitting) to rule for the defendant. Citing an opinion of the judge (App. p. 13), it noted while “[o]ur court of appeals has never acknowledged the rule against claim-splitting, this Court and numerous others in this district have applied this discretionary doctrine.” Again, Rule 12(b)(6) doesn’t recognize claim-

splitting. For the reasons noted below, the rule does not apply; but even if it did, its application is inconsistent with existing D.C. district court rulings and U.S. Supreme Court precedent.

In its dismissal memo, the district court stated the claim-splitting rule is similar to res judicata (claim preclusion) except there is one key difference: “claim-splitting occurs when the first suit would preclude the second suit as a matter of res judicata except the first suit is not yet final.” (App. p. 13) It cites a few D.C. district court cases, a Tenth Circuit case and *Wright & Miller* for this conclusion. The problem is, as the district court well documents, neither the renewal issue nor the alternative excessive information issue is included in the first suit. For res judicata to potentially apply, there must be a “final, valid judgment on the merits” (Exh. 2, App. p. 12), which there is not and cannot ever be under *Steele I* under the circumstances—as to either of the claims set forth in the complaint.¹⁸

The main case cited in the district court’s opinion is *Smith v. District of Columbia*, 387 F. Supp. 3d 8 (D.D.C. 2019). This opinion does not mention the *Hellerstedt* case, discussed below. *Smith* involved a putative class action brought when a pending putative class action had some similar and some identical or virtually identical claims. Regarding claim-splitting and the motion to dismiss, at p. 19, the Court acknowledged it is “not a jurisdictional matter but rather a

¹⁸ As noted, the alternate excessive information claim was made in *Steele I*, but the district court said it wasn’t made.

prudential ‘matter of docket management allowing district courts to ‘dispense with duplicative litigation.’” (Citing Charles Alan Wright, *Federal Practice & Procedure*. It continued (p. 19):

But still other courts in this district have declined to dismiss a second action under claim-splitting where the court previously precluded the plaintiff from adding the claims and defendants to their prior suit, *Coulibaly v. Pompeo*, 318 F. Supp. 3d 176 181-82 (D.D.C. 2018),¹⁹ . . . Yet regardless of whether they applied the rule in a given case, all seem to agree that courts can discretionally dismiss claims from subsequent actions for claim splitting if the claims “may still be advanced in the first action.” Wright et al., § 4406 n. 20.

Here, the district court specifically refused to add back the anti-renewal claim in 2020. And, as discussed below, the district court said the alternative argument (i.e., excess questioning) had not been raised. It’s pretty clear these claims cannot now be advanced in the first action. The *Smith* court then went on to distinguish the relief being sought, allowing the claim to proceed.

In the *Coulibaly* case (cited above), the plaintiff had brought a “series of actions,” and in a prior one the court refused to add claims primarily out of fear of delay in the litigation. The claims were under consideration in *Coulibaly*. The defendant sought to have the case dismissed based on claim-splitting. The Court refused to do so, even though much of the prior proposed amendment was futile. Here, the prior proposed amendment in *Steele I* certainly was not futile.

¹⁹ The footnote is *Smith* was footnote 9. It related to *Dorsey v. Jacobson Holman PLLC*, 764 F. Supp. 2d 209, 213 (D.D.C. 2011).

Also cited by the district court was *Clayton v. District of Columbia*, 36 F. Supp. 3d 91 (D.D.C. 2014). In *Clayton*, there were two cases, and the second one (by the same plaintiff) raised two claims that had been previously added to the first case. While consolidation was considered by the court, concerning claim splitting, the court said: “To determine whether a plaintiff is claim-splitting, ‘[t]he proper question is whether, assuming the first suit was already final, the second suit would be precluded under res judicata analysis.’” (Citing *Katz v. Gerardi*, 655 F. 3d 1212, 1217 (10th Cir. 2011). *Katz* is another case cited by the district court.) Here, *the second suit isn’t precluded under the district court’s own analysis because res judicata cannot apply—neither the renewal issue nor the (alternative) excess questioning claim exists in Steele I (so it is not possible to have a judgment on the merits with respect to either issue when Steele I becomes final).*

