IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ESTHER JENKE, ET AL. *Plaintiffs*, v. **UNITED STATES OF AMERICA,** *Defendant*.	Case No. 1:23-cv-02950-CJN **ORAL ARGUMENT REQUESTED**

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Since September 2014, the U.S. government has been charging U.S. citizens $2,350 to exercise their natural and fundamental right to voluntarily renounce their U.S. citizenship ("Renunciation Fee"). This fee is by far the highest fee charged by the government for any consular service. No country in the world even comes close to the U.S. in conditioning the right to renounce on payment of such an astronomical fee.

On October 2, 2023, the government published a notice of proposed rulemaking, seeking to reduce the Renunciation Fee from $2,350 back to the $450 amount it charged in 2010.[1] *Schedule of Fees for Consular Services—Administrative Processing of Request for Certificate of Loss of Nationality (CLN) Fee*, 88 FED. REG. 67687-01 (Oct. 2, 2023). Pending culmination of the rulemaking process, the government continues to collect the $2,350 fee from renunciants.

Plaintiffs in this lawsuit are all former U.S. citizens who paid the Renunciation Fee and renounced their U.S. citizenship. Through this lawsuit, they seek to reclaim a portion of the Renunciation Fee which they claim was excessive and illegal. For Plaintiffs – and those similarly situated – the government's pending rulemaking is an admission to what was obvious for over a decade: there was no justification in the

[1] Before 2010 and since the founding of the Republic, individuals were able to renounce their U.S. citizenship without paying any fee at all.

first place to charge $2,350 per renunciant and the fee that was collected for over a decade was and remains illegal, excessive and should be refunded.

SUMMARY OF ARGUMENT

The government seeks to dismiss Plaintiffs claims under four legal theories.

1. *First*, the government contends that the claims are time-barred under 28 U.S.C. §2401(a) which provides a 6-year limitation period for claims against the United States.
2. *Second*, the government argues that the claims are barred under *res judicata.*
3. *Third*, according to the government, this Court does not have subject matter jurisdiction for Plaintiffs' claims.
4. *Fourth*, and last, the government claims that Plaintiffs have failed to state a cause of action under the APA.

All four theories lack merit.

1. Plaintiffs' cause of action accrued on the date that they paid the Renunciation Fee, ***not*** – as the government contends – the date when the rule fixing the $2,350 Renunciation Fee came into effect in 2015. *Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates*, 80 FED. REG. 51464-01, 51465 (Aug. 25, 2015).[2] Moreover, even if

[2] The $2,350 Renunciation Fee rule became final in August 2015. However, the government began collecting the $2,350 fee in August/September 2014 when it issued an interim final rule, *Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates—Visa and Citizenship Services Fee Changes*, 79 FED. REG. 51247-01, 51249 (Aug. 28, 2014) ("2014 IFR"). *See* Complaint, ¶30.

the claims accrued at the time of the publication of the rule, this "action falls within a long-recognized exception under which those affected when an agency seeks to apply [a] rule after the statute of limitations has passed may challenge that application on the grounds that it conflicts with the statute from which its authority derives." *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm'n*, 971 F.3d 340, 348 (D.C. Cir. 2020), *citing Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145 (D.C. Cir. 2014) (internal quotation marks omitted) (the "*Weaver* exception").

2. This lawsuit is not barred by *res judicata* because **(a)** the parties are not identical and **(b)** because the claims and issues raised in this lawsuit are not identical to those in *L'Association des Américains Accidentels et al. v. United States Department of State, et al.*, 1:20-cv-03573 (TSC).[3] Moreover, even if the *res judicata* elements are present, this case falls within the exceptions to that doctrine. Specifically, because the judgment in *AAA v. DOS* is immune from any appellate review (as we discuss below), the parties are free to relitigate the matter.

3. This Court has subject matter jurisdiction under 28 U.S.C. §1331 because the Administrative Procedure Act, 5 U.S.C. §500 *et seq*. ("APA") waives the government's sovereign immunity for claims seeking ***specific*** monetary relief in the form of a refund. *Am.'s Cmty. Bankers v. F.D.I.C.*, 200 F.3d 822, 829

[3] For purposes of clarity, this lawsuit will be called "*Jenke v. USA"* and the previous lawsuit "*AAA v. DOS*."

(D.C. Cir. 2000). The government is wrong to characterize this lawsuit as one seeking monetary ***damages***.

