No. _____

In the
Supreme Court of the United States

BRITTANY MONTROIS, CLASS OF MORE THAN 700,000 SIMILARLY SITUATED INDIVIDUALS AND BUSINESSES, ET AL.,
*Petitioner*S,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

Allen Buckley
Counsel of Record
2727 Paces Ferry Road
Suite 750
Atlanta, Georgia 30339
(404) 610-1936
ab@allenbuckleylaw.com

Counsel for Petitioners

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

I. Whether a U.S. court of appeals can explicitly decline to follow U.S. Supreme Court precedent requiring a voluntary act and a "special benefit" for an agency to charge a user fee, and instead apply its own three-pronged test to determine whether user fees can be charged annually under 31 U.S.C. § 9701 to a class of approximately 1,500,000 tax return preparers with respect to registration and re-registration of a permanent identification number used by the Internal Revenue Service?

II. Under *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), when the administrative record clearly shows the grounds for an agency's charging of user fees via seven (7) separate clear consistent statements and the lawfulness of those grounds is invalidated by a U.S court of appeals, can the agency's simple mention of a potential favorable byproduct in a related regulation supply the basis for the same court of appeals to uphold agency action?

To Petitioners' knowledge, these issues have not been previously addressed by any U.S. district court or U.S. court of appeals.

PARTIES

Brittany Montrois is a Georgia Certified Public Accountant (CPA) who prepares tax returns and refund claims for her clients. Adam Steele is a Minnesota CPA who prepares tax returns and refund claims for his clients. Joseph Henchman is an attorney who resides in the District of Columbia. He occasionally prepares tax returns for others. They were appellees below. A class of over 700,000 tax return preparers was certified by the U.S. District Court for the District of Columbia on August 8, 2016. However, based on information published by the Internal Revenue Service provided in Appendix E, the number of tax-return preparers who have received a PTIN since September 28, 2010, is 1,548,778. The United States of America, the defendant-appellant below, is the Respondent.

CORPORATE DISCLOSURE STATEMENT

There are no corporate parties or corporate interests in this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Brittany Montrois, Adam Steele and Joseph Henchman, on behalf of themselves and a class of over 700,000 tax return preparers, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit issued on March 1, 2019, reversing and remanding the district court's ruling in favor of the Petitioners, is provided in the Appendix to this Petition as Appendix A. The District Court's opinion, directing refunds to petitioners, is provided in the Appendix to this Petition as Appendix B.

JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of the judgment below. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

26 U.S.C. § 6109, Identifying Numbers, provides, in pertinent parts, the following:

§ 6109(a)(1), Supplying of identifying numbers,

> (a) Supplying of identifying numbers, when required by regulations prescribed by the Secretary:

> (1) Inclusion in returns. Any person required under the authority of this title to make a return, statement, or other documents shall include in such return, statement, or other document such identifying number as may be prescribed for securing proper identification of such person.

§ 6109 (a)(4), 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. For purposes of this paragraph, the terms "return" and "claim for refund" have the respective meanings given to such terms by section 6696(e).

§ 6109 (c) Requirement of Information – 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.

§ 6109 (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 specific under regulations of the Secretary, by used as the identifying number for such individual for purposes of this title.

31 U.S.C. § 9701 provides in pertinent part:

> (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.

Section 8 of Article I of the United States Constitution provides in part:

The Congress shall have the power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.

STATEMENT OF THE CASE

A. Facts and Proceedings Below

The basis for federal jurisdiction in the court of first instance is 5 U.S.C. § 702.

Before 2011, anyone could file a tax return on behalf of someone else for compensation. J.A.38; J.A.68. Although the Justice Department could criminally prosecute tax-return preparers who committed fraud or other misconduct, and federal district courts could enjoin repeat offenders from preparing returns, *see* 26 U.S.C. § 7407, the IRS had no authority of its own to license or regulate who may prepare tax returns for others. J.A.39; *see also* Jay A. Soled & Kathleen Delaney Thomas, *Regulating Tax Return Preparation*, 57 B.C. L. Rev. 151, 163 (2017) ("[W]hen it comes to

congressional oversight of tax return preparers, there is none.").

