No. 25-5090

In the United States Court of Appeals for the District of Columbia Circuit

BRITTANY MONTROIS, ET AL.
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, CASE NO. 1:14-CV-01523-RCL (HON. ROYCE C. LAMBERTH)

PLAINTIFFS-APPELLANTS' REPLY TO DEFENDANT-APPELLEE'S RESPONSE TO MOTION OF ALLEN BUCKLEY TO FILE A SUPPLEMENTAL BRIEF

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GLOSSARY

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

CPA .....certified public accountant

DOJ .....U.S. Department of Justice

FRCP .....Federal Rules of Civil Procedure

I or me (or my) ..... Allen Buckley

IRS ..... Internal Revenue Service

Main Brief .....brief filed by co-counsel on October 14, 2025

PTIN ..... preparer tax identification number

RPO .....IRS Return Preparer Office

REPLY

Undersigned counsel did everything reasonably possible to have the Supplemental Brief's materials included in the Main Brief. I must represent the class as best I can. A majority of the class representatives have said repeatedly (Mr. Steele pre-death) that they wish for me to decide matters. Justice is potentially achievable and the wishes of the class are fulfilled only if the Supplemental Brief is considered.

Background. This background explains the case history that caused me to file the Supplemental Brief (and the related motion for permission to do so).

The undersigned was retained by Adam Steele, CPA in February of 2014. Mr. Steele was referred to me by the Institute for Justice, which I had helped with the *Loving* case for free. (*Loving v. Internal Revenue Service*, 742 F.3d 1013 (D.C. Cir. 2014).) In September 2014, the lawsuit that resulted in the current appeal was filed. Current co-counsel had no involvement. The undersigned drafted the majority of the original complaint, a complaint that sought to shut down the remainder of the licensing system in existence post-*Loving*.

Undersigned counsel was hired by the class representatives in this case. Only my firm has signed engagement letters with the class representatives. Those engagement letters permit my firm to engage other attorneys to help with the case. Based on that authority, in December 2014, I brought Motley Rice LLC into the

case, mainly due to its class action experience. In my then 29+ years of experience (including three class actions), I had not previously worked with a class action firm.

In December 2014, Motley Rice LLP and Allen Buckley LLC signed an agreement to jointly work the case. The agreement provided the firms would "jointly prosecute and appear as co-lead counsel of record" in the case. Fees would be shared roughly equally, with my firm receiving at least half. It also provided that the firms would have equal responsibility for managing the litigation, and that all major decisions (including the content of significant briefs) would be made, to the extent possible, with the agreement of the firms. Regarding ethics, in pertinent part, the agreement provided: "With respect to all matters subject to this Agreement, the Firms shall conduct themselves at all times in compliance with all applicable rules of professional conduct governing lawyers, law firms, and the practice of law."

In early 2015, a group of law firms attempted to take over the case by filing a parallel action and filing a motion to consolidate the cases and have their group named as class counsel. A competition ensued. In the process, Motley Rice inserted Motley Rice (alone) as lead counsel in one or more documents. On March 4, 2015, I sent an email to Bill Narwold of Motley Rice to verify that a naming of his firm as lead counsel would not impact the legal relationship of our firms. He responded: "We have an agreement and we intend to honor it." The email exchange is Exhibit A. On June 30, 2015, the court awarded the right to handle the case to our group.

The court's memorandum opinion (Exhibit B) noted my prior work and experience (dating to 2011) as a large part of the reason for its decision. *See* Exhibit B, p. 8.

Also during the competition to handle the case (in early 2015), Mr. Narwold, without the knowledge or consent of the undersigned, in breach of our firms' agreement, retained the services of Deepak Gupta's firm, granting that firm the right to 20 percent of any fees ultimately recovered. *Res ipsa loquitur*. Because of the ongoing fight to handle the case and the need to keep harmony, I later agreed to add them as co-counsel, thus reducing my firm's potential fees in the event of success by roughly 20 percent. Mr. Gupta's firm wasn't to make major decisions.

In July 2015, the Motley Rice/Allen Buckley LLC agreement was restated. The restated agreement included the joint control and responsibility provisions, and most of rest of the provisions of the original agreement, including the provision that the agreement would comport with all applicable professional conduct rules. The new agreement said the firms would jointly prosecute and appear as co-counsel, thus deleting the term "co-lead," in recognition that Motley Rice had been named lead counsel in the district court's June 30, 2015 order. The control provisions were amended to provide that adding counsel was something that would need to be jointly decided. Also, the following provision was added: "In the event a disagreement cannot be resolved, the Firms will agree upon a mechanism to resolve the disagreement." This agreement has not been amended.

Since 2015, Motley Rice has continued to take actions to place it in control of the case. In doing so, Motley Rice has continuously attempted to limit recovery sought to money. The Main Brief, filed by co-counsel added by Motley Rice on October 14, 2025, is consistent therewith. *Never* did I agree to reduce the comprehensive relief sought in the original complaint.[1]

In 2023, after the district court ruled that the second amended complaint did not include a claim relating to excess questioning, I filed a separate action challenging PTIN renewals and, in the alternative, excess questioning. The district court dismissed the case based on claim-splitting. On July 18, 2025, this Court affirmed on the same basis. *Steele and Comer v. United States*, No. 24-5076. Its opinion is Exhibit C. The opening appellate brief in that case is Exhibit D. *See* pp. 18-22. These two documents tell the story of Motley Rice's efforts to eliminate non-monetary relief claims and my counter efforts to retain those claims.

Like Motley Rice, the groups of firms that tried to take over the case in 2015 sought only fees. *Dickson v. United States*, 1:14-cv-02221-RCL. If full justice is our goal, and a class action law firm must participate, then we have a system problem.[2]

Per the co-counsel agreement, I have many times recommended to Mr. Narwold that a majority of the (three) class representatives decide any significant

[1] As a lawyer, I believe have a duty to seek full legal relief for all my clients' legitimate legal grievances. There is no reason not to seek non-monetary relief in this case.

[2] As Exhibit B provides, a court must look at four factors to determine qualifications to handle class actions. The rules (FRCP 23(g)) favor class action firms.

disputes. The class representatives are intelligent—an attorney, a CPA and a retired actuary. He has refused such and, to my knowledge, has never offered an alternative.

Numerous communications exist from Ms. Montrois and Mr. Steele (before his death), stating they wished for me to make decisions for the class. Some of them are attached as Exhibit E. Simply put, they view/viewed me as their lawyer. And as noted in Exhibit E, they don't want to annually file and pay to renew their PTINs.

Specific Details. In April 2025, without running a draft by me, co-counsel with Gupta Wessler LLP filed a Preliminary Statement of Issues to be Raised in the current appeal. The list related exclusively to fees. Later that month, I sent an email to co-counsel, stating I took issue with failure to include three points I thought needed to be covered on appeal. I received an email back from Jon Taylor, stating my points were fair, and that the forms were purely procedural and non-binding.

Having concern about the lack of inclusion of three points (later raised in the Supplemental Brief) in the Preliminary Statement of Issues Raised, I called the clerk's office to discuss the matter. The clerk said all issues should be raised. I then sent an email to co-counsel along with a draft supplement to the issues to be raised. After waiting several days, when no comments were received, I filed a supplement to include the issues I was concerned about. It is Exhibit F. At that point (June 25,

2025), it was clear to me it was going to very difficult to have the materials listed in Exhibit G included the opening brief of Appellants. I began actions to counter.[3]

Months in advance of the August due date for the brief, I sent my co-counsel three separate potential brief inserts on the three topics ultimately covered in the Supplemental Brief. Each was tailored so it could "snap on" to the brief.

The opening brief of Appellants had an original due date of August 12, 2025, two months earlier than the ultimate October 14, 2025 due date. Counsel for Gupta Wessler had twice sought and received two separate one-month extensions. While I noted I was opposed to the first extension request (given the case was in its 11th year), I did not oppose the second request (as I knew it was going to happen no matter).

Several emails took place over the Summer of 2025 in my attempt to convince my co-counsel of the need to cover the issues that ultimately ended up in the Supplemental Brief. In one, I noted one of my neighbors who is a CPA called the annual PTIN filings "a pain in the ass." But the emails were going nowhere, so I began corresponding with Joe Rice, a managing partner of Motley Rice, to try to convince him of the need to cover the matters. When those communications went nowhere, on September 8, 2025, I invoked the mediation provisions of our co-counsel agreement, demanding that Motley Rice engage in mediation to try to resolve the issues. I suggested a mediator who had informed me she could handle

[3] On July 3, 2025, an Order was issued by Clifton B. Cislak, Clerk, that stated: "All issues and arguments must be raised by appellants in the opening brief."

the matter on short order. Mr. Rice refused to mediate, stating there was no disagreement. But there was, as evidenced by the Supplemental Brief.[4]

I then discussed with my lawyer the possibility of filing a lawsuit to force Motley Rice to comply with the terms of the agreement and proceed to mediation (potentially followed by arbitration), to resolve differences and cover the issues that ultimately appeared in the Supplemental Brief. Given various considerations including time constraints, it was decided that drastic step should not be taken.[5]

On September 9, 2025, when I asked if he could supply a current draft of the brief (that supposedly had been in the works), Jon Taylor of Gupta Wessler said: "We're working on the draft now but it's not ready to share just yet. We'll circulate the draft to you and MR as soon as it's ready, and we'll make sure that we have plenty of time for multiple rounds of feedback." But that didn't happen.

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[4] When Mr. Rice did not respond to my August 25th letter, on September 8th I wrote again and stated: "At this point, I wish to proceed to mediation . . ." My letter specifically set forth the three issues that ultimately appear in the Supplemental Brief. Given the October 14th due date of the brief, I asked for a response by September 15th. On September 12th, Mr. Rice responded to my August 25th letter, first by supplying excuses for not having responded earlier. Regarding the brief, he said: "With respect to the brief, we are open to considering the excess- questioning and ghost issues if Deepak and Jon feel we can include them without doing violence to the other issues they plan to raise. . . . I am not in favor of creating issues where none currently exists." Subsequent correspondence was consistent. Deepak and Jon do what Motley Rice wants, and Motley Rice wants control and money/fees.

[5] Other more drastic possibilities have been considered by the undersigned, including drafting the brief myself and filing it before my co-counsel could file, after taking into full consideration and making changes for the comments of co-counsel (i.e., unlike how they treated me). Such things shouldn't even need to be considered.

On October 3, 2025, I participated in a conference call with co-counsel Jon Taylor, Meghan Oliver and Bill Narwold. I made it clear why I believed the matters ultimately covered in the Supplemental Brief needed to be covered in the brief. For each point, Jon Taylor said he recognized my point of view. Subject to a lot of "buts," there was much agreement on their end. Mr. Narwold inquired when the brief would be supplied. Jon Taylor said it would be sent on Monday, October 6th.[6]

Nothing was received on October 6th. Pieces of the brief began being received on the 7th, a week before the due date. The first piece received was a standard of review section. Later on the 7th, a facts section was received. It was painful to read. I politely so told co-counsel. I quickly supplied comments. Over the course of the next week, I recommended many changes and asked that the materials ultimately included in the Supplemental Brief be added. *The full brief was not received until the morning it was due*. Relatively few changes were made for my comments.

On Monday, October 13, 2025 (the day before Appellants' brief was due), recognizing my co-counsel had no intention of including the materials of the Supplemental Brief in the Main Brief, I sent an email to co-counsel, stating I planned on filing a supplemental brief if the materials I requested be included weren't included. A rough draft was attached. No response was received in relation

[6] At one point in the conversation, Jon Taylor said he wanted to include in the brief only things clerks would get excited about. But there is nothing exciting about calculating the costs of issuing and renewing PTINs—what's at issue per *Montrois*.

thereto. On the morning and very early afternoon of October 14th, I sent many comments. *Not a single change was made incident thereto, except perhaps a typo correction.* On the afternoon the brief was due, another email was sent by me, along with revised version of the proposed supplemental brief (that was similar to what was ultimately filed). The email said: "Obviously, I would prefer to have these materials included in the brief now being prepared for filing today." I also asked when a revised version of the brief would be sent. No response was received. The Main Brief was filed later that evening at 11:30.

Gupta Wessler has never been involved in the "weeds" of this case. Motley Rice brings them in for appeals matters in this Court. Their lack of weeds experience hurts when Gupta Wessler is either unwilling or unable to make requested changes from counsel who have been in the weeds, including the undersigned. The first paragraph of the Supplemental Brief supplies an example.[7]

My co-counsel do all they can to exclude materials I believe need to be covered. Regarding non-monetary relief, the class needs and wants relief from the annual W-12 filings with respect to a permanent identification number (i.e., a PTIN). *See* Exhibit E. Post-*Loving*, there is no lawful basis for requiring such.

[7] A draft of a brief piece received on October 11th included the following definition: "personal registration number (or PTIN)." I sent comments requesting a change to "preparer tax identification number (PTIN)." This recommended change was made.

Response to DOJ's Brief. Regarding DOJ's opposition brief of November 25th, contrary to what is said at pp. 2-3, the original complaint sought comprehensive relief to eliminate the remainder of the licensing scheme not struck down by *Loving*. Thus, 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." A declaratory judgment was sought for all renewals to cease. *See* Exhibit D, footnote 11, pp. 18-22.

Regarding me calling myself "class counsel in exile" (p. 3), it was not I but the district court that called me such, and has continued to call me such. Keeping a sense of humor (which is difficult), I signed a supplement to a complaint I later filed with the Court of Appeals regarding the district court's conduct with an aka as such.

Concerning Motley Rice being named class counsel, as explained above, I agreed to such provided we'd jointly control the case. I believe Motley Rice has not followed our agreement. In 2020, the district court rejected an attempt by me to replace Motley Rice as named class counsel, but in the process said it expected professionalism on behalf of co-counsel. ECF 126. The district court has acted to take away the Plaintiffs' attorney and replace him with counsel only interested in

fees/money. That may be good for the IRS, but it's not good for American return preparers.[8]

Finally, regarding the claim (point 3, p. 8) that the Supplemental Brief will have a "significant, adverse impact on this case going forward," that's true if the objective is for this case to continue on for *many* more years and for the IRS to (inconsistent with *Montrois*[9]) be able to pretend for *many* more years it has licensing power, as is the obvious objective of both the IRS and the DOJ. Unlike the Main Brief, that says fees are excessive and seeks vacatur without recommending a course of action, the Supplemental Brief: (a) attacks the unlawful licensing scheme; and (b) supplies a cost analysis consistent with *Montrois* that could potentially be used to end the case. Regarding the number of briefs (4 vs. 7), the Supplemental Brief covers three specific things that can be considered part of the Main Brief.

Excess Questioning. A brief discussion of this claim is necessary because, based on experience with my co-counsel (*supra*), otherwise no discussion will exist.

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[8] Undersigned is unaware of any legal authority (FRCP or otherwise) for declaring one firm of a group of firms appointed to represent plaintiffs as having sole authority over a case. The district court has ruled on some matters brought solely by the undersigned, including the motion to compel described in the second paragraph of p. 9 of the Supplemental Brief. If justice is the goal, considering all *supra*, the lawyer hired by the class representatives should be heard when he seeks to argue a point the class representatives have asked him to argue (which is not otherwise argued).

[9] *Montrois* said at p. 1063: "[T]he agency's PTIN-related activities are now confined to generating and maintaining a database of PTINs." But that is not what has happened. *See* IRM 1.1.28 for RPO continuing on with licensing activities.

Excess questioning is the lynchpin of the licensing system because the IRS gets more information from prepared returns than it does from prior Form W-7P (meaning eliminating excess questioning should eliminate renewals). The most important line from the *Loving* case (p. 1015) is: "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." Section 330 was the licensing system's backbone. Without it, the only remaining non-fee provision is Code §6109. Subsection (a)(4) provides: "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." Also pertinent is subsection (c). It provides: "For purposes of this section, the Secretary is authorized to require such information as may be necessary to assign an identifying number to any person." So, by statute, the IRS can only require preparers to acquire and use PTINs. Renewals are unlawful. Non-identification questioning is unlawful.[10]

Since *Loving*, PTIN renewals and excess questioning have been unlawful because an agency has only that authority granted it by Congress. *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

[10] A Pennsylvania CPA told me although he placed his PTIN on all returns prepared for compensation, the IRS recently successfully penalized him $2,900 for using an "expired" PTIN—the injustice in action.

agency has stayed within the bounds of its statutory authority"). The IRS has so known. The DOJ has so known. My co-counsel has so known. The Courts system has so known. Exhibit G is the IRS's latest notice of PTINs expiring. DOJ's acts are akin to a prosecutor continuing to prosecute a defendant it knows is innocent.

Judge Lamberth ruled in *Lopes v. JetSetDC*, 994 F. Supp.2d 126, 130 (D.D.C. 2014) that "[d]enying leave to amend without sufficient justification, such as undue delay, bad faith or dilatory motive constitutes an abuse of discretion." In this case in 2020 he refused to allow the complaint to be amended to add back the anti-renewal provision. (No renewals means no renewal fees.) Here, the court refused to consider the excess questioning claim, even though the DOJ (that has fought this case tooth-and-nail) never argued the claim wasn't made and fully briefed the issue.[11]

Big Picture. It is fundamentally unfair to expect the people to regularly do the right thing when its government won't do the same. Americans are losing faith in

[11] Although *Nat'l Cable Tel Ass'n v. United States*, 415 U.S. 336 (1974) ruled a fee is incident to a voluntary act, and making return preparers annually file W-12s and pay fees is not a voluntary act post-*Loving* (because they have a right to prepare returns), this Court required post-2019 litigation to pull costs supplying private benefits from a mass of licensing costs. In doing so, it said in *Montrois* (p. 1068) that the district court had ruled requiring renewals was lawful. But when that specific issue was raised at the district court in the supplemental PTIN case, the court said it said no such thing. Exhibit H, p. 19. And query how claim-splitting, which requires the matter to be *res judicata* once this case is concluded, can apply to anti-renewal, when that claim clearly no longer exists in this case? (*See* Exhibit C, p. 15, bottom.) A recent article discussing the unreasonableness and lack of logic of what's taking place is attached as Exhibit I.

their government. This case is a battle for the soul of our justice system. DOJ's fighting inclusion of the Supplemental Brief shows pursuing justice isn't its goal.