4. Plaintiffs have stated a viable cause of action under the APA because bringing a Little Tucker Act, 28 U.S.C. §1346(a)(2), claim in the United States Court of Federal Claims does not constitute an "other adequate remedy" for purposes of 5 U.S.C. §704. Plaintiffs seek specific monetary relief in the form of a refund, as well as equitable relief in the form of prospective declaratory relief. Given the government's own representations that it reserves the right to increase the fee in the future – coupled with its past practices as well as the fact that the current fee remains fixed at $2,350 – the adjudication of the lawsuit in this court is appropriate.

ARGUMENT

I. This lawsuit is not barred by the statute of limitations

The government maintains that this lawsuit should be dismissed because the claims are barred under 28 U.S.C. §2401(a). That provision states:

> […] every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first ***accrues***.

[emphasis added].

The government contends that §2401(a) applies to this this lawsuit because the claims are a "civil action commenced against the United States." The government further contends that Plaintiffs' right of action first accrued, at the latest, on August 25, 2015, the date on which the $2,350 fee became final. Gv't Br., at 10. According to

the government, this action is, therefore, time-barred because the suit commenced on October 4, 2023, approximately eight years after the Renunciation Fee regulation became final.

The government's argument fails for two reasons. *First*, the date that the cause of action accrued for Plaintiffs is the date on which they paid the Renunciation Fee not the date the regulation became final. Prior to that time, no cause of action existed, and no claim could have accrued.

Second, even assuming the cause of action accrued on the date the Renunciation Fee became a final rule in 2015, Plaintiffs' challenge would fall within the *Weaver* exception, which allows an otherwise time-barred claim to go forward if it challenges the application of a federal rule by an agency on the grounds that it conflicts with the statute from which its authority derives.

(A) Plaintiffs' right of action *accrued* on the day of the payment of the Renunciation Fee

Under §2401(a), the limitations period for claims against the United States starts running when the claim "first accrues." The Supreme Court has interpreted "accrue" to mean the date "when the plaintiff has a complete and present cause of action." *Gabelli v. SEC*, 568 U.S. 442, 448 (2013). The APA, in turn, generally provides a cause of action to any "person [...] adversely affected or aggrieved by agency action." 5 U.S.C. §702; *Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 181 (D.C. Cir. 2019).

Reading §2401(a) and §702 in tandem leads to the straightforward conclusion that an APA cause of action "accrues" at the time the individual is "adversely affected

or aggrieved by agency action." *See Herr v. U.S. Forest Serv.*, 803 F.3d 809, 822 (6th Cir. 2015) ("When a party first becomes aggrieved by a regulation that exceeds an agency's statutory authority more than six years after the regulation was promulgated, that party may challenge the regulation without waiting for enforcement proceedings.").[4]

Here, Plaintiffs' cause of action "accrued" on the day they paid the Renunciation Fee. Prior to that date, Plaintiffs would not have been able to bring any claim under the APA for the illegal payment of the Renunciation Fee because they were not yet "adversely affected or aggrieved by agency action." 5 U.S.C. §702. Indeed, claims against the government for the refund of an alleged illegal fee generally will accrue at the time of payment. *See Tommy Davis Const., Inc. v. Cape Fear Pub. Util. Auth.*, 807 F.3d 62, 67 (4th Cir. 2015) (constitutional challenge to municipal fees accrued upon the payment of the fee); *P.B. Dirtmovers, Inc. v. United States*, 1994 WL 61721 (Fed. Cl. Feb. 25, 1994) (suit to recover mine reclamation fees allegedly

[4] The plaintiffs in *Herr* sued in 2014 to challenge a 2007 regulation restricting the use of motorboats on a lake abutting property they bought in 2010. *Id.*, at 812-813. The Sixth Circuit held that they timely sued because §2401(a)'s six-year clock did not begin to run until 2010, when they "purchased their waterfront property" on the lake subject to the restrictions. *Id.*, at 819. "If a party cannot plead a 'legal wrong' or an 'adverse effect,' it has no right of action" under the APA. *Id.* (cleaned up and collecting cases). And the plaintiffs there "could not have become 'aggrieved' by the Forest Service's invasion of [their] property right until they became property owners on the lake—until they purchased their waterfront real estate in September 2010." *Id.*

The question of when an APA action accrues under §2401(a) is currently pending before the Supreme Court. *Corner Post, Inc. v. Bd. of Governors*, No. 22-1008, 2023 WL 6319653 (U.S. Sept. 29, 2023) (granting petition for certiorari). In that case, the Eighth Circuit held that, "when plaintiffs bring a facial challenge to a final agency action, the right of action accrues, and the limitations period begins to run, upon publication of the regulation." *N. Dakota Retail Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys.*, 55 F.4th 634, 641 (8th Cir. 2022), *cert. granted sub nom. Corner Post, Inc. v. Bd. of Governors*, 2023 WL 6319653 (U.S. Sept. 29, 2023). The Eighth Circuit explicitly rejected the holding of the Sixth Circuit in *Herr v. U.S. Forest Serv.*, 803 F.3d 809 (6th Cir. 2015), cited above.