In the preceding decade, the IRS had supported nearly a dozen attempts in Congress to secure the regulatory authority to create eligibility criteria and "require the registration" of tax-return preparers. J.A.41–42. All failed. *Id.* Stymied in Congress, the IRS took it upon itself to regulate return preparers in 2010—the first attempt to do so in American history. An internal study declared that, despite the repeated rejection of "bills requiring the registration and regulation of tax return preparers," the agency did not actually need any "additional legislation" to exercise licensing authority over preparers, because (in its view) the IRS had such licensing authority all along. J.A.92; J.A.100. Based on this view, the agency claimed existing statutory authority and announced its intention to issue regulations imposing mandatory registration and other requirements "to increase the oversight of paid tax return preparers," thereby achieving the "twin goals of increasing taxpayer compliance and ensuring uniform and high ethical standards of conduct for tax return preparers." J.A.69; J.A.73; *see* J.A.99–100 (citing 26 U.S.C. § 6109 and 31 U.S.C. § 330).

The new regulations consisted of three interrelated parts. The first part, finalized in June 2011, formed the core of the regulatory scheme: It imposed eligibility requirements on preparers, including competency testing and continuing education. *See Regulations 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. Specifically, this regulation mandated that certain preparers—those who were not licensed attorneys, certified public accountants, or authorized tax practitioners known as enrolled agents—pass a qualifying exam and take 15 hours of continuing-education courses per year to be able to prepare tax returns on behalf of others for compensation. 76 Fed. Reg. at 32,287. As authority for these novel eligibility requirements, the IRS invoked a 125-year-old statute, 31 U.S.C. § 330, that predated the creation of the federal income tax and that the IRS had "never interpreted . . . to give it authority to regulate tax-return preparers." *Loving v. IRS*, 742 F.3d 1013, 1021 (DC Cir. 2014).

The other two regulations were complementary. Together, they would require tax-return preparers to obtain and pay for an IRS-issued preparer tax identification number (a PTIN), and to pay for the annual renewal of that number, while making the new preparer eligibility requirements part of the PTIN application and renewal process to ensure continued compliance.

1. The regulation requiring preparers to obtain a PTIN

The first of these regulations established the requirement that preparers obtain and annually renew a PTIN (which ordinarily does not change). 26 C.F.R. § 1.6109-2.

Until this regulation took effect, preparers had long been allowed to use their social security numbers as the required "identifying number" on the returns they

prepared for others, as permitted by 26 U.S.C. § 6109(d). J.A.39–41. That statute provides that the social security number shall "be used as the identifying number," unless "otherwise . . . specified under regulations issued by the IRS. 26 U.S.C. § 6109(d). The PTIN, introduced in 1998 as an optional alternative identification number, was provided at no charge and with no annual renewal requirement. *User Fees Relating to Enrollment and Preparer Tax Identification Numbers*, 75 Fed. Reg. 43,110 (July 23, 2010). And, preparers could omit their identifying number—social security or PTIN—from the taxpayer's copy of the return, thus fully protecting the preparer's privacy. *Tax Return Preparer Penalties Under Sections 6694 and 6695*, 73 Fed. Reg. 78,430, 78,432 (Dec. 22, 2008); Rev. Rul. 78-317, 1978-2 C.B. 335.

This regime changed in 2010. For the first time, the IRS disallowed use of a return preparer's social security number as the identifying number and mandated that each preparer obtain and annually renew a PTIN.

Relying on its authority under 26 U.S.C. § 6109, the IRS explained that it changed its longstanding policy "to address two overarching objectives." *Furnishing Identifying Number of Tax Return Preparer*, 75 Fed. Reg. 60,309, 60,310 (Sept. 30, 2010). The "first overarching 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 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. 14,539, 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."). These are the same "twin goals" first identified by the IRS in its 2009 study, *see* J.A.73, out of which the three final regulations were "an outgrowth," 75 Fed. Reg. at 60,314; *see also* J.A.44 (2009 study: "Increased oversight begins with mandatory registration.").

According to the IRS, the regulation would help achieve these twin goals by using the PTIN as a new "threshold requirement" that would enable the agency to "enforce the regulation of tax return preparers." *User Fees Relating to Enrollment and Preparer Tax Identification Numbers*, 75 Fed. Reg. 60,316, 60,318–19 (Sept. 30, 2010); *see* J.A.130 ("As the regulation is currently written, [people will] not qualify for a PTIN unless they become registered tax return preparers authorized to practice under section 330"—the statute at issue in *Loving*.). Put differently, the PTIN would now take on a "revised purpose" as an occupational license, 75 Fed. Reg. at 43,113—a way "to administer requirements intended to ensure that tax return preparers are competent, trained, and conform to rules of practice," and therefore "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 social security number, 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; *see also id.* at 14,544 ("The [new regulations] will ensure that qualified, competent, and ethical tax return preparers will be assigned prescribed preparer identifying numbers."). Thus, "to obtain a PTIN," the regulation stated, the "preparer must be an attorney, certified public accountant, enrolled agent, or registered tax return preparer authorized to practice before the IRS under 31 U.S.C. 330." 75 Fed. Reg. at 60,312. And to ensure continued compliance with the new requirements, the IRS mandated that each preparer annually renew the PTIN, something even enrolled agents are not required to do. *Compare* 75 Fed. Reg. at 60,310 ("[B]y requiring regular renewal of a PTIN, tax return preparers will confirm their continuing competence and suitability to be tax return preparers."); *with* IRS, *Enrolled Agent Information*, https://perma.cc/FX4T-BQX8 (Enrolled agents had to pay $30 and "complete 72 hours of continuing education courses every three years.").

