

D.C. CIRCUIT AFFIRMS IRS AUTHORITY
TO REQUIRE PRACTITIONER
TAX ID NUMBERS & IMPOSE A USER FEE:
MONTROIS V. UNITED STATES

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Abstract

In the last five years, the D.C. Circuit has considered multiple cases regarding the scope of the Internal Revenue Service (IRS)'s power to regulate tax return preparers. In the most recent case, *Montrois v. United States*, the court held that the IRS has statutory authority to require tax return preparers to obtain a “practitioner tax identification number” (PTIN) as a prerequisite to the commercial preparation of tax returns. The holding also stated that the IRS could charge a user fee for the PTIN. In essence, *Montrois* justifies a licensing fee for a regulatory scheme that the very same court had previously held could not be implemented by the IRS.

This Article discusses why, in the wake of this trio of decisions, Congress should provide the IRS with clear, statutory guidance on the scope of authority it has delegated to the IRS over the tax return preparation industry. In light of these developments, Congress should articulate how broad, or narrow, the IRS's authority over tax return preparers is, instead of the current patchwork of statutory and judicial guidance over the tax preparation industry.

I. INTRODUCTION

In the last five years, decisions from three lines of cases, which considered the scope of the IRS's power to regulate tax return preparers, have come out of the D.C. Circuit; *Montrois v. United States* is the third decision.¹ In *Montrois*, the D.C. Circuit Court disregarded its own earlier decisions;² it held that the Internal Revenue Service (IRS) has statutory authority to require that all tax return preparers obtain a "preparer tax identification number" (PTIN) as a prerequisite to the commercial preparation of tax returns.³ Furthermore, this court also held that the IRS could charge a user fee for the PTIN.⁴

In the wake of these decisions, Congress should provide the IRS with statutory guidance regarding the scope of its authority to regulate the tax return preparation industry. Currently, there is a conflict within the same circuit; a previous decision held that the licensing fee associated with the regulatory scheme is unauthorized,⁵ but this recent decision allows the IRS to require that preparers obtain, and pay for, a PTIN.⁶ Instead of the current patchwork of statutory and judicial guidance, Congress should articulate the scope of the IRS's authority.

1. 916 F.3d 1056 (D.C. Cir. 2019), *rev'g* *Steele v. United States*, 260 F. Supp. 3d 52 (D.D.C. 2017) (beginning in 2014 with several decisions in the case prior to the *Montrois* decision, including: (1) *Steele v. United States*, 159 F. Supp. 3d 73 (D.D.C. 2016) ("*Steele I*") (granting class certification as to demand for declaratory relief); (2) *Steele v. United States*, 200 F. Supp. 3d 217 (D.D.C. 2016) ("*Steele II*") (including restitution of fees paid by class members as demand for relief); (3) *Steele v. United States*, 260 F. Supp. 3d 52 (D.D.C. 2017) ("*Steele III*") (holding that the IRS has no authority to impose PTIN user fees); (4) *Steele v. United States*, 2017 WL 3621747 (D.D.C. July 10, 2017) ("*Steele IV*") (enjoining IRS from charging PTIN user fees), *vacated*, *Montrois v. United States*, 916 F.3d 1056 (D.C. Cir. 2019); (5) *Steele v. United States*, 287 F. Supp. 3d 1 (D.D.C. 2017) ("*Steele V*") (denying stay pending appeal). For purposes of this Article, all references to the *Steele III* (merits) decision will be shortened to "*Steele*."

2. *See* *Loving v. IRS*, 742 F.3d 1013, 1014–15 (D.C. Cir. 2014) (holding the IRS lacked the authority to regulate tax return preparers and invalidating the regulations that imposed mandatory conditions on an individual's right to prepare and file tax returns for compensation); *Am. Inst. Cert. Pub. Acc'ts v. IRS*, No. 16-5256, 2018 WL 3893768 (D.C. Cir. 2018) [hereinafter *AICPA IV*] (limiting the scope of the *Loving* decision to hold the IRS could implement a *voluntary* program to regulate tax return preparers). *See infra* Part I for an in-depth discussion on the history of the cases and regulations creating this issue.

3. *Montrois*, 916 F.3d at 1058. "The Internal Revenue Code defines a tax-return preparer as 'any person who prepares for compensation' a federal income tax return or claim for refund. *The Code establishes no professional constraints on who may act as a tax-return preparer*, with the result that preparers range from uncredentialed persons to attorneys and certified public accountants." *Id.* (emphasis added) (citations omitted). This decision further limited the scope of *Loving* by holding that—even though it does not have the authority to regulate tax return preparers—the IRS can require preparers to obtain a PTIN. *Id.*

4. *Id.* at 1064 ("We thus can rest on the confidentiality-protection rationale alone as conferring a specific benefit for which a PTIN fee may be assessed.")

5. *Loving*, 742 F.3d at 1019 ("That original language plainly would not encompass tax preparers.")

6. *Montrois*, 916 F.3d at 1066. Arguably, this is a de facto regulation of the very same type that was at issue in *Loving*.

This Article briefly reviews the initial effort to regulate tax preparers and the PTIN requirement. It then reviews the *Loving* decision and its impact on the regulatory framework. Next, this Article discusses the Eleventh Circuit's *Brannen* decision, the district court's opinion, and their respective views concerning the PTIN.⁷ This Article then moves into an analysis of the D.C. Circuit's opinion in light of its earlier *Loving* decision and the other courts that have considered it. It examines the Panel's finding that a PTIN does, in fact, provide a "service or thing of value" to the taxpayer,⁸ thereby satisfying the requirements of the IOAA and, accordingly, justifying the IRS's imposition of a user fee.⁹ While the *Montrois* court's analysis may not be reconcilable with its earlier view in *Loving* regarding the IRS's role, it does seem to reach the correct outcome following the *AICPA* decision.

This Article also argues that, while the IRS has specific authority to require the use of PTINs, the court should have articulated a more principled rationale to justify the user fee. In *AICPA*, the D.C. Circuit held the IRS has a limited role in the regulation of tax preparers—of which, the PTIN would constitute an important component.¹⁰ By subsequently permitting the IRS to charge a fee in *Montrois*, the D.C. Circuit significantly undermined its holding in *Loving*—that the IRS lacks authority to regulate tax return preparers because the user fee is tied to an impermissible regulatory scheme. On remand, the district court will consider those factors and arrive at an equitable charge for the PTIN.¹¹ While it may be a good public policy to permit the IRS to regulate the tax preparation industry, that authority—as *Loving* admonished—should come directly from Congress.¹²

II. PROCEDURAL BACKGROUND

In 2010 and 2011, as part of its overall effort to regulate tax return preparers, the IRS promulgated regulations that impose mandatory requirements on individuals who prepare and file tax returns for compensation.¹³ These regulations create an entirely new class of tax

7. See *infra* Part I-D.

8. In this Article, the term "Panel" shall refer to the D.C. Circuit Court in *Montrois*. The Panel consisted of Chief Judge Garland and Circuit Judges Srinivasan and Millet. The opinion was written by Circuit Court Judge Srinivasan. See *Montrois*, 916 F.3d at 1056.

9. *Montrois*, 916 F.3d at 1062.

10. See *AICPA IV*, 2018 WL 3893768, at *8-9 (D.C. Cir. 2018).

11. *Montrois*, 916 F.3d at 1058.

12. See, e.g., Alex H. Levy, *Believing in Life after Loving: The IRS Regulation of Tax Preparers*, 17 FLA. TAX REV. 437, 441 (2015) ("A legislative fix that explicitly empowers the IRS to regulate tax preparers will be difficult to achieve in our highly polarized political environment, but that should not obscure the fact that it is worth fighting for.").

13. Regulations Governing Practice Before the Internal Revenue Service, 76 Fed. Reg. 32,286, 32,286-87 (June 3, 2011) [hereinafter Regulations Governing Practice] (to be codified at 31 C.F.R. pt. 10), *invalidated by* *Loving v. IRS*, 742 F.3d 1013, 1015 (D.C. Cir. 2014).

practitioners; previously unregulated tax preparers would become “Registered Tax Return Preparers” (RTRPs) and would join the preexisting group of authorized tax return preparers: attorneys, certified public accountants, and enrolled agents.¹⁴ In passing these regulations, the IRS set in motion a legal challenge that would span the decade. We have now entered the next decade, and this challenge remains unresolved.