Our nation is very ill in many ways. Congress is inept. The DOJ is weaponized. The Executive Branch regularly abuses its power. The national debt and the finances in general are the greatest of our problems.[12] The IRS (unlawfully) requiring return preparers to annually update its dossier on them while charging them to do so isn't going to solve the problems. If the legal system cannot be relied upon to produce justice, it's hopeless.

For American return preparers, please consider the Supplemental Brief.

December 2, 2025

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[12] Interest costs exceed military costs, and the Congressional Budget Office expects the ratio to grow to 1.7 by 2035. For over 20 years, I've dedicated a significant amount of my free time to trying to produce solutions to the financial problems. Exhibits J and K supply two examples. Exhibit J is a summary of the Financial Sanity Act of 2025, a 13-page bill designed to reduce the costs of Medicare, Social Security and health care. Exhibit K is one-paragraph summary of a recommendation for a much simpler, reasonably progressive, less evasive tax system that produces balanced budgets annually by tying spending to tax rates. It is based on the following article: *taxnotes.com/exempt-organizations/tax-reform/eliminating-income-tax-while-balancing-budget/2017/09/20/lw7hx*. I've sent both to many members of Congress.

CERTIFICATE OF COMPLIANCE WITH RULE 32(g)(1)

I hereby certify that my word processing program, Microsoft Word, counted 3,905 words in the foregoing **PLAINTIFFS-APPELLANTS' REPLY TO DEFENDANT-APPELLEE'S RESPONSE TO MOTION OF ALLEN BUCKLEY TO FILE A SUPPLEMENTAL BRIEF**, exclusive of the portions excluded by Rule 32(g)(1). The font is Baskerville Old Face 14. A separate motion is being filed to request permission to exceed the word count limit (which likely is 2,600).

/s/*Allen Buckley*
Allen Buckley

CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2025, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellee CM/ECF system.

/s/Allen Buckley
Allen Buckley

EXHIBIT A

Allen Buckley

From: Narwold, Bill <bnarwold@motleyrice.com>
Sent: Wednesday, March 04, 2015 9:50 AM
To: Allen Buckley
Subject: RE: Our Agreement/Lead Counsel Role

Allen,

These kind of emails are not helpful to our relationship. We have an agreement and we intend to honor it. That is how we work. I do not plan to reconfirm it every few months. As I wrote to you after we retained GB and CD, I would like to discuss with you refining that agreement, if our group is appointed lead. However, unless we mutually agree to modify our existing agreement, it will remain in effect.

Bill

William H. Narwold | Attorney at Law | Motley Rice LLC
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o. 860.882.1676 (9190MtP) | **c.** 860.543.3445 | **f.** 860.882.1682

From: Allen Buckley [mailto:ab@allenbuckleylaw.com]
Sent: Wednesday, March 04, 2015 8:50 AM
To: Narwold, Bill
Subject: Our Agreement/Lead Counsel Role

Please confirm that the terms of our December 18, 2014 agreement will continue to apply regardless of who is named lead counsel in the case.

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EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADAM STEELE and, BRITTANY MONTROIS, **Plaintiffs,** **v.** **UNITED STATES OF AMERICA,** **Defendants.**	**Civil Case No. 14-1523**
WALLACE G. DICKSON, **Plaintiff,** **v.** **UNITED STATES OF AMERICA,** **Defendants.**	**Civil Case No. 14-2221**

MEMORANDUM OPINION

Plaintiff Wallace Dickson and plaintiffs Adam Steele and Brittany Montrois seek an order consolidating the above-captioned cases because they share common questions of law and fact. Plaintiff Dickson further moves for appointment of the law firms Hausfeld LLP and Boies Schiller & Flexner LLP ("BSF Group") to serve as interim co-lead counsel in the proposed consolidated action. Plaintiffs Steele and Montrois seek the appointment of the law firm Motley Rice as interim lead counsel in the proposed consolidated action, to work with Allen Buckley and others ("Motley Rice Group").

I. BACKGROUND

In 2010, the IRS promulgated new regulations requiring tax-return preparers to meet requirements for competency testing and engage in continuing education. *See* 31 C.F.R. §§ 10.4(c), 10.5(b), 10.6(d)(6), (e)(3). Additionally, the IRS also required all tax preparers to pay to obtain a Preparer Tax Identification Number ("PTIN"), and pay to renew it each ear. *See* 26 C.F.R. § 300.12(a), (b).

Allen Buckley subsequently agreed to represent Jesse Brannen, a tax-return preparer who wanted to challenge the new PTIN fees in court. In May 2011, Buckley filed a complaint, *Brannen v. United States*, No. 4:11-cv-00135, 2011 WL 8245026 (N.D. Ga. Aug. 26, 2011), arguing that the IRS lacks statutory authority to require paid tax preparers to file for, pay for, and receive a PTIN. *Id.* at *1. Although the *Brannen* case was subsequently dismissed, *see Brannen*, 2011 WL 8245026; *aff'd*, 682 F.3d 1316 (11th Cir. 2012), Mr. Buckley further developed these themes in an article he wrote, *Is Treasury's New Regulatory Scheme for Return Preparers Lawful?*, published in Tax Notes magazine in October 2012. Buckley Decl. ¶ 8, Ex. A (reprinted at http://www.taxanalysts.com/www/features.nsf/Articles/F40714F3406FC5E585257D86000CDD68?OpenDocument).

Mr. Buckley also alleges that he was substantially involved in another case challenging the legality of the IRS's efforts to regulate tax-return preparers, *Loving v. IRS*, 917 F. Supp. 2d 67 (D.D.C. 2013). Buckley Decl. ¶ 7. He alleges that he reviewed all major briefs, provided research, and frequently consulted with Daniel Alban, lead counsel in the *Loving* case. *Id.* This case was successful: In February 2014, the D.C. Circuit affirmed the lower court's holding that the IRS lacked the authority to regulate tax-return preparers. *Loving v. IRS*, 742 F.3d 1013, 1014-15 (D.C.

Cir. 2014). The D.C. Circuit opinion relied on many of the same arguments Buckley set forth two years earlier in his Tax Notes article.

In the meantime, Mr. Buckley had agreed to represent Adam Steele, who was introduced to him by Mr. Alban. Knowing Mr. Buckley sought local counsel in Washington, D.C., Mr. Alban introduced Mr. Buckley to Stuart Bassin. Buckley Decl. ¶ 13. Mr. Bassin also claims to have been involved with the *Loving* case, occasionally sharing insights and making substantive suggestions about the case on appeal. Decl. of Stuart Bassin, *Dickson* ECF No. 17-2.[1] Mr. Bassin, after working extensively with Allen Buckley, filed the *Steele* complaint in this Court on September 8, 2014. *Steele* Compl. The *Steele* plaintiffs seek review of the IRS's decision under the Administrative Procedure Act (APA).

Several attorneys became interested in the litigation at this point, including James Pizzirusso of Hausfeld, Jeffrey Kaliel of Tycko & Zavareei, and Scott Gant of BSF. In the meantime, the relationship between Mr. Buckley and Mr. Bassin deteriorated, and they terminated their working relationship. Buckley Decl. ¶ 16; Bassin Decl. ¶¶ 13-14. After meeting with Mr. Buckley and discussing potential arrangements as co-counsel, Mr. Pizzirusso and Mr. Kaliel declined to work with him. Buckley Decl. ¶ 19, Pizzirusso Decl. ¶ 18. Mr. Buckley alleges that Mr. Gant of BSF declined to return his calls. Buckley Decl. ¶ 21. Mr. Buckley reached an agreement with Motley Rice LLC that it would serve as counsel in the *Steele* case.

Later that month, Hausfeld, BSF, and Tycko & Zavareei LLP, filed the *Dickson* complaint on December 31, 2014. The *Dickson* complaint asserts claims for illegal exactions, contending that the IRS lacks legal authority to impose PTINs fees—at all, or alternatively, in the amounts charged.

[1] Mr. Bassin is now collaborating with the *Dickson* plaintiff.

One week later, the plaintiff in *Dickson* moved to consolidate the *Dickson* and *Steele* actions, and sought appointment of Hausfeld and BSF as interim co-lead counsel for the proposed class, supported by Mr. Bassin. The *Steele* plaintiffs also move for consolidation, but seek the appointment of Motley Rice as interim class counsel, working with Mr. Buckley and others. The government has not opposed their motions.

II. CONSOLIDATION

Federal Rule 42(a) permits consolidation of actions that involve "a common question of law or fact." Fed. R. Civ. P. 42(a). Local Rule 40.5 states that two or more civil cases "are deemed related when the earliest is still pending on the merits in the District Court and they (i) relate to common property, or (ii) involve common issues of fact, or (iii) grow out of the same event or transaction or (iv) involve the validity or infringement of the same patent." LCvR 40.5(a)(3).

"In deciding whether to consolidate, courts must 'weigh the risks of prejudice and confusion wrought by consolidation against the risk of inconsistent rulings on common factual and legal questions, the burden on the parties and the court, the length of time, and the relative expense of proceeding with separate lawsuits if they are not consolidated." *Royer v. Fed. Bureau of Prisons*, 292 F.R.D. 60, 61 (D.D.C. 2013) (quoting *Nat'l Ass'n of Mort. Brokers v. Bd. of Governors of the Fed. Reserve Sys.*, 770 F. Supp. 2d 283, 286 (D.D.C. 2011)). Consolidation is appropriate when cases involve the same general facts, are at similar stages of litigation, and when consolidation poses no risk of confusion or prejudice. *Id.*

These cases involve common questions of both law and fact, and the Court agrees with the parties that consolidation would promote convenience and judicial economy, simplify management of the cases, and facilitate global resolution of the class claims and conserve judicial resources.

Dickson and *Steele* share similar operative facts. While the cases present some differences, they are both predicated on allegations that the government assessed PTIN fees on tax preparers without legal authority to do so. The cases share basic relevant facts, involve the same defendant, and challenge the IRS's assessment of PTIN fees—or the level at which they were set.

Additionally, both cases are in their infancy. No discovery has been conducted in either, and consolidating the cases now will support judicial efficiency.

Finally, consolidation would avoid duplication, waste, and inconsistent results. Already, the Court and parties have been faced with unnecessarily duplicative motion practice and difficulties with coordination. These cases potentially involve hundreds of thousands of putative class members, and duplicative discovery disputes could become burdensome.

For these reasons, the Court will consolidate the *Dickson* and *Steele* cases into a single action.

III. INTERIM CLASS COUNSEL

A. Legal Standard

Under Federal Rule of Civil Procedure 23(g)(3), the Court may "designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action." Fed. R. Civ. P. 23(g)(1). Rule 23(g), which outlines the factors a court must consider when appointing class counsel, applies equally to the appointment of interim class counsel before certification. *In re Shop-Vac Mktg. & Sales Practices Litig.*, No. 4:12-MD-2380, 2013 WL 183855, at *1 (M.D. Pa. Jan. 17, 2013); *Brigiotta's Farmland Produce & Garden Ctr., Inc. v. United Potato Growers of Idaho, Inc.*, No. 4:10-cv-307, 2010 WL 3928544, at *1 (D. Idaho Oct. 4, 2010); *Four In One Co. v. SK Foods, L.P.*, No. 08-cv-03017, 2009 WL 747160, at *1 (E.D. Cal.

Mar. 20, 2009); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 240 F.R.D. 56, 57 (E.D.N.Y. 2006).

Rule 23(g) requires the court to consider: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A). The court may also consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). Where more than one applicant seeks appointment as class counsel, the court must appoint the applicant "best able to represent the interests of the class." Fed. R. Civ. P. 23(g)(2).

B. Analysis

At the outset, the Court must determine exactly whose efforts and expertise are to be evaluated. BSF Group argues that "the court must choose lead counsel based on the work, experience, knowledge, and resources of the class counsel applicants themselves, not their paid consultants and experts." BSF's Reply, *Dickson* ECF No. 17 at 5, 8 (citing *In re Honey Transshipping Litig.*, No. 13-cv-2905 (N.D. Ill. Aug. 9, 2013) (rejecting co-lead applicants' reliance on his co-counsel's experience)). Therefore, it asserts, because the Motley Rice firm seeks to be chosen as solo lead counsel in this lawsuit, the role of Mr. Buckley and other retained firms is irrelevant to its adequacy as lead counsel.

However, Rule 23(g)(1)(B) explicitly permits the Court to consider, in addition to the four required factors, "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." The proposed involvement of the other counsel in the Motley Rice Group is "pertinent" to whether Motley Rice is the proposed class counsel "best able to represent the

interests of the class." Fed. R. Civ. P. 23(g)(2). There is no need to require those who seek to work together to seek a multiple lead counsel arrangement: The Court is assured that Motley Rice, Mr. Buckley, Mr. Beck, and Mr. Rizek, have a strong working relationship and can function as a team with Motley Rice at the helm. The proposed lawyers in the Motley Rice Group have each entered appearances in this case as counsel. Indeed, Mr. Buckley has previously entered into a co-counsel agreement with Motley Rice, indicating that the relationship is not merely one where Motley Rice hires "paid consultants" to make up for any perceived deficiencies, but a close working relationship. As such, the Court will consider *all* factors pertinent to Motley Rice's ability to represent the purported class, including its relationships with Mr. Buckley and others.

Each group is comprised of accomplished attorneys and has demonstrated significant experience in handling class actions, including class actions. *See* Fed. R. Civ. P. 23(g)(1)(A)(ii). While both groups put forth arguments about specific types of lawsuits their opponents have not handled—for example, class actions against the government or illegal exaction claims, specifically—the Court is thoroughly impressed by the qualifications of both groups. The purported plaintiff class would benefit from the wealth of experience that either group offers. Furthermore, both groups of attorneys appear to have a strong command of the applicable law. *See* Fed. R. Civ. P. 23(g)(1)(A)(iii).

The Court is also satisfied that both groups of attorneys have significant resources that they are willing to commit to representing the putative class. *See* Fed. R. Civ. P. 23(g)(1)(A)(iv). The costs the Motley Rice Group may incur to travel to Washington D.C. throughout the course of litigation would be minimal, and the Court finds that does not affect its ability to effectively or efficiently represent the purported class.

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 these cases 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 the potential claims and initiated legal action months in advance of other applicants. Consideration of "the 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). While other counsel also claim to have conducted some investigative work, no claimed efforts appear to pre-date Mr. Buckley's work.

The Motley Rice Group has documented its work and investigative efforts to the Court in sufficient detail to satisfy that Court that it has conducted a comprehensive investigation, and made a significant investment in time and resources such that its commitment to this litigation is unquestioned. The Motley Rice Group was instrumental in ferretting out similar lawsuits as early as May 2011 before publishing an article on key issues at stake in this case in 2012. And while the BSF Group asserts that its "significant independent and original work" is reflected in its complaint, which differs in some respects from the *Steele* complaint, the Motley Rice Group had already initiated its claims in September, 2014. The Motley Rice Group has satisfied the Court that it has conducted more significant work in investigating and identifying potential claims in this action.[2]

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[2] Indeed, even if this factor alone were insufficient to support the selection of the Motley Rice Group, the Court finds that since both groups are more than qualified to handle this action, it would be imminently reasonable to select the Motley Rice Group on the basis that their complaint was filed first. *See, e.g., Richey v. Ells*, No. 12-CV-02635-WJM-MEH, 2013 WL 179234, at *2 (D. Colo. Jan. 17, 2013) (citing *Biondi v. Scrushy*, 820 A.2d 1148, 1159 (Del. Ch. 2003) (because all firms were more than qualified to handle the action, the court appointed counsel who first filed the case); *Moradi v. Adelson*, 11cv490–GMN–RJJ, 2011 WL 5025155, *3 (D. Nev. Oct. 20, 2011).

While both groups of attorneys have satisfied the Court that they have sufficient experience, adequate knowledge of the applicable law, and sufficient resources to adequately represent the putative class, the Motley Rice Group has demonstrated that it has conducted more significant work in identifying and investigating potential claims. Consideration of the factors set forth in Rule 23(g) thus leads the Court to conclude that it is the group that is best able to represent the interests of the putative class. For this reason, the Court will grant Motley Rice's motion to serve as interim class counsel.

IV. CONCLUSION

For the aforementioned reasons, the plaintiffs' motion for consolidation will be GRANTED. Motley Rice's motion for appointment as interim class counsel is GRANTED, while BSF's motion for appointment is DENIED.

A separate order consistent with this Opinion shall issue on this date.

Signed by Royce C. Lamberth, United States District Judge, on June 30, 2015.

EXHIBIT C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 16, 2024 Decided July 18, 2025

No. 24-5076

ADAM STEELE AND KRYSTAL COMER,
APPELLANTS

v.

UNITED STATES OF AMERICA,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:23-cv-00918)

Allen Buckley argued the cause and filed the briefs for appellants.

Robert J. Branman, Attorney, U.S. Department of Justice, argued the cause for appellee. With him on the brief was *Jennifer M. Rubin*, Attorney.

Before: MILLETT and CHILDS, *Circuit Judges*, and GINSBURG, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* CHILDS.

CHILDS, *Circuit Judge*: Each year, tax return preparers help millions of Americans file their federal income taxes. Federal law requires those preparers to obtain or renew a Preparer Tax Identification Number (PTIN) from the Internal Revenue Service (IRS). I.R.C. § 6109(a)(4). To do so, they must complete Form W-12, which requires users to pay a fee and disclose personal information. Treas. Reg. § 1.6109-2.

Adam Steele and Krystal Comer (Plaintiffs) have long contested these requirements. In 2014, they joined a still-pending class action challenging the IRS's authority to impose user fees for issuing and renewing PTINs. That suit initially included separate claims challenging the PTIN renewal process itself, and the amount of information Form W-12 requires for that renewal. Class counsel later withdrew those claims.

Plaintiffs now seek a second bite at the apple by attempting to revive their abandoned claims in a parallel suit. The district court dismissed their complaint for violating the rule against claim-splitting. On appeal, Plaintiffs insist the court erred in dismissing their case. The government disagrees and adds that the Paperwork Reduction Act (PRA) bars judicial review of Plaintiffs' challenge to the amount of information the IRS collects through Form W-12.