Concerning the alternative argument, that information requested by the IRS on Form W-12 exceeds that which can be asked by law (under Code §6109(c)—“such information as may be necessary to assign an identifying number”), this claim was in the original complaint in *Steele I* and it has remained throughout that action. Yet the district court said it was not made. As noted in the facts section (footnote 11 above), the original complaint sought: “An injunction prohibiting Treasury from asking more information than is necessary to issue a PTIN, and requiring Treasury to ask for such necessary information only once.” Did that

language cut the mustard? Per the district court, the following language from the 2015 *Steele I* amended complaint (with identical language carried over to the second amended complaint) didn't cut it: "A judgment declaring that the IRS may only request information from tax return preparers that is authorized by statute." But analyzing the entire 2015 amended complaint (and the 2020 second amended complaint) and the pertinent law, it is clear what was meant. (*See Exhs. 6, 7*) *There simply was/is no other information in issue other than that requested of return preparers on Form W-12.* The Defendant in *Steele I* never took the position the relief prayer didn't exist or was somehow defective. Both sides argued the merits of the excessiveness question via briefs filed in 2022. Why? Because there was no doubt the claim had been made. But the district court surprised all in January 2023 when it said it hadn't been made, so it wouldn't consider the issue. (*See Addendum 6.*) The district court erred.²⁰ That error necessitated this action. In any event, the issue does not now exist in *Steele I*.

²⁰ FRCP 8(d)(1) requires each complaint allegation to be "simple, concise, and direct. No technical form is required." Wright & Miller, *Federal Practice and Procedure*, Civil 3d ¶ 1286, p. 767, provides "the provision requires that all pleadings be construed by the district court to do justice." It continues (pp. 768-773): "One of the most important objectives of the federal rules is that lawsuits should be determined on their merits and according to dictates of justice, rather than in terms of whether or not the allegations in the paper pleadings have been artfully or inartfully drawn." ... " . . . [T]he district court is obligated to make a determined effort to understand what the pleader is attempting to set forth and to construe the pleading in his or her favor, whenever the interest of justice so requires." ... "Defects in the form of pleading, such as lack of conciseness, will not

It is obvious the district court simply doesn't want to deal with either of these issues. But the law requires it to do so. And kicking out a case based on claim-splitting after refusing to deal with the issue (at a minimum, the excess questioning claim) in a prior case is pure injustice.

U.S. Supreme Court rulings are binding on all federal courts. "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1.

The claim-splitting doctrine of the district court is a subset of the nucleus of facts rule set forth by the district court at App. p.12. In *Whole Woman's Health v. Hellerstedt*, 579 U.S. ___, 136 S. Ct. 2292 (2016), the U.S. Supreme Court rejected analysis consistent with the nucleus theory when it reversed the Fifth Circuit's ruling that prohibited suit based on a different provision of an act than the one challenged earlier. Both provisions related to abortion. The first (the "admitting privileges requirement") required a physician performing an abortion to have admitting privileges at a hospital located not more than 30 miles from the place at

render the pleading vulnerable to a pretrial motion under Federal Rule of Civil Procedure 12 unless the opposing party is prejudiced by the defect, as would be true if the pleading failed to give proper notice of what was being alleged." The second amended complaint in *Steele I* is Exh. 7. Concerning appealing, the district court left Motley Rice in charge of that decision. *See supra* for potential issues.

which the abortion is performed. The second (the “surgical-center requirement”) set forth minimum standards for abortion clinics. The plaintiffs had previously challenged the admitting privileges requirement, but not the surgical-center requirement.

The Court of Appeals for the Fifth Circuit barred the claim based on res judicata. It used the following nucleus of facts basis, noting the two requirements:

“Arise from the same transactio[n] or series of connected transactions.’ ... The challenges involve the same parties and abortion facilities; the challenges are governed by the same legal standards; the provisions were enacted at the same time as part of the same act; the provisions were motivated by a common purpose; the provisions are administered by the same state officials; and the challenges form a convenient trial unit because they rely on a common nucleus of operative facts.” 790 F. 3d, at 581 [136 S. Ct. 2308]

Regarding claim preclusion as to the surgical-center lawsuit due to failure to previously challenge it when the admitting privileges requirement was challenged, the Supreme Court said:

The Court of Appeals failed, however, to take account of meaningful differences. The surgical-center provision and the admitting-privileges provision are separate, distinct, independent requirements with different enforcement dates. This Court has never suggested that challenges to two different statutory provisions that serve two different functions must be brought in a single suit. And lower courts normally treat challenges to distinct regulatory requirements as ‘separate claims,’ even when they are part of an overarching ‘[g]overnment regulatory scheme.’ 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4408, p. 52 (2d ed. 2002, Supp. 2015); see *Hamilton Bogarts, Inc. v. Michigan*, 501 F.3d 644, 650 (C.A.6 2007).

Hellerstedt, 136 Sup. Ct. at 2308.

Like *Hellerstedt*, PTIN requirements, fees and licensing rules were not implemented simultaneously. As noted above, fees were first charged in 2010 under 31 U.S.C. §9701, under a separate regulation from the 31 U.S.C. §330 licensing regulations and the Code §6109 PTIN regulations. Starting in 2011, the licensing regulatory provisions (issued under 31 U.S.C. §330) were gradually phased in over a few years. PTIN renewal (under Code §6109 regulations) was first required in 2011. These three separate regulatory pieces were part of the Pub. 4832 package—a government regulatory scheme.