A. *The Tax-Return Preparer Regulations*

The regulations are, in actuality, a trio of regulations: the primary regulation,¹⁵ which mandates that “unlicensed” or “uncredentialed” tax return preparers become RTRPs (Regulations Governing Practice),¹⁶ and two other regulations (the PTIN regulations): one that requires the use of PTINs,¹⁷ and another that imposes a user fee.¹⁸

The PTIN, an integral component of the regulations, serves as the mechanism to impose the regulatory program upon tax preparers.¹⁹ Under the regulatory scheme, a PTIN is only issued to those tax preparers who have, *inter alia*, successfully completed a mandatory competency exam.²⁰ In addition, the IRS requires that tax preparers affix their PTIN to every tax return they prepare and file.²¹ Prior to the regulations, a practitioner could use their Social Security number (SSN) in lieu of a PTIN—or, if a PTIN was desired, he or she could obtain one from the IRS, free of charge.²²

The Regulations Governing Practice—the mandatory provisions of the tax preparer regulations—were held invalid in *Loving*.²³ However, a voluntary version of the RTRP program, the Annual Filing Season Program (AFSP), promulgated by the IRS in the wake of *Loving*, was

14. *Id.*

15. *Id.*

16. *Montrois*, 916 F.3d at 1059. “[T]he IRS sought to establish a . . . regime for tax-return preparers. It did so by requiring . . . uncredentialed preparers . . . to become ‘registered tax return preparers.’ . . . To become a registered tax-return preparer, a person would need to undergo a background check, pass a competency exam, and satisfy continuing education requirements.” *Id.* (citations omitted).

17. Furnishing Identifying Number of Tax Return Preparer, 75 Fed. Reg. 60,309, 60,309–10 (Sept. 30, 2010) [hereinafter Furnishing Identifying Number] (to be codified at 26 C.F.R. pt. 1.).

18. User Fees Relating to Enrollment and Preparer Tax Identification Numbers, 75 Fed. Reg. 60,316, 60,316, 60,319 (Sept. 30, 2010) [hereinafter PTIN User Fee] (to be codified at 26 C.F.R. pt. 300) (current version amended June 12, 2019).

19. *Id.*

20. *Id.*

21. 26 I.R.C. § 6109 (2018).

22. Furnishing Identifying Number, *supra* note 17.

23. *Loving v. IRS*, 742 F.3d 1013, 1015 (D.C. Cir. 2014) (finding that the IRS could not unilaterally impose such restrictions on RTRPs).

upheld by the D.C. Circuit in *AICPA v. United States*.²⁴ The remaining two PTIN regulations—the first of which requires all tax preparers to obtain a PTIN and affix it to all tax returns filed with the IRS (Furnishing Identifying Number), and the second, requiring payment of a user fee (PTIN User Fee)—were the subject of the *Steele* and *Montrois* decisions.²⁵

The PTIN regulations are authorized by two separate statutory sources. The Furnishing Identifying Number regulation requires tax preparers to obtain the PTIN and is now expressly provided in I.R.C. § 6109.²⁶ The PTIN User Fee regulation is not traceable to a specific statutory grant of authority,²⁷ but the IRS has justified it on the more general authority contained in the Independent Offices Appropriations Act (IOAA).²⁸ The IOAA provides that agencies can charge fees in connection with the provision of a “service or thing of value.”²⁹ For the regulation to be upheld pursuant to the IOAA, the IRS must establish that it provides a service or, in the alternative, that the PTIN is a thing of value.³⁰

In a belated response to *Loving*, the IRS reduced the fee charged for the issuance of a PTIN from \$50.00 to \$33.00.³¹ This reduction was created after the court of appeals held the IRS could not implement the

24. *AICPA IV*, 2018 WL 3893768, at *10 (D.C. Cir. 2018); see Frank G. Colella, *D.C. Circuit Upholds IRS’s Voluntary Regulation of Tax Preparers—Majority Holds APA’s Statutory Notice & Comment Not Required*: *AICPA v. IRS*, 15 N.Y.U. J. L. & Bus. 229, 231 (2019) (providing a detailed discussion of *AICPA v. IRS*).

25. See *infra* Part I-E.

26. See Furnishing Identifying Number, *supra* note 17; see also *Montrois v. United States*, 916 F.3d 1056, 1059 (D.C. Cir. 2019). “[T]he IRS required preparers to obtain a PTIN and renew it annually. . . . According to the agency, the ‘requirement to use a PTIN will allow the IRS to better identify tax return preparers, centralize information, and effectively administer the rules relating to tax return preparers.’ . . . The IRS further noted that the PTIN requirement would benefit ‘tax return preparers and help maintain the confidentiality of [their] SSNs.’” *Id.* (second alteration in original) (citations omitted).

27. See PTIN User Fee, *supra* note 17; see also *Montrois*, 916 F.3d at 1059. “[T]he IRS decided it would charge tax-return preparers a fee of roughly \$50 (plus a vendor fee) to obtain and renew a PTIN. The agency explained the fee would cover the costs of ‘the development and maintenance of the IRS information technology system’ associated with the PTINs, as well as the costs of ‘the personnel, administrative, and management support needed to evaluate and address tax compliance issues, investigate and address conduct and suitability issues, and otherwise support and enforce the programs that require individuals to apply for or renew a PTIN.’” *Id.* (internal citations omitted).

28. See *infra* Part I-B for a discussion on the IOAA; see also *Montrois*, 916 F.3d at 1058. “As authority to exact the PTIN fee, the IRS relies on the Independent Offices Appropriations Act, which allows federal agencies to charge fees for services in certain conditions.” *Id.* (emphasis added) (citing 31 U.S.C. § 9701).

29. 31 U.S.C. § 9701 (2018).

30. *Id.*

31. Preparer Tax Identification Number (PTIN) User Fee Update, 81 Fed. Reg. 52,766, 52,767 (Aug. 10, 2016) (to be codified at 26 C.F.R. pt. 300).

Regulations Governing Practice.³² Accordingly, the IRS reduced the fee to reflect the reduced role that it undertakes in the imposition of the PTIN because a substantial amount of the administrative work that it expected to complete was no longer necessary.³³

B. Independent Offices Appropriations Act

I.R.C. § 6109 does not explicitly mention a fee for the issuance of a PTIN. However, the IRS claims authority for the PTIN User Fee pursuant to the general application § 9701 of the IOAA.³⁴ Section 9701 provides:

(a) It is the sense of Congress that each service or thing of value provided by an agency . . . to a person . . . to be self-sustaining to the extent possible.

(b) The head of each agency . . . may prescribe regulations establishing the charge for a service or thing of value provided by the agency[.] Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be—

(1) fair; and

(2) based on—

(A) the costs to the Government;

(B) the value of the service or thing to the recipient;

(C) public policy or interest served; and

(D) other relevant facts.³⁵

In *National Cable Television Associates v. United States*, the Supreme Court interpreted § 9701's general grant of authority to impose fees narrowly in order to prevent what it viewed would otherwise be an impermissible delegation of congressional taxing power to an administrative agency.³⁶ Otherwise, the Court noted, "if read literally, [the IOAA would] carr[y] an agency far from its customary orbit *and put[] it in search of revenue in the manner of an Appropriations Committee of the House.*"³⁷

32. *Montrois*, 916 F.3d at 1060. "The IRS adjusted the PTIN fee in the wake of our decision in *Loving*. A portion of the original PTIN fee was to have been used to pay the costs of the registered tax-return preparer program invalidated in *Loving*, and the IRS reduced the amount of the PTIN fee to cover the costs of those portions of the PTIN program that remained in effect after *Loving*." *Id.* (emphasis added) (citations omitted).

33. *Id.*

34. *See Montrois*, 916 F.3d at 1059.

35. 31 U.S.C. § 9701(a)-(b) (2018).

36. 415 U.S. 336, 341 (1974). "It would be such a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power *that we read [the IOAA] narrowly as authorizing not a 'tax' but a 'fee.'* A 'fee' connotes a 'benefit,' and the Act, by its use of the standard 'value to the recipient,' carries that connotation." *Id.* (emphasis added).

37. *Id.* (emphasis added).