It remains unclear how and to what extent the Supreme Court's disposition of *Corner Post* will affect the present case. Plaintiffs would reserve the right to submit supplemental authority depending on the outcome of *Corner Post*. Oral argument in that case is scheduled for February 20, 2024.

erroneously paid to United States pursuant to Surface Mining Control and Reclamation Act first accrued, for limitations purposes, when plaintiff paid fees); *cf. Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of California*, 522 U.S. 192, 200 (1997) (limitations period cannot commence at a time when the plaintiff could not yet file a lawsuit.).

Because Plaintiffs were adversely affected and aggrieved only when they paid the Renunciation Fee, their claims accrued at that time. The Plaintiffs paid the Renunciation Fee in 2018 (Plaintiff Jenke) and 2022 (Plaintiffs Nelson and Poli). Complaint, ¶¶11-14. Accordingly, the lawsuit is not barred under §2401(a).

(B) Plaintiffs' challenge falls within the *Weaver* exception

Even assuming, as the government contends, that Plaintiffs' right of action accrued on the date the government published the rule fixing the current $2,350 Renunciation Fee, their claims would not be barred by §2401(a) because the lawsuit squarely fits with this Circuit's exception for "as applied" challenges.

Where Congress imposes a statute of limitations on challenges to a regulation, facial challenges to the rule are barred, if commenced after the running of the applicable limitations period. However, when an agency seeks to apply the rule, those affected may challenge that application on the grounds that it "conflicts with the statute from which its authority derives." *Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145-146 (D.C. Cir. 2014), *quoting Nat'l Air Transp. Ass'n v. McArtor*, 866 F.2d 483, 487 (D.C. Cir. 1989); *see also Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958); *Genuine Parts Co. v. Env't Prot. Agency*, 890 F.3d

304, 316 (D.C. Cir. 2018); *Graceba Total Commc'ns, Inc. v. FCC*, 115 F.3d 1038, 1040-1041 (D.C. Cir. 1997); *Am. Tel. & Tel. Co. v. FCC*, 978 F.2d 727, 734 (D.C. Cir. 1992); *NLRB Union v. Fed. Labor Relations Auth.*, 834 F.2d 191, 196 (D.C. Cir. 1987); *Geller v. FCC*, 610 F.2d 973, 978 (D.C. Cir. 1979). The *Weaver* exception is based on fairness and logic: because "administrative rules and regulations are capable of continuing application," limiting review of a rule to the period immediately following rulemaking "would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." *Functional Music*, 274 F.2d at 546.

Many of the cases that address the "as applied" standard concern enforcement proceedings. However, the sort of "application" that opens a rule to such a challenge is not limited to formal "enforcement actions." *Weaver*, 744 F.3d at 145-146. *See, for example, Functional Music*, 274 F.2d at 547-548 (considering the validity of rules that an agency applied in an order imposing certain limitations on a broadcast licensee, despite want of a prior timely attack); *Graceba*, 115 F.3d at 1040-1041 (considering validity of rules applied by an agency order rejecting challenges to auction procedures to which a bidder objected); *Murphy Expl. & Prod. Co. v. U.S. Dep't of Interior*, 270 F.3d 957, 958 (D.C. Cir. 2001) (considering validity of rules applied in an order denying a mineral lessee's claim to certain royalty reimbursements); *Genuine Parts Co.,* 890 F.3d at 316 (claim that regulation which did not require EPA to consider water flow direction in determining target population conflicted with a statute with which the regulation's authority is derived was not barred).

This lawsuit clearly fits within the D.C. Circuit's "as applied" doctrine. Plaintiffs are individuals who successfully renounced their U.S. citizenship and, in doing so, were forced by Defendant to pay the Renunciation Fee. Plaintiffs' – and those similarly situated – challenge this application of the rule setting the fee at its current value of $2,350.

In addition, Plaintiffs' challenge is based on the grounds that the government's fixing of the $2,350 Renunciation Fee "conflicts with the statute from which its authority derives." *Nat'l Air Transp. Ass'n*, 866 F.2d at 487. *See* Complaint, ¶¶44-54 [asserting that the Renunciation Fee conflicts with: (1) the Constitution; (2) the APA; (3) Independent Offices Appropriation Act, 31 U.S.C. §9701; and (4) 8 U.S.C. §1481].