The IRS explained how this new licensing scheme would work: "[T]he 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. at 60,314–15. In this way, the PTIN requirement was "critical to effective oversight" of tax-return preparers. 75 Fed. Reg. at 60,313.

2. The regulation requiring preparers to pay for a PTIN

The second regulation established the requirement that preparers annually 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 annually to renew. J.A.52.

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—just like it issues other identifying numbers without a fee (much less annual renewal fees). *See* IRS, *Taxpayer Identification Numbers (TIN)*, https://perma.cc/K69M-X2FN (listing four IRS-issued identification numbers in addition to social security numbers: EIN, ITIN, ATIN, and PTIN).[1]

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." 75 Fed. Reg. at 43,111. Thanks to that new regulatory regime, the IRS estimated that there would be "as many as 1.2

[1] Indeed, the IRS had never attempted to charge a fee for *any* of these numbers, despite having issued millions of them.

million [PTIN] applications," and this "increase in demand" would "require the IRS to expend more resources." 75 Fed. Reg. at 43,111, 43,113.[2] More importantly, because of the new registered-preparer program, 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 suggest[ed] that the individual may be unfit to practice before the IRS. These checks were not previously performed as a prerequisite to obtaining a PTIN." *Id.* at 43,111.

Given "the increased costs to the government to process the application for a PTIN," as well as "the anticipated increase in PTIN applications"—and the fact that "Congress has not appropriated funds to the registered tax return preparer program or PTIN application process"—the IRS determined that there was "no viable alternative to imposing a user fee." 75 Fed. Reg. at 43,113. The IRS charged this annual fee to those who already had a PTIN.

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[2] By comparison, the IRS has issued about 4.6 million ITINs to taxpayers without charging a fee. *See* National Taxpayer Advocate, *Annual Report to Congress FY2015, Vol. 1*, at 196, https://goo.gl/wmHynf ("Without ITINs, approximately 4.6 million taxpayers would not be able to comply with their annual tax filing and payment obligations, or receive tax benefits to which they are legally entitled.").

The IRS justified the fee under the IOAA, which authorizes agencies to impose user fees for providing a "service or thing of value" to an identifiable person, not to exceed the costs incurred by the agency in providing that service. 31 U.S.C. § 9701. The IRS explained why it thought the statute applied: "By limiting the individuals who may prepare all or substantially all of a tax return or claim for refund to individuals who have a PTIN, the IRS is providing a special benefit to the individuals who obtain a PTIN"—the ability "to prepare all or substantially all of a tax return or claim for refund." 75 Fed. Reg. at 60,319–20. "Because only attorneys, certified public accountants, enrolled agents, and registered tax return preparers are eligible to obtain a PTIN, only a subset of the general public is entitled to a PTIN and the special benefit of receiving compensation for the preparation of a return that it confers." 75 Fed. Reg. at 60,317.

At the same time, the IRS explained why requiring a PTIN would "provide important benefits to the IRS." 75 Fed. Reg. at 43,113. These would include "allowing the IRS to track the number of persons who prepare returns, track the qualifications of those persons who prepare returns, track the number of returns each person prepares, and, when instances of misconduct are detected, locate and review returns prepared by a specific tax return preparer." *Id.*

To justify the amount of the fee—a flat $50 to the government, plus a separate payment to a third-party vendor—the IRS listed all the compliance work it would now have to perform in implementing the licensing program: "The $50 annual fee is expected to

recover the $59,427,633 annual costs the government will face in its administration of the PTIN registration program. This fee includes: (1) costs the government faces in administering registration cards or certificates for each registered tax preparer, (2) costs associated with prescribing by forms, instructions, or other guidance which forms and schedules registered tax preparers can sign for, and (3) tax compliance and suitability checks conducted by the government." 76 Fed. Reg. at 32,296. Of these three categories, the IRS previously determined that the last category (compliance and suitability checks) would account for 74% of the estimated costs, while the second category (forms)—for which the agency already receives appropriations from Congress—would account for only 0.25%. J.A.50–51; J.A.53–54. The first category (registration cards) has never been implemented.