We hold that the PRA precludes review only of the Director's decision to approve, disapprove, or take no action on an agency collection of information—not of the agency's legal authority to demand information. Plaintiffs' suit still cannot proceed. Claim-splitting bars duplicative litigation between the same parties asserting the same claims, even absent a final judgment by the court with jurisdiction over the first litigation. Plaintiffs' claims were raised, then withdrawn; Plaintiffs were later denied leave to amend in the class action; they then refiled the same claims in this litigation. We affirm.

I.

A.

1.

Writing in 1789, Benjamin Franklin famously remarked that "nothing can be said to be certain, except death and taxes." Letter from Benjamin Franklin, President, to Jean Baptiste Leroy (Nov. 13, 1789), *in* THE WRITINGS OF BENJAMIN FRANKLIN 69, 69 (Albert H. Smyth ed., 1907). True to Franklin's words, the Sixteenth Amendment authorized the federal income tax, U.S. Const. amend. XVI, prompting Congress to enact the Revenue Act of 1913, which required individuals to file returns. Revenue Act of 1913, ch. 16, § II, 38 Stat. 114, 166–81. That obligation ultimately spurred today's widespread reliance on professional tax assistance.

In 1976, Congress authorized the Treasury Secretary to require that returns filed by paid preparers "bear such identifying number . . . as may be prescribed." Tax Reform Act of 1976, Pub. L. No. 94-455, § 1203(d), 90 Stat. 1520, 1691 (codified at I.R.C. § 6109(a)). A "tax return preparer" is any person paid to prepare tax returns or refund claims, or who employs others to do so. I.R.C. § 7701(a)(36)(A). Preparers initially signed returns using their social security numbers, *see* § 1203(d), 90 Stat. at 1691, until privacy concerns arose about "inappropriate use" of such information. S. Rep. No. 105-174, at 106 (1998).

Congress responded in 1998 by authorizing alternative identifiers. IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3710, 112 Stat. 685, 779. The IRS approved PTINs the next year, which remained voluntary to use in place of the social security number for over a decade. Furnishing

Identifying Number of Income Tax Return Preparer, 64 Fed. Reg. 43,910, 43,911 (Aug. 12, 1999).

That changed in 2010, when the Treasury Department issued regulations requiring all paid preparers to obtain and annually renew PTINs, for a fee. Furnishing Identifying Number of Tax Return Preparer, 75 Fed. Reg. 60,309, 60,309–10 (Sept. 30, 2010); User Fees Relating to Enrollment and Preparer Tax Identification Numbers, 75 Fed. Reg. 60,316, 60,317–19 (Sept. 30, 2010). In 2011, additional regulations required non-attorneys, CPAs, or enrolled agents to pass exams and take annual training to remain "registered tax return preparers." Regulations Governing Practice Before the IRS, 76 Fed. Reg. 32,286, 32,286–88 (June 3, 2011).

Preparers challenged the changes resulting from the 2011 regulations. The district court ruled in their favor, and we affirmed, holding that the IRS "may not unilaterally expand its authority through such an expansive, atextual, and ahistorical reading of Section 330." *Loving v. IRS*, 917 F. Supp. 2d 67 (D.D.C. 2013), *aff'd*, 742 F.3d 1013, 1022 (D.C. Cir. 2014). While *Loving* invalidated the IRS's licensing rules, it left the PTIN renewal requirement intact. *Montrois v. United States*, 916 F.3d 1056, 1068 (D.C. Cir. 2019). Thereafter, preparers shifted focus to whether the IRS could demand their information at all. That question turns on the statutory limits governing federal information collection.

2.

The PRA imposes requirements on agencies when they collect information from the public. *See* 44 U.S.C. §§ 3501–3521. Congress enacted the statute to "minimize the paperwork burden" and promote coordinated, efficient information policies. *Id.* § 3501(1)–(7). A "collection of

information" includes agency requests for identical data from ten or more people, including standardized forms and recordkeeping. *See id.* § 3502(3); 5 C.F.R. § 1320.3(c).

A valid collection must display an Office of Management and Budget (OMB) control number and expiration date. *See* 44 U.S.C. § 3507(a); 5 C.F.R. § 1320.5(b)(1). Agencies must inform respondents of the purpose, whether a response is required, and the expected burden. 44 U.S.C. § 3506(c)(1)(B)(iii); 5 C.F.R. § 1320.8(b)(3). The statute includes a "public protection" provision: if a collection lacks a valid OMB control number, "no person shall be subject to any penalty for failing to comply." 44 U.S.C. § 3512(a). Once approved and assigned a control number, the PRA bars judicial review of the Director's decision to authorize the collection of information. *See id.* § 3507(d)(6).

Form W-12 is a "collection of information" subject to the PRA. *See id.* §§ 3501(1), 3507(a), 3512(a); *see also* Treas. Reg. § 1.6109-2(d)–(e). In 2010, the IRS sought emergency OMB approval to implement Form W-12, which replaced the prior version. *See* Information Collection Request, Form W-12, ICR Reference No. 2010008-1545-048 (2010), *available at* https://perma.cc/9WAD-HL2M. OMB approved the submission and assigned it Control Number 1545-2190. *Id.* The IRS later pursued notice and comment rulemaking.[1] Each version of Form W-12 from 2010 to 2022 displays a valid OMB control number.

[1] *See e.g.*, 75 Fed. Reg. 70971 (Nov. 19, 2010); 76 Fed. Reg. 14458 (Mar. 16, 2011); 78 Fed. Reg. 76892 (Dec. 19, 2013); 79 Fed. Reg. 29841 (May 23, 2014); 82 Fed. Reg. 18212 (Apr. 17, 2017); 82 Fed. Reg. 49480 (Oct. 25, 2017); 85 Fed. Reg. 81286 (Dec. 15, 2020); 86 Fed. Reg. 16657 (Mar. 30, 2021).

B.

This appeal arises from a Federal Rule of Civil Procedure 12(b)(6) dismissal. The "relevant facts are those alleged in the complaint, taken in the light most favorable to the plaintiff[s] and with all reasonable inferences drawn in [their] favor." *Hurd v. District of Columbia*, 864 F.3d 671, 675 (D.C. Cir. 2017).

In 2014, Adam Steele and Brittany Montrois (Class Plaintiffs) filed a putative class action challenging the IRS's PTIN regulations. J.A. 63–95. They alleged, among other things, that the IRS lacked authority to charge user fees, require PTIN renewal (PTIN renewal claim), and that IRS Form W-12 requested more information than necessary (excessive questioning claim). J.A. 75–78 ¶¶ 46–57, 88 ¶¶ 98–99, 90 ¶ 107. The complaint sought declaratory relief halting PTIN renewal requirements and fees, and an injunction limiting the IRS to collecting only necessary information once. J.A. 92, 94.

In 2015, the district court consolidated the class action with a related case and appointed Motley Rice LLC as interim class counsel. *See Steele v. United States (Steele I)*, No. 14-cv-1523, 2020 WL 7123100, at *1 (D.D.C. Dec. 4, 2020). Motley Rice amended the complaint to challenge the user fees only, omitting the PTIN renewal and excessive questioning claims. J.A. 96–111. As the attorney that initiated the class action for Mr. Steele and Ms. Montrois, Mr. Allen Buckley objected to Motley Rice's strategic choice to withdraw those claims.[2]

[2] Allen Buckley is both an attorney and a licensed certified public accountant. J.A. 47. Though the class action claims apply to him as a preparer, Mr. Buckley is excluded from the suit due to his role as counsel. J.A. 66 ¶ 13. Assisted by another attorney, J.A. 95, he filed *Steele I* on behalf of Class Plaintiffs. Oral Arg. Tr. 7:5–7. Mr.

In 2017, the district court granted partial summary judgment for the Class Plaintiffs. *See Steele I*, 260 F. Supp. 3d 52, 68 (D.D.C. 2017), *vacated* and *remanded sub nom. Montrois v. United States*, 916 F.3d 1056 (D.C. Cir. 2019).[3] After vacatur and remand by this Court, Mr. Buckley represented Mr. Steele, who moved for leave to amend the complaint to revive the earlier abandoned PTIN renewal and excessive questioning claims. *See Steele I*, 2020 WL 7123100, at *4–6. The district court denied that request, citing undue delay, prejudice to the government, and futility. *See id.* at *6.

In April 2023, while *Steele I* remained pending, Mr. Buckley filed a separate lawsuit on behalf of Mr. Steele, reprising the abandoned claims. J.A. 43–44 ¶¶ 67–70, 44–45 ¶¶ 1–4. In May 2023, Mr. Buckley amended the complaint to add Ms. Comer. J.A. 29–30. The district court dismissed the suit under the rule against claim-splitting, holding that Plaintiffs' complaint improperly duplicated claims raised and withdrawn in the ongoing class litigation. *See Steele v. United States (Steele II)*, No. 23-cv-0918, 2024 WL 1111639, at *12–13 (D.D.C. Mar. 14, 2024). Plaintiffs timely appealed.

II.

We have jurisdiction to review the district court's judgment. 28 U.S.C. § 1291.

Buckley later solicited Motley Rice LLC to serve as class counsel given their experience with class actions. *Id.* 7:9–16.

[3] Following our decision in *Montrois*, Mr. Buckley moved for a preliminary injunction to bar the IRS from requiring PTIN renewals. *See Steele I*, 2020 WL 7123100, at *2. Motley Rice LLC opposed the motion alongside the government, which argued that the request exceeded the scope of the amended complaint. *Id.* The district court denied the motion. *Id.* at *1.

III.

As an alternative ground to affirm, the government argues that the district court lacked subject matter jurisdiction because the PRA bars judicial review of Plaintiffs' excessive questioning claim. 44 U.S.C. § 3507(d)(6). The district court did not address that argument. Ordinarily, we refrain from resolving issues the district court has not decided in the first instance. *See Pollack v. Hogan*, 703 F.3d 117, 121 (D.C. Cir. 2012). But the government squarely raised it below in its motion to dismiss. *See* Resp't's Mot. Dismiss Br. 6–9. Because federal appellate courts may consider any issue that was either "pressed or passed upon below," *Blackmonn-Malloy v. United States Capitol Police Bd.*, 575 F.3d 699, 707 (D.C. Cir. 2009) (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)), we proceed to untangle the legal knot the government has presented. Whether a statute bars judicial review is a legal question reviewed de novo. *See Porzecanski v. Azar*, 943 F.3d 472, 482 (D.C. Cir. 2019); *Zhu v. Gonzales*, 411 F.3d 292, 294 (D.C. Cir. 2005).

Although sovereign immunity bars suits against the United States absent an express waiver, *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260–61 (1999), the APA supplies a general waiver for suits challenging final agency action, 5 U.S.C. § 702. However, that waiver is unavailable where "statutes preclude judicial review." 5 U.S.C. § 701(a)(1); *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984). There is a "strong presumption that Congress intends judicial review of administrative action," rebuttable only by "clear and convincing evidence of a contrary legislative intent." *Amador Cnty. v. Salazar*, 640 F.3d 373, 379–80 (D.C. Cir. 2011) (quoting *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 671–72 (1986)).

The PRA provides that the "decision by the Director [of OMB] to approve or not act upon a collection of information contained in an agency rule shall not be subject to judicial review." 44 U.S.C. § 3507(d)(6). The government contends that, because the IRS secured OMB approval and displayed a valid control number, the district court lacked jurisdiction to assess the scope of information required by Form W-12. Plaintiffs disagree. They argue that even full compliance under the PRA cannot confer substantive authority Congress never granted. In their view, agencies may not collect more than the statute permits, regardless of OMB approval. Plaintiffs are correct that the PRA's jurisdictional bar is inapplicable to challenges that question an agency's statutory authority to act.

We begin with the text. The PRA speaks to the OMB Director's "decision." *Id.* A plain language reading insulates the Director's discretionary judgment to *allow* or *remain silent* on an agency's proposed collection. It does not bar judicial review of agency conduct taken after such approval. The PRA imposes requirements on how agencies collect information and assigns oversight responsibility to the OMB Director. While it adds conditions to the collection process, it does not say anything about whether an agency possesses statutory authority to demand particular information. Thus, where a statute is silent, we presume Congress did not displace the courts' ordinary role in determining whether an agency has acted within the bounds of its legal authority. *See Salazar*, 640 F.3d at 379–80.

That reading accords with the PRA's structure. Congress enacted the PRA to improve coordination, efficiency, and transparency in agency information practices. *See* 44 U.S.C. § 3501(1)–(7). The statute requires agencies to seek OMB approval before imposing collections on the public. *See id.* § 3507; 5 C.F.R. § 1320.5(a). That framework includes

meaningful safeguards. The Director must determine whether a proposed collection is "necessary for the proper performance of the functions of the agency" and has "practical utility," and must both solicit public comment and respond to petitions for review. 44 U.S.C. §§ 3508, 3517(a)–(b). Individuals need not respond to collections lacking a valid control number. *Id.* § 3512(a).

However, the PRA does not authorize *what* information an agency may collect, but rather governs the process authorizing *how* any agency collects information that suits its objectives. It prescribes a framework to ensure oversight, not to expand substantive power. If OMB's clearance were treated as an unreviewable license to exceed statutory limits, it would invert the statute's purpose and design. The PRA neither states nor supports that result.

That distinction is critical. The judgment that a collection has "practical utility" lies with the Director of OMB, not with the courts. *Id.* § 3508. Indeed, courts may not second guess that determination. But they retain the responsibility to decide whether the agency acted within the scope of its statutory authority. That inquiry determines whether the APA's waiver of sovereign immunity applies. In this instance, it does.

Plaintiffs' suit does not challenge the Director's approval of Form W-12. Tellingly, Plaintiffs do not question the validity of the Director's decision or allege defects in the PRA process. They allege that "[r]equiring renewal of PTINs is an act beyond [the IRS's] pertinent statutory authority." J.A. 31 ¶ 5. Their claim is that, even with a valid control number, the IRS exceeded the limits of I.R.C. § 6109(c) by demanding more information than necessary to assign or renew a PTIN. *Cf.* J.A. 40 ¶ 56 (identifying allegedly necessary information); J.A. 41 ¶ 59 (listing the form's additional requirements). That is a

substantive challenge to the agency's authority, not an objection to how it obtained OMB approval. Accordingly, Plaintiffs' excessive questioning claim falls within the APA's waiver. *See* 5 U.S.C. §§ 702, 706.

To be sure, Plaintiffs describe, in their complaint, the form's questions as "licensing-type" and burdensome. J.A. 42 ¶ 61. That criticism might support a petition under 44 U.S.C. § 3517(b), which authorizes challenges to unnecessary or unduly burdensome collections. But Plaintiffs do not invoke that provision or claim a violation of its procedures. And the government has offered no persuasive basis—in briefing or at argument—to suggest that the PRA forecloses judicial review of an agency's statutory authority to collect information. Courts must take care not to let parties sidestep the PRA's constraints by recasting them as statutory challenges—or the reverse.

The government's own case confirms the distinction. In *Tozzi v. EPA*, the plaintiffs argued that the agency's submission to OMB was procedurally deficient and that the Director's approval should be set aside. 148 F. Supp. 2d 35, 42–48 (D.D.C. 2001). That claim targeted OMB's judgment under the PRA and was thus barred by § 3507(d)(6). *Id.* at 47–48. Plaintiffs here make no such challenge. Their claim is that the IRS lacked authority to request the information in the first place—an analytically distinct inquiry *Tozzi* left untouched.

Hyatt v. Office of Mngt. & Budget reinforces the point. There, the Ninth Circuit held that § 3507(d)(6) bars review only of OMB's decision to approve a collection "contained in an agency rule," and rejected the notion that such approval insulates an agency from review of its statutory authority. 908 F.3d 1165, 1171–72 (9th Cir. 2018). That reasoning applies here. Plaintiffs do not challenge OMB's action. They argue

that, even with approval, the IRS exceeded § 6109(c) by collecting more information than necessary to assign a PTIN. *Hyatt* confirms that such a claim is not subject to the PRA's bar on judicial review.

Therefore, we hold that the PRA does not bar judicial review of Plaintiffs' excessive questioning claim.

IV.

Claim-splitting operates as a corollary to claim preclusion. Where claim preclusion bars successive litigation following a final judgment, claim-splitting prohibits duplicative litigation filed before judgment. That is the posture presented here.

Plaintiffs initiated *Steele II* to relitigate causes of action that were voluntarily withdrawn and later denied reinstatement in *Steele I*. That tactic cannot seclude their complaint from dismissal. As the Tenth Circuit explained, "the fact that plaintiff[s] w[ere] denied leave to amend does not give [them] the right to file a second lawsuit based on the same facts." *Hartsel Springs Ranch of Colo., Inc. v. Bluegreen Corp.*, 296 F.3d 982, 989 (10th Cir. 2002) (citation omitted). That principle accords with the rule long applied in this Circuit: Parties may not "maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant." *Zerilli v. Evening News Ass'n*, 628 F.2d 217, 222 (D.C. Cir. 1980) (citation omitted).

Every circuit to address claim-splitting has adopted a similar view.[4] Consistent with longstanding precedent, we

[4] *See, e.g.*, *Armadillo Hotel Grp., LLC v. Harris*, 84 F.4th 623, 628 (5th Cir. 2023); *Kezhaya v. City of Belle Plaine*, 78 F.4th 1045, 1050 (8th Cir. 2023); *Mendoza v. Amalgamated Transit Union Int'l*, 30

hold that the claim-splitting rule provides a valid, independent basis for dismissal, even absent a final judgment. Dismissal was therefore proper.

A.