Accordingly, because Plaintiffs **(1)** challenge the Renunciation Fee as applied to them and **(2)** assert that the fee conflicts with that statute(s) from which the government's authority is derived, Section 2401(a) does not bar their claim.

The government nevertheless argues that Plaintiffs raise a ***facial*** challenge, evidenced by their assertion that "the $2,350 fee is unlawful in all circumstances and Plaintiffs' requested relief seeking a declaration to that effect." Gv't Br., at 10. However, the government is conflating the "standard for success on a facial challenge into the definition of a facial challenge." *Banner Health v. Burwell*, 126 F. Supp. 3d 28, 68 (D.D.C. 2015), *aff'd in part, rev'd in part sub nom. Banner Health v. Price*, 867 F.3d 1323 (D.C. Cir. 2017). The government raised an identical argument in *Banner* which addressed several hospitals' challenges against a series of regulations governing "outlier" payments. There, the government argued that:

> this is a facial challenge because Plaintiffs are arguing that the regulations in question cannot be validly applied in calculating any hospital's payments- not simply in calculating payments due to Plaintiffs. […]. For that proposition, the Secretary looks to the oft-repeated standard for success on a facial challenge: To prevail in such a facial challenge, [a party] must establish that no set of circumstances exists under which the [regulations] would be valid.

This Court, however, rejected that line of argument:

> […] the Secretary has transformed the standard for success on a facial challenge into the definition of a facial challenge. They are not the same. The Secretary has not pointed to any authority suggesting that, just because a plaintiff argues that a regulation is invalid, such a plaintiff has waived any arguments not raised in a prior rulemaking proceeding […]

Here too, the fact that Plaintiffs argue that the Renunciation Fee is invalid does not, *ipso facto*, transform an otherwise "as applied" lawsuit into a "facial" lawsuit. The government has applied the 2015 Final Rule towards the Plaintiffs. Plaintiffs now challenge the government's statutory authority to fix and collect such a fee. These set of circumstances are precisely what this Circuit has called an "as applied" challenge that works to extend the limitations period from the time of the application.

II. Plaintiffs' claims are not barred by *Res Judicata*

The government next argues that the lawsuit should be dismissed under the doctrine of *res judicata*. Gv't Br., at 11-17. Under *res judicata*, also known as claim/issue preclusion,[5] "a judgment on the merits in a prior suit bars a second suit

[5] *Res judicata* is comprised of two distinct doctrines: (1) claim preclusion and (2) issue preclusion. Under the doctrine of ***claim*** preclusion, a final judgment forecloses "successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit." *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001). ***Issue*** preclusion, in contrast, bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment," even if the issue recurs in the context of a different claim. *Id.*, at 748-749.

involving identical parties or their privies based on the same cause of action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n. 5 (1979); *Apotex Inc. v. FDA*, 393 F.3d 210, 217 (D.C. Cir. 2004). The government's *res judicata* argument fails because **(1)** the *res judicata* elements are not satisfied and, **(2)** even if they were, this case clearly falls within the exceptions to *res judicata*.

(A) The government has failed to demonstrate that the *res judicata* elements are satisfied

For a suit to be barred by *res judicata*, four elements must be satisfied: **(1)** an identity of parties; **(2)** a judgment from a court of competent jurisdiction; **(3)** a final judgment on the merits; and **(4)** an identity of the cause of action. *U.S. Indus., Inc. v. Blake Constr. Co.*, 765 F.2d 195, 205 (D.C. Cir. 1985). All four elements must be proven before a claim in a subsequent action will be precluded on *res judicata* grounds. The government has failed to show that these elements exist in this case.

1. Plaintiffs are not identical to the plaintiffs in *AAA v. DOS*

"It is a principle of general application in Anglo–American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008), *citing Hansberry v. Lee*, 311 U.S. 32, 40 (1940). It is undisputed that the named plaintiffs in this lawsuit are ***not*** identical to the plaintiffs in *AAA v. DOS*. Nor could they be. Whereas in *AAA v. DOS*, plaintiffs consisted of individuals seeking to lower the fee and who have not yet renounced, the Plaintiffs in *Jenke v. USA* are persons who have paid the Renunciation Fee and have actually renounced. They are now seeking a refund.