In May 2008, the Government Accountability Office (GAO) issued a report titled FEDERAL USER FEES, A Design Guide. The "Why the GAO Did This Study" box on the first page provides: "As new priorities emerge, policymakers have demonstrated an interest in user fees as a means of financing new and existing services." GAO-08-386SP. The licensing system described above initially proposed many new user fees, including the annual PTIN fees (for both the government and a private vendor), registered tax return provider application annual fees, testing fees for eligibility to be a registered tax return preparer (for both the government and the vendor), fingerprinting fees, continuing education provider applicant fees and

continuing education fees.[3] Some of these proposed fees were not implemented. Only annual PTIN fees (that are in issue) have survived.

B. In early 2014, the D.C. Court of Appeals invalidated the new eligibility requirements as a "vast expansion of the IRS's authority," unauthorized by Congress.

Five years ago, the U.S. Court of Appeals for the D.C. Circuit invalidated the heart of the return-preparer regulations: the IRS's attempt to impose competency-testing and continuing-education requirements. The Court held that the asserted statutory basis for imposing these requirements—the 125-year-old statute permitting the IRS to "regulate the practice of representatives of persons before the Department of the Treasury," 31 U.S.C. § 330—"cannot be stretched so broadly as to encompass authority to regulate tax-return preparers." *Loving*, 742 F.3d at 1015.

"If we were to accept the IRS's interpretation of Section 330," the Court 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, indeed, for more than a century "the IRS never interpreted the statute to give it authority to regulate

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[3] *See* 76 Fed. Reg. 59,329, 59,330 (Sept. 26, 2011); 75 Fed. Reg. 51,713, at 51,716, 51,721, 51,728, 51,730, 51,733 (Aug. 23, 2010); 76 Fed. Reg. 32,286, 32,296 (June 3, 2011).

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. Court of Appeals agreed and affirmed the judgment "permanently enjoin[ing] the tax-return preparer regulations." *Id.* at 1016. (The plaintiffs had not sought monetary relief.) As a result, anyone may (once again) prepare tax returns on behalf of others for compensation.

Despite the fact that the D.C. Court of Appeals invalidated the core of its regulatory program, the IRS continued to charge PTIN fees that it had previously justified as necessary to fund the failed licensing regime.[4]

C. In late 2015, the IRS reduced the amount of the PTIN fee.

In October 2015—nearly two years after *Loving* (and about a year after this case was filed)—the IRS issued a temporary regulation reducing the total PTIN fee to $50. *Preparer Tax Identification Number (PTIN) User Fee Update*, 80 Fed. Reg. 66,792, 66,794 (Oct. 30, 2015) . The IRS said that it had "re-calculated its cost

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[4] The IRS used some of these fees to fund a now-voluntary testing and IRS-approved program similar to the one struck down in *Loving*. J.A.57–58. By contrast, the IRS has issued refunds for all competency-testing fees that it had collected. *See* IRS, *Registered Tax Return Preparer Test Fee Refunds*, https://perma.cc/6VUJ-2YCB.

of providing services under the PTIN application and renewal process" and "determined that the full cost of administering the PTIN program going forward has been reduced from $50 to $33 per application or renewal." *Id.* The IRS also explained that the "vendor fee is increasing from $14.25 for original applications and $13 for renewal applications to $17 for [either]." *Id.* The IRS issued a final regulation to the same effect ten months later, in August 2016. *Preparer Tax Identification Number (PTIN) User Fee Update*, 81 Fed. Reg. 52,766 (Aug. 10, 2016) . (At p. 11 of its opinion, the D.C. Circuit stated: " . . . [T]he agency's services are now confined to generating and maintaining a database of PTINs.") So, with the licensing component eliminated, the annual renewal fee was reduced by just 20.6 percent (i.e. (63-50)/63).

Among the reasons why the fee had been set too high, the IRS explained, was "the fact that certain activities that would have been required to regulate registered tax return preparers will not be performed. In particular, the determination of the user fee no longer includes expenses for personnel who perform functions primarily related to continuing education and testing for registered tax return preparers. Additionally, expenses related to personnel who perform continuing education and testing for enrolled agents and enrolled retirement plan agents were also removed from the user fee." 80 Fed. Reg. at 66,794. The IRS did not, however, provide a refund of the fees that it had already collected to reimburse these expenses. Nor did the IRS attempt to square its modest fee reduction with its earlier determination that compliance and suitability checks, plus registration

cards, would be responsible for all but 0.25% of the costs.[5]

D. Procedural background

1. Tax-return preparers file this lawsuit to challenge the lawfulness of the PTIN fee and get their money back.

Because the IRS refused to stop charging PTIN fees and did not refund any PTIN fees after *Loving*, tax-return preparers brought this class-action lawsuit in late 2014. The complaint asserts two claims. The first claim is purely legal and is what is at issue here: that the IRS lacks authority to charge the fee because doing so "constitutes unlawful agency action under the Administrative Procedure Act, 5 U.S.C. § 706(2)," and because "preparers receive no specific or special benefit or thing of value in registering for and obtaining a PTIN," as required by the IOAA, 31 U.S.C. § 9701. J.A.24.