Requiring a lawsuit challenging a particular agency action to also challenge everything in the subject area issued pursuant to a statutory or regulatory package that might be unlawful in order to preserve the right to potentially challenge one or more different provisions later on is not only inconsistent with *Hellerstedt* but it would cause an already overburdened federal judiciary to be further overburdened. And 5 U.S.C. §702 permits challenges only by those “adversely affected or aggrieved by agency action within the meaning of a relevant statute.” What if someone is currently aggrieved by one part but only later aggrieved by another part? Where does the nucleus (and claim-splitting) end? Here, fee charges could have been challenged in 2010, but renewal requirements could not have been challenged until 2011. As licensing was phased-in, various initial challenge dates

existed as to its provisions. In discussing *Hellerstedt*, Wright & Miller, *Federal Practice and Procedure*, Civil 3d ¶ 4408, provides:

[*Hellerstedt*] found that challenges to distinct regulatory requirements are normally treated as separate claims, even when part of a single statute. Any other rule would force broadside litigation without benefit to the parties or the courts.

Regarding the nucleus position, citing numerous cases including *Lawlor v. Nat'l Screen Service Corp.*, 349 U.S. 322 (1955), Wright & Miller, *Federal Practice and Procedure*, Civil 3d ¶ 4409 provides:

A substantially single course of activity may continue through the life of a first suit and beyond. The basic claim-preclusion result is clear: a new claim or cause of action is created as the conduct continues.

Renewal creates a new cause of action. The district court covered *Hellerstedt* in *one footnote* (1, Exh. 2, App. p. 16).

Wright & Miller also notes the following regarding claim preclusion:

Private interests in justice have also been found to warrant exceptions to claim preclusion. The strongest justification arises from cases in which disposition of the first action has failed to provide any tolerable resolution of a continuing problem.

Wright & Miller, *Federal Practice and Procedure*, Civil 3d ¶ 4415. Here, the IRS will apparently continue to demand PTINs to be annually renewed absent a *firm* court order stopping it from doing so.

As the district court correctly noted (Exh. 2, App. p. 22), this case has some unique facts. To the extent the claim-splitting basis for dismissing a case is still possible under *Hellerstedt*, it should not apply here. *Steele I* was brought in 2014 to

strike down all remaining provisions of the licensing scheme post-*Loving*, including PTIN renewals. The district court's memo so notes. When a class action law firm (Motley Rice) was brought in to help work the case in December 2014 (as necessary to handle the matter under FRCP 23), control was not turned over to it. The class representatives' contracts are solely with Allen Buckley LLC, and the majority have consistently expressed their desire for me to represent them. I agreed to let Motley Rice be named sole class counsel with the district court under the condition joint control would remain. As noted, before being retained in December 2014 and until the complaint was amended in 2015, never did Motley Rice say it thought the relief sought should be reduced. Yet it sought to only seek fees recovery in the 2015 complaint amendment. I thoroughly contested elimination of relief relating to renewals and excessive questioning in the 2015 complaint amendment process.

In 2020, after this Court partially reversed the district court's ruling that all fees had to stop and prior fees had to be refunded, I acted to add back the anti-renewal relief prayer. Motley Rice initially opposed my efforts, but later joined them. The government opposed them. The district court ruled in favor of the government, even though FRCP 15(a)(2) provides: "The court should freely give leave [to amend the complaint] when justice so requires." Substantial authority existed for the district court to simply add back the relief prayer. For example, in

Lopes v. JetSetDC, LLC, 994 F. Supp. 2d 126, 130 (D.D.C. 2014) (Lamberth presiding) permitted a complaint to be amended, noting “Rule 15(a)(2) is to be interpreted liberally, as ‘Congress intended to permit amendment broadly to avoid dismissal of suits on technical grounds.’ . . . Indeed, a ‘district court should grant a motion to amend unless there is a clear and solid justification for denying it. . . . Denying leave to amend without sufficient justification, such as undue delay, bad faith, or dilatory motive constitutes an abuse of discretion.’” When the district court prohibited the add back, renewals were going to continue absent another lawsuit or a ruling prohibiting excess questioning. The district court (erroneously) said the excess questioning relief prayer was not made.