The government, however, argues that even though the parties are not identical, the first *res judicata* element is still satisfied because two out of the six grounds for non-party preclusion listed in *Taylor* are present here. *First*, claims the government, AAA is the force behind the current lawsuit and ***controls*** it. *Taylor*, 553 U.S. at 895. *Second*, according to the government, the *Jenke v. USA* Plaintiffs are AAA's ***proxy*** to relitigate the claims that were raised in *AAA v. DOS*. *Id.*

i. AAA does not control this lawsuit for purposes of *res judicata*

To have control of litigation requires that a person have effective choice as to the legal theories and proofs to be advanced on behalf of the party to the action. RESTATEMENT (SECOND) OF JUDGMENTS §39 (1982), cmt. c. ("RESTATEMENT"). Whether involvement in the action is extensive enough to constitute control is a question of fact. *Id.* and the defendants bear the burden of establishing control. *Cigar Ass'n of Am. v. U.S. Food & Drug Admin.*, 436 F. Supp. 3d 70, 82 (D.D.C. 2020).

The government supports its "control" argument by reference to statements made by Mr. Fabien Lehagre, president of AAA, which the government says "emphasized their role as the driving force behind this lawsuit." Gv't Br., at 15. The government's argument is based on AAA's social media comments about the litigation.

Reduced to its essence, the government has failed to produce any evidence of control by AAA. Rather the material cited by the government merely shows that AAA has an interest in this lawsuit and has provided limited assistance in recruiting plaintiffs. Nothing, however, in the government's submissions, demonstrates that

AAA has "an effective choice as to the legal theories and proofs being advanced in this litigation or any other significant involvement." RESTATEMENT, §39, cmt. c. The government's "evidence" does not establish "control."[6] *See* Wright & Miller, *Nonparty Control*, 18A Fed. PRAC. & PROC. JURIS. §4451 (3d ed.) ("Yet it would be profoundly inconsistent with the needs of good adversary litigation for a court to attempt any regulation of the relationships between the precluded organization and the subsequent named party for the purpose of preventing the organization from exerting "control" rather than lending assistance in subsequent litigation.").

ii. Plaintiffs are not proxies of AAA for purposes of *res judicata*

A party bound by a judgment may not avoid its preclusive force by relitigating through a proxy. *Taylor*, 553 U.S. at 895. Preclusion via proxy applies when a person who did not participate in a litigation later brings suit as the *designated representative* of a person who was a party to the prior adjudication. *Id*; *Cigar Ass'n of Am.*, 436 F. Supp. 3d at 83. Here, the government has not produced any probative evidence to show that Plaintiffs are the "designated representatives" of AAA.

Importantly, the government has failed to show that Plaintiffs are acting on behalf of AAA. Plaintiffs are individuals who were apprised of the possibility to seek

[6] The government cites only one case, from Florida, to support its "control" argument, *Peter Coppola Beauty, LLC v. Casaro Labs, Ltd.*, 108 F. Supp. 3d 1323 (S.D. Fla. 2015). The government claims that that case stands for the proposition that "control" is established where a nonparty "controlled settlement discussions," "participated regularly in litigation strategy," and, "most telling[ly]," repeatedly referred to nonparty and party in the collectively. Gv't Br., at 15. Not only is the case from outside this Circuit, it also does not support the government. There, under the settlement in the prior lawsuit, the plaintiff in the second lawsuit (the assignee of the plaintiff in the first lawsuit), had complete control over the litigation in the first lawsuit and, in fact, participated in the first lawsuit. Nothing comparable has occurred with the plaintiffs in *AAA v. DOS* and *Jenke v. USA*.

a refund of the Renunciation Fee that they paid. While it may be true that Plaintiffs heard about the lawsuit through the social media posts of AAA, that does not transform them into "designated representatives" of AAA. The government says it has "evidence" that AAA is supporting this lawsuit (Gv't Br., at 14), a rather unremarkable and irrelevant fact considering AAA's goals and purposes. But support, even enthusiastic support for, a lawsuit does not equate to an agency relationship or its equivalent between AAA and the Plaintiffs. The case law requires a more substantive legal relationship in order to render the Plaintiffs proxies or "designated representatives" of AAA. *Cigar Ass'n of Am.*, 436 F. Supp. 3d at 83 (dismissing government's "designated representative" argument).

In this regard we note that the proxy argument in a *res judicata* defense is even more limited when an association such as AAA is said to be the principal in the subsequent suit. Commentators have warned that "great care should be taken before binding all members to an association loss." Wright & Miller, *Representation- In General – Association Representation*, 18A Fed. PRAC. & PROC. JURIS §4456 (2d ed. 2017). An association "may choose to conduct a particular suit with an eye to its interests in other suits and other questions," making it unfair to bind a member to the association's litigation result. *Cigar Ass'n of Am.*, 436 F. Supp. 3d at 82. *See also Matrix Distributors, Inc. v. Nat'l Ass'n of Boards of Pharmacy*, 2020 WL 7090688, at *5 (D.N.J. Dec. 4, 2020), *aff'd in part, rev'd in part and remanded*, 34 F.4th 190 (3d Cir. 2022) (declining to determine privity between association and members for res

judicata purposes, noting that it is a "fact-intensive inquiry" and how confused preclusion becomes when applied to associations.").