The Supreme Court further explained that, in exchange for a fee charged by an agency, an individual must receive something of value in return.³⁸ Accordingly, “[t]he phrase ‘value to the recipient’ is . . . the measure of the authorized fee.”³⁹ In the companion case decided on the same day as *National Cable*, the Court elaborated:

[A] reasonable charge “should be made to each *identifiable recipient* for a measurable unit or amount of Government service or property from which he derives a special benefit.” . . . [N]o charge should be made for services rendered, “when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public.”⁴⁰

In *Seafarers International Union of North America v. United States Coast Guard*, the D.C. Circuit applied the dual Supreme Court admonitions for distinguishing between a permissible user fee and an otherwise unconstitutional tax.⁴¹ It noted that “the Court [in *National Cable*] made it clear that a user fee will be justified under the IOAA if there is a sufficient nexus between the agency service for which the fee is charged and the individuals who are assessed.”⁴² Further, the court utilized *Federal Power Commission’s* explanation: “[F]ees are valid so long as the agency levies ‘specific charges for specific services to specific individuals or companies.’ Under this test, it does not matter whether the ultimate purpose of the regulatory scheme giving rise to the license requirement (and accompanying user fee) is to benefit the public.”⁴³

Accordingly, the *Montrois* Panel considered the PTIN User Fee by evaluating them against the following three factors: “(i) [T]hat it provides some kind of service in exchange for the fee, (ii) that the service yields a specific benefit, and (iii) that the benefit is conferred upon identifiable individuals.”⁴⁴ Applying those factors, the Panel disagreed with the district court’s analysis; it concluded that the IRS had met all the requirements with regards to the PTIN User Fee.⁴⁵

38. *Id.*

39. *Id.* at 342–43.

40. *Fed. Power Comm’n v. New England Power Co.*, 415 U.S. 345, 349–50 (1974) (citing Budget Circular No. A-25, Sept. 23, 1959).

41. 81 F.3d 179, 182 (D.C. Cir. 1996).

42. *Id.* at 182–83.

43. *Id.* at 183 (quoting *Fed. Power Comm’n*, 415 U.S. at 349).

44. *Montrois*, 916 F.3d at 1062–63 (citing *Seafarers Int’l*, 81 F.3d at 184–85).

45. *Id.* at 1063 (“Here, the PTIN fee satisfies those conditions.”).

C. *Loving v. IRS*

In 2014, the D.C. Circuit held in *Loving v. IRS* that the IRS's statutory authority to regulate individuals who practice before it does not extend to tax return preparers.⁴⁶ The court elaborated that merely preparing and filing tax returns—without more—does not constitute practice before the IRS, which means the IRS cannot regulate tax return preparers.⁴⁷ Accordingly, the D.C. Circuit invalidated the Regulations Governing Practice, which mandated, *inter alia*, that tax return preparers pass a basic competency exam and complete annual continuing education requirements.⁴⁸ However, the court specifically left intact the Furnishing Identifying Number and the PTIN User Fee regulations,⁴⁹ stating that the validity of those regulations was not brought before the court.⁵⁰

Loving was faced with the task of defining “practice” under 31 U.S.C. § 330, which governs the IRS's ability to regulate “the practice of representatives of persons before the Department of the Treasury.”⁵¹ The *Loving* court discussed that there is a significant difference between individuals who prepare tax returns and those who represent taxpayers before the IRS.⁵² It found that term “practice” encompasses more than the preparation and filing of tax returns; it includes the actual representation of taxpayers before the IRS with respect to, for example, the information reported or positions taken on tax returns.⁵³ Because of this, the court held that the mere preparation and filing of tax returns, without more, does not constitute practice before the IRS.⁵⁴

While *Loving* invalidated the Regulations Governing Practice, the district court had left open the question of whether the IRS could provide for “voluntarily obtained credentials.”⁵⁵ Based upon that bit of

46. See *Loving v. IRS*, 742 F.3d 1013,1015 (D.C. Cir. 2014) (*affg* *Loving v. IRS*, 917 F. Supp. 2d 67 (D.D.C. 2013)); see also Frank G. Colella, *Loving is Affirmed: IRS Lacked Authority to Regulate Preparers*, 143 TAX NOTES 371, 371 (2014); Steve R. Johnson, *Loving and Legitimacy: IRS Regulation of Tax Return Preparation*, 59 VILL. L. REV. 515, 515–16 (2014).

47. *Loving*, 742 F.3d at 1017–18.

48. 26 C.F.R. § 1.6109-2, *invalidated in part* by *Loving v. IRS*, 917 F. Supp. 2d 67 (D.D.C. 2013); see Regulations Governing Practice, *supra* note 13.

49. *Loving*, 742 F.3d at 1021; see *supra* notes 17–18.

50. See *infra* note 60 and accompanying text.

51. *Id.* at 1017–18 (explaining 31 U.S.C. § 330 (2015)). The Regulations Governing Practice before the IRS sought to broaden the reach beyond the already covered attorneys, CPAs, and enrolled agents to include the unregulated tax preparers. See Treasury Department Circular 230, 31 C.F.R. § 10 (1966) (revised 2011).

52. *Id.* at 1021.

53. *Id.* at 1020.

54. *Id.* at 1017.

55. *Loving v. IRS*, 920 F. Supp. 2d 108, 111 (D.D.C. 2013) [hereinafter *Loving II*]. “[T]he Court is not requiring the IRS to dismantle its entire scheme. It may choose to retain the testing centers and some staff, as it is possible that some preparers may wish to take the exam or continuing

dictum from the *Loving* district court, the IRS subsequently promulgated the voluntary “Annual Filing Season Program” (AFSP) regulations, which permit otherwise unlicensed tax preparers to pass, inter alia, a qualifying examination to become “credentialed.”⁵⁶ This voluntary program was at issue in *AICPA*.⁵⁷

Subsequently, the district court in *Loving* issued a separate opinion that denied the IRS’s motion for a stay of the injunction pending its appeal.⁵⁸ That decision did, however, modify the terms of the original injunction to clarify that neither the Furnishing Identifying Number nor the PTIN User Fee regulations were enjoined.⁵⁹ The district court made clear that the validity of these two regulations had never been before the court:

Plaintiffs make manifest in their pleadings *that their lawsuit does not challenge the IRS’s requirement that each tax-return preparer obtain a preparer tax-identification number (PTIN)*. Indeed, Congress has specifically authorized the PTIN scheme by statute. That scheme, therefore, does not fall within the scope of the injunction and may proceed as promulgated, except that the IRS may no longer condition PTIN eligibility on being “authorized to practice.”⁶⁰

This issue did not appear before the court until litigation initiated under the name *Steele v. United States* was directly challenged in the D.C. Circuit,⁶¹ which was appealed as *Montrois v. United States*.

D. *Brannen v. United States*

In *Brannen*, an attorney-CPA named Jesse Brannen filed for, received, and paid for a PTIN as required by the Furnishing Identifying Number and PTIN User Fee regulations.⁶² He then filed a claim for a refund with the IRS for the \$64.25 he paid for the PTIN and the associated vendor fee.⁶³ The refund claim was denied, and Brannen commenced the lawsuit that sought to have: (1) the PTIN User Fee

education even if not required to. Such *voluntarily* obtained credentials might distinguish them from other preparers.” *Id.* (emphasis added).

56. See generally Rev. Proc. 2014-42, 2014-29 I.R.B. 192 (2014).

57. See discussion *infra* Part I.F.

58. *Loving v. IRS*, No. 13-5061, 2013 WL 1703893, at *1 (D.D.C. Sept. 27, 2013).

59. *Loving II*, 920 F. Supp. 2d at 112.

60. *Id.* at 109 (emphasis added) (citations omitted); see *Steele v. United States*, 260 F. Supp. 3d 52, 58 (D.D.C. 2017) (“Thus, after *Loving*, the only part of the new regulatory scheme that remains is the PTIN . . . and the attendant PTIN fee requirement.”).

61. See discussion *infra* Part I.E.

62. *Brannen v. United States*, 682 F.3d 1316, 1316–17 (11th Cir. 2012).