From a logical perspective, why would anyone want to bring two separate lawsuits when one lawsuit could cover the entire matter? Between time and costs, no rational person would do so. Only unique facts, such as those present here, would result in a separate suit. As noted above in footnote 12, the group of class action plaintiffs’ attorneys who attempted to take over the case sued for only fees. And under FRCP 23, one of those type firms was necessary to handle a class action. So, to attack anything beyond fees, a separate action was going to be necessary unless the district court ruled on the excess questioning issue (which it

chose not to do).²¹ Concerning the excess questioning claim, the district court wrongfully refused to consider the (fully briefed) issue in *Steele I*, and then kicked out this necessary follow-up case. That's justice? To the extent claim-splitting still remains as a dismissal mechanism post-*Hellerstedt*, its use should be applied only where there is prejudice to the opposing party—that's not the case here.

At Exh. 2, App. p. 22, the district court said: “The Court will exercise its discretion to [dismiss under the claim splitting rule] because of the unique facts of this case: The class-counsel-in-exile from the first case brought a new suit to revive claims that plaintiffs initially raised in the first case but then dropped over his objection, and that the Court did not permit him to reinsert in the prior case.” The district court named me “class-counsel-in-exile” three times in the memo. App. pp. 7, 22 and 24. Someone gets a kick out of writing such, and this animosity apparently impacted the district court's judgment.

The district court then went on (App. p. 23) to talk about unfairness. The district court knows Congress never granted the IRS licensing powers or the power to make return preparers renew a permanent identification number. If the district court was interested in stopping unfairness, it would have permitted the anti-renewal provision to be added back in 2020 and it would have considered the

²¹ I think a lawyer needs to seek all relief necessary for his/her clients. Post-*Loving*, it was clear the IRS was going to continue its licensing program, making seeking full relief the most prudent course.

excessive questioning claim in *Steele I*. FRCP 15(a)(2) provides complaint amendment should be permitted when justice so requires. Isn't fairness a subset of justice? The fact that this action needed to be filed is a sad reality based on the unique facts, including the actions of the district court. In any event, under law listed above, the claim splitting rule doesn't apply.

At Exh. 2, App. p. 24, the district court states: "Mr. Buckley's evident purpose in launching this action is to wrest control of litigation from class counsel in *Steele I* and do an end-run around the Court's orders in that case." That's incorrect. *The case was brought solely for the reasons set forth in the complaint.* The sad reality is this case is necessary to *attempt to* produce what Congress wants.

At App. p. 26, the district court stated "[d]ismissing plaintiffs' splinter suit would also promote judicial economy by sparing the Court the need to adjudicate complicated issues the plaintiffs chose to stop pressing in the prior suit." There are no "complicated issues" whatsoever. Regarding the PTIN renewal claim, the simple issue is whether the following statutory language (Code §6109(a)(4)) permits the IRS to require renewal of PTINs: "Any return or claim for refund prepared by a tax return preparer shall bear such identifying number for securing proper identification of such preparer, his employer, or both, as may be prescribed." Equally simple is the alternative Code §6109(c) excess questioning

issue. *See* Exhibits 9, 11, Append. pp. 136, 240. The district court (hopefully) so knows.²²

In sum, the law permits this action to be brought. For justice to prevail, it must proceed.

Other Important Considerations. The below materials are provided to help the appellants and help the federal court system aid our country. It's understood some of what is said below might not be pleasant to read. But life is short, and our country is going downhill quickly. I believe I am a patriot.

The public is losing faith in federal (but not necessarily state) institutions. The Department of Justice (DOJ) is a case in point. Also consider the USPS. And the FBI. The federal courts are part of the problem.

When I first started fighting the IRS licensing abuse of power in 2011, I asked a number of attorneys if they wished to be involved. A common refusal reason was: "The federal government will be favored the whole way; I couldn't deal with it." One said: The government will put the case on a "slow train to Padducaville." It's 2024, and Padducaville is nowhere in sight. But I knew the IRS had no statutory authority for what it did, so the case seemed pretty easy to win.

²² Supreme Court justice John Roberts has said it is the job of a judge to call balls and strikes. Here, the call(s) would be easy. But it's not possible to make a call if the umpire does not allow the pitch to be thrown.

I generally work in the areas of tax, employee benefits and estate planning. I had never sued the federal government. My experience with the Appeals Office of the IRS was always satisfying even though it's part of the administrative branch of government. I felt the Appeals officers always acted independently and tried to reach a fair result, based on the facts and the law. (I still feel that way.) In this regard, IRS revenue agents often take egregious positions and apply penalties against every taxpayer they believe owes tax, only to have the matter corrected by the Appeals Office (often after the filing of a Tax Court petition). Based on experience, if handled by IRS Appeals, the licensing system would have been completely gone with or pre-*Loving*.