Moreover, the government' submissions demonstrate that the relationship between the Plaintiffs and the previous lawsuit and AAA (if any) is a fact-intensive inquiry and is not appropriate to resolve at this early stage of the litigation. *Id*. (declining to determine res judicata claim based on privity between an association and its members on a motion to dismiss).

Last, recall that this lawsuit is seeking class-wide relief and Plaintiffs do not sue merely in their individual capacity, but as potential representatives of a class numbering anywhere between 30,000-50,000 former U.S. citizens who have paid the Renunciation Fee. The government's position would lead to a completely inequitable result- the denial of these individuals (*i.e.*, class-members) opportunity to have their claim efficiently resolved by a court. These potential class members stretch across the globe to all continents. Surely, AAA's prior lawsuit cannot serve to preclude these tens of thousands of claims.

2. The causes of action in *AAA v. DOS* and *Jenke v. USA* are not identical

The doctrine of *res judicata* prohibits "successive litigation of the ***very same claim***" by the same parties. [emphasis added]. *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 599, (2016), *as revised* (June 27, 2016), and *abrogated on different grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). Importantly, a "[p]etitioners' postenforcement as-applied challenge is not "the very same claim" as

their preenforcement facial challenge." *Id.* This is especially true there is a "development of new material facts." *Id.*

The Restatement adds that, where important human values are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought." *Id.*, *citing* RESTATEMENT, §24, Comment f; *see Bucklew v. Lombardi*, 783 F.3d 1120, 1127 (8th Cir. 2015) (allowing as applied challenge to execution method to proceed notwithstanding prior facial challenge).

With these background principles in mind, it is clear that *AAA v. DOS* is not identical to *Jenke v. USA* for purposes of *res judicata*. *AAA v. DOS* was a facial challenge to the 2015 Final Rule implementing the $2,350 Renunciation Fee. The present case is a post-enforcement, as applied challenge. *See also* Section I.B., *supra*. Whereas *AAA v. DOS* involves Plaintiffs who are U.S. citizens and have yet to pay the Renunciation Fee, Plaintiffs here have paid the Renunciation Fee and effectively expatriated. Whereas plaintiffs in *AAA v. DOS* sought prospective/injunctive relief, Plaintiffs here seek retrospective monetary relief in the form of a refund.

The gap between the two cases is even more poignant when considering that Plaintiffs Nelson and Poli's cause of action did not even accrue at the time the complaint in *AAA v. DOS* was filed. Nelson paid the Renunciation Fee on November 15, 2022; Poli on August 29, 2022. The lawsuit in *AAA v. DOS* commenced almost two years prior on December 8, 2020. Plaintiffs Nelson and Poli did not have any viable cause of action for a refund when *AAA v. DOS* was filed. This fact highlights the fundamental difference between the two cases and is alone sufficient grounds to reject

the government's *res judicata* argument. *Morgan v. Covington Twp.*, 648 F.3d 172, 177-178 (3d Cir. 2011) (*res judicata* does not apply to events post-dating the filing of the initial complaint); *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 919 (2d Cir. 2010) (same); *Smith v. Potter*, 513 F.3d 781, 783 (7th Cir. 2008) (same); *Rawe v. Liberty Mut. Fire Ins. Co.*, 462 F.3d 521, 529-530 (6th Cir. 2006) (same); *Mitchell v. City of Moore*, 218 F.3d 1190, 1202 (10th Cir. 2000) (same); *Manning v. City of Auburn*, 953 F.2d 1355, 1360 (11th Cir. 1992) (same).

Moreover, the government's 11th hour, unilateral decision to lower the fee back to the post-2014 amount of $450 is precisely the type of "change in circumstances" discussed in *Whole Woman's Health*. The government's sudden about-face to reduce the fee back to $450 is nothing more than astounding. After years of claiming that the provision of renunciation services is the most expensive of all consular services and that charging $2,350 per renunciant is necessary to recoup the costs incurred, the government now essentially concedes that $450 per renunciant is sufficient. This fundamental change in circumstances will play a significant and vital role in this lawsuit as Plaintiffs intend to argue that the government's new rulemaking to reduce the fee demonstrates that the exorbitant $2,350 fee was never necessary in the first place and, hence, illegal and in excess of statutory authority. *See*, for example, Complaint, ¶41(B)(i) ("Whether, in light of the government's Fee Reduction Notice, payment by Plaintiffs and putative class members was excessive under the Fifth Amendment Due Process Clause, the APA and the IOAA.").