63. *Brannen v. United States*, No. 4:11-CV-0135-HLM, 2011 WL 8245026, at *1 (N.D. Ga. Aug. 26, 2011).

regulations declared invalid, and (2) the IRS directed to refund the fees paid.⁶⁴ Brannen later conceded that the IRS has the authority to require the PTIN pursuant to I.R.C. § 6109; he argued, however, that there was no authority granted to justify the imposition of the fee.⁶⁵ The district court granted the IRS's motion to dismiss,⁶⁶ and the Brannen appealed that decision to the Eleventh Circuit.⁶⁷

The Eleventh Circuit upheld the district court's dismissal of Brannen's claim;⁶⁸ it examined the scope of the IRS's authority with respect to PTINs and concluded that the Service has the statutory authority to require PTINs and, likewise, impose a fee for issuing them.⁶⁹ *Brannen* held that the authority to issue PTINs is solidly based in I.R.C. § 6109, which specifically permits the IRS to issue a unique taxpayer identification number in lieu of the taxpayer's own SSN.⁷⁰ I.R.C. § 6109 is unambiguous and, more importantly, it also includes a specific directive that authorizes the IRS to promulgate regulations that implement the provision.⁷¹

The *Brannen* court also agreed with the IRS that the authority to impose the PTIN user fee is contained in the IOAA, specifically § 9701(b), which permits agencies to charge a fee for services provided or a thing of value.⁷² According to the *Brannen* court, to the extent the PTIN satisfies the provisions of § 9701(b), the IRS has the statutory authority to impose a user fee when issuing the tax preparer a PTIN.⁷³ In its analysis, the *Brannen* court concluded that the IRS provides a service—in issuing and maintaining the PTINs—and that the taxpayer receives a thing of value, such as enhanced privacy protection, by substituting a PTIN for an individual's SSN.⁷⁴

While *Brannen* was a pre-*Loving* decision, the rationale the court applied in its analysis of the PTIN user fee, as measured against the requirements of the IOAA, was persuasive to the *Montrois* Panel.⁷⁵ This

64. *Id.* *Brannen* also attempted class certification but, unlike *Steele*, was unsuccessful. *See id.* *See generally supra* note 44 and accompanying text.

65. *Brannen*, 682 F.3d at 1317.

66. *Brannen*, 2011 WL 8245026, at *6 (reasoning that "*Brannen* failed to set forth a viable claim" to justify the holding).

67. *Brannen*, 682 F.3d at 1316.

68. *Id.* at 1320.

69. *Id.* at 1319–20.

70. *Id.* at 1318 ("Furnishing identifying number of tax return preparer—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.") (quoting 26 I.R.C. § 6109(a)(4)).

71. *Id.*

72. 31 U.S.C. § 9701; *see Brannen* 682 F.3d at 1318.

73. *Brannen v. United States*, No. 4:11-CV-0135-HLM, 2011 WL 8245026, at *5 (N.D. Ga. Aug. 26, 2011).

74. *Id.* at *6.

75. *See Montrois v. United States*, 916 F.3d 1056, 1067 (D.C. Cir. 2019).

is especially noteworthy because *Brannen* specifically stated that one benefit of the PTIN is the *privilege* of preparing tax returns for compensation.⁷⁶ Since the Panel considered *Loving* unnecessary to its analysis of the IOAA,⁷⁷ the reversal of the district court's decision, which relied heavily on *Loving*, is understandable.

E. Steele v. United States

Steele I, like *Brannen*, was initiated by plaintiffs who maintained that the IRS lacked authority to require PTINs and charge tax preparers for their issuance.⁷⁸ Procedurally, however, *Steele* was litigated as a class action,⁷⁹ and the plaintiffs sought a declaratory judgment that the IRS lacked legal authority to charge fees for the PTINs, and thus demanded a refund of the fees paid.⁸⁰ Alternatively, the class argued the fees charged were excessive, and they should receive a refund of the excessive fees collected.⁸¹ While the district court ruled that the IRS could continue to issue PTINs, the plaintiffs met some success—the IRS was enjoined from charging a fee for a PTIN issuance.⁸² Additionally, the court ordered the IRS to refund the PTIN user fees previously paid by the tax return preparer-plaintiffs.⁸³

The *Steele* court had no difficulty reaching the conclusion that I.R.C. § 6901 provides the IRS with the statutory authority to impose the PTIN requirement, citing *Brannen* to do so: “Congress specifically authorized the Secretary of the Treasury to create regulations requiring tax return preparers to identify themselves, by means of identifying numbers, on tax returns and refund claims that they prepare.”⁸⁴ The court then cited the post-*Loving* district court decision, *Buckley v. United States*,⁸⁵ to highlight the specific statutory authority: “[Section] 6109(a)(4) expressly authorizes the Secretary to assign such numbers.”⁸⁶

However, while *Steele* is consistent with *Brannen* and *Buckley*, that the IRS has the authority to require PTINs, it reached the opposite

76. *Brannen*, 682 F.3d at 1319.

77. *Montrois*, 916 F.3d at 1068.

78. *See Steele I*, 159 F. Supp. 3d 73, 76 (D.D.C. Feb. 9, 2016).

79. *See id.* at 88 (granting class certification as to demand for declaratory relief).

80. *Steele I*, 159 F. Supp. 3d at 76.

81. *Id.*

82. *Steele III*, 260 F. Supp. 3d at 67–68.

83. *Steele IV*, 2017 WL 3621747, at *1. While the IRS eventually stopped charging fees for the PTINs during the pendency of the appeal, it did not refund any of the fees that had been paid by the tax return preparers. Kelly Erb, *IRS Gets Big Win in Multimillion-Dollar PTIN Fees Case*, FORBES (Mar. 4, 2019, 10:07 PM), <https://www.forbes.com/sites/kellyphillipserb/2019/03/04/irs-gets-big-win-in-multimillion-dollar-ptin-fees-case/#72fc48e39cfd>.

84. *Steele III*, 260 F. Supp. 3d at 59 (citing *Brannen v. United States*, No. 4:11-CV-0135-HLM, 2011 WL 8245026, at *1 (N.D. Ga. Aug. 26, 2011)).

85. No. 1:13-CV-1701, 2013 WL 7121182, at *1–2 (N.D. Ga. 2013).

86. *Id.*

conclusion with respect to whether it could charge user fees for the PTINs.⁸⁷ Based on the *Loving* court's invalidation of the Regulations Governing Practice, the *Steele* analysis focused on the premise that the IRS lacks authority to regulate tax return preparers, holding that charging a fee for something it is not permitted to regulate is inappropriate.⁸⁸ It found that the PTIN regulations are inextricably linked to the Regulations Governing Practice, held invalid by *Loving*: “[T]he argument that the registered tax return preparer regulations regarding testing and eligibility requirements and the PTIN regulations are completely separate and distinct is a stretch at best. While it is true that they were issued separately and at different times, they are clearly interrelated.”⁸⁹

Notably, the *AICPA* litigation was well underway during the pendency of the *Steele* litigation, but the district court decisions and the initial court of appeals decisions in *AICPA* all focused on jurisdictional questions.⁹⁰ The decisions on the merits—upholding the IRS's authority to maintain a voluntary program, the AFSP—was reached after *Steele* was decided.⁹¹ The *AICPA* court distinguished the IRS's efforts to encourage unlicensed tax preparers to improve their tax knowledge and skills (via the AFSP) from the mandatory rules of the Regulations Governing Practice.⁹² The latter are impermissible and could not be enforced; the former are valid and permissible IRS objectives.⁹³

While the AFSP and RTRP considerations were not present, the *Steele* court did consider the IOAA and its application to the PTIN User Fee.⁹⁴ It found that the IOAA applied when the agency seeking to justify the imposition of a fee *was engaged in an otherwise “valid regulatory scheme[]”*⁹⁵ Pursuant to *Loving*, the IRS is not permitted to regulate tax return preparers:

87. *Id.* at 63–64.

88. *Id.* at 64. The IRS, however, contended that they were not interconnected: “[T]he PTIN and user fee regulations are separate from the regulations imposing eligibility requirements on registered tax return preparers.” *Id.*

89. *Id.* The district court in *Loving* specifically articulated that inter-connectedness: “*This registration requirement is the vehicle by which the Rule adds burdens on tax-return preparers. To initially register, a tax-return preparer must pay a fee and pass a qualifying exam. Then, to maintain her registration, each year the preparer must pay another fee and complete at least 15 hours of continuing education courses.*” *Loving v. United States*, 917 F. Supp. 2d 67, 71–72 (D.D.C. Jan. 18, 2013) (alteration in original) (emphasis added) (citation omitted).

90. *AICPA v. IRS*, No. 16-5256, 2018 WL 3893768, at *2 (D.C. Cir. 2018) (noting that the case was initially dismissed at the district court level on the grounds that the plaintiff lacked standing).

91. *Id.*

92. *Id.* at *8–9.

93. *Id.*

94. *Steele III*, 260 F. Supp. 3d at 66.

95. *Id.* at 65 (emphasis added) (citation omitted).