2. The District Court Invalidates the Fees.

The district court granted the plaintiffs' motion for summary judgment and invalidated the fees. The court rooted its holding in the IOAA, "find[ing] that PTINs do not pass muster as a 'service or thing of value' under the government's rationale." J.A.192. In support of this conclusion, the court easily disposed of the IRS's claim that the PTIN regulations are "completely separate and

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[5] The 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. J.A.57–58.

distinct" from the regulation struck down in *Loving*, calling this argument "a stretch at best." J.A.189; J.A.192. The court then rejected the IRS's contention that the "service or thing of value" provided by the PTIN is the ability to prepare returns for compensation: "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." J.A.193–94.

Canvassing the case law, the court explained that "the D.C. Circuit cases finding that a fee was permissible under the IOAA generally concern valid regulatory schemes, as opposed to the situation here where the regulatory scheme was struck down." J.A. 194–95. The court could not find any precedential opinion "in which an agency has been allowed to charge fees under the IOAA for issuing some sort of identifier when that agency is not allowed to regulate those to whom the identifier is issued." J.A.197. Further, the court remarked, "it 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"—the special benefit originally identified by the IRS. *Id.* Anyone can now do so. If a benefit exists after *Loving*, the court concluded, "it inures to the IRS." *Id.* Because the court found that the fee is unauthorized under the IOAA, it did not reach the plaintiffs' alternative argument that the fee is arbitrary and capricious because there is no "valid justification" for it after *Loving*. J.A.191.

3. The Court of Appeals Reverses and Remands.

The D.C. Circuit reversed the decision of the U.S. District Court and remanded the case to the district court to determine if fee charges are excessive. The Court of Appeals for the District of Columbia recognized and briefly quoted from the two controlling U.S. Supreme Court precedents relating to the user fee statute, but then did not apply them and instead declared that a three-part test applied. The Court concluded this three-part test had been met by the IRS. Importantly, although a PTIN is a permanent number and the IRS separately knows when a tax return preparer's address changes, the D.C. Circuit also ruled that return preparers could be required to annually renew their PTINs (and pay for such annual renewal).

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals Erred in Not Applying Supreme Court Precedents

What the D.C. Circuit Ruled. The Court of Appeals recognized and briefly quoted from the two controlling U.S. Supreme Court precedents relating to the user fee statute, *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), but then stated that a three-pronged test not described in those cases applied in determining whether fees can be charged. It cited its own precedents for this test, including *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177 (D.C. Cir. 1994) and *Seafarers Int'l Union of N. Am. v. U.S. Coast Guard*, 81 F.3d 179 (D.C. Cir. 1996). The

ruling provided that to satisfy the three prongs, the agency must show: (i) it provides some kind of service in exchange for the fee; (ii) the service yields a specific benefit; and (iii) the benefit is conferred upon identifiable individuals. (App. A, p. 10) The Court then concluded its three-part test had been met by the IRS.

Why the D.C Circuit Erred. The Court of Appeals erred because it did not follow the two U.S. Supreme Court precedents. Under those precedents, fees could not be charged. Those precedents ruled against the applicable agencies in issue, and one held that "a fee is incident to a voluntary act." *Nat'l Cable*, 340. Both decisions held that the fee must produce a "special benefit." *Id.* at 343; *Fed. Power Comm'n,* 351. In those 1974 cases—both involving highly regulated industries (which tax preparation is not[6]), the Supreme Court noted its concern about agencies passing on their costs, and effectively taxing in contravention to Section 8 of Article I of the U.S. Constitution. The Supreme Court "read the Act narrowly to avoid constitutional problems." *Nat'l Cable*, 342.

After 2010, a PTIN was a license that *had* to be acquired and annually renewed for a person to prepare tax returns for compensation. *Loving* struck down the licensing power. Once again, anyone could prepare returns. Penalties potentially apply under 26 U.S.C. § 6695 for failure to comply with PTIN requirements. There is no voluntary act. As such, there is no fee.