Because the claims in *AAA v. DOS* and *Jenke v. USA* are not identical and, even more, are intersected the fundamental change in circumstances of the fee reduction, the last *res judicata* element has not been satisfied and the lawsuit is not precluded.

(B) Exceptions to *res judicata* apply in this case

Claim preclusion is an equitable doctrine for which there are exceptions. *See* RESTATEMENT, §28. Even assuming, *arguendo*, that the elements of *res judicata* are applicable here, which they are not, the exceptions to *res judicata*'s preclusive effects are clearly met. The Restatement lists five exceptions to the general rule of issue preclusion. Exceptions one, two, and five are relevant here.

(1) **The first *res judicata* exception is applicable here**

Under the first exception, *res judicata* will not apply "when the determination of an issue is plainly essential to the judgment but the party who lost on that issue is, for some other reason, disabled as a matter of law from obtaining review by appeal." RESTATEMENT, §28, cmt. a. "Such cases can arise because "the controversy has become ***moot***." *Id.* (emphasis added) That is precisely the case here.

Plaintiffs are not barred by maintaining the present action because the new rule rescinding the $2,350 fee and reducing it to $450 has insulated the *AAA v. DOS* judgment from any meaningful appellate review. As pled in the Complaint (¶¶37-38), plaintiffs in *AAA v. DOS* filed an appeal. However, during the remainder of the rulemaking process the appeal will remain in abeyance and, with the finalization of the new rule, may ultimately become moot, thus preventing plaintiffs from obtaining

any appellate review. *See Alaska v. United States Dep't of Agric.*, 17 F.4th 1224, 1226 (D.C. Cir. 2021) (rescinding of rule by agency and replacement of a challenged regulation will moot the litigation over the legality of the original regulation); *Akiachak Native Cmty. v. U.S. Dep't of Interior*, 827 F.3d 100, 113 (D.C. Cir. 2016) (same). *See also Retail Store Emps. Union, Loc. 1001, Retail Clerks Int'l Ass'n, AFL-CIO v. N.L.R.B.*, 1978 WL 4933, at *7 n. 9 (D.C. Cir. Dec. 5, 1978), *on reh'g sub nom. Retail Store Emp. Union, Loc. 1001, Retail Clerks Int'l Ass'n, AFL-CIO v. N. L. R. B.*, 627 F.2d 1133 (D.C. Cir. 1979), *rev'd sub nom. N.L.R.B. v. Retail Store Emp. Union, Loc. 1001*, 447 U.S. 607, 100 S. Ct. 2372, 65 L. Ed. 2d 377 (1980) ("Contemporaneously with dismissal of a moot case, the reviewing court may-and when so requested by a litigant should-vacate the outstanding judgment to eliminate the rigors of res judicata.");[7] *cf. Nat'l PFAS Contamination Coal. v. United States Env't Prot. Agency*, 2023 WL 22078, at *3 (D.D.C. Jan. 3, 2023) (ordering a stay of the lawsuit pending the outcome of the rulemaking process); *cf. Am. Petroleum Inst. v. E.P.A.*, 683 F.3d 382, 389 (D.C. Cir. 2012) (holding appeal "in abeyance pending resolution of the proposed rulemaking.").

Even the government must concede that the *AAA v. DOS* judgment is likely to be immune from meaningful appellate review. In fact, the government has jointly submitted a motion requesting that the *AAA v. DOS* appeal be held in abeyance

[7] With respect to controversies that have become moot, it is a procedural requirement in some jurisdictions, to avoid the impact of issue preclusion, that the appellate court reverse or vacate the judgment below and remand with directions to dismiss. RESTATEMENT, §28. The government has created a procedural conundrum where, on the one hand, the appeal should be held in abeyance and, on the other, the new proposed rule has yet to become final. Thus, it remains premature to make such a motion to the Court of Appeals. Nonetheless, the exception to *res judicata* applies.

pending the outcome of its rulemaking. *See* Joint Motion to Hold Appeal in Abeyance, Case no. 23-5034, Doc. no. 1998224 (D.C. Cir. May 8, 2023) ("New rulemaking could moot the pending appeal or otherwise make it unnecessary for this Court to decide its merits.").

Accordingly, because the government is in the process of rescinding the 2015 Final Rule [88 FED. REG. 67687-01 (Oct. 2, 2023)], making *AAA v. DOS* moot, thereby depriving the plaintiffs in that case from seeking appellate review, the issues raised here are not precluded under the Restatement's first *res judicata* exception.