Duplicative suits are typically dismissed under the doctrine of res judicata, or claim preclusion. That doctrine forecloses subsequent litigation where there has been prior adjudication "(1) involving the same claims or cause of action, (2) between the same parties or their privies, and (3) there has been a final, valid judgment on the merits, (4) by a court of competent jurisdiction." *Smalls v. United States*, 471 F.3d 186, 192 (D.C. Cir. 2006) (citations omitted). The district court did not apply claim preclusion here because *Steele I* had not reached final judgment on the issue of PTIN renewal. *See Steele II*, 2024 WL 1111639, at *11. Recognizing, however, that Plaintiffs had asserted and then withdrawn the same claims in the earlier suit, the court turned instead to the closely related rule against claim-splitting, which borrows from claim preclusion to bar duplicative litigation filed before final judgment. *Id.*

Claim-splitting obliges a plaintiff to "assert all . . . causes of action arising from a common set of facts in one lawsuit." *Katz v. Gerardi*, 655 F.3d 1212, 1217 (10th Cir. 2011); *see also*

F.4th 879, 886 (9th Cir. 2022); *Scholz v. United States*, 18 F.4th 941, 952 (7th Cir. 2021); *Church Joint Venture, LP v. Blasingame*, 817 F. App'x 142, 146 (6th Cir. 2020); *Vanover v. NCO Fin. Servs., Inc.*, 857 F.3d 833, 841–42 (11th Cir. 2017); *Kanciper v. Suffolk Cnty. Soc'y for the Prevention of Cruelty to Animals*, 722 F.3d 88, 92 (2d Cir. 2013); *Katz v. Gerardi*, 655 F.3d 1212, 1217–18 (10th Cir. 2011); *Sensormatic Sec. Corp. v. Sensormatic Elecs. Corp.*, 273 F. App'x 256, 265 (4th Cir. 2008); *Kale v. Combined Ins. Co. of Am.*, 924 F.2d 1161, 1166 (1st Cir. 1991).

18 Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4406 & n.20 (3d ed. 2025). "Whether two cases involve the same cause of action turns on whether they share the same 'nucleus of facts.'" *Drake v. FAA*, 291 F.3d 59, 66 (D.C. Cir. 2002) (quoting *Page v. United States*, 729 F.2d 818, 820 (D.C. Cir. 1984)). This Court follows the Second Restatement of Judgments' "transactional approach." *U.S. Indus., Inc. v. Blake Const. Co.*, 765 F.2d 195, 205 (D.C. Cir. 1985); Restatement (Second) of Judgments § 24(1) (1982). In applying that framework, courts consider "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Apotex, Inc. v. Food & Drug Admin.*, 393 F.3d 210, 217 (D.C. Cir. 2004) (quoting *I.A.M. Nat'l Pension Fund v. Indus. Gear Mfg. Co.*, 723 F.2d 944, 949 n. 5 (D.C. Cir. 1983)). The bar thus extends not only to claims that were actually litigated, but also to those that should or could have been. *See* 18 James Wm. Moore et al., Moore's Federal Practice - Civil § 131.20[1] (2025).

The parties dispute the appropriate standard of review. Plaintiffs invoke the default rule that Rule 12(b)(6) dismissals are reviewed de novo. *See Hurd*, 864 F.3d at 678 (citing *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1128 (D.C. Cir. 2015)). The government, by contrast, urges the abuse of discretion standard. Our sister circuits are divided. Some analogize claim-splitting to res judicata and apply de

novo review.[5] Others treat it as a matter of case management and afford district courts greater leeway.[6]

We need not resolve that disagreement. The dismissal withstands scrutiny under either standard. The rule against claim-splitting safeguards vital institutional values. It aims to "conserve judicial resources, avoid inconsistent results, engender respect for judgments of predictable and certain effect," and "prevent serial forum shopping and piecemeal litigation." *Hardison v. Alexander*, 655 F.2d 1281, 1288 (D.C. Cir. 1981). It also "shield[s] parties from vexatious concurrent or duplicative litigation." *Katz*, 655 F.3d at 1218. The Supreme Court has long emphasized these systemic interests in discouraging duplicative proceedings. *See, e.g.*, *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *The Haytian Republic*, 154 U.S. 118, 124 (1894). Whether framed as a rule of case management or as an outturn of finality and fairness, claim-splitting is a proper basis for dismissal under Rule 12(b)(6).

Applying the transactional approach, claim-splitting requires prior litigation (1) "involving the same claims or cause of action," (2) "between the same parties or their privies," and (3) before "a court of competent jurisdiction." *See Smalls*, 471 F.3d at 192; *Katz*, 655 F.3d at 1218–19 (explaining that "the test for claim splitting is not whether there is finality of judgment, but whether the first suit, assuming it were final, would preclude the second suit.").

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[5] *See, e.g.*, *Kale*, 924 F.2d at 1165; *Sensormatic Sec. Corp.*, 273 F. App'x at 264; *Mendoza*, 30 F.4th at 886.

[6] *See, e.g.*, *Armadillo Hotel Grp.*, 84 F.4th at 628; *Scholz*, 18 F.4th at 950–51; *Church Joint Venture, L.P.*, 817 F. App'x at 146; *Katz*, 655 F.3d at 1217; *Vanover*, 857 F.3d at 837.

First, *Steele II* plainly arises from the same nucleus of facts as *Steele I*. Both suits challenge the same statutory and regulatory framework governing PTIN renewal and information disclosure. *Compare* J.A. 43 ¶¶ 67–68, *with* J.A. 75–76 ¶¶ 46–52. Both suits assert the same core claims regarding PTIN renewal and excessive questioning. *Compare* J.A. 44 ¶¶ 69–70, *with* J.A. 90 ¶ 107. Plaintiffs originally asserted these claims in *Steele I*, voluntarily withdrew them following appointment of new class counsel, and were later denied leave to amend. *See Steele II*, 2024 WL 1111639, at *2–4.

At oral argument, Plaintiffs' counsel conceded as much that the two suits rest on the same operative facts and legal theories. Oral Arg. Tr. 4:18–25, 6:8–15. And Plaintiffs identify no intervening change in law or fact that might excuse a second round of litigation. *See* Pet'rs' Br. 44–45. The claims at issue would have formed a convenient trial unit in *Steele I* and fall well within the scope of what the parties expected to resolve in that litigation. That is enough to render them part of the same "claim" under Restatement § 24. *See Apotex, Inc.*, 393 F.3d at 217.

Second, Plaintiffs are the same parties in both suits. Mr. Steele is a named plaintiff in *Steele I*, and Ms. Comer is a certified class member. *See Steele II*, 2024 WL 1111639, at *9; J.A. 64. Though Mr. Buckley is not formally a party, his appearance as counsel in both actions underscores the duplicative nature of this suit.

Third, both suits were brought before the same court of competent jurisdiction.

In short, *Steele II* is not just a rerun—it is an impractical detour designed to bypass the consequences of a prior strategic decision. While claim preclusion would only apply upon entry of final judgment, the claim-splitting rule blocks Plaintiffs' restart in *Steele II*.

B.

Plaintiffs resist the district court's dismissal on several grounds. They challenge the validity of claim-splitting as a basis for dismissal under Rule 12(b)(6), assert that a procedural bar exempts this litigation, and contend that they lacked a fair opportunity to litigate the claims. We address each in turn.

1.

Claim-splitting is a proper ground for dismissal under Rule 12(b)(6). Courts have long recognized that dismissal is appropriate when a complaint establishes on its face a legal bar to relief. *See Jones v. Bock*, 549 U.S. 199, 215 (2007); *Heck v. Humphrey*, 512 U.S. 477, 487–89 (1994). Rule 12(b)(6) authorizes dismissal where a complaint "fail[s] to state a claim upon which relief can be granted," Fed. R. Civ. P. 12(b)(6). That determination turns not only on pleading defects, but also on substantive legal impediments evident from the complaint itself. *See Jones*, 549 U.S. at 215 (citing *Leveto v. Lapina*, 258 F.3d 156, 161 (3d Cir. 2001)) ("Whether a particular ground for opposing a claim may be the basis for dismissal for failure to state a claim depends on whether the allegations in the complaint suffice to establish that ground," including affirmative defenses apparent on the face of the complaint).

Claim preclusion is one such defense. *See Taylor v. Sturgell*, 553 U.S. 880, 907 (2008) (first citing Fed. R. Civ. P. 8(c); and then citing *Blonder–Tongue Labs., Inc. v. Univ. of Ill.*

Found., 402 U.S. 313, 350 (1971)). Although the burden remains on the party invoking it, *see Taylor*, 553 U.S. at 907, a complaint that discloses all necessary elements of preclusion is ripe for dismissal. The same is true of claim-splitting, a close doctrinal cousin that likewise bars duplicative litigation arising from a common nucleus of operative fact. *See* Wright, Miller & Cooper, *supra* § 4406 n.20 ("[C]laim-splitting analysis supports dismissal if claim preclusion would arise from a final judgment in the first action.").

Courts have repeatedly affirmed that claim-splitting is a proper basis for Rule 12(b)(6) dismissal when the duplicative nature of the action is plain from the face of the pleadings or the judicially noticeable record. *See, e.g., Vanover*, 857 F.3d at 836 & n.1, 841–42. Such dismissal is proper even in the absence of a final judgment in the first suit.

All the same, claim-splitting addresses not merely when litigation must end, but also how it must proceed. In operation, it functions as a substantive defect in the plaintiff's entitlement to relief—exactly the kind of legal insufficiency that Rule 12(b)(6) is meant to catch. When, as here, Plaintiffs attempt to reassert claims that they previously raised, voluntarily withdrew, and failed to revive through amendment, their complaint fails to state a claim as a matter of law. That deficiency is clear from the face of the complaint and the judicially noticeable docket in *Steele I*. Plaintiffs may not transform a previously forfeited claim into a new lawsuit simply by rewrapping it in fresh paper. The Federal Rules do not afford litigants a revolving door to recycle abandoned claims as if the first round of litigation never happened.

2.

Plaintiffs point to *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016), to argue that claim preclusion cannot apply where procedural barriers foreclosed resolution of their claims in earlier litigation. *See* Pet'r's Br. 29–33. But *Hellerstedt* does not stretch nearly that far. There, the Court rejected a preclusion defense because the second suit challenged a distinct statutory requirement—the surgical-center provision of Texas House Bill 2—that had not been raised or litigated in the prior case involving the admitting-privileges requirement. *Hellerstedt*, 579 U.S. at 604 ("[T]he surgical-center provision and the admitting-privileges provision are separate, distinct provisions of H.B.2. They set forth two different, independent requirements with different enforcement dates."); *id.* ("This Court has never suggested that challenges to two different statutory provisions that serve two different functions must be brought in a single suit.").

That distinction mattered. The Court emphasized that the two statutory provisions triggered separate legal obligations. *Id.* at 604–05. The challenged surgical-center provision had not even been implemented by the time of the earlier suit, and the plaintiffs reasonably anticipated that the forthcoming regulations might exempt them. *Id.* at 605. In other words, the later filed claim arose from a "meaningful difference[]," *id.* at 604, not just a later procedural maneuver.

Not so here. Plaintiffs seek to relitigate claims arising under the same statutory provision, I.R.C. § 6109, and based on the same agency conduct—the use of Form W-12 to implement the PTIN system—that they previously asserted, voluntarily withdrew, and were denied leave to amend in *Steele I*. That is a far cry from the factually and legally distinct claims at issue in *Hellerstedt*. *See* 579 U.S. at 604–06.

Indeed, the concerns articulated in *Hellerstedt* do not apply to Plaintiffs' claims. The Court warned that construing the doctrine to require simultaneous challenge to every provision of a statutory scheme "would encourage a kitchen-sink approach to any litigation" and was "less than optimal—not only for litigants, but for courts." *Id.* at 605. But that concern arises only where different statutory provisions give rise to different legal claims. When the same plaintiffs refile the same claims under the same statute in the same court, the claim-splitting rule bars the second bite. Nothing in *Hellerstedt* says otherwise.

3.

We do not take lightly the denial of leave to amend, particularly where a party has not yet had a meaningful opportunity to litigate her claims. But where the plaintiff had a fair chance to press those claims in the earlier action, the rule against claim-splitting bars their revival—even when the district court denied leave to amend. *See Hatch v. Trail King Indus., Inc.*, 699 F.3d 38, 45 (1st Cir. 2012) ("It is axiomatic that claim preclusion doctrine requires a party to live with its strategic choices" (cleaned up)) (quoting *Airframe Sys., Inc. v. Raytheon Co.*, 601 F.3d 9, 11 (1st Cir. 2010)). The only remaining question is whether the newly filed claims arise from "the same conduct, transaction or event" and could have been raised earlier. *See Curtis v. Citibank*, 226 F.3d 133, 139 (2d Cir. 2000); *see also N. Assurance Co. of Am. v. Square D Co.*, 201 F.3d 84, 87–88 (2d Cir. 2000); *cf. King v. Hoover Grp., Inc.*, 958 F.2d 219, 222–23 (8th Cir. 1992) ("It is well settled that denial of leave to amend constitutes res judicata on the merits of the claims which were the subject of the proposed amended pleading.") (citations omitted).

This case fits that rule hand in glove. Plaintiffs previously raised these same claims in *Steele I*, voluntarily dismissed them, and were denied leave to replead. They cannot now sidestep that procedural history by repackaging the same legal theory in a new complaint. The claim-splitting rule bars precisely that form of duplicative litigation. Whether the claims were fully adjudicated is beside the point; what matters is that they could have been. *See* Moore's *supra* § 131.20[1].

The point is not just procedural housekeeping. It reflects a longstanding principle of litigation integrity: a plaintiff may not "split up his demand and prosecute it by piecemeal," holding back claims to repackage them for another turn at the courthouse door. *Vanover*, 857 F.3d at 841 (quoting *Greene v. H&R Block E. Enters., Inc.*, 727 F. Supp. 2d 1363, 1367 (S.D. Fla. 2010) (quoting *Stark v. Starr*, 94 U.S. 477, 485 (1876))); *see also Hardison*, 655 F.2d at 1288. As this Court has explained, "a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another." *SBC Commc'ns Inc. v. FCC*, 407 F.3d 1223, 1229 (D.C. Cir. 2005) (cleaned up). Nor is a new lawsuit a proper vehicle for appealing an interlocutory loss.

C.

The presence of a certified class raises a subsidiary issue. Courts have long exercised caution when applying preclusion doctrines to class actions, mindful that procedural constraints or questions about the adequacy of representation may cabin the claims a class can pursue. *See Taylor*, 553 U.S. at 893–95; *Smith v. United States*, 387 F. Supp. 3d 8, 19 (D.D.C. 2019). Some courts have reasoned that claim-splitting "generally does not apply to class actions." *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 256 F.R.D. 586, 597 (N.D. Ill. 2009). Others have suggested the opposite—that splitting claims "is generally

prohibited by the doctrine of res judicata, particularly in class actions." *Brewer v. Lynch*, No. 08-cv-1747, 2015 WL 13604257, at *10 (D.D.C. Sept. 30, 2015), *aff'd* 863 F.3d 861 (D.C. Cir. 2017).

That divergence reflects a deeper concern: a class action may operate, functionally, as "a court of limited jurisdiction in which only certain claims and certain forms of relief are available." Moore *supra* § 131.40 (citing Restatement (Second) of Judgments § 26(1)(c)). In those instances, at least one court has hesitated to apply preclusion doctrines where doing so might bind class members to a judgment that compromised claims they never had the opportunity to pursue. *See Makor Issues & Rights, Ltd.*, 256 F.R.D. at 597–98.

But those equitable concerns are not in play here. As discussed, Mr. Steele and Ms. Comer were members of the *Steele I* class, which had every opportunity to assert the very claims now raised in *Steele II*. And indeed, it did. Those claims were voluntarily withdrawn, and Class Plaintiffs' later attempt to reassert them through amendment was denied. Beyond that, Plaintiffs make no claim that the boundaries of the *Steele I* class, or any other feature of class procedure, stood in the way of presenting their claims in that case. Whatever prudential limits may apply to class action preclusion where parties are limited in what claims they can pursue, those limits do not bar application of claim-splitting to plaintiffs who had every opportunity to litigate their claims the first time around. That applies in full force here.

****

With all elements satisfied, this duplicative suit falls squarely within the claim-splitting rule's reach. A far cry from an abuse of discretion or legal error, the district court's ruling

reflects a sound exercise of judicial authority to prevent strategic end runs around procedural rulings and to preserve the integrity of the adjudicative process.

V.

For the foregoing reasons, we affirm.

So ordered.

EXHIBIT D

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.

CPA ……..certified public accountant

DOJ ……..U.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

RPO ……The IRS Return Preparer Office

RTRP ……registered 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,

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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" (RTPRs). 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, 60312[4], 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

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[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

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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

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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 supr*a 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* rational 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.

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[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)*. 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! c*bo.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

/s/Allen Buckley
Allen Buckley LLC
Allen Buckley
ab@allenbuckleylaw.com
DC Bar No. GA0042
2900 Paces Ferry Road, Suite C-2000
Atlanta, GA 30339
Telephone land line: (678) 217-4083
Cell phone: (404) 610-1936
Facsimile: (855) 243-0006
Counsel for Appellants

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,

/s/Allen Buckley

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Cell phone: (404) 610-1936
Facsimile: (855) 243-0006
Counsel for Appellants

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:

Robert Branman
U.S. Department of Justice
Tax Division
Appellate Section
P.O. Box 502
Washington, D.C. 20044
Counsel for Defendant-Appellee

/s/Allen Buckley
Allen Buckley
Ga. Bar No. 092675
DC Bar No. GA0042

EXHIBIT E

February 27, 2018

Via Email
Mr. William Narwold
Motley Rice LLC
One Corporate Center
20 Church Street, 17th Floor
Hartford, CT 06103

Re: *Steele v. U.S.* Matters

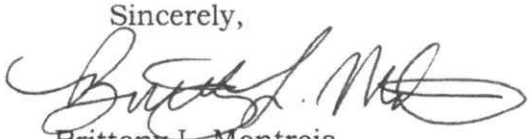
Dear Mr. Narwold:

I am writing in connection with the class action case that was captioned *Steele v. U.S.* in the U.S. District Court. I understand that the name of the case may have changed to *Montrois v. U.S.* at the U.S. Court of Appeals.

With regard to the case, I hired Allen Buckley and his firm to represent me. I did not hire any other lawyer or law firm. In the agreement I signed with Mr. Buckley, I understood that he might hire one or more additional firms to help him in the case. However, according to Mr. Buckley, he did not turn over control of the case to you, your firm, any other lawyer(s) or law firm(s). Mr. Buckley has said he agreed to jointly control the case with your firm. However, he has informed me that you and your firm have attempted to control matters.