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[6] J.A.39; *see also* Jay A. Soled & Kathleen Delaney Thomas, *Regulating Tax Return Preparation*, 57 B.C. L. Rev. 151, 163 (2017) ("[W]hen it comes to congressional oversight of tax return preparers, there is none.").

Rather, there is a charge relating to a requirement. Requiring people and businesses to do things is the vast majority of what agencies do. The rationale for the Supreme Court precedents is directly in play.

How does a "special" benefit differ from a "specific" benefit (i.e. one of the prongs of the three-pronged test)? In pertinent part, *Marian-Webster's Desk Dictionary* (1995) defines "special" to mean "1:UNCOMMON, NOTEWORTHY 2:particulary favored." In pertinent part, the same dictionary defines "specific" to mean "DEFINITE, EXACT."[7] The words have different meanings. The Supreme Court provided examples of things requested that would provide a special benefit if supplied. They include "a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcasting station." *Nat'l Cable,* 340. These things are favorable things to which one is not entitled. After *Loving* shut down the licensing power, anyone can (again) prepare tax returns for compensation.

In contrast to the special benefit examples noted immediately above, this case involves: (a) an identification requirement created to help the IRS, with a preparer's Social Security number being the original identifier; (b) Congressional recognition of possible identity theft negative consequences, coupled with a 1998 statutory fix; (c) after years of issuing PTINs for free, IRS conversion of PTINs into licenses;

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[7] In pertinent part, *The Second College Edition of The American Heritage Dictionary* (1982) defines "special" to mean "surpassing what is common or usual; exceptional." It defines "specific" to mean "explicitly set forth; definite."

and (d) the *Loving* case shutting down the licensing power. They are apples and oranges.

Listed *infra*, seven sets of preambles to applicable regulations stated that a PTIN "confers the right" to prepare tax returns. They did so because by converting a PTIN into a license, fees could be charged under the two Supreme Court precedents. But, as ruled by the District Court, simply issuing an "identifier" doesn't get the job done.[8] The problem that has existed since the *Loving* decision is that a PTIN does not confer the right to prepare tax returns. Rather, *Loving* returned a PTIN to what it was meant to be by applicable statute: an identification number. The only thing received by a tax return preparer is an identification number the only use for which is to be placed on tax returns prepared, to let the IRS know the identity of the preparer (so it can find wrongdoers).

Based on a scouring of the 31 U.S.C. § 9701 (user fee) annotations, the D.C. Court of Appeals has handled most of the U.S. courts of appeals cases involving the user fee statute. It has never struck down an agency's charges of such fees.[9]

The immediate implication of the D.C. Circuit's ruling is roughly 750,000 people in the U.S will need to

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[8] Like a Social Security number, a PTIN has nine digits. However, it begins with the letter P.

[9] Thirteen D.C. Circuit Court cases were counted. Combined, ten cases were counted from the other U.S. courts of appeals (other than the Federal Circuit). Some of these cases did not consider whether fees could be charged; others did not only consider whether fees could be charged.

annually renew, and pay to renew, a permanent identification number—*indefinitely*.[10] The broader implication is, contrary to the two 1974 U.S. Supreme Court precedents, agencies will be able to pass on much of their costs. Agencies could become largely self-sustaining. The Executive Branch gains power; the Legislative Branch loses power.

It is easy to pass the three-pronged test. Prong (i) requires a service be performed. Agencies employ people who perform services. Prong (ii) requires some identifiable benefit. Under the D.C. Court of Appeals view of *Chenery* (discussed *infra*), this requirement is easy to satisfy. Prong (iii) simply requires the ability to determine who benefits. Any request made to an agency for information, or a request for a form, would satisfy the test. As noted *supra*, the IRS does not charge for identification numbers in any other area. They could charge for all of them.[11] Social Security numbers would easily pass the test, as they can be used to provide a personal benefit (e.g. in applying for a loan).

On page 17 of its opinion (App. A), the D.C. Court of Appeals permits the IRS to require annual renewal of PTINs, and to charge annual fees incident thereto. The

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[10] *See* Return Preparer Office Federal Tax Return Preparer Statistics, included as Appendix E, reporting 754,500 "active" PTINs as of May 1, 2019, and 1,548,778 PTINs issued since September 28, 2010.

[11] D.C. Circuit precedent allows agencies to charge for "services which assist a person in complying with his statutory duties." *Electronic Inustries Ass'n v. FCC*, 554 F.2d 1109, 1115 (D.C. Cir. 1976).

only applicable statutory authorities, subsections (a)(4) ("[a]ny 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") and (c) (" . . . the Secretary is authorized to require such information as may be necessary to assign an identifying number to any person") of 26 U.S.C. § 6109, allow no such thing. They simply allow the IRS to issue an identification number, and to require information necessary to issue one.