Granting the ability to prepare tax returns for others for compensation—the IRS’s proposed special benefit—is *functionally equivalent to granting the ability to practice before the IRS*. The D.C. Circuit has already held, however, that the IRS does not have the authority to regulate the practice of tax return preparers.⁹⁶

Steele might have reached a different outcome if the court had the benefit of *AICPA*’s reasoning on the voluntary AFSP.

F. *AICPA v. IRS*

After the *Steele* decision, the D.C. Circuit in *AICPA v. IRS* held that the IRS could not regulate the tax-return preparation industry, but it could play a role.⁹⁷ The plaintiffs argued that if the IRS could not promulgate a mandatory regulatory program, it was likewise incapable of creating a voluntary one.⁹⁸ The D.C. Circuit disagreed, upholding the AFSP—the voluntary version of the RTRP program.⁹⁹

It is significant that the core provisions focusing on education and testing were originally embodied in the Regulations Governing Practice, which were invalidated by *Loving*. In fact, the entire genesis of the voluntary program was traceable to dictum from the *Loving* decision: “Perhaps taking this clarification to heart, *the IRS decided to retain much of the rule’s infrastructure* but did so by relying on tax preparers’ willingness to voluntarily participate. It is this voluntary program that sits at the heart of the current suit.”¹⁰⁰

Except for a brief reference to what the IRS *could not* charge a fee for, *AICPA* noted that *Loving* “enjoined enforcement of the rule but stayed the injunction in part to allow the IRS to continue operating ‘its testing and continuing-education centers.’”¹⁰¹ The *AICPA* court continued, explaining that this operation was allowable “as long as the IRS did not require any tax preparer to take a test, enroll in continuing education, or pay a fee for either of those services.”¹⁰² *AICPA* did not

96. *Id.* (emphasis added). Compare Donald T. Williamson, *The End of PTINs?—Not for Now at Least*, 156 TAX NOTES 1263 (2017) (examining the court’s reasoning and conceding “that the decision is, in fact, correct”), with Vincent R. Barrella & Walter G. Antognini, *PTINs and Tax Return Practice Following Steele*, 96 TAXES 51, 57 (2018) (criticizing the *Steele* result).

97. See generally *AICPA IV*, 2018 WL 3893768 (D.C. Cir. 2018) (discussing the program as voluntary and explaining that those who submit to it are properly governed by the IRS with respect to Circular 230).

98. *Id.* at *9.

99. *Id.* at *2 (“In the wake of the *Loving* litigation, the IRS instituted a voluntary scheme known as the Annual Filing Season Program.”).

100. Am. Inst. Cert. Pub. Acc’ts v. IRS, 199 F. Supp. 55, 59 (D.D.C. 2016) (emphasis added). The Court observed that *Loving* had not required the IRS to dismantle the entire regulatory program, but the IRS could not require individuals to participate. *Id.*

101. *AICPA IV*, 2018 WL 3893768, at *4 (D.C. Cir. 2018) (citation omitted).

102. *Id.* (emphasis added).

otherwise mention PTINs nor the ability of the IRS to charge for them. That the IRS may charge for other program-related items is implicit in the above-quoted passage.¹⁰³

Given that *Steele* did not have the benefit of the *AICPA* decision, its heavy reliance on *Loving* is understandable. However, since *AICPA* made clear that the IRS can engage in numerous activities connected to the tax preparation industry,¹⁰⁴ it seems that a more flexible view toward the “service provided, benefit received” analysis is warranted. At a minimum, the infrastructure costs to implement and administer the AFSP, which grew out of the RTRP, are legitimate costs to be included in the PTIN user fee. On remand, the district court will need to address the impact of the voluntary program on the PTIN cost structure.

III. ANALYSIS

Given the analysis provided by the court of appeals in *AICPA*, the justification for a user fee is measurably stronger than it had been prior to its decision. Even though *Montrois* addressed the issue without reference to *AICPA*, the Panel nevertheless reached the correct result with its own analysis.¹⁰⁵ There was no real controversy over the IRS’s ability to use PTINs—§ 6109 is dispositive.¹⁰⁶ Yet, reasonable people can disagree as to the application of the IOAA’s trio of factors examined to test the fee. Nevertheless, as shown by the Panel’s analysis, the PTIN user fee is justified.¹⁰⁷ Remand is the appropriate method to answer just how much of a fee is reasonable.

A. I.R.C. Section 6109 Authorizes PTINs

While the district court in *Steele* included a meaningful discussion in its decision of the IRS’s authority to require PTINs, the court of appeals barely mentioned the issue of the requirement in its opinion, other than to note: “The [district] court upheld the IRS’s requirement that preparers obtain a PTIN.”¹⁰⁸ Since the IRS had only appealed the court’s invalidation of the PTIN User Fee, the *Montrois* Panel did not otherwise opine on the validity of the requirement. Instead, its validity is presumably implied by the court’s description of the legislative history of the provisions.¹⁰⁹

103. *See, e.g., id.*

104. *See generally id.* (discussing areas the IRS may regulate).

105. *Montrois v. United States*, 956 F.3d 1056, 1061 (D.C. Cir. 2019).

106. *Id.*

107. *Id.* at 1064.

108. *Id.* at 1060.

109. *Id.* at 1059. “In 1998, Congress, acting out of concern that ‘inappropriate use might be made of a preparer’s [SSN],’ allowed the IRS to permit or require preparers to list a different identifying number on returns they prepared. The IRS subsequently issued regulations allowing—

That legislation, incorporated into I.R.C. § 6901, permits tax return preparers to use an identification number other than their own SSNs.¹¹⁰ As a result, after 1998, the use of PTINs was entirely voluntary since the IRS allowed a free alternative—the preparer’s social security number—to be used instead.¹¹¹ The IRS’s view on PTINs changed in 2009, following an exhaustive review of tax return preparers that year.¹¹² The *Montrois* Panel observed that:

According to the agency, the “requirement to use a PTIN will allow the IRS to better identify tax return preparers, centralize information, and effectively administer the rules relating to tax return preparers.” The IRS further noted that the PTIN requirement would benefit “tax return preparers and help maintain the confidentiality of [their] SSNs.”¹¹³

Notably, this is the sole reference to confidentiality and SSNs contained in the entire preamble to the proposed regulations.

In contrast, while reviewing § 6901, the district court in *Steele* concluded that it “must give effect to the unambiguous intent of Congress that the Secretary may require the use of such a number.”¹¹⁴ It also held that the IRS’s decision to mandate PTINs “was not arbitrary and capricious.”¹¹⁵ Finally, the court took note that both *Brannen* and *Buckley* also held that the IRS has specific authorization for mandating PTINs.¹¹⁶ On the question of the PTIN User Fee, however, *Steele* sharply diverged from the reasoning of the other courts.

but not requiring—preparers to obtain from the agency a unique Preparer Tax Identification Number (PTIN) and to list that PTIN, instead of a [SSN], on any return they prepared.” *Id.* (emphasis added) (citations omitted).

110. I.R.C. § 6109(d) (2019) (“(d) Use of social security account number. The social security account number issued to an individual for purposes of section 205(c)(2)(A) of the Social Security Act shall, *except as shall otherwise be specified under regulations of the Secretary, be used as the identifying number for such individual for purposes of this title.*” (emphasis added)).

111. *See supra* note 17.

112. *See, e.g.*, IRS Publication 4832 at 3 (Rev. 12-2009), *Return Preparer Review* (2010); *see also* Furnishing Identifying Number of Tax Return Preparer, 67 Fed. Reg. 52862 at § 1.6109-2 (Aug. 12, 2002).

113. *Montrois*, 916 F.3d at 1059 (alteration in original) (citations omitted).

114. *Steele III*, 260 F. Supp. 3d at 63.

115. *Id.* “The IRS has articulated satisfactory explanations for its actions. There is a rational connection between the regulations—requiring the use of PTINs—and the stated rationales—effective administration and oversight. And, there is no indication that the IRS entirely failed to consider an important aspect of the problem, or that its rationales ran counter to the evidence before it, or that its reasoning is completely implausible. In addition, this was not an unexplained change in policy. The aforementioned reasons for the change in policy were identified by the IRS.” *Id.* (citations omitted).

116. *Id.* “Other courts to consider this issue have also found that the PTIN requirement is authorized by law.” *Id.* (referring to *Brannen* and *Buckley*).