Mr. Buckley told me he recommended that a majority vote of the class representatives decide when there is a dispute, but you have not agreed with such a resolution mechanism and have not proposed an alternative dispute resolution mechanism (although he requested you do so if you did not agree). Under the circumstances, if you do not agree with the mechanism proposed by Mr. Buckley, then I wish for Mr. Buckley to be the decider with respect to all matters with respect to which there is disagreement in the case, including whether a brief due date should be extended, who supplies oral argument, and what is included in any brief that is filed. I wish for Mr. Buckley to do whatever is necessary to accomplish these objectives.

Sincerely,



Brittany L. Montrois

Subject: Letter
From: editor@northernherald.com
Date: 2/28/2018 3:25 AM
To: ab@allenbuckleylaw.com

Mr. Buckley:

In future attachments, please use .doc format if you can ("save as" in .doc format). .Pdf is OK too. Due to my system (antique), .docx takes a workaround for me to open, so may take a bit longer to review and act on.

In the following, the underlined text is added.

To whom it may concern:

Allen Buckley is my counsel in the case Adam Steele v. U.S.A. (captioned Montrois on appeal). I have no agreements with nor retention of any other counsel. Accordingly, should he bring other counsel onboard by agreement between Mr. Buckley and such other counsel, such agreements are solely between those parties. Should other counsel be so retained; for my part, Mr. Buckley remains LEAD counsel representing my interests. As far as I am concerned, he has sole control over my case. I am agreeable to a one-week extension to file briefs, if that is what Mr. Buckley wants to do; but not longer than that, unless Mr. Buckley is in agreement with the same.

Further,
I am writing in connection with the class action case that was captioned *Steele v. U.S.* in the U.S. District Court. I understand that the name of the case may have changed to *Montrois v. U.S.* at the U.S. Court of Appeals.

With regard to the case, I hired Allen Buckley and his firm to represent me. I did not hire any other lawyer or law firm. In the agreement I signed with Mr. Buckley, I understood that he might hire one or more additional firms to help him in the case. However, according to Mr. Buckley, he did not turn over control of the case to you, your firm, any other lawyer(s) or law firm(s), and I do not assign such control over MY case. Mr. Buckley has said he agreed to jointly control the case with your firm. However, he has informed me that you and your firm have attempted to control matters.

Mr. Buckley told me he recommended that a majority vote of the class representatives decide when there is a dispute, but you have not agreed with such a resolution mechanism and have not proposed an alternative dispute resolution mechanism (although he requested you do so if you did not agree). Under the circumstances, if you do not agree with the mechanism proposed by Mr. Buckley, then I wish for Mr. Buckley to be the decider with respect to all matters with respect to which there is disagreement in the case, including whether a brief due date should be extended,

who supplies oral argument, and what is included in any brief that is filed. I wish for Mr. Buckley to do whatever is necessary, within the terms of our agreement, to accomplish these objectives.

Further, for future "internal" disputes on matters of case management style, Mr. Buckley REMAINS MY LAWYER -- no one else is, on this case. I can't speak for the other Plaintiffs (all 700,000 of them), but Mr. Buckley controls MY case, and has the prerogative of making the procedural decisions to best represent my interest and cause of action.

My Gosh!
We fought the IRS and WON!
We also fought off the outside attorneys who wanted to steal this case from us.
I would think that we could find peace within our own ranks!
Let's get it together and win Round 2, too!
UNITED WE STAND!

-- Onward!
Adam Steele, C.P.A.
voice phone: 218-759-1162
email: editor@northernherald.com

"Do the best you can in every task, no matter how unimportant it may seem at the time. No one learns more about a problem than the person at the bottom."
-- Justice Sandra Day O'Connor (retired), U.S. Supreme Court

Subject: Re: Email
From: Joe Bishop-Henchman <joebishophenchman@gmail.com>
Date: 9/24/2020, 12:24 PM
To: Allen Buckley <ab@allenbuckleylaw.com>

Naturally I would prefer to no longer have to pay PTIN fees or renew annually.

On Thu, Sep 24, 2020 at 8:24 AM Allen Buckley <ab@allenbuckleylaw.com> wrote:

> Joe-
>
> If you would prefer not having to continue annually filing for your (permanent) PTIN, and would prefer to no longer have to pay PTIN fees, please send me a separate email (not a reply) this morning, so stating.
>
> Thanks
>
> --
> Allen Buckley
>
> Law Office of Allen Buckley LLC
> Suite 750, Building 1
> 2727 Paces Ferry Road
> Atlanta, GA 30339
>
> Phone: (678) 981-4689
> Fax: (855) 243-0006

Subject: Fees
From: Brittany Montrois <bmontrois@bmontroiscpa.com>
Date: 9/24/2020, 1:28 PM
To: "ab@allenbuckleylaw.com" <ab@allenbuckleylaw.com>

I would prefer not to have to continue making annual PTIN filings and paying annual PTIN fees. And, I would like for Mr. Buckley's motion of September 16, 2020 to be considered by the court.

Thank you,
Brittany L. Montrois, CPA

Sent from my iPhone

Subject: Representation
From: editor@northernherald.com
Date: 9/23/2020, 5:53 PM
To: ab@allenbuckleylaw.com

Greetings, sir:

As I've mentioned before, my representation agreement is with you -- not Mr. Narwold or anyone else. You are MY sole counsel on this case, and the decisions you make therein on my behalf are the decisions that need to be followed.

Thank you for your continuing assistance!
Let's Keep America Great!

-- Onward!
Adam Steele, C.P.A.
voice phone: 218-759-1162
email: editor@northernherald.com
http://adamsteelecpa.com

"Do the best you can in every task, no matter how unimportant it may seem at the time. No one learns more about a problem than the person at the bottom."
-- Justice Sandra Day O'Connor (retired), U.S. Supreme Court

From: editor@northernherald.com
Date: 9/24/2020, 3:11 PM
To: ab@allenbuckleylaw.com

I would prefer to not have to continue making PTIN annual filings and paying PTIN fees.

-- Onward!
Adam Steele, C.P.A.
voice phone: 218-759-1162
email: editor@northernherald.com
http://adamsteelecpa.com

"Do the best you can in every task, no matter how unimportant it may seem at the time. No one learns more about a problem than the person at the bottom."
-- Justice Sandra Day O'Connor (retired), U.S. Supreme Court

Subject: Re: Lead Counsel
From: editor@northernherald.com
Date: 1/7/2020, 5:16 PM
To: Allen Buckley <ab@allenbuckleylaw.com>
Received: from smtp.centurylink.net ([206.152.134.66]) by sunsky.net with MailEnable ESMTP; Tue, 7 Jan 2020 17:17:05 -0500
Return-Path: <editor@northernherald.com>
X_CMAE_Category: , ,
X-CNFS-Analysis: v=2.3 cv=MvQsFFSe c=1 sm=1 tr=0 a=1YoS7o2E2lS6/TamrR4Qbw==:117 a=1YoS7o2E2lS6/TamrR4Qbw==:17 a=KGjhK52YXX0A:10 a=kj9zAlcOel0A:10 a=Jdjhy38mL1oA:10 a=TVhDSEOuJwwA:10 a=eQrCS-SpgXYA:10 a=igKW5NZpAAAA:8 a=9Ckwpb3G7zS4V8GV1woA:9 a=_W_S_7VecoQA:10 a=CjuIK1q_8ugA:10 a=YRn024_MTVsA:10 a=L2-wey3sLI8A:10 a=Rz8dU_UOK415Make6tLQ:22
X-CM-Score: 0
X-Scanned-by: Cloudmark Authority Engine
Feedback-ID: dfw:ctl:res:onyx
X-Authed-Username: c2lsZW50dGh1bmRlckBjZW50dXJ5bGluay5uZXQ=
Authentication-Results: smtp02.onyx.dfw.sync.lan smtp.user=silentthunder@centurylink.net; auth=pass (LOGIN)
Received: from [184.99.185.115] ([184.99.185.115:2465] helo=oemcomputer.northernherald.com) by smtp.centurylink.net (envelope-from <editor@northernherald.com>) (ecelerity 3.6.25.56547 r(Core:3.6.25.0)) with ESMTPA id 5D/EB-22302-163051E5; Tue, 07 Jan 2020 17:17:06 -0500
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X-Sender: silentthunder@centurylink.net#pop.centurylink.net@127.0.0.1
X-Mailer: QUALCOMM Windows Eudora Version 5.2.0.9
MIME-Version: 1.0
Content-Type: text/html; charset="us-ascii"
X-Antivirus: avast! (VPS 110412-1, 04/12/2011), Outbound message
X-Antivirus-Status: Clean
X-Antivirus: Avast (VPS 200106-2, 01/06/2020), Inbound message
X-Antivirus-Status: Clean

Greetings, sir:

This is to confirm that, as far as I am concerned, you ARE my lead, and sole, counsel in this action. I have no agreement for representation on this with any other attorney -- my agreement is with you; and anyone else that you're working with on this case works for you.

Further, you are on this case, in part, because of your legal writing ability, and experience with the subject matter. What you've written for filing in the Accenture thing should be filed.

Thank you for your continuing assistance!

-- Onward!
Adam Steele, C.P.A.
voice phone: 218-759-1162
email: editor@northernherald.com

"Do the best you can in every task, no matter how unimportant it may seem at the time. No one learns more about a problem than the person at the bottom."
-- Justice Sandra Day O'Connor (retired), U.S. Supreme Court

Hi Allen,

I just wanted to send this email for clarification. This is to confirm that you are my lead, and sole, counsel in this action. I signed with you originally and you are the only one I have a continual form of communication with on this case. I have no agreement for representation on this with any other attorney -- my agreement is with you; and anyone else that you're working with on this case works for you.

I understand that other lawyers are assisting you in this matter, but you are the one I signed with to represent me and the one I put my trust in to handle this case as closely to my beliefs and concerns as possible. This is why I want to be clear that your decision making is what I agreed to be represented by. Please let me know if there is anything you need from me concerning the case. Otherwise, I appreciate the updates and will continue to await further news from you.

Thank you,
Brittany L. Montrois, CPA

blm-cpa-logo-clr

Brittany L. Montrois, CPA, PC
2116 Jodeco Road, West
McDonough, GA 30253
Phone: 770-474-6116
Fax: 770-914-8005
www.bmontroiscpa.com

EXHIBIT F

In the United States Court of Appeals for the District of Columbia Circuit

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BRITTANY MONTROIS, CLASS OF MORE THAN 700,000 SIMILARLY SITUATED INDIVIDUALS AND BUSINESSES, ET AL.
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, CASE NO. 1:14-CV-01523-RCL (HON. ROYCE C. LAMBERTH)

SUPPLEMENT TO PRELIMINARY STATEMENT OF ISSUES TO BE RAISED

In addition to the issues listed in the document titled "Preliminary Statement of the Issues to be raised" (Doc. #2113348, filed April 28, 2025), by Deepak Gupta and Jonathan E. Taylor (co-counsel to the undersigned), the following additional issues will be raised on appeal:

Whether the court erred in refusing to consider Plaintiffs' claim for relief related to excess questioning of return preparers.

Whether, given the costs of "generating PTINs and maintaining a database of PTINs" (as required by this Court on remand in 2019) cannot be calculated under the IRS's court-approved cost methodology (because the IRS doesn't have the

necessary information), the district court erred by rejecting the cost methodology supplied by plaintiffs (or a derivative thereof), that located costs incurred with respect to both the IRS and Accenture and applied reasonable apportionment thereto.

Whether the district court erred by ruling the costs of "generating PTINs and maintaining a database of PTINs" (as required by this Court on remand in 2019) includes costs that would have been incurred if Social Security Numbers were used to identify return preparers, including costs of finding "ghost preparers."

/s/Allen Buckley
ALLEN BUCKLEY
ALLEN BUCKLEY LLC
Suite 200-C
2900 Paces Ferry Road
Atlanta, GA 30339
(404) 610-1936
ab@allenbuckleylaw.com
Co-counsel to Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I certify that on June 25, 2025, I electronically filed the foregoing document with the Clerk of Court for the U.S. Court of Appeals for the District of Columbia by using the CM/ECF system. All participants are registered CM/ECF users and will be served via the CM/ECF system.

/s/Allen Buckley
ALLEN BUCKLEY

EXHIBIT G

IRS

Treasury, IRS issue regulations to reduce the amount of the user fee for tax professionals who apply for or renew a PTIN

IR-2025-95, Sept. 29, 2025

WASHINGTON — The Department of the Treasury and the Internal Revenue Service today issued interim final regulations and a notice of proposed rulemaking to reduce the amount of the user fee imposed on tax professionals who apply for or renew a preparer tax identification number (PTIN).

The IRS Return Preparer Office conducted a biennial review of the PTIN user fee in 2025 and determined that the full cost of issuing or renewing a PTIN should be reduced from $11 to $10, plus $8.75 payable directly to a third-party contractor. This newly established $10 user fee will be effective for the start of the next PTIN renewal cycle beginning on Oct. 16, 2025. The PTIN fee is non-refundable. Failure to have and to use a valid PTIN may result in penalties.

The IRS projects that over 900,000 individuals will apply for an initial or renewal PTIN during each of the next three PTIN renewal cycles.

Treasury and IRS also invite comments and requests for a public hearing in the notice proposed rulemaking by Oct. 30, 2025. Commentors are encouraged to use the Federal e-Rulemaking portal to submit comments (indicate "IRS" and "REG-108673-25"). Requests for a public hearing must be submitted as prescribed in the "Comments and Requests for a Public Hearing" section. Paper submissions should be sent to: CC:PA:01:PR (REG-108673-25), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

Apply for or renew a PTIN online

Anyone who prepares or helps prepare a federal tax return or claim for refund for compensation must have a valid PTIN from the IRS and needs to include the PTIN as their identifying number on any return or claim for refund filed with the IRS. All enrolled agents must also have a valid PTIN to maintain their active status.

PTINs expire on December 31 of the calendar year for which they are issued. Paid tax return preparers and enrolled agents, who need to apply for an initial PTIN or renew a PTIN expiring on Dec. 31, 2025, should use the online portal, which takes about 15 minutes to complete. A paper option, Form W-12, IRS Paid Preparer Tax Identification Number (PTIN) Application and Renewal, along with the instructions, are also available for PTIN applications and renewals. However, the paper form can take approximately six weeks to process.

⚠ *News items may not be updated after their release. Please verify the date before relying on the language.*

EXHIBIT H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADAM STEELE, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 1:23-cv-918-RCL

MEMORANDUM OPINION

Aggrieved by the class counsel's litigation strategy and unsatisfied with this Court's rulings, a plaintiffs' attorney in a class action has decided to start over by spinning off a new suit with the same plaintiffs, the same defendant, and the same issues. Before the Court is the government's Motion to Dismiss. MTD, ECF No. 12. Since plaintiffs' splinter suit violates the rule against claims-splitting, the Court will **GRANT** the government's motion and dismiss this case in its entirety. Also before the Court is plaintiffs' Motion to File a Sur-Reply Brief, ECF No. 20, which the Court will **GRANT**.

I. BACKGROUND

A. *Steele I*

This case—*Steele II*—must be understood in the context of *Steele v. United States*, No. 1:14-cv-1523 (RCL), which the Court will refer to as *Steele I*. Both this Court and the D.C. Circuit have already explained in some detail the statutory and regulatory background to *Steele I* and its procedural history. *See Steele v. United States*, No. 1:14-cv-1523 (RCL), 2023 WL 6215790, at *1–2 (D.D.C. Sept. 25, 2023); *Steele v. United States*, 657 F. Supp. 3d 23, 28–34 (D.D.C. 2023); *Steele v. United States*, No. 1:14-cv-1523 (RCL), 2020 WL 7123100, at *1–2 (D.D.C. Dec. 4, 2020); *Montrois v. United States*, 916 F.3d 1056, 1058–61 (D.C. Cir. 2019); *Steele v. United*

States, 260 F. Supp. 3d 52, 56–60 (D.D.C. 2017). For that reason, the Court will summarize only the background information necessary to resolve the present motions.

1. Regulatory and Statutory Framework

As the Court previously explained, *Steele*, 657 F. Supp. 3d at 28–34, the Internal Revenue Code defines a "tax return preparer" as "any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of" or "claim for refund of" federal income taxes. 26 U.S.C. § 7701(a)(36)(A). While the Code does not set professional standards or licensing requirements for return preparers, Congress enacted a statute in 1976 authorizing the IRS to require them to list their Social Security numbers for identification purposes on returns they prepared. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 1203(d), 90 Stat. 1520, 1691.

In 1998, Congress amended that statute to authorize the IRS to permit return preparers to list a separate identification number issued by the agency instead of a Social Security number. 26 U.S.C. § 6109(a), (d). The IRS promulgated an implementing regulation the following year creating the Preparer Tax Identification Number (PTIN) program and allowing, but not requiring, return preparers to list the PTINs it issued in lieu of a Social Security number on returns. Furnishing Identifying Number of Income Tax Return Preparer, 64 Fed. Reg. 43,910 (Aug. 12, 1999) (codified at 26 C.F.R. pt. 1).

In 2010 and 2011, the IRS issued a series of regulations expanding its reach over return preparers. As a part of that effort, the IRS expanded the PTIN program, retooled it as a broader information-gathering system as to preparers, made obtaining and renewing PTINs mandatory for preparers, and began charging a fee to obtain and renew a PTIN. *See* Furnishing Identifying Number of Tax Return Preparer, 75 Fed. Reg. 60,309–10 (Sept. 30, 2010); User Fees Relating to

Enrollment and Preparer Tax Identification Numbers, 75 Fed. Reg. 60,316, 60,319 (Sept. 30, 2010). To support the expanded program, the IRS organized a new Return Preparer Office (RPO) with multiple departments.

The regulations also authorized the IRS to prescribe the manner for issuing and renewing a PTIN. *See* 26 C.F.R. 1.6109-2(d)–(e). To that end, since 2010 the IRS has required those seeking to obtain or renew a PTIN to complete IRS Form W-12. *See* Amend. Compl. ¶ 57; MTD 8. Form W-12 includes requests for name, Social Security number, date of birth, and contact information, as well as further information, such as whether the preparer is current on his or her own federal taxes and has any past felony convictions. *See* MTD, Exs. 3–16.