The information annually requested by the IRS is significantly more than what is needed to issue a PTIN. Aside from name, Social Security number and address, the application form (W-12 or its online equivalent) asks the following additional information: (1) past felony convictions; (2) address of last individual income tax return filed; (3) filing status for last year filed; (4) whether the applicant is current on her or his taxes; and (5) professional credentials and related numbers and expiration dates. Post-*Loving*, the questions on the form have not changed.[12] Prior to the licensing regime, in a filing done only once, name, home address, date of birth and Social Security number were required for PTIN issuance. J.A. 40.

Once issued, a PTIN does not change. J.A. 47-48. It is akin to a Social Security number except, unlike a Social Security number (for which there has never been a charge), there is no use for a PTIN outside the tax

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[12] A copy of the 2017 edition of Form W-12 is included in the Appendix as Exhibit F. A copy of the January 2013 edition of Form W-12 is included in the Appendix as Exhibit G.

system. It cannot be used to apply for a credit card, etc. The legislative history of Code § 6109(a)(4) provides the sole reasoning for enactment:

> *Explanation of Provisions*
> . . . The bill also requires that any income tax return preparer retain a copy of all returns . . . This provision, plus the requirement that the preparer place his identification number on the return itself, *is 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.*

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

All of the major tax return forms, including 1040 (relating to individuals), 1120 (relating to C corporations), 1120S (relating to S corporations) and 1065 (relating to partnerships and most multiple member limited liability companies), require the return preparer to place her or his name, PTIN, firm name, firm employer identification number, firm address and phone number on the form. The IRS updates addresses when returns are filed with new addresses.[13] So, there is no logical or legal reason for requiring annual renewal of PTINs.

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[13] See App. H.

PTIN fees are unlawful license fees. Congress did not authorize the IRS to require U.S. citizens to use any of their time or money to annually "check in" with the IRS.

In response to *Loving*'s injunction prohibiting the licensing system, the IRS reduced recurring PTIN fees by a mere *20.6* percent. It continued to charge for a host of licensing-type activities, including background checks for vendor staff, professional designation checks, and complaint intake and prioritization. Additional tasks listed include standard mumbo-jumbo—contract management, back office support, metrics and analysis, internal support and IRS connectivity, software licenses, human resource management, labor relations management, budgeting, training, quality assurance, facilities management, executive oversight, operational management, administrative support, etc. J.A. 59-60.

As noted by the GAO in 2008, "policymakers have demonstrated interest in user fees as a means of financing new and existing services."[14] The financial challenges of the federal government are well known. Taking away peoples' rights and then charging them fees to get them back is not a legal solution. This problem will very likely recur. The three-pronged test created by the D.C. Court of Appeals is easier to meet than the requirements set forth in the two U.S.

[14] FEDERAL USER FEES, A Design Guide. GAO-08-386SP.

Supreme Court precedents. Applying the U.S. Supreme Court precedents, return preparers win.[15]

II. The D.C. Circuit Erroneously Stepped Outside the Administrative Record's Reasoning for User Fee Charges, and Relied on a Single Byproduct to Justify Fee Charges

A seminal U.S. Supreme Court case, *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) holds that a reviewing court is to analyze only the agency's reasoning when deciding whether to uphold a regulatory requirement. It pertinent part, it provides:

> The rule is to the effect that a reviewing court, when dealing with a determination of judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely on the grounds invoked by the agency. . . . If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

Id., 196. Unlike the District Court, the D.C. Court of Appeals did not follow *Chenery*.

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[15] A distinguished American University tax law professor, Donald T. Williamson, agreed with the District Court's ruling. While liking regulation in general, he stated: "This article examines the court's reasoning in *Steele* and concedes that the decision is, in fact, correct." Donald T. Williamson, *The End of PTINs?—Not for Now at Least*, Tax Notes, Vol. 156, No. 10, Sept. 4, 2017, 1263. The article noted the need for a voluntary act and a special benefit. *Id.*, 1267. It concluded by noting a panel of judges from the D.C. Circuit could possibly be convinced to use a "fairly slender thread" of identity theft protection rationale to reverse. *Id.*, 1268.

The administrative record is clear that the "grounds invoked by the agency" were granting of the right to prepare tax returns, and that grant produced the special benefit necessary for fees to be charged. Citations follow.