In March 2024, I attended a Georgia CLE seminar presented by two Georgia lawyers, one a tax lawyer and the other a distinguished former tax lawyer who previously was the judge of the Georgia Tax Tribunal and now hears and decides tax and non-tax cases as a Georgia administrative law judge (Charles Beaudrot). Judge Beaudrot said his tribunal gets together with the lawyers and always tries to get to the right result. By that, I think he meant what the law intended, as set forth by the Georgia legislature. I thought to myself: That's the way it ought to be. Having gone through many years of PTIN litigation in the federal courts, I don't feel that's the combined federal government's objective as to PTIN litigation.

In 2012, I wrote and had published a *Tax Notes* article that analyzed the (then) new licensing scheme and concluded all except the requirement that return preparers obtain PTINs was unlawful. (A sentence from it was roughly quoted in the 2014 *Loving* decision.²³) (Exh. 13) Based on federal statutory law and U.S. Supreme Court precedents, that's still correct. But that's not where the PTIN litigation sits. And, unlike the Georgia administrative law court, the court system has not been trying to fulfill Congress's intentions.

The injustice began with *Brannen v. U.S.*, 682 F.3d 1316 (11th Cir. 2012), with the Eleventh Circuit upholding a FRCP 12(b)(6) dismissal of a fees challenge based on a finding that Code §6109 grants licensing power. The flaw in that reasoning is set forth in Exh. 12. *Montrois* didn't even mention *Brannen*. But *Brannen* was followed by *Loving*, a simple, logical and just ruling at both the D.C. district court and the D.C. Court of Appeals.

The *Steele I* case could have ended at several points, *negating the need for this action*. But the court system has helped the IRS, thereby stretching out the matter and allowing it to keep its licensing system, albeit with less funding by

²³ Regarding 31 U.S.C. §330, *Loving* includes the following sentence at p. 1014: "In the first 125 years after the statute's enactment, the Executive Branch never interpreted the statute to authorize regulation of tax-return preparers." The following sentence is from the article (Exh. 13, App. p. 251): "Thus, it should be readily understandable why, in the more than 125-year history of the law, it had never been applied to tax compliance work."

return preparers. In 2019, after the district court in *Steele I* ruled all fee charges had to stop and all past fees had to be refunded, this Court scaled back that ruling so the IRS could charge the costs of issuing and renewing PTINs. *The vast majority of the Steele I plaintiffs are U.S. citizens and taxpayers*, and they likely won't get interest on any refunds received in *Steele I*. As of now, the result is a hodgepodge of what the IRS wants and what the courts other than the Supreme Court want, not what Congress wants. As noted above, prior to the IRS's creation of its licensing power, Congress specifically rejected numerous legislative attempts to do what the IRS did via regulatory fiat.²⁴

In *Steele I*, this Court disregarded binding precedent from the U.S. Supreme Court. In 1974, considering the "big picture," the U.S. Supreme Court handed down two cases concerning the user fee statute (then, 31 U.S.C. §483a). Combined, the cases held that in order for user fees to be charged, a "special benefit" must be provided and a voluntary act to receive the service or thing of value must exist by the person being charged. The cases are *Nat'l Cable Tel Ass'n Inc. v United States*, 415 U.S. 336 (1974) and *Fed. Power Comm'n v. New England Power*, 415 U.S. 349 (1974). Per *Nat'l Cable* at 340, "a fee is incident to a voluntary act." When the IRS created its licensing scheme, it made PTINs mandatory, thus converting them into licenses. It could thereby claim it was

²⁴ See the legislative authorities on p. 3.

supplying a “special benefit.” (“Having a PTIN is a special benefit that allows specified tax return preparers to prepare all or substantially all of a tax return or claim for refund for compensation.” 75 Fed. Reg. 60309 (Sept. 30, 2010)) *Loving* shot down the backbone of the licensing scheme when it ruled in 2014 a p. 1015: “We agree with the District Court that the IRS’s statutory authority under Section 330 cannot be stretched so broadly as to encompass authority to regulate tax-return preparers.” That left only Code §6109(a)(4), an identification requirement. That should have been the end of it, but the IRS pressed on, as agencies customarily do when a court order doesn’t specifically strike down *exactly what they are doing and whatever they could do in the future to get around the court’s ruling*. Surely this Court so knows. Once licensing power was lost (when the clock struck midnight—Cinderella), a PTIN should have been returned to what it was—a simple alternative identification number to an SSN. Unlike the pre-licensing scheme scenario, when a PTIN could be procured if desired, there was no voluntary act. Fees were unlawful.²⁵

In 2019, in *Montrois* at pp. 1062-1063, this Court mentioned both 1974 Supreme Court precedents but did not apply or even mention the voluntary act

²⁵ The district court’s 2017 decision in *Steele* was examined in a 2017 article by Professor Donald T. Williamson of American University. Williamson, “The End of PTINs? — Not for Now at Least,” *Tax Notes*, Sept. 4, 2017. In his article, Professor Williamson said: “This article examines the court’s reasoning in *Steele* and concedes the decision is, in fact, correct.” Williamson urged Congress to enact legislation permitting regulation of return preparers and charging of user fees.

requirement noted above. Instead, it applied its own three-part test to determine fees could partially be charged in *Steele I*. It held, citing its prior decision: “To justify a fee under the Act, then, an agency must show (i) that it provides some kind of service in exchange for the fee; (ii) that service yields a specific benefit; and (iii) that the benefit is conferred upon identifiable individuals.” Note what is missing: The voluntary act requirement.