After the IRS implemented its new return preparer regulations, a group of return preparers sued the IRS, arguing that its new preparer credentialing process was unlawful because the statute that the agency used to justify it did not reach return preparers. *See Loving v. IRS*, 742 F.3d 1013, 1015–16 (D.C. Cir. 2014). The district court granted summary judgment to the plaintiffs, invalidating the credentialing requirement, and the Circuit affirmed. *Id.* at 1021–22. *Loving* thus invalidated many of the RPO activities that had been funded by fees charged for issuing or renewing a PTIN. But *Loving* left undisturbed the regulations requiring all return preparers to obtain and renew PTINs and to pay a fee and provide information to do so.

2. Procedural History of *Steele I*

(i) Pre-Montrois *Procedural History*

In the wake of *Loving*, plaintiffs Adam Steele and Brittany Montrois, on behalf of a putative class of tax-return preparers, filed an action in this Court against the United States challenging the IRS's requiring PTIN issuance and renewal, requesting unnecessary information to issue and renew a PTIN, and imposing a fee on the issuance and renewal of PTINs. *See* Compl., ECF No.

1, *Steele v. United States*, No. 1:14-cv-1523 (RCL) (D.D.C. Sept. 8, 2014) ("*Steele I* Compl."). Mr. Steele and Ms. Montrois were represented by attorney Allen Buckley, who had been involved in previous litigation concerning the IRS's regulation of tax-return preparers. Mem. & Op. 2–3, ECF No. 37, *Steele v. United States*, No. 1:14-cv-1523 (RCL) (D.D.C. June 30, 2015). Mr. Buckley reached an agreement with the law firm Motley Rice LLC for it to also serve as counsel in the case, and the Court later appointed Motley Rice LLC interim class counsel. *Id.* at 9.

Especially relevant to this case are plaintiffs' initial challenges to the IRS's authority to require PTIN renewal and to request allegedly unnecessary information before issuing or renewing a PTIN. According to the original complaint, "[s]ince there is no lawful basis for requiring renewal of a PTIN, charging user fees for renewal of a PTIN is unlawful" and "[s]ince all that is necessary to issue a PTIN is name, SSN (or TIN) and address, requiring tax return preparers to provide any additional information is unlawful." *Id.* ¶¶ 98–99. Among other relief, the plaintiffs sought a declaratory judgment that "all renewal requirements should cease," *id.*, Requested Relief, Count 2, and an injunction prohibiting the IRS "from asking more information than is necessary to issue a PTIN," *id.*, Requested Relief, Count 12.

On August 7, 2015, the plaintiffs amended their complaint. They dropped the allegations and requests for relief concerning the requirement of PTIN renewal. *Steele I* 1st Amend. Compl., ECF No. 41, *Steele v. United States*, No. 1:14-cv-1523 (RCL) (D.D.C. Aug. 7, 2015); *see also Steele*, 2020 WL 7123100, at *5 (observing that when plaintiffs amended their complaint, they omitted their challenge to the PTIN renewal requirement). Mr. Buckley later acknowledged that "the choice to omit that claim from the amended complaint was an intentional decision made by Class Counsel over his objection." *Id.* at *6. The complaint also deleted its allegation that the IRS was unlawfully requiring tax-return preparers to provide unnecessary information beyond name,

Social Security number, and address, although it did request "[a] judgment declaring that the IRS may only request information from tax return preparers that is authorized by statute." *Steele I* 1st Amend. Compl., Prayer for Relief, No. 5.

On August 8, 2016, the Court certified a class under Federal Rule of Civil Procedure 23 and appointed Motley Rice LLC as class counsel. *See* Order, ECF No. 63, *Steele v. United States*, No. 1:14-cv-1523 (RCL) (D.D.C. Aug. 8, 2016). The class comprised "[a]ll individuals and entities who have paid an initial and/or renewal fee for a PTIN, excluding Allen Buckley, Allen Buckley LLC, and Christopher Rizek." *Id.*

The parties later cross-moved for summary judgment and on June 1, 2017, this Court granted in part and denied in part both parties' summary judgment motions. *Steele*, 260 F. Supp. 3d at 67–68. The Court first held that the Internal Revenue Code authorized the IRS to require the use of PTINs, although it did not address the renewal requirement. *Id*. at 62–63. But the Court sided with plaintiffs to hold that under the Independent Offices Appropriations Act, the IRS lacked authority to *charge a fee* for PTINs. *Id.* at 63–67. The Court therefore issued a final judgment and permanent injunction forbidding the IRS from charging for issuing or renewing PTINs. Final J. & Permanent Inj., ECF No. 82, *Steele v. United States*, No. 1:14-cv-1523 (RCL) (D.D.C. July 7, 2017).

Plaintiffs did not appeal, but the government did. In a March 1, 2019 decision, the D.C. Circuit determined that the IRS has authority to charge tax-return preparers a fee for obtaining and renewing a PTIN. *Montrois*, 916 F.3d at 1062–66. The Circuit vacated the judgment of the Court and remanded the matter for further proceedings, "including an assessment of whether the amount of the PTIN fee unreasonably exceeds the costs to the IRS to issue and maintain PTINs." *Id.* at 1058.

(ii) Post-Remand Infighting Among Plaintiffs' Counsel

On remand, this Court entered a new scheduling order and the parties commenced fact discovery on the reasonableness of the fees charged. *Steele*, 657 F. Supp. 3d at 33. "That is when infighting among plaintiffs' counsel threatened to derail the case" as "Mr. Buckley, co-counsel for plaintiffs, evidently could not reach an agreement to share control of the case with class counsel Motley Rice LLC." *Id.* Mr. Buckley moved to be appointed sole lead class counsel. Mot. to be Named Sole Lead Class Counsel, ECF No. 118, *Steele v. United States*, No. 1:14-cv-1523 (RCL) (D.D.C. Jan. 23, 2020). Recounting a "long history," Mr. Buckley accused Motley Rice LLC's attorneys of breach of trust, dilatory conduct, and failure to defer to his superior views, as well lacking Mr. Buckley's own "passion and abilities." *See* Reply in Support of Mot. of Allen Buckley LLC to Be Named Sole Lead Class Counsel 12, ECF No. 121, *Steele v. United States*, No. 1:14-cv-1523 (RCL) (D.D.C. Feb. 13, 2020). The Court denied his motion as not in the best interest of the class. Order, ECF No. 126, *Steele v. United States*, No. 1:14-cv-1523 (RCL) (D.D.C. Apr. 27, 2020). Undeterred, Mr. Buckley took on the mantle of "class-counsel-in-exile." *Steele*, 657 F. Supp. 3d at 33.

Thus ensued internecine warfare: "Without the Court's assistance in wresting control of plaintiffs' case from his co-counsel, Mr. Buckley decided to go rogue. He filed two motions, purportedly on behalf of the class, but against class counsel Motley Rice LLC's wishes." *Id.* One motion requested a preliminary injunction against requiring registered preparers to renew their PTINs. *See* Prelim. Inj. Mot., ECF No. 128, *Steele v. United States*, No. 1:14-cv-1523 (RCL) (D.D.C. Sept. 16, 2020). The other motion was for leave to file an amended complaint. The proposed complaint would include the "reinsertion" of the claim that the PTIN renewal requirement was unlawful. *See* Mot. to Amend. Compl. 1, ECF No. 133, *Steele v. United States*,

No. 1:14-cv-1523 (RCL) (D.D.C. Sept. 30, 2020); *see also Steele I* Proposed 2d Amend. Compl. ¶ 50, Prayer for Relief ¶ 6, ECF No. 133-1, *Steele v. United States*, No. 1:14-cv-1523 (RCL) (D.D.C. Sept. 30, 2020). The new complaint would also have added allegations that the PTIN fees charged after 2020 were excessive. *See Steele I* Proposed 2d Amend. Compl. In addition, it would have alleged that PTIN applications must require only name, Social Security number, date of birth, and current address. *See id.* ¶ 50. And it would have amended the prayer for relief's request for "[a] judgment declaring that the IRS may only request information from tax return preparers that is authorized by statute" by appending the phrase "to wit, name, Social Security Number, date of birth and address." *Compare Steele I* Proposed 2d Amend. Compl., Prayer for Relief, ¶ 5, *with Steele I* 1st Amend. Compl., Prayer for Relief, ¶ 5.

Eventually, both factions of plaintiffs' counsel and the government reached a stipulation regarding the motion to amend. The government consented to changes concerning the post-2020 fee amounts, but did not consent to the changes concerning the renewal requirement or the information the IRS could request. Stipulation 2, 15, 17, ECF No. 139, *Steele v. United States*, No. 1:14-cv-1523 (RCL) (D.D.C. Oct. 28, 2020). On December 4, 2020, the Court decided the two motions. *Steele*, 2020 WL 7123100, at *7.

The Court granted leave to amend the complaint with respect to "these consented-to allegations" about post-2020 fees. *Id.* at *4. But it denied leave to amend the complaint "to reintroduce a challenge to the PTIN renewal requirement" because these so-called "allegations" were added after undue delay and because adding them to the complaint would be futile as they were actually "naked legal conclusions." *Id.* at *4–6. The Court did not expressly address the unconsented-to proposed additions concerning what information the IRS could require, but these were omitted when, after the Court's decision, plaintiffs filed the Second Amended Complaint.

See Steele I 2d Amend. Compl., Prayer for Relief ¶ 5, ECF No. 148, *Steele v. United States*, No. 1:14-cv-1523 (RCL) (D.D.C. Dec. 11, 2020).

As the Court denied plaintiffs' request to amend the complaint to reinsert allegations challenging the PTIN renewal requirement, the operative complaint—the *Steele I* Second Amended Complaint—contained no allegations about the legality of the renewal requirement, and the Court therefore denied the preliminary injunction motion. *Id.* at *6–7. The Court identified Mr. Buckley's effort to enjoin the IRS from requiring class members to renew their PTINs as "a transparent attempt to circumvent the D.C. Circuit's ruling in *Montrois* that the IRS can charge fees for PTIN renewals." *Id.* at *2; *see also* Prelim. Inj. Mot. 1 ("If return preparers are not required to renew their PTINs, they cannot be charged for such.").

(iii) Post-Remand Summary Judgment

Next, the parties filed cross-motions for summary judgment concerning the excessiveness of the PTIN and vendor fees. The Court granted in part and denied in part each motion. The Court refused to "entertain plaintiffs' argument about the IRS's statutory authority to request additional information on PTIN applications" beyond name, address, phone number, Social Security number, and birth date because "an express claim that the IRS exceeds its statutory authority under the PTIN statute by requesting further information is nowhere to be found in that complaint." *Steele*, 657 F. Supp. 3d at 48. However, the Court held that the FY 2011 through FY 2017 PTIN and vendor fees were excessive as a matter of law because the IRS erred in determining whether the activities used to justify the PTIN and vendor fees were sufficiently related to the provision of PTINs to return preparers. *Id.* at 36–45. The Court remanded to the IRS to determine an appropriate refund for the class in a manner consistent with the IOAA. *Id.* at 50.

On January 22, 2024, the government filed a notice of the IRS's estimated refund. *See* ECF No. 256, *Steele v. United States*, No. 1:14-cv-1523 (RCL) (D.D.C. Jan. 22, 2024). As plaintiffs wish to challenge the IRS's post-remand estimate, the Court ordered plaintiffs to file their challenge to the IRS' decision, which has not yet occurred. *See* Mar. 4, 2024 Order, ECF No. 269, *Steele v. United States*, No. 1:14-cv-1523 (RCL) (D.D.C. Mar. 4, 2024). The Court has therefore not yet entered final judgment in *Steele I*.

B. *Steele II*

On April 4, 2023, Mr. Steele filed a new complaint against the United States. Compl., ECF No. 1. Mr. Buckley signed the complaint. *See id.* at 16. On May 17, the complaint was amended to add Krystal Comer, another tax return preparer, as a plaintiff. *Steele II* Amend. Compl. ¶ 2. The plaintiffs sought the elimination of the IRS's PTIN renewal requirement or, in the alternative, "reduction in the information requested by the IRS incident to PTIN renewal to information required to renew (given they already have a PTIN), with such information to include only name, Social Security number, PTIN, date of birth, address and phone number and/or email address." *Id.* ¶ 3.

The government moved to dismiss the Amended Complaint. *See* MTD. It argued that plaintiffs' challenge to the questions included on Form W-12 should be dismissed because the Paperwork Reduction Act bars judicial review of that claim. *Id.* 6. It also moved to dismiss both claims as barred by res judicata and by the statute of limitations set forth in 28 U.S.C. § 2401. *Id.* The government also argued, in a footnote, that plaintiffs lack standing. *Id.* 6 n.5. Plaintiffs filed a response, Pls.' Opp'n, ECF No. 15, and the government filed a reply, Reply, ECF No. 19. Plaintiffs also moved for leave to file a sur-reply, to which the government objected. *See* Mot. to File Sur-Reply 1, ECF No. 20. These motions are now ripe for review.

II. LEGAL STANDARDS

A. Federal Rule of Civil Procedure 12(b)(1)

A defendant in a civil action may move to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). If the Court lacks subject matter jurisdiction, it must dismiss the claim or action. Fed. R. Civ. P. 12(h)(3). A court considering a motion to dismiss for lack of subject matter jurisdiction must take all the well-pleaded allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Doe v. Wash. Metro. Area Transit Auth.*, 453 F. Supp. 3d 354, 361 (D.D.C. 2020). "However, those factual allegations receive closer scrutiny than they do in the Rule 12(b)(6) context," and the court "may look to documents outside of the complaint in order to evaluate whether or not it has jurisdiction to entertain a claim." *Id*.

One situation in which a court lacks subject-matter jurisdiction is if a plaintiff lacks Article III standing. *See Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987). The plaintiff bears the burden of establishing standing by demonstrating (1) a concrete injury in fact that is (2) traceable to the complained-of conduct and (3) redressable by the relief sought. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

B. Federal Rule of Civil Procedure 12(b)(6)

A defendant in a civil action may also move to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) for "failure to state a claim upon which relief can be granted." *See* Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion, a complaint must contain sufficient factual allegations, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible on its face if it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A court

evaluating a Rule 12(b)(6) "motion presumes that the complaint's factual allegations are true and construes them liberally in the plaintiff's favor." *Alemu v. Dep't of For-Hire Vehicles*, 327 F. Supp. 3d 29, 40 (D.D.C. 2018). However, "[a] court need not accept a plaintiff's legal conclusions as true, . . . nor must a court presume the veracity of legal conclusions that are couched as factual allegations." *Id.* (citation omitted).

C. Res Judicata

The common law doctrine of res judicata—also known as "claim preclusion"—provides that "a subsequent lawsuit will be barred if there has been prior litigation (1) involving the same claims or cause of action, (2) between the same parties or their privies, and (3) there has been a final, valid judgment on the merits, (4) by a court of competent jurisdiction." *Smalls v. United States*, 471 F.3d 186, 192 (D.C. Cir. 2006). In assessing the first element, "courts in this circuit do not require literally identical claims for res judicata to apply; instead, there is an identity of the causes of action when the cases are based on the 'same nucleus of facts.'" *Capitol Hill Grp. v. Pillsbury Winthrop Shaw Pittman, LLP*, 574 F. Supp. 2d 143, 149 (D.D.C. 2008) (Lamberth, C.J.) (quoting *Page v. United States*, 729 F.2d 818, 820 (D.C. Cir. 1984)), *aff'd*, 569 F.3d 485 (D.C. Cir. 2009). "In pursuing this inquiry, the court will consider '"whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage."'" *Apotex, Inc. v. Food & Drug Admin.*, 393 F.3d 210, 217 (D.C. Cir. 2004) (quoting *I.A.M. Nat'l Pension Fund v. Indus. Gear Mfg. Co.*, 723 F.2d 944, 949 n.5 (D.C. Cir. 1983)).

Res judicata is designed to "preclude parties from contesting matters that they have had a full and fair opportunity to litigate." *Montana v. United States*, 440 U.S. 147, 153–54 (1979). Accordingly, "[p]rinciples of res judicata prevent relitigation not only on the grounds or theories

actually advanced, but also on those which could have been advanced in the prior litigation." *Mervin v. F.T.C.*, 591 F.2d 821, 830 (D.C. Cir. 1978). Claim preclusion may therefore apply to "ground[s] for relief which [the parties] already have had an opportunity to litigate even if they chose not to exploit that opportunity." *Hardison v. Alexander*, 655 F.2d 1281, 1288 (D.C. Cir. 1981).

D. Claim-Splitting

To "ensure fairness to litigants and to conserve judicial resources," a plaintiff may not engage in "claim-splitting" by "seek[ing] to maintain two actions on the same subject in the same court, against the same defendant at the same time." *Clayton v. Dist. of Columbia*, 36 F. Supp. 3d 91, 94 (D.D.C. 2014) (citations and quotation omitted). This doctrine is similar to claim preclusion, with one key difference: claim-splitting occurs when the first suit would preclude the second suit as a matter of res judicata except that the first suit is not yet final. *Id.* (citing *Katz v. Gerardi*, 655 F.3d 1212, 1219 (10th Cir. 2011)); *see also Hudson v. Am. Fed'n of Gov't Emps.*, 308 F. Supp. 3d 388, 394 (D.D.C. 2018) (citing *Clayton*, 36 F. Supp. 3d. at 94); 18 Wright & Miller, Fed. Prac. & Proc. § 4406 (3d ed. Aug. 2023 update). Claim-splitting thus requires prior litigation (1) "involving the same claims or cause of action," (2) "between the same parties or their privies," and (3) before "a court of competent jurisdiction." *See Smalls*, 471 F.3d at 192.

Although "[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. *Smith v. District of Columbia*, 387 F. Supp. 3d 8, 19 (D.D.C. 2019) (Lamberth, J.) (collecting cases). Dismissal for claim-splitting "is not a jurisdictional matter but rather a prudential 'matter of docket management' allowing districts courts to 'dispense with duplicative litigation.'" *Id.* (quoting 18 Wright & Miller, Fed. Prac. & Proc. § 4406 (3d ed. 2019)). So, if the lack of final judgment

prevents a court from dismissing a case based on claim preclusion, the court may potentially still consider dismissing it for claim-splitting.

III. DISCUSSION

As a threshold matter, plaintiffs assert concrete injuries-in-fact that give them standing to bring this case. Further, their claims are not barred by res judicata, because *Steele I* has not yet come to final judgment. Nonetheless, the Court will dismiss plaintiffs' case for violating the rule against claim-splitting.