B. *Section 9701 & "Provision of Service"*

At the outset of its consideration on the IOAA's trio of factors, the *Montrois* Panel had no difficulty in reaching the conclusion that the IRS provides a service in exchange for the issuance of PTINs to the tax return preparers.¹¹⁷ It examined what specific steps were included in the process:

[T]he IRS generates a unique identifying number for each tax-return preparer and maintains a database of those PTINs, enabling preparers to use those numbers in place of their [SSNs] on tax returns. The IRS devotes personnel and resources to managing the PTIN application and renewal process and developing and maintaining the database of PTINs.¹¹⁸

The Panel did not seek to quantify the level of service provided.

However, it is more telling that, regardless of the burden undertaken related to the administrative services required, the court did not consider whether the additional work is entirely self-imposed by the IRS's mandate to exclusively use PTINs.¹¹⁹ Instead, the court sought to rebut the tax preparers' concern about how much "service" was actually involved in the process.¹²⁰ The court states: "The tax-return preparers question how robust a service the IRS undertakes when it provides them a PTIN. As they point out, before our decision in *Loving* invalidated the registered tax-return preparer regulations, *the activities the IRS undertook in connection with PTINs were more substantial.*"¹²¹ The Panel stated that although the IRS provided "a slimmed-down version of the PTIN-related services afforded by the agency before *Loving*, [it] still constitute[s] the provision of a service."¹²² This concern, according to the Panel, goes "to the *reasonableness of the fee*, not to whether a fee can be assessed in the first place."¹²³ Notably, the district court had not considered the service-provided factor as a stand-alone issue.¹²⁴ Instead, it focused its analysis on the benefit conferred by the PTIN on the tax return preparers.¹²⁵

117. *Montrois*, 916 F.3d at 1063.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* (emphasis added). The Panel did not, as the district court did, take the opportunity to observe that, post-*Loving*, the IRS was prohibited from regulating tax return preparers. *Cf. id.*

122. *Id.* (emphasis added).

123. *Id.* (emphasis added) ("There may be force to the tax-return preparers' claim that the fee amount is excessive, but no court has yet considered that claim, and the preparers can press the matter in the proceedings on remand.")

124. *Montrois*, 916 F.3d at 1060, 1066.

125. *Id.* at 1060.

While the district court apparently conflated the two factors, the D.C. Circuit Court of Appeals correctly determined that the IRS provides a service when it issues a PTIN, separate and apart from any benefit derived therefrom.¹²⁶ The IRS recognized that without the original regulatory framework in place for the RTRP, the service required would be substantially reduced.¹²⁷ Accordingly, the court of appeals found that:

The IRS adjusted the PTIN fee in the wake of our decision in *Loving*. A portion of the original PTIN fee was to have been used to pay the costs of the registered tax-return preparer program invalidated in *Loving*, and the IRS reduced the amount of the PTIN fee to cover the costs of those portions of the PTIN program that remained in effect after *Loving*.¹²⁸

C. Section 9701 & “Specific Benefit”

The “specific benefit provided” question was considered in detail by both courts, and they reached dramatically different outcomes.¹²⁹ The district court held the IRS could not provide a thing of value (by permitting individuals to prepare and file tax returns) because the IRS could simply not regulate tax preparers.¹³⁰ The court of appeals purposely sidestepped that point and, instead, chose to focus on the identity protection that the PTIN afforded preparers.¹³¹ While it may not seem like the benefit is particularly meaningful, the protection is still a benefit provided to tax preparers:¹³²

We thus can rest on the confidentiality-protection rationale alone as conferring a specific benefit for which a PTIN fee may be assessed. The confidentiality advantages associated with the PTIN requirement readily qualify as a specific benefit: without protection of their [SSNs], preparers would face greater risks of identity theft.¹³³

The district court was skeptical that tax preparers receive a confidentiality benefit by using a PTIN instead of a SSN because of the IRS’s original purpose for mandating the PTIN—to serve as the gateway procedural device to enforce the RTRP regulations.¹³⁴ It was also highly

126. *Id.* at 1060, 1066.

127. *Id.* at 1060.

128. *Id.* at 1060 (emphasis added).

129. *Montrois*, 916 F.3d at 1060, 1062–68.

130. *Id.* at 1060.

131. *Id.* at 1064–65.

132. *Id.* at 1066.

133. *Montrois*, 916 F.3d at 1064 (emphasis added).

134. *Id.* at 1059–60.

critical of the IRS's assertion that the PTIN's confidentiality constituted a thing of value:

The confidentiality justification is mentioned only briefly in the regulations requiring the use of PTINs: "The final regulations will also benefit taxpayers and tax return preparers and help maintain the confidentiality of SSNs." *It is not discussed in the regulation specifically addressing user fees.* Despite the fact that tax return preparers were allowed for many years to use their SSNs, and that under the statute SSNs are presumptively to be used as the required identifying number, and that the taxpayer's SSN appears on their tax returns regardless of whether they used a tax return preparer, the regulations fail to even state that SSNs were being inadvertently disclosed or that their confidentiality was at risk. It is not at all clear that requiring PTINs was necessary for this reason.¹³⁵

The district court was unpersuaded that the confidentiality issue is a legitimate concern and refused to accept it as a valid justification for the fee.¹³⁶ The court opined that it "will not defer to these conclusory and unsupported justifications and [found] that the IRS may not charge fees for PTINs for this reason."¹³⁷

Notably, the *Brannen* opinion made no mention of the confidentiality benefit provided to tax preparers using the PTIN in lieu of the SSN.¹³⁸ It justified the user fee on the more straightforward and original IRS-asserted benefit: "*the privilege of preparing returns for others for compensation.*"¹³⁹ Similarly, the district court in *Buckley*, a post-*Loving* decision, did not refer to the confidentiality rationale when it analyzed the benefit factor.¹⁴⁰ It agreed with *Brannen*, also holding "that the user fee associated with the PTIN number [sic] confers a special benefit on tax return preparers who prepare the tax returns of others for compensation and therefore satisfies the [IOAA]."¹⁴¹ Thus, neither the *Brannen* nor the *Buckley* decision relied on confidentiality as a benefit.

135. *Steele*, 260 F. Supp. 3d at 67 (emphasis added).

136. *Id.*

137. *Id.* (citations omitted).

138. *Brannen v. United States*, 682 F.3d 1316, 1318–19 (11th Cir. 2012).

139. *Id.* at 1318 (emphasis added). The district court in *Brannen* did mention, however, in a footnote, the "additional purpose— protecting the confidentiality of tax return preparers' [SSNs]." *Brannen v. United States*, No. 4:11-CV-0135-HLM, 2011 WL 8245026, at *6 n.7 (N.D. Ga. Aug. 26, 2011). Despite the observation, however, its holding was premised on the special benefit conferred "on tax return preparers *who otherwise would not be permitted to prepare tax returns and refund claims on behalf of others in exchange for compensation.*" *Id.* at *6 (emphasis added).

140. *Buckley v. United States*, No. 1:13-CV-1701 RLV, 2013 WL 7121182, at *2 (N.D. Ga. Dec. 4, 2013).

141. *Id.* at *3–4.

Given the scant evidence in the record on the need for confidentiality and protection against identity theft, it is difficult to explain the court of appeals' conclusion that the IRS had relied on those justifications.¹⁴² The Panel stated: "We conclude, however, that the IRS adequately relied on the confidentiality protections afforded by PTINs when issuing the PTIN regulations."¹⁴³ It reached that conclusion despite the district court's view that, at best, the confidentiality rationale was a secondary consideration, with the RTRP program—the principle reason behind the PTIN and user fee.¹⁴⁴ However, the Panel disagreed with the district court: "The IRS's concern with maintaining the confidentiality of preparers' [SSNs] runs throughout the regulatory history of the PTIN requirement and fee."¹⁴⁵

While it is technically correct that a PTIN may provide some protection against identity theft, it strains credulity to then rely on that observation as the principal justification to impose substantial financial costs on tax return preparers.¹⁴⁶ It is no small irony that the very court to hold that the IRS cannot regulate tax preparers then, in turn, approved a fee structure that is imposed on those same individuals to subsidize the de facto regulation of the tax preparation industry.¹⁴⁷ It can be argued that if one has to pay for the privilege of performing an activity, then the entity that extracts the fee is "regulating" the activity.¹⁴⁸

By upholding the PTIN User Fee, the court of appeals permitted the IRS to accomplish what *Loving* held it could not do.¹⁴⁹ It should be noted that the *AICPA* court only considered the IRS's voluntary role in overseeing tax preparers.¹⁵⁰ If it chooses, Congress can permit the IRS to regulate them and, likewise, authorize it to impose a user fee. By upholding the PTIN User Fee, the court of appeals not only undermined its own decision in *Loving* but may have permitted the IRS to impose a significant share of the cost of those regulations on the tax return preparers.