- "Individuals who obtain a PTIN receive the ability to prepare all or substantially all of a tax return or claim for refund. The ability to prepare all or substantially all of a tax return or claim for refund is a special benefit. [New paragraph] The legal basis for these requirements is contained in section 9701 of title 31." 75 Fed. Reg. 43,110, 43,112 (July 23, 2010).

- "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. 60,316, at 60,317 (Sept. 30, 2010).

- "By limiting the individuals who may prepare all or substantially all of a tax return or claim for refund to individuals who have a PTIN, the IRS is providing a special benefit to the individuals who obtain a PTIN." *Id*., at 60,319; 75 Fed. Reg. 43,110, at 43,112.

- "A PTIN confers a special benefit because without a PTIN, a tax return preparer could not receive compensation for preparing all or substantially all of a Federal tax return or claim for refund." 75 Fed. Reg. 60,316, at 60,317; 76 Fed. Reg. 32,286, at 32,296 (June 3, 2011).

- "PTIN holders receive the special benefit of being able to prepare all or substantially all of a tax return or claim for refund for compensation." 76 Fed. Reg. 59,330, at 59,332. (Sept. 26, 2011).

Loving gutted this reasoning. Because the reasoning no longer stood, the D.C. Circuit sought something outside the agency's reasoning. It settled on identity theft protection. Although the D.C. Circuit states on p. 14 of its opinion that confidentiality is discussed in the final user fee regulations' preamble (by citing 75 Fed. Reg. 60,318), neither the user fee proposed regulations' preamble nor the user fee final regulations' preamble mentions identity theft protection. 75 Fed. Reg. 43,110-43,114 (July 23, 2010); 75 Fed. Reg. 60,316-60,321 (Sept. 30, 2010). Rather, as noted *supra*, both state that granting of the right to prepare returns supplies the special benefit that justifies fee charges. On p. 13 of its opinion, the D.C. Circuit cites a paragraph in the PTIN regulation that mentions, in passing, identity theft protection as being a benefit provided by use of a PTIN as an identifying number.[16] The paragraph provides:

> The requirement to use a PTIN will allow the IRS to better identify tax return preparers, centralize information, and effectively administer rules relating to tax return preparers. The final regulations will also benefit

[16] On pages 13 and 15 of its opinion, the D.C. Court of Appeals also cited the 2015 regulation that reduced fees to $50 (80 Fed. Reg. at 66,793) for authority. By the end of 2011, the IRS's regulatory licensing system was completed. A 2015 authority cannot lawfully or logically be considered.

> taxpayers and tax return preparers and help maintain confidentiality of SSNs.

75 Fed. Reg. 60,309.

Return preparers could remove their identification number (PTIN only, after 2010) from the copy of the return given to the taxpayer.[17] Under 26 U.S.C. § 6103, the IRS is required to keep identification numbers private. The rationale is bogus.[18] The theoretical benefit is protection of personal information that only became at risk due to Congress's original requirement that it be disclosed. There is no special benefit.

The D.C. Court of Appeals decision is inconsistent with *Chenery*. If its ruling stands, the lesson that will be taught to agencies is simple: Think of as many beneficial things as possible when creating a user fee via regulation and list them in the preamble; only one needs to stick. That's unjust.

The IRS took away the rights of people to prepare tax returns and gave them back in exchange for annual filings and fees. Under existing U.S. Supreme Court

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[17] *Tax Return Preparer Penalties Under Sections 6694 and 6695*, 73 Fed. Reg. 78,430, 78,432 (Dec. 22, 2008); Rev. Rul. 78-317, 1978-2 C.B. 335.

[18] On p. 16 of its opinion, the D.C. Court of Appeals cites comments by H&R Block and the Ohio Society of CPAs to bolster its identity theft position. These comments don't defeat the reality that return preparers' identification numbers can be kept secret. If the facts were different, such that identifying numbers had to be placed on taxpayer copies of returns and PTINs were optional, then the issue would be whether a PTIN provides a special benefit.

precedents, none of this scheme is lawful. Justice requires this last vestige be struck.

CONCLUSION

For all of the forgoing reasons, the D.C. Circuit erred in reversing and remanding the district court's order in favor of tax return preparers.

Petitioners respectfully request that his certiorari petition be granted, and that the D.C. Circuit's Opinion be vacated and this Court find that the U.S. Treasury has no authority to charge fees for the issuance of or renew of a PTIN.

Respectfully submitted this 24th day of May, 2019.

Allen Buckley
Counsel of Record
2727 Paces Ferry Road
Suite 750
Atlanta, Georgia 30339
(404) 610-1936
ab@allenbuckleylaw.com

Counsel for Petitioner