A. Plaintiffs Have Standing

The plaintiffs have adequately alleged Article III standing to challenge the IRS's PTIN renewal requirement and Form W-12 information requests. The Court rejects the government's argument that plaintiffs lack a cognizable injury-in-fact.

The government suggests in a footnote that plaintiffs lack standing, because their "wasted personal time alone is not an injury in fact." MTD 6 n.5. Plaintiffs do allege that the questions put to them when renewing their PTINs waste an hour or so each year. *See* Am. Compl. ¶ 64. But they also allege that some of the questions are "invasive and unnecessary." *Id.* ¶ 62. And plaintiffs point out that the PTIN renewal requirement leads to preparers paying annual fees. *See* Opp'n 14; *see also Montrois*, 916 F.3d at 1062–66.

Although the government apparently disputes the standing of plaintiffs to assert either of their challenges, "standing is not dispensed in gross," and a court must consider plaintiffs' standing for each claim. *See Friends of Animals v. Zinke*, 373 F. Supp. 3d 70, 85 (D.D.C. 2019) (Lamberth, J.) (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)), *aff'd sub nom. Friends of Animals v. Bernhardt*, 961 F.3d 1197 (D.C. Cir. 2020). Clearly, plaintiffs allege that the renewal requirement causes them a concrete injury-in-fact, because it carries with it a fee and "[i]f a defendant has

caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III." *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021).

Plaintiffs also suffer a monetary injury-in-fact from answering the questions on Form W-12. To continue as a tax return preparer, one must renew one's PTIN. *See* 26 C.F.R. § 1.6109-2(a)(1). To renew one's PTIN, one must answer the required questions. Am. Compl. ¶ 57; *see also* 26 C.F.R. § 1.6109-2(e). Should plaintiffs refuse to answer the questions on Form W-12, they would be unable to continue in their chosen livelihood. Plaintiffs therefore have a concrete injury-in-fact for their claim concerning Form W-12.

Since each of plaintiffs' injuries-in-fact is obviously caused by the IRS's enforcement of its regulations and redressable by their requested relief of a permanent injunction prohibiting the challenged practices, Am. Compl., Requested Relief ¶¶ 3–4, plaintiffs have standing to bring this case.

B. Plaintiffs' Claims Are Not Barred by Claim Preclusion

Steele I does not bar plaintiffs' claims as a matter of claim preclusion. Plaintiffs have conceded that three of the four requirements for claim preclusion are met: *Steele I* involves the same claims or cause of action, is between the same parties or their privies, and is before a court of competent jurisdiction. However, no final, valid judgment on the merits exists that could bar plaintiffs from raising their claims concerning the PTIN requirement and information requests.

1. Plaintiffs Concede That *Steele I* and *Steele II* Involve the Same Claims or Cause of Action

Both *Steele I* and *Steele II* involve the same claims or cause of action. Plaintiffs have conceded this element by acknowledging that the two cases involve entirely the same set of facts. What is more, plaintiffs first raised the precise claims of this action in the previous case before making a conscious, strategic decision to drop them.

Plaintiffs have effectively conceded that *Steele I* and *Steele II* share the same nucleus of facts. Plaintiffs urged the Court to deny the government's motion for an extension of time to respond to the complaint in this case because "Defendant is fully knowledgeable about all of the pertinent facts, given its (and its attorneys') involvement in *Steele I*" and so "[t]here is no need to 'get up to speed' on anything." Pls.' Response to Request for Extension 2, ECF No. 8. If, as plaintiffs say, the two cases are factually indistinguishable, they of course share a common nucleus of facts.[1] Since the two suits are factually identical, plaintiffs could have raised the claims of this suit in the first suit—as indeed they did.

That plaintiffs merely invoke claims already brought in the first case is a further reason to find identity between *Steele I* and *Steele* II. In *Steele I*, plaintiffs challenged the IRS's authority to require renewal of PTINs and to ask for allegedly unnecessary information—but then chose not to further pursue those claims. As discussed above, the initial complaint asserted that the IRS could not lawfully require renewal or demand preparers provide information beyond name, Social Security number, and address. *See Steele I* Compl. ¶¶ 98–99. Plaintiffs accordingly sought relief addressing these issues. *Id.* ¶ 111; *id.*, Requested Relief, Counts 2, 12. But plaintiffs then amended their complaint to drop these allegations and requests for relief. *See Steele I* 1st Amend. Compl. Why the complaint was amended is no mystery. Mr. Buckley, who included these matters in the original complaint, "candidly admits" that "the choice to omit that claim from the amended complaint was an intentional decision made by Class Counsel over his objection." *Steele*, 2020

[1] Plaintiffs read the Supreme Court's decision in *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016) to mean that challenges to distinct regulatory provisions should be considered separate claims for purposes of claim preclusion, regardless of whether they share a common factual nucleus. *See* Opp'n 20–22. They therefore argue that they can challenge the PTIN renewal requirement and Form W-12 questions despite having previously challenged the PTIN issuance requirement and PTIN fees. *See id.* 21. But it is far from clear that *Hellerstedt* sweeps quite as broadly as plaintiffs say. *See* 18 Wright & Miller, Fed. Prac. & Proc. § 4408 (3d ed. Apr. 2023 update) ("It remains to be seen how far this decision will be generalized."). And in any event, even if plaintiffs are correct about *Hellerstedt*, there would certainly be identity of cause of action between *Steele I* and *Steele II* because in the first suit plaintiffs raised the precise claims brought now in the later case.

WL 7123100, at *6; *see also* Opp'n 11 ("[T]he undersigned fought hard in 2015 for the 2015 amended complaint to include the comprehensive relief provisions of the original (2014) complaint. Over my significant objections . . . co-counsel took out the relief prayer for PTIN renewals to cease."); Reply in Support of Mot. of Allen Buckley LLC to Be Named Sole Lead Class Counsel 9–10 (detailing Mr. Buckley's criticism of Motley Rice LLC for not accepting his view that plaintiffs should seek to limit the power of the IRS to require renewal of PTINs and to request more information than necessary).

Mr. Buckley first attempted to resurrect these claims in *Steele I* by filing motions without authorization from class counsel, but the Court rejected his gambit in its December 2020 ruling. *See Steele*, 2020 WL 7123100. Thus, the *Steele I* Second Amended Complaint—the operative complaint in that case—does not include those issues. *See Steele I* 2d Amend. Compl. That is why the Court later rejected plaintiffs' attempt to use their motion for summary judgment to reintroduce their claim about the IRS asking for unnecessary information. *Steele*, 657 F. Supp. 3d at 48.

Frustrated in his efforts to reinsert these matters into the initial suit, Mr. Buckley decided to do so by launching a new civil action. Mr. Buckley frankly admits that the purpose of this action is to resurrect matters previously dispatched by class counsel and interred by the Court. He has stated that "[i]f the court would have considered the matter" of the IRS's authority to request allegedly unnecessary information on PTIN applications in its summary judgment opinion, "this action would not have been filed." Opp'n 19 n.15.

Bearing in mind this procedural history, *Steele I* and *Steele II* must involve the same claims because plaintiffs in both cases could have asserted—and indeed did assert—the same allegations about PTIN renewal and unnecessary requests for information. "Claim preclusion bars a party

from re-litigating a claim that," as in this case, "was or should have been asserted in a prior action." *Hurd v. District of Columbia*, 864 F.3d 671, 679 (D.C. Cir. 2017). The identity of claims element does not require "literally identical claims," *Capitol Hill Grp.*, 574 F. Supp. 2d at 149, but surely this element is satisfied when the claims *are* literally identical.

The requirement of identity of claim or cause of action is therefore met.

2. Plaintiffs Concede That *Steele I* and *Steele II* Are Between the Same Parties or Their Privies

Plaintiffs concede, correctly, that the cases are between the same parties or their privies.

Plaintiffs acknowledge that "[t]he Steele Class Action members could be privies to Plaintiffs here." Opp'n 18; *see also id.* 23 (stating that the parties in the two cases are "not the same parties, but likely the same privies"). Mr. Steele, of course, gives his name to each case. And the parties agree that both Mr. Steele and his co-plaintiff Ms. Comer are members of the *Steele I* class. MTD 12; Opp'n 18. This membership suffices for privity because "[r]epresentative suits with preclusive effect on nonparties include properly conducted class actions." *See Taylor v. Sturgell*, 553 U.S. 880, 894–95 (2008) (citing *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989)); *see also Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) ("There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation.").

The identity-of-parties requirement is therefore met.

3. Plaintiffs Concede That *Steele I* Is Before a Court of Competent Jurisdiction

Plaintiffs concede that the court in *Steele I* is a court of competent jurisdiction. Opp'n 22. As well they should, since the Court has already found it has jurisdiction over *Steele I*. *See Steele v. United States*, 200 F. Supp. 3d 217, 219 (D.D.C. 2016). This requirement is clearly met.

4. No Final, Valid Judgment on the Merits Precludes the Claims Here

Although the other three requirements of claim preclusion have been met, one element is missing. Claim preclusion is unavailable because there has not been a valid, final judgment on the merits in *Steele I* that can preclude plaintiffs from bringing this case.

Litigation in *Steele I* remains ongoing. When the Court decided the cross-motions for summary judgment, it did not enter final judgment but instead remanded to the IRS to determine an appropriate refund for the class. *Steele*, 657 F. Supp. 3d at 49–50. Although the government recently gave notice of the IRS's estimated refund, the plaintiffs intend to challenge that estimate and the Court has yet to enter final judgment. *See* Mar. 4, 2024 Order.

Nonetheless, the government argues that plaintiffs' claims are barred by a valid, final judgment in *Steele I*. Its theory is that this Court held that the IRS could require the use and renewal of PTINs, and that ruling was affirmed on appeal by *Montrois*. MTD 12–13; Reply 8–9. In the government's view, this alleged affirmance preserved that aspect of the Court's final judgment for res judicata purposes even though the Circuit vacated the Court's judgment and remanded for further proceedings. MTD 13 (citing *Kissi v. EMC Mortg. Corp.*, 887 F. Supp. 2d 1, 8 (D.D.C. 2012)). That is so because "[w]hen a court's 'decision has been affirmed in part and reversed and remanded in part, that portion of the judgment that has been affirmed is considered final and binding.'" *Id.* (quoting *FDIC v. Braemoor Assocs.*, No. 76-3295, 1985 WL 1919, at *6 n.3 (N.D. Ill. June 28, 1985) and citing *Mazaleski v. Harris*, 481 F. Supp. 696, 698 (D.D.C. 1979), *aff'd sub nom. Mazaleski v. Schweiker*, 670 F.2d 1235 (D.C. Cir. 1981)). Here, the government argues, the Court's ruling that the IRS could require issuance and renewal of PTINs deserves claim preclusive effect because the *Montrois* court affirmed this holding even as it reversed on other matters. *Id.* 13–14. Although the plaintiffs accept the government's statement of the law, they

argue it does not apply because in truth this Court never ruled on the renewal requirement issue. *See* Opp'n 20.

The Court agrees with plaintiffs. Even if the government is right that any matter held by this Court and affirmed in *Montrois* is entitled to preclusive effect,[2] preclusive effect would only attach to the matter of whether the IRS may require PTINs to be issued—not whether it can require them to be *renewed*.

The government's assertion that "there has already been a judgment on whether the IRS can require the renewal of PTINs," Reply 8, is incorrect and relies on a misunderstanding of *Steele I* and a misreading of *Montrois*. The *Montrois* opinion states that "as the district court held, the IRS's requirement that preparers obtain and renew a PTIN survives" the Circuit's *Loving* decision. *Montrois*, 916 F.3d at 1068 (citing *Steele*, 260 F. Supp. 3d at 62–63).

But that language does not mean that *Montrois* held that the IRS may require preparers to renew their PTINs. The most natural reading of the Circuit's statement is that the renewal requirement "survives" *Loving* because *Loving* did not itself invalidate the PTIN issuance and renewal requirements. *See Steele*, 657 F. Supp. 3d at 29 ("*Loving* thus invalidated many of the RPO activities that the PTIN fees funded. However, it left undisturbed the regulations requiring all return preparers to obtain and renew PTINs and to pay a fee for doing so."). Moreover,

[2] The D.C. Circuit's comments on the preclusive effect of a judgment affirmed in part and reversed in part seem to point in opposite directions. *Compare U.S. Industries, Inc. v. Blake Const. Co., Inc.*, 765 F.2d 195, 199 n.9 (D.C. Cir. 1985) (suggesting that the part of a prior judgment affirmed on appeal is final for claim preclusion purposes), *with Nat'l Ass'n of Broadcasters v. F.C.C.*, 554 F.2d 1118, 1124 n.17 (D.C. Cir. 1976) ("A judgment may . . . be reversed by an appellate court on a single ground, and remanded with other determinations of the trial court left intact. In such a case, the unreversed determinations of the trial court are generally adhered to on remand; but this is an application of the doctrine of law of the case, rather than res judicata or collateral estoppel.") (alteration in original) (citation omitted); *see also Mazaleski*, 481 F. Supp. at 698 ("[I]f the original judgment has been set aside or reversed, and further proceedings are directed, such as a new trial, rules of Res judicata are not applicable until new judgment is rendered.") (citation and internal quotation omitted).

Montrois cannot be read as affirming a ruling upholding PTIN renewal because the underlying decision from this Court did not actually decide that issue.

This Court ruled that the IRS has authority to require preparers to *obtain* PTINs, but it did not reach whether the IRS may require them to *renew* PTINs. Determining the preclusive effect, if any, of a partially reversed judgment requires a close assessment of the content of the underlying judgment. The opinion reviewed on appeal held that the IRS could require preparers to "obtain" and "use" PTINs, but did not address the IRS's authority to force preparers to renew already-issued PTINs. *See Steele*, 260 F. Supp. 3d at 62–63. Nor does the Final Judgment and Permanent Injunction speak to whether the IRS may require PTIN renewals. *See* Final J. & Permanent Inj. In fact, the Court could not have reached this issue because the then-operative First Amended Complaint did not address the IRS's authority to require renewal. *See Steele I* 1st Amend. Compl. ¶¶ 39–45; *see also Steele*, 2020 WL 7123100, at *4–6 (denying leave to amend the First Amended Complaint "to reintroduce a challenge to the PTIN renewal requirement"). Since the Court did not pass upon the PTIN renewal requirement, *Montrois* cannot be read to affirm any such judgment. This Court has already implicitly recognized that *Montrois* effectively affirmed the IRS's authority to require PTINs. *See Steele*, 657 F. Supp. 3d at 33 (describing the procedural history of *Steele I* and explaining that "[b]ecause only the government appealed, the Circuit's decision [in *Montrois*] did not disturb this Court's holding that the IRS was authorized to require preparers to obtain PTINs"). Therefore, far from "already [having] ruled on the same claims in this suit," Reply 8, the *Montrois* court affirmed only the Court's judgment that IRS may require preparers to obtain PTINs.

Even if the government is right on the law, the only aspect of the Court's judgment with preclusive effect is its decision upholding the IRS's authority to require preparers to obtain PTINs.

But that by itself cannot preclude plaintiffs from bringing this case. To treat the judgment as precluding not just the specific ground affirmed on appeal but also other grounds advanced in the same litigation would be to act as if the Circuit had affirmed the judgment in whole rather than in part. It would be strange if an affirmance on one aspect of a valid final judgment should bar the claims of this suit when the Circuit vacated the Court's ruling on the aspect of the judgment more closely related to these claims, namely whether the IRS could charge fees for PTIN renewals,

Since no final judgment has been entered in *Steele I* that could bar adjudication of *Steele II*, the Court will decline to dismiss plaintiffs' case on the basis of claim preclusion.

C. Plaintiffs' Suit Violates the Rule Against Claim-Splitting

The Court will dismiss plaintiffs' case for violating the rule against claim-splitting. As previously discussed, and as plaintiffs concede, every element of claim preclusion other than finality has been met. *Steele II* therefore violates the rule against claim splitting, meaning the Court has discretion to dismiss it. The Court will exercise its discretion to do so 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 objections, and that the Court did not permit him to reinsert into the prior case.

1. The Court Has Discretion to Dismiss Plaintiffs' Case for Claim-Splitting

The Court has discretion to dismiss plaintiffs' case for claim-splitting. As established above, *Steele I* "involve[es] the same claims or cause of action," is "between the same parties or their privies," and is before "a court of competent jurisdiction." *See Smalls*, 471 F.3d at 192. In

addition, the concerns that might make a court hesitate before applying claim-splitting doctrine are absent here.

To be sure, "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." *Smith*, 387 F. Supp. 3d at 19 (citing *Coulibaly v. Pompeo*, 318 F. Supp. 3d 176, 181–82 (D.D.C. 2018); *but see id.* at 19 n.9 ("Courts have admittedly gone both ways on this question." (citing *Dorsey v. Jacobson Holman PLLC*, 764 F. Supp. 2d 209, 213 (D.D.C. 2011)); *Sensormatic Sec. Corp. v. Sensormatic Elecs. Corp.*, 273 F. App'x 256, 265 (4th Cir. 2008) ("Often, the rule against claim splitting applies to prevent a plaintiff from filing a new lawsuit after the court in an earlier action has denied the plaintiff's request for leave to amend to add the claims later asserted in the second lawsuit."). But even if a general rule against applying claim-splitting in such a context holds, it would not apply here. Blocking a plaintiff from advancing claims first by denying leave to amend their complaint, and then by dismissing their separate case could, depending on the circumstances, smack of unfairness. But there is no such unfairness when, as in this case, the plaintiffs brought these claims in the initial suit, made a strategic choice to drop them, and now seek a second chance to litigate them. Plaintiffs had their day in court, and now seek another.