As was often the case as to Supreme Court rulings of that era, no specific rationale was given for the voluntary act requirement or the special benefit requirement. But what has happened in *Steele I* likely was behind it. *Steele I* was remanded by *Montrois* to figure out what amount of the licensing scheme’s costs is attributable to issuing and renewing PTINs—an *accounting nightmare*. If agencies uniformly apply the three-part test listed above, then there is a huge new (very messy) financing mechanism for agencies—one that bypasses Congress.

Whatever any agency does will likely produce some sort of private benefit, even if the vast majority of what it does is designed to help the agency. For a court to so find is easy. And it is just as easy to then rule the benefit is special (or specific). So, absent the voluntary act requirement, it’s pretty easy for an agency to pass part of its costs on to the public. But add the voluntary act requirement, and

it's an entirely different equation. The voluntary act requirement necessitates the public perceiving individual benefit worth acting to acquire.²⁶

If this Court had applied *Nat'l Cable's* voluntary act requirement, in light of *Loving*, it's difficult to see how it would have ruled fees could continue to be charged. Funding for the licensing scheme would have been completely cut off. The IRS might have continued its scheme without financing, as it did following issuance of the 2017 injunction by the district court, stopping future fee charges. But it could not do so if PTIN renewals stopped.

In *Montrois*, this Court said the district court had ruled renewals were lawful. But in its March 2024 memo (Exh.2, App. pp. 19-21), the district court said it did no such thing.

As discussed above, in 2020, the district court in *Steele I* could have allowed the complaint to be amended to add back the anti-renewal relief prayer. It went against the justice grain of FRCP 15(a)(2) to prohibit such. Had it permitted the add back, it could then have ruled renewals unlawful. The licensing scheme would have been stopped. (Given the language of 26 U.S.C. § 6109(a)(4) and its

²⁶ The D.C. Circuit ruled in *Electronic Industries Ass'n v. FCC*, 554 F.2d 1109, 1115 (D.C. Cir. 1976) that user fees can be charged of regulated persons by an agency with respect to fulfillment of statutory duties. As to the voluntary act requirement, it's difficult to reconcile *Electric Industries* with *Nat'l Cable*. But assuming *Electric Industries* is valid, there is no statutory duty to renew a PTIN, and there is no statutory duty to supply information other than that necessary for the IRS to issue a PTIN (i.e., SSN, address, phone number and perhaps date of birth). *Electronic Industries* was not cited for justifying fee charges in *Montrois*.

legislative history, and numerous U.S. Supreme Court rulings holding an agency's powers are limited to those granted by Congress, it's difficult to see how it could have ruled otherwise.) The same result would have existed if it had handled the excessive question issue: This case wouldn't exist.

In January 2023, after significant discovery of costs in 2021 and significant briefing in 2022, the district court remanded the matter of calculating the costs of issuing and renewing PTINs to the IRS, pursuant to *Montrois*. The district court's memo states the case was remanded for further proceedings, "including an assessment of whether the amount of the PTIN fee unreasonably exceeds the cost to the IRS to issue and maintain PTINs." (Exh. 2, App. p. 6) But while *Montrois* limited fee charges to those necessary to maintain a PTINs database, the district court expanded what could be charged to include costs of "(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." (Addendum 8, ECF 222 in *Steele I*.) Given the *exact same* considerations would exist with respect to SSNs, there is no logic for this expansion, particularly in light of the *Montrois* rationale for fee charges (i.e., protection from identity theft). But it helped the IRS. And, instead of placing a reasonable hard deadline for the IRS to come up with the costs (e.g., 90 days), the

district court merely required the IRS to file a monthly report, noting its progress. A year later, the IRS produced a very opaque costs report, necessitating further action by the plaintiffs to get clarity. It concluded **45 percent** of the licensing costs (roughly \$138 million over 7 years) related to issuing and renewing PTINs. (?)

As noted, *Montrois's* conclusion (p. 1063) that the “[IRS]’s PTIN-related services are now confined to generating and maintaining a database of PTINs” is not what has happened. The RPO is running at full bore. As agencies do, it will keep doing so unless and until a federal court places a steel dagger in RPO’s heart.