142. *Montrois v. United States*, 916 F.3d 1056, 1064 (D.C. Cir. 2019).

143. *Id.*

144. *Id.*

145. *Id.* The court continued: "In opting to require the use of PTINs in 2010, the IRS explained that they provide 'an alternative to using the tax return preparers' [SSNs].' When issuing its final PTIN regulations later that year, the IRS specifically noted the 'identity protection currently provided by PTINs,' and explained that the regulations would benefit 'tax return preparers and help maintain the confidentiality of SSNs.'" *Id.* at 1065 (citations omitted).

146. *Id.*

147. The D.C. Circuit panel that decided *Loving* was comprised of Circuit Judges Kavanaugh, Williams and Sentelle; none of whom sat on the *Montrois* Panel. *See supra* note 8.

148. *Contra AICPA IV*, 2018 WL 3893768, at *6 (D.C. Cir. 2018).

149. *Id.*

150. *Id.*

D. Section 9701 & “Conferred Upon Identifiable Individuals”

The *Montrois* court disagreed with the *Steele* court’s conclusion that because tax preparers “need not meet any eligibility criteria” after *Loving* invalidated the Regulations Governing Practice, that there can be no benefit to “certain individuals not available to the general public.”¹⁵¹ In *Steele*, the court premised its analysis on the IRS’s inability to impose regulations:

[I]t is no longer the case that only a subset of the general public may obtain a PTIN and prepare tax returns for others for compensation. Hypothetically, every member of the public could obtain a PTIN, which means that every member of the public would also get the supposed “benefit” of being able to prepare tax returns for others for compensation.¹⁵²

However, the *Montrois* court found that reasoning unpersuasive.¹⁵³ Instead, the Panel focused not on the *theoretical* availability to anyone of the opportunity to prepare tax returns for compensation but rather on those individuals who actually chose to do so.¹⁵⁴ “It does not matter, though, that the service and benefit are theoretically available to the general public.¹⁵⁵ What matters is that the service is provided to, and the corresponding benefit is received by, *the specific group of persons who in fact pay the fee.*”¹⁵⁶ To bolster that view, the Panel considered the Supreme Court’s treatment of fees for the issuance of passports.¹⁵⁷

Referring to the example discussed in *New England Power*, the Panel noted that passports are “generally available to the entire citizenry.”¹⁵⁸ A fee, however, is properly charged to only those who actually request one: “[T]he Act, as understood by the Supreme Court, enables the State Department to charge a fee *to the particular persons who apply for a passport* because the service undertaken to process passport applications benefits those persons.”¹⁵⁹ Likewise, since the PTIN user fee is only charged to individuals who request one, “the specific benefit supporting the fee extends only to identifiable individuals rather than the public writ large.”¹⁶⁰

151. *Steele v. United States*, 260 F. Supp. 3d 52, 67 (D.D.C. 2017).

152. *Id.* The court then concluded that “[t]here is therefore no special benefit for certain individuals not available to the general public.” *Id.*

153. *Montrois v. United States*, 916 F.3d 1056, 1066 (D.C. Cir. 2019).

154. *Id.*

155. *Id.*

156. *Id.* (emphasis added).

157. *Id.*

158. *Id.* (citing *Fed. Power Comm’n v. New England Power Co.*, 415 U.S. 345, 349 (1974)).

159. *Id.* at 1066–67 (emphasis added).

160. *Id.* at 1067.

Unfortunately, the Panel's reasoning is unpersuasive for the same reason the district court concluded the IRS's argument was unconvincing: the fee at issue in the example is specifically authorized by Congress.¹⁶¹ In the case of passports, Congress authorizes the State Department to impose the fee.¹⁶² As pointed out by *Steele*, the IRS had similarly argued before the district court that "anyone may enter a national park if they buy a ticket."¹⁶³ But, just as Congress provides that the Secretary of State can charge fees for passports, it also authorizes the Secretary of the Interior, "by statute[,] to 'establish, modify, charge, and collect recreation fees at Federal recreational lands and waters.'"¹⁶⁴ The IRS has no similar statutory authority to impose a PTIN user fee, "so the national park analogy fails."¹⁶⁵

E. Whether the Decision to Impose the Fee Was Arbitrary & Capricious

Independent from its analysis of the IOAA, the court of appeals also considered the issue of whether the IRS's decision to impose the fee was arbitrary and capricious.¹⁶⁶ The district court did not examine this separately but rather as part of its review of the PTIN in connection with the Regulations Governing Practice.¹⁶⁷ The Panel observed: "An agency generally must 'give adequate reasons for its decisions,' and the requirement to give a 'satisfactory explanation for its actions' is 'satisfied when the agency's explanation is clear enough that its path may reasonably be discerned.'"¹⁶⁸

The crux of the tax preparers' argument, according to the Panel, was that the IRS's justification for the PTIN "does not survive our

161. *Id.* at 1061–63.

162. *See* 22 U.S.C. § 214 (2019) ("(a) There shall be collected and paid into the Treasury of the United States a fee, prescribed by the Secretary of State by regulation, for the filing of each application for a passport (including the cost of passport issuance and use)").

163. *Steele v. United States*, 260 F. Supp. 3d 52, 67 (D.D.C. 2017).

164. *Contra id.* (citing 16 U.S.C. § 6802(a)). "As plaintiffs note, *that statute would be wholly unnecessary if the agency were allowed to charge fees under the IOAA.*" *Id.* (emphasis added) (footnote omitted)).

165. *Id.*

166. *Montrois v. United States*, 916 F.3d 1056, 1062 (D.C. Cir. 2019). "On the merits, the tax-return preparers contend that the PTIN fee is unlawful for two distinct reasons. First, they argue . . . that the [IOAA] does not provide statutory authority for the fee. Second, *they contend that the IRS's decision to impose the fee was arbitrary and capricious.* We disagree on both counts." *Id.* (emphasis added).

167. *Steele*, 260 F. Supp. 3d at 64. The court noted the IRS's position: "the PTIN requirements are not arbitrary and capricious *because they make it easier to identify tax return preparers and the returns they prepare, which is a critical step in tax administration*, and because PTINs protect [SSNs] from disclosure." *Id.* (emphasis added). It can be argued the IRS emphasized the PTIN was *critical to tax administration*, but protecting SSNs via PTINs was a secondary, less significant, concern. *Id.*

168. *Montrois*, 916 F.3d at 1067 (citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016)) (emphasis added).

decision in *Loving*.¹⁶⁹ The district court had, in fact, agreed with that contention; it concluded the PTIN User Fee is inextricably interwoven with the Regulations Governing Practice, and when they were held invalid in *Loving*, the PTIN User Fee could no longer be sustained on that basis.¹⁷⁰ The district court reemphasized that point in a later decision, *Steele V*, when it denied the IRS's motion to lift the stay on collecting the PTIN user fees during the appeal: "The court agrees with the plaintiffs that the IRS cannot use an invalidated regulatory scheme to bootstrap in a fee."¹⁷¹

The Panel, nevertheless, disagreed and held that the PTIN User Fee is not only sufficiently separate from the Regulations Governing Practice, but it also independently justified: "the IRS sufficiently rooted its decision to assess a PTIN fee in justifications independent of those rejected in *Loving*."¹⁷² Regardless of the sparseness to the reference, the Panel remained focused on the protection of preparers' SSNs: "When the IRS reissued the PTIN [User] [F]ee regulations after *Loving*, it explained that PTINs would benefit preparers by protecting their confidential information and would improve tax compliance and administration."¹⁷³ Left unexamined by the Panel was the notion of proportionality; the improved compliance and administration substantially benefit the IRS while the confidentiality, at best, only marginally benefits the preparers.

If the Furnishing Identifying Number and PTIN User Fee regulations had been issued without regard to the Regulations Governing Practice—not simply in time, but independent and apart from an effort to regulate the tax return preparation industry—there would be little doubt that both would be sustained. It can also be argued that there would be sufficient connection between the confidentiality issues and the statutory authority of § 6901 to allay any concerns that the IRS had acted in an arbitrary and capricious manner. While some might quibble about the amount charged, the imposition of a fee would

169. *Id.* "The preparers emphasize that the 2010 regulations originally establishing the PTIN fee stated that the fee would pay for the registered tax-return preparer program, which *Loving* later invalidated." *Id.* (citation omitted).