Next, this Court has expressed uncertainty about how the rule against claim-splitting should apply in the context of class actions, but the considerations that may warrant concern are absent here. *See Smith*, 387 F. Supp. 3d at 19 ("This rule does not easily scale to the class action setting."); *compare Makor Issues & Rts., Ltd. v. Tellabs, Inc.*, 256 F.R.D. 586, 597 (N.D. Ill. 2009) ("[T]he doctrine of claim splitting generally does not apply to class actions."), *with Brewer v. Lynch*, No. 08-cv-1747 (BJR), 2015 WL 13604257, at *10 (D.D.C. Sept. 30, 2015) (noting that claim splitting

"is generally prohibited by the doctrine of res judicata, particularly in class actions."). But the concern about applying claim-splitting in the class action context is rooted in the fact that "a class action can be thought of as an action in a court of limited jurisdiction in which only certain claims and certain forms of relief are available." *See* 18 Moore's Federal Practice § 131.40 (3d ed. 2024) (citing Restatement (Second) of Judgments § 26(1)(c) (Am. L. Inst. 1982)). But the Court is not confronted with a situation in which "the plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because" it was a class action and now "desires in the second action to rely on that theory or to seek that remedy or form of relief." *See* Restatement (Second) of Judgments § 26(1)(c). Nothing about *Steele I*'s class action status prevented plaintiffs from bringing their PTIN renewal and Form W-12 claims in that case, and indeed plaintiffs initially *did* bring those claims. Therefore, the fact that *Steele I* is a class action does not militate against applying the claim-splitting rule in this case.

2. The Court Will Dismiss Plaintiffs' Case for Claim-Splitting

The Court thus has discretion to dismiss plaintiffs' case for claim-splitting, and the unique facts of this case justify doing so. Permitting a "class counsel in exile" to unleash parallel, duplicative litigation against a defendant is not in the interest of judicial economy, fairness to defendants, or sound judicial policy.

The Court is not blind to what is going on here. Mr. Buckley has often vented his exasperation with and resentment of class counsel's exercise of its authority. *See, e.g.*, Reply in Support of Mot. of Allen Buckley LLC to Be Named Sole Lead Class Counsel 2–10 (airing various grievances against individual Motley Rice LLC attorneys); *id.* at 12 (accusing Motley Rice LLC of lacking "the passion and abilities I possess"); Reply to Gov.'s Opp'n to Mot. for Prelim. Inj. 2 n.1, ECF No. 134, *Steele v. United States*, No. 1:14-cv-1523 (RCL) (D.D.C. Sept. 30, 2020)

("[T]reatment of me as something other than co-counsel by both my co-counsel and the Defendant's counsel is both difficult to stomach and potentially unethical"); Reply to Class Counsel's Response to Mot. for Prelim. Inj. 3 n.1, ECF No. 131, *Steele v. United States*, No. 1:14-cv-1523 (RCL) (D.D.C. Sept. 24, 2020) (arguing that that Motley Rice LLC's omission of the PTIN renewal issue from the *Steele I* First Amended Complaint "was another example of how the class was potentially hurt by rejection of a reasonable request I made"); *id.* at 2 (accusing Motley Rice LLC of opposing his unauthorized motion for a preliminary injunction because it seeks to maximize its own attorney fees at the expense of the best interests of the class).

Mr. Buckley has not come to terms with the Court's decision to vest the authority of class counsel in Motley Rice LLC and not him. *See, e.g.*, Reply to Class Counsel's Response to Mot. for Prelim. Inj. 3 ("A person who hires a lawyer to do a job should not have that lawyer's power to represent them taken away, and instead be forced to be served by another lawyer with whom she or he has no contract and who does not do what the client wants or what is in the client's best interest."); Mot. to File Pls.' Suppl. Opp'n Br. 1, ECF No. 188, *Steele v. United States*, No. 1:14-cv-1523 (RCL) (D.D.C. May 12, 2022) ("I hired Motley Rice LLC to help me with the case, not to take control and run the case. Never did I turn over control to it.").

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. Plaintiffs concede that "[i]f the court would have considered the matter" of the IRS's authority to request allegedly unnecessary information on PTIN applications in its summary judgment opinion even though the Court had already excluded it from the Second Amended Complaint, "this action would not have been filed." Opp'n 19 n.15. As far back as 2020, in the midst of his failed hostile takeover of *Steele I*, Mr. Buckley warned that if the Court did not put him in charge of the case and permit

him to amend the complaint to add the issues of PTIN renewal and requests for allegedly unnecessary information, "the class will have been shortchanged, as bringing another lawsuit to cover such matters would be painful (and illogical, when the matters should be handled here)." *See* Reply in Support of Mot. of Allen Buckley LLC to Be Named Sole Lead Class Counsel 10.

Dismissing this case for claim-splitting is appropriate in light of the important interests served by preclusion doctrines, including "protection of litigants from the vexation and expense of repetitious litigation, protection of the courts from the burden of unnecessary litigation, promotion of respect for the judicial process and confidence in the conclusiveness of judicial decision-making, avoidance of disconcertingly inconsistent results, and securing the peace and repose of society." *Clark-Cowlitz Joint Operating Agency v. FERC*, 775 F.2d 366, 373 (D.C. Cir. 1985), *reh'g granted, judgment vacated on other grounds*, 787 F.2d 674 (D.C. Cir. 1986).

Here, dismissing the case for claim-splitting would not be unfair to plaintiffs, because they already had a full and fair opportunity to litigate these precise issues in *Steele I*, but decided not to do so. Meanwhile, dismissing this action would spare the defendant the "vexation and expense of repetitious litigation," *id.*, particularly the need to fight a war on two fronts, defending itself in duplicative suits helmed by rival attorneys with clashing aims and approaches.

Dismissing plaintiffs' splinter suit would also promote judicial economy by sparing the Court the need to adjudicate complicated issues that plaintiffs chose to stop pressing in the prior suit, and by discouraging future plaintiffs from splitting their claims. Mr. Buckley himself previously told the Court that a second suit on the issues of PTIN renewal and requests for allegedly unnecessary information would make no sense. *See* Reply in Support of Mot. of Allen Buckley LLC to Be Named Sole Lead Class Counsel 10 ("[B]ringing another lawsuit to cover such matters would be painful (and illogical, when the matters should be handled here)." The Court

agrees with Mr. Buckley that adjudicating this case would be "painful" and "illogical" because the matters should have been handled, if at all, in the initial case.

Relatedly, dismissing this case would promote "respect for the judicial process and confidence in the conclusiveness of judicial decision-making." *Clark-Cowlitz Joint Operating Agency*, 775 F.2d at 373. "Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm." Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(1), 119 Stat. 4, 4. Permitting splinter suits by disgruntled plaintiffs' attorneys would impede the ability of the underlying class action to serve the purposes envisaged by Congress, including by potentially undermining the authority and efficacy of class counsel and complicating the resolution of the class action.

For these reasons, the Court will exercise its discretion to dismiss plaintiffs' case for violating the rule against claim-splitting.

D. The Court Will Grant Plaintiffs' Motion to File a Sur-Reply Brief

In the interest of fairness, the Court will permit plaintiffs' sur-reply to be filed. Although sur-replies are generally disfavored, "[t]he decision to grant or deny leave is 'committed to the sound discretion of the Court.'" *Doe v. Exxon Mobil Corp.*, 69 F. Supp. 3d 75, 85 (D.D.C. 2014) (Lamberth, J.) (quoting *Lu v. Lezell*, 45 F. Supp. 3d 86, 91 (D.D.C. 2014)). Here, denying plaintiffs leave to file their sur-reply would be unfair to Mr. Buckley, because the government's reply brief accused Mr. Buckley of misrepresenting facts. *See* Reply 1, 10. Mr. Buckley wishes to use a sur-reply to challenge this characterization. *See* Pls.' Sur-Reply 2, ECF No. 20-1 ("In legal vernacular, Defendant claims I lied . . . . I value my reputation, and I've always considered myself to be

honest."). It would be unfair to deny Mr. Buckley the chance to respond to the government's accusation. The Court will therefore grant plaintiffs' motion to file a sur-reply.

IV. CONCLUSION

For the foregoing reasons, the Court concludes that plaintiffs violated the rule against claim-splitting. The Court will accordingly exercise its discretion to **GRANT** the government's motion to dismiss and will **DISMISS** the amended complaint. The Court will also **GRANT** plaintiffs' motion to file a sur-reply.

A separate Order consistent with this Memorandum Opinion shall issue.

Date: 3/14/24

Royce C. Lamberth
United States District Judge

EXHIBIT I

Daily Tax Report ®
Insight

IRS Needs More Consistent Approach to Tax Preparer User Fees

Oct. 22, 2025, 4:30 AM EDT

The IRS's proposed and interim final regulations reducing preparer tax identification number, or PTIN, user fee charges from $11 to $10 presents itself decision as good news. But that interpretation misses something important.

The agency's approach to user fees—especially those targeting tax professionals—is incoherent, impenetrable, and indefensible.

There is no discernable standard for a "special benefit" that would require a user fee, and too many hidden cost calculations. And in these interim regulations, the IRS shoulders preparers with staffing costs that strain credulity. Comments on the proposed regulations are due Oct. 30.

The IRS is allowed to charge user fees for PTINs through guidance that agency heads are allowed to "prescribe regulations establishing the charge for a service or thing of value provided by the agency." In 2019's *Montrois v. United States* , the US Court of Appeals for the District of Columbia Circuit reversed an 2017 ruling in *Steele v. United States* , which found the IRS lacked authority to charge a PTIN user fee.

This leads to two important questions:

Is "special benefit" consistently determined? As the interim regulations remind us, "Under OMB Circular A-25, federal agencies that provide services that confer benefits on identifiable recipients are to establish user fees that recover the full cost of providing the service."

In this case, the IRS asserts it charges a user fee because the PTINs "provide tax return preparers a specific benefit by allowing them to provide an identifying number that is not a Social Security number on returns and claims for refund."

A section devoted to user fees in the IRS's internal revenue manuals mentions a "special benefit" that includes, among other things, something that "enables the beneficiary to obtain more immediate or substantial gains or values than those given to the general public" or "is performed at the request of or for the convenience of the recipient."

Yet the IRS doesn't assess a user fee for, among others, for Individual Taxpayer Identification Numbers (ITINs), Electronic Filing Identification Numbers (EFINs), Identity Protection Personal Identification Numbers (IP PINs), or Centralized Authorization File (CAF) numbers.

While I'm not suggesting the agency should charge user fees in these cases, the question remains why some identifying numbers that appear to confer benefits and/or provide a Social Security number alternative aren't assessed user fees.

Further, the IRS declines to charge a user fee for its annual filing season program even though its website goes so far as to outline the program's special benefits. Perhaps one could be forgiven for concluding the IRS approach to user fees is "vibes" based, when it is just as likely an explanation as anything else.

Why doesn't the IRS show its work? The agency concedes in the proposed regulations that it had its proverbial wings clipped on remand in a 2023 ruling, also named *Steele v. United States* , which held that the agency had for seven fiscal years (2011–17) overcharged for PTIN fees to the extent they were based on five proscribed categories.

The IRS says it limits recovering direct staffing costs to those related to "compliance activities of investigating ghost preparers; handling complaints regarding the improper use of a PTIN" including the use of a comprised PTIN, or a PTIN obtained through identity theft; and composing the data to refer complaints to other IRS business units.

The IRS claims direct and indirect costs for PTIN-related support activities and maintaining the PTIN database will consume $17.5 million of salary and benefits, plus more than $11 million of overhead, for a total of some $26.8 million over three years, or an average of $9.5 million annually.

A $9.5 million annual budget for such a limited scope of work is eyebrow-raising, especially since the IRS separately bills a third-party contractor for "the issuance, renewal spend, and maintenance of PTINs, such as processing applications and operating a call center."

Key Takeaways

While the judiciary has blessed a PTIN user fee, it hasn't done so for the IRS's calculation of those fees.

Steele (2023) reminds the IRS that when a court determines a fee from the Independent Offices Appropriations Act was excessive "because it charged for unallowable activities, the extent and expense of which are in dispute, the proper remedy is to remand the agency to show its work and set a new fee within the bounds of what the law allows."

Further, the Internal Revenue Manual calls for avoiding fees that "increase enforcement costs, reduce voluntary compliance or otherwise create difficulties in achieving the IRS's mission."

It isn't too much to ask the agency to be consistent when assessing user fees and to show its work when it chooses to do so. Now would be a good time to start.

If we're in the business of protecting our clients from IRS's caprices, then surely we should protect ourselves from the same. We shouldn't accept an asymmetric world in which IRS demands we follow rules and show our work but refuses to do the same itself.

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Write for Us: Author Guidelines

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EXHIBIT J

Summary of the Financial Sanity Act of 2025

1. In half-year increments, moves the Social Security normal retirement age for people born after 1965 to age 70. For someone born in 1966, the normal retirement age is 67½. For someone born in 1967, the normal retirement age is 68. Subject to the future change provisions below, for someone born in 1971 or later, it is age 70.
2. The age 70 normal retirement age is adjusted for each decade beginning on January 1, 2050, to account for changing life expectancy, so that the percentage of life expected to receive benefits (based on life expectancy at age 65, using 2041 as the initial base year), remains constant. Rounding to the closest half-year applies. Example: Assume life expectancy of a 65-year-old in 2041 is, rounded, 20 years. (In 2041, the Social Security normal retirement age 70.) The percentage of life for which benefits are expected is 17.65 (i.e., 85-70/85). If life expectancy at age 65 in 2043 is 21 years (i.e., to age 86), then the normal retirement age is 71 (i.e., 86 x .1765 = 15.2, 86 – 15.2 = 70.8; rounded to 71) for 2050 through 2059. A new normal retirement age would be calculated in 2053, continuing to use the 17.65 percent, effective for the decade beginning on January 1, 2060. Early and late retirement ages are adjusted accordingly. Normal retirement age would not drop below age 70.
3. Social Security early retirement age is 5 years prior to normal retirement age. So, for someone born in 1965 or earlier, it is age 62. For someone born in 1966, it is age 62½. For someone born in 1967, it is age 63. For someone born in 1971 or later, it is age 65.
4. Social Security late retirement age is normal retirement age plus 3 years. So, for someone born in 1965 or earlier, it is age 70. For anyone born in 1966, it is age 70½. For someone born in 1971 or later, it is age 73.
5. Beginning in 2027, include employer-paid health insurance premiums in FICA and HI wages but completely exclude Social Security payments from income taxation.
6. A death benefit is added for people whose normal retirement age is increased pursuant to 1 above if they die after attaining early retirement age and before they and/or their relatives have received benefits equal to their contributions plus half the employer matching contributions to the Social Security trust fund (the "shortfall"). If no survivor benefits apply, a shortfall benefit will be gradually phased in, with 1/6th payable to those born in 1966, 2/6ths payable to those born in 1967, and the full amount payable to those born in 1971 or later.
7. For people whose Social Security normal retirement age is increased pursuant to 1 above, their benefit in excess of $2,000 per month (indexed for inflation) is gradually reduced up to 50 percent. The reduction for someone born in 1966 is 1/6th of 33.33%, or 5.55%. For someone born in 1967, the reduction is 2/6th of 33.33%, or 11.11%. A 33.33% reduction applies to those born post-1970, except the reduction is increased to 37% in 2045, 43% in 2050 and 50% in 2055.
8. For people whose Social Security normal retirement age is increased pursuant to 1, subject to 1/6th phase-ins as noted above, if 1% or more of their annual earnings is contributed to an IRA, 401(k) account etc., a 1% matching contribution, with a minimum of $500 and maximum of $1,000 (both indexed for inflation), will be made by the U.S. government. The $500 amount is pro-rated for people who work part-time. The same will apply for contributions to an HSA; the Medicare Part B coinsurance rate for them gradually increases from 20% to 30%.
9. Medicare initial eligibility age is the Social Security normal retirement age. See 1 and 2 above. (Between Obamacare, Medicaid, etc., people can get reasonably priced health care coverage prior to retirement.)
10. Starting in 2029, eligibility for widow's and widower's benefits, etc., is moved back 3 years (from 50 to 53 and from 60 to 63).
11. Beginning in 2029, tax subsidies for employer provided health insurance and Obamacare exist only for high deductible health plan coverage (as defined in Code §223(c)(2)).
12. Beginning in 2029, the co-insurance (i.e., the amount paid by the consumer) percentage under a high deductible health insurance plan must be at least 25 percent (until the maximum out-of-pocket amount is reached). Also, the deductible can be lower than current law minimums (and can be $0), if the co-insurance percentage is never below 50 percent (until the maximum out-of-pocket amount is reached).

EXHIBIT K

Tax Proposal

Eliminate the income tax altogether while increasing the FICA tax rate from 7.65 percent to x percent and adding an x percent VAT. The self-employment tax (SECA) rate would be 2x percent. The x/2x percent rate is flexible, and it would be adjusted to balance the budget in non-recession (or worse) years. A 13.4 percent rate (26.8 percent for SECA tax) would roughly have been sufficient to balance the budget in 2014. While the corporate and individual income taxes are completely eliminated, the Social Security Wage Base cap is eliminated and passive income in the nature of interest and other income from investments (including from corporations), other than long-term capital gain, would be taxable as self-employment income. (Social Security calculations would not change.) Half of long-term capital gains would be treated as self-employment income, as would 60 percent of retirement distributions. A household poverty level deduction would exist, as would an up to 25% of income charitable, up to $20,000 per individual retirement, up to $1,500/month mortgage interest, and high deductible health care premiums/HSA deductions. International business taxation is greatly simplified; the incentive for "inversions" is eliminated, by eliminating the corporate foreign tax credits system and annually taxing the U.S. portion of profits of any company, partnership or LLC (regardless of legal type or domicile, etc.) to owners based on the U.S. percent of sales using flow-through rules-i.e. flow through of profits to owners without taxation of the company-with affiliated businesses treated as one company. To discourage offshoring of jobs, labor costs would be nondeductible to the extent the foreign labor percentage exceeds the foreign sales percentage. (For example, if foreign labor was 80 percent of labor costs and foreign sales were 20 percent of total sales, 60 percent of total labor costs could not be deducted.) Foreigners would be subject to the same company taxation regime, plus their earned U.S. source income would be taxed. Americans working wholly or partially abroad would continue to use a credits/exclusion system for their earned income. The numbers work because basic algebra is used to make them work. The proposal is progressive because it grants poverty, housing, charitable, retirement and health care SECA tax credits. Everyone would pay the VAT, but the FICA/SECA tax would be paid only by the upper half of the middle class and above. Everyone would feel government spending, and everyone would pitch in to help solve the nation's financial problems.