A constant theme is apparent. The federal courts below the Supreme Court generally believe IRS action is good, and so they will support it. But if the IRS action is good here, then Congressional action is bad, because they are *polar opposites*. The courts should not empower the Executive Branch to overrule the legislature. On numerous occasions, Congress rejected the actions the IRS is undertaking. Numerous Supreme Court precedents exist that provide the intent of Congress is supposed to apply. *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) (“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”); *Sackett v. EPA*, 598 U.S. ___ (2023); *Southwest Airlines v. Saxon*, 596 U.S. ___ (2022); *West Virginia v. EPA*, 597 U.S. ___ (2022). The IRS has clearly exceeded the bounds of its statutory authority.

Why is the IRS's licensing system being protected? The IRS is simply collecting a dossier of information on all who prepare tax returns. Information is power. Legally, the information acquired cannot be used by the IRS to prevent anyone from preparing tax returns, as the sole basis for doing so is set forth in Code §7407. The IRS already gets an extract of felons who prepare tax returns from the DOJ. The IRS can audit them and their activities.²⁷ As to return preparers who are deficient on their own taxes, the IRS can audit them and go after them and assess deficiencies (as it should). *Assuming answered honestly and correctly, no answer to any question on Form W-12 can be used to prevent a return preparer from being able to prepare returns.* Only certain conduct, specified in Code § 7407(b), can give rise to an injunction preventing someone from being able to prepare returns. *The W-12 questions don't fit within the 7407(b) boxes.* Subparagraph (A) relates to penalty information that the IRS possesses. Subparagraph (B) relates to misrepresentation of "ability to practice before the Internal Revenue Service, or otherwise misrepresented his experience or education as a tax return preparer." Subparagraph (C) relates to guaranteeing payment of a refund or credit. Subparagraph (D) relates to very rare fraudulent conduct of which the IRS would have knowledge. With the possible exception of a tax fraud conviction (of which the IRS would be knowledgeable), Form W-12 doesn't ask

²⁷ Perhaps such persons should not be permitted to prepare tax returns. Congress could act to prevent them from doing so. It hasn't so acted.

7407(b) questions.²⁸ Prepared major income tax returns (1040, 1041, 1065, 1120 and 1120S) include the following information with respect to tax return preparers: PTIN, self-employed status, firm name, firm address, phone number and firm's employer identification number (EIN).²⁹ Addendum 7.

It would be best for the IRS employees involved in the RPO to take other, more productive jobs in the IRS, such as in the audit division. It's no secret audit activity has been at a historical low.³⁰ The main problem with the tax system is excessive complexity. It's often difficult to tell the reason for error. Nothing RPO does impacts these realities.

²⁸ Form W-12 asks about professional credentials, but not about ability to practice before the IRS, experience, or education. Generally, attorneys and CPAs can "practice" before the IRS. Enrolled agents (EAs) may also be able to practice to some degree. But again, if the W-12 questions are answered correctly, there is nothing the IRS can do with the information to prevent the answerer from preparing returns. Form W-12 signed under penalties of perjury; answering incorrectly would be stupid. If the IRS believes someone is misrepresenting their credentials, it can inquire of the pertinent state bar or state board of accountancy. The IRS issues EA designations.

²⁹ The alternative basis for relief in the complaint is for the information requested to be scaled back to only that necessary to issue a PTIN (i.e., name, SSN, address, and perhaps date of birth and/or phone number). In the event of such a scale-back, the IRS would very, very likely cease renewal activity, as it gets more information from prepared tax returns. (The Form W-7P (Exh. 11), used before the licensing scheme was implemented, asked only such necessary questions.)

³⁰ Concerning information requested, unlike the current matter, regulatory implementation of the recently enacted Corporate Transparency Act (31 U.S.C. §5336) asks questions about direct and indirect owners of businesses, and the regulations and form are consistent with the statutory law.

If the reasoning is, at least in part, to protect the federal fisc, the September 30, 2023 financial statements of the U.S. government and the latest Congressional Budget Office (CBO) figures and projections show the outlook is grim. The financial statements list \$5.4 trillion of assets and \$42.9 trillion of liabilities as of September 30, 2023. For the year ended September 30, 2023, revenue was \$4.5 trillion; expenses were \$7.9. [fiscal.treasury.gov/reports-statements/financial-report/2023/02-15-20243-FR-\(Final\)](https://fiscal.treasury.gov/reports-statements/financial-report/2023/02-15-20243-FR-(Final)). CBO's June 18, 2024 update shows interest expense exceeding military spending in 2024, with the gap growing annually thereafter until the ratio of net interest spending to defense spending hits **1.46** in 2034! cbo.gov/system/files/2024-06/60039-Outlook-2024. ***Our national debt is our nation's greatest problem!*** ***But***, the 75-year present value outlook of the financial statements (pp. 64-68) shows that, interest expense aside, all of the future problems relate to Social Security and Medicare. No outcome in *Steele I* or this case will impact this result. A major concern is insurrection due to too much revenue being spent on interest. While "every little bit helps," the harm caused to the nation by agency favoritism (i.e., more lost public confidence) would far exceed the benefit gained by saving money in these cases or similar agency cases. In 2023, I drafted a bill titled "The Financial Sanity Act of 2023." If enacted, it would have solved a significant part of the problem by, *inter alia*, gradually pushing back the Social Security normal retirement age and the Medicare eligibility age to 70, and then