170. *See* Furnishing Identifying Number, *supra* note 17.

171. *Steele V*, 287 F. Supp. 3d at 4.

172. *Id.* at 1067.

173. *Id.* ("*Loving* did not cast doubt on those justifications, which are independent of the registered tax-return preparer [RTRP] program we considered and invalidated there."). The district court was convinced when it denied the motion for a stay that *Loving* was dispositive because the PTIN and RTRP regulations were impermissibly bound together: "[W]hile the regulations 'were issued separately and at different times, they are clearly interrelated.' . . . The 'RTRP regulations specifically mention the PTIN requirements' and 'the overarching objectives named in the PTIN regulations indicate a connection to the RTRP regulations.' *The government has not presented any additional arguments that change the [c]ourt's perspective that the two sets of regulations are 'clearly interrelated.'*" *Steele V*, 287 F. Supp. 3d at 4 (emphasis added) (citations omitted).

have been directly connected to the stated purpose of the PTIN regulations, and thereby justified.

But the plaintiffs and the district court had solid arguments that the PTIN regulations were not created independent of an otherwise invalid regulatory scheme. To permit the IRS to subsequently bootstrap an otherwise legitimate regulation to save what is essentially a remnant of the failed RTRP regulatory framework violates the spirit, if not the letter, of the IOAA. Simply because a PTIN user fee can be justified under different factual circumstances does not mean that the fee is proper under the facts presented.

F. Remand & Reasonableness of the Fee

While the court of appeals reversed the district court and held the IRS properly imposed the PTIN user fee, it did not opine on whether the fee was, in itself, reasonable for the service provided to the tax return preparers and for the benefit received by them. For that analysis, the Panel remanded the case to the district court for a hearing and ultimate resolution.¹⁷⁴ Apart from the IRS's *sua sponte* reduction of the fee in 2015,¹⁷⁵ as a consequence of the *Loving* decision, the only court to consider the reasonableness issue was the district court in *Buckley*.¹⁷⁶

However, the initial *Steele* decisions discussed what costs the PTIN user fee should include and, more importantly, *exclude* from consideration. Specifically, *Steele I* held that under § 9701, the IRS may only consider the fees it incurs to provide the PTIN service: “[T]he prevailing (and binding) interpretation of section 9701, which states, again, ‘the measure of fees [imposed under § 9701] is the cost of the government of providing the service, not the intrinsic value of the service to the recipients.’”¹⁷⁷

In other words, the IRS may not consider the benefit derived by individual plaintiffs from the use of the PTINs; the benefit must be uniform for all tax return preparers. That holding served as the legal

174. *Montrois*, 916 F.3d at 1058 (“[We] remand 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.”).

175. See Preparer Tax Identification Number (PTIN) User Fee Update, *supra* note 27; see also *Montrois*, 916 F.3d at 1060.

176. *Buckley v. United States*, No. 1:13-CV-1701 RLV, 2013 WL 7121182, at *3 (N.D. Ga. Dec. 4, 2013) In giving little to no weight to the *Loving* district court decision, *Buckley* held: “the \$50 annual fee was not arrived at in an arbitrary and capricious manner. . . . [and] that [taxpayer’s] declarations do not establish that there [was] a material fact in dispute regarding whether the \$50.00 annual renewal fee is excessive.” *Id.*; see *Brannen v. United States*, 682 F.3d 1316, 1317–18 n.1 (11th Cir. 2012). In failing to consider the reasonableness of the PTIN User Fee, the *Brannen* court found “that *Brannen* [did] not challenge[] the amount or excessiveness of the user fee. Indeed, *Brannen* expressly disclaimed any such argument in the district court.” *Id.* (emphasis added).

177. *Steele I*, 159 F. Supp. 3d 73, 84 (D.D.C. 2016) (citing *Seafarers Int’l Union of N. Am. v. U.S. Coast Guard*, 81 F.3d 179, 185 (D.C. Cir. 1996)).

basis for the *Steele* litigation to proceed as a class action and, likewise, for ordering relief on a class-wide basis:

[T]he IRS has stated time and again that the cost of issuing a PTIN is the same regardless of whether the pin number is issued to an attorney, CPA, or uncertified tax return preparer. As plaintiffs note, *that is why the IRS decided in the first place to impose a uniform fee for every PTIN it issued*—regardless of the recipient’s professional status.¹⁷⁸

Finally, the IRS cannot include costs, via the PTIN user fee, that are not associated with the PTIN program. The plaintiffs alleged that the amount charged included impermissible components even after the IRS’s voluntary reduction of the fee in 2015: “[t]he IRS has also continued to use the fees to fund activities related to tax compliance, background checks, the voluntary certification program established after *Loving*, and many other things unrelated to issuing a number.”¹⁷⁹ The Panel agreed that any costs associated with activities found invalid pursuant to *Loving* could be reviewed on remand.¹⁸⁰

Accordingly, the district court must consider on remand whether the already-reduced fee appropriately reflects the costs of the administration of PTINs.¹⁸¹ One question that bears upon this analysis is the separate cost paid directly to third party administrators and imposed on the tax-return preparers.¹⁸² Thus, the original fee was not \$50 but rather \$64.25 when the processing charge was included.¹⁸³ Similarly, the present fee is not \$33.00, but rather \$50, with the addition of the processing charge. Which also increased from \$14.25 to \$17 per application/renewal.¹⁸⁴ As the plaintiffs succinctly and rhetorically stated: “[I]f Accenture [the third-party vendor] does everything necessary to issue a PTIN, then what benefit is the government providing to tax-return preparers?”¹⁸⁵

178. *Id.* (emphasis added).

179. Brief of Plaintiff-Appellees at 16 n.4, *Montrois v. United States*, 916 F.3d 1056 (D.C. Cir. 2019) (No. 17-5204) (citations omitted).

180. *Montrois*, 916 F.3d at 1068 (“The tax-return preparers’ concerns that the justifications for the PTIN fee might encompass functions deemed in *Loving* to fall outside the IRS’s regulatory authority can be addressed on remand, when the district court examines whether the amount of the fee is reasonable and consistent with the [IOAA].”).

181. *Montrois*, 916 F.3d at 1069.

182. Motion for Summary Judgment for Plaintiff at 8, *Steele*, 260 F. Supp. 3d 52 (D.D.C. 2017) (No. 14-cv-01523-RCL). “As for the vendor’s fee, that would go to Accenture [third-party vendor], whose contract with the government requires it to do (and who has in fact done) all the things necessary to issue and renew PTINs.” *Id.* (citation omitted).

183. *Id.*

184. *Id.*

185. Motion for Summary Judgment for Plaintiff at 20, *Steele*, 260 F. Supp. 3d 52 (D.D.C. 2017) (No. 14-cv-01523-RCL).

IV. CONCLUSION

Since each court to consider the PTIN regulations had no difficulty in upholding their validity, the only practical question confronting the courts is whether the IRS could impose the PTIN user fee. The district court provided a comprehensive review of the PTIN regulations and the significant role the PTINs were expected to serve in the RTRP program. When the D.C. Circuit Court invalidated the RTRP in *Loving*, the PTIN regulations had to survive on their own merit. The PTIN requirement has done so because the IRS has specific statutory authority to use them in lieu of SSNs.

The PTIN user fee is a good deal more problematic because its validity, to a degree, depends upon whether one views the fee either as part of a failed regulatory effort or, rather, in exchange for a meaningful benefit. The exhaustive treatment of this issue by the district court is definitive and leaves little doubt that the PTINs are inextricably interwoven into the fabric of the invalid RTRP program. Nonetheless, whether the linkage between the RTRP and PTIN is dispositive, in and of itself, remains unclear.

As begrudging as it was, the district court did observe that confidentiality was a benefit for tax preparers, who could use PTINs in lieu of their SSNs, thereby protecting their individual identities. The court of appeals correctly stated that the IRS could legitimately impose a charge for the PTIN, but it also pointed out that the size of the benefit would impact the amount that is considered “reasonable.” The final PTIN user fee will be determined on remand, after a remarkable sixth appearance before the district court.¹⁸⁶

Undoubtedly, this is the correct result because, even though *Loving* invalidated the RTRP program, *AICPA* upheld the voluntary version—the AFSP—and made clear that the IRS has a role in the regulation of tax return preparers. For better or worse, once the final PTIN user fee is determined on remand, it will remain a permanent fixture on the tax-return preparation industry landscape.

186. See *supra* note 1 and accompanying text.