adjusting them every decade starting in 2050 based on changing life expectancy. With a summary, it was sent to many members of Congress. Not one response was received.³¹

There is a general pervasive belief among those who work for the federal government and a substantial portion of the general U.S. population that the federal government is good, and all or vast majority of what it does is good. Until approximately 20 years ago, I was of that substantial portion of the population. (My father worked for NASA for decades; my brother worked for the FBI for decades.) The War in Iraq changed my views.

The federal government does good and bad things. When they can, courts should stop the bad things. Any agency's action in direct contradiction to Congress's wishes, as is the case here, is a bad thing. While no court can prevent an unjustified war, federal courts can and should stop an unlawful expansion of the administrative state.

³¹ The bill also made changes to health care tax laws. It has been revised to make it more likeable to members of Congress and the public. The current draft and related summary are attached at Addendum 9. In 2017, I wrote and had published in *Tax Notes* an article that analyzed the current tax system and possible replacements, and recommended a reasonably progressive simpler and less evasive replacement tax system, utilizing one income tax (instead of two) and a value-added tax with rates tied to spending via algebra to force balanced budgets. Congress would fill the gaps. taxnotes.com/exempt-organizations/tax-reform/eliminating-income-tax-while-balancing-budget/2017/09/20/lw7hx. This information is provided not to boast, but to show I am concerned enough about the financial problems to propose solutions. These and other solutions remain viable, but time is running very short.

I recently stopped by an office of a solo practitioner return preparer in a small town in Georgia and asked him what he thought about PTIN renewals and fees. He said he didn't like them, but then asked: What can be done? He said the courts will always protect the IRS. So far, he's right.

In June 2024, a CPA told me although he included his PTIN on all prepared returns, the IRS is attempting to charge him \$2,900 (\$50 x 58 returns) for failing to renew his PTIN (i.e., using an "expired" PTIN). That's the injustice in action.

It seems very unlikely the Founding Fathers anticipated federal agencies. While the PTIN renewal requirement and fees, standing alone, are not a big deal, the cumulative effect of all agencies' continuous actions to increase their power and take away Americans' freedom, here directly contrary to Congress's wishes, is wrong. Agencies' efforts rarely completely fail, regardless of Congress's wishes. The federal courts are part of the reason they rarely fail. The federal government regularly expands; it virtually never contracts. A bad situation is growing partially due to this reality.

Life is short. I wish for our country to endure. Substantial changes will be necessary for that to happen, including a return to faith in federal institutions.

Plaintiffs are at the mercy of the Court. So is the IRS's licensing scheme. Based on statutory law, there is no authority for the IRS to require PTIN renewals.

It is understood what is written immediately above will not be taken lightly.

Finally, at Exh. 2, App. p. 7, the district court stated: “ Mr. Buckley accused Motley Rice’s attorneys of . . . failure to defer to his superior views . . .” *Never was any such thing done.* The “behind the scenes” reality, of which the district court lacks knowledge, is consistent with what is written above. I have acted in good faith and in a timely manner in all aspects of *Steele I*. The above facts so evidence. I believe I’ve consistently followed the golden rule as to my co-counsel.

CONCLUSION

Appellees ask this Court to reverse the dismissal order of the district court and remand the case to the district court for resolution, very likely via summary judgment.

Date: July 19, 2024

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STATEMENT REGARDING ORAL ARGUMENT

While it appears that oral argument should not be necessary, Appellants will participate in oral argument if the Court believes such would be beneficial.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned certifies that the foregoing Appellants' Opening Brief complies with the applicable type-volume limitations of Fed. R. App. P. 32(a)(7)(B). This certificate was prepared in reliance on word count of the word-processing system (Microsoft Word) used in this brief.

More specifically:

1. Exclusive of portions exempt by Fed. R. App. R. P. 32(f), this brief contains 12,999 words.

2. This brief has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point font.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on July 19, 2024, I caused a copy of the foregoing Opening Brief of Plaintiffs-Appellants Adam Steele and Krystal Comer to be deposited in the United States mail, First Class postage pre-paid, in an envelope addressed to the following persons:

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