(2) The fifth *res judicata* exception is applicable here

Under the fifth *res judicata* exception, a "clear and convincing need for a new determination of the issue" due to the adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action are grounds for relitigating the matter. RESTATEMENT, §28.

The court in *AAA v. DOS* determined that U.S. citizens do not have any constitutional or natural right to renounce their citizenship. Moreover, the court also held that, even if such a right exists, the court would simply defer to the government's assertion that such a fee passed constitutional muster. Lastly, the court found – without any serious analysis or discussion – that the government's assertion that it costs $2,350 to provide renunciation services (per renunciant) should be taken at face value. *See*, for example, *AAA v. DOS*, Oral Argument Transcript (Jan. 9, 2023, at 10, lines 15-20) ("The government provides an explanation and a reason for the regulation and the fee. My role, as I understand it, is not to sit down and go through

their breakdown of the costs with a fine-tooth comb, not on the APA anyway."). True to its statement, the *AAA v. DOS* court did not "fine-tooth" the claims, having failed to address them seriously at all.[8]

The battle over the Renunciation Fee's legality raises important and precedential matters concerning the nature of the right to renounce one's citizenship, and, conversely, the meaning of U.S. citizenship. Moreover, the government's imposition and collection of $2,350 per renunciant since 2014 raises serious issues as to the propriety of the government's fee schedule and its revenue-making methods. This is even more so in light of the government's unilateral decision to reduce the fee by 81% to $450 during the *AAA v. DOS* lawsuit, even though it had claimed for years

[8] Plaintiffs in *AAA v. DOS* raised at least three issues demonstrating that the $2,350 fee did not (and could not) reflect the true costs to the government in providing renunciation services. *First*, plaintiffs showed that it takes significantly less time to process a renunciation case than the government claimed. *Second*, plaintiffs showed that the government's cost estimates are off the chart and, more importantly, the government included costs that are completely irrelevant to the renunciation process. *Third*, plaintiffs showed that other consular services which are much more complicated and involved much more paperwork and submissions are a fraction of the cost of the Renunciation Fee. Instead of taking these claims seriously (as the government apparently did when it decided to lower the fee), the court – without any analysis or discussion, simply took the government's word for it. For example, in their brief, plaintiffs in *AAA v. DOS* spent a total of 12 pages (and additional exhibits) in demonstrating that the government cost analysis is far from accurate and that the government illegally grafted onto the Renunciation Fee costs that are unrelated to the renunciation process. *See L'Association des Américains Accidentels et al. v. United States Department of State, et al.*, 1:20-cv-03573, Memorandum of Points and Authorities in Opposition of Defendants' Partial Motion for Summary Judgment (ECF 14, June 17, 2021) ("SJ Brief"), at 31-39; Reply in Support of Motion for Partial Summary Judgment (ECF 20, August 19, 2021) ("SJ Reply Brief"), at 10-14. In "addressing" these arguments in its memorandum opinion, the *AAA v. DOS* court **spent less than one page** and, ultimately, concluded "the State Department provided a rational connection between the facts found, *i.e.*, the cost model inputs – and the choice made, *i.e.*, assessing the costs of providing renunciation services at $2,350 per applicant." The court did not address how the government could justify the fee in reliance on indirect costs such as "Other Bureau Services" and "ICASS" – the bulk of the alleged costs in administering renunciation. *See* SJ Brief, at 35-37 (addressing ICASS and Other Bureau Services).

Contrast how the court in *AAA v. DOS* addressed these matters with *Steele v. United States*, 657 F. Supp. 3d 23 (D.D.C. 2023), which addressed the claim that the government was assessing the fees to income tax return preparers for its issuance and renewal of Preparer Tax Identification Numbers ("PTINs"), and charging users for unrelated costs.

that $2,350 was accurately reflected its costs in rendering renunciation services. This raises serious questions as to the government's cost-based analyses that has impacted (and continues to impact) tens of thousands of individuals – who were not represented at all in *AAA v. DOS* – and who have paid the $2,350 Renunciation Fee to exercise their natural right to expatriate.

These aforementioned factors – coupled with the *AAA v. DOS* court's failure to address them in any serious fashion – justify revisiting the *AAA v. DOS* "determination," through another round of briefing and evidence to truly determine whether the $2,350 fee is constitutional, fair and reasonable and whether it conforms to the government's duties under the APA, the IOAA, and 8 U.S.C. §1481.

Given the number of U.S. citizens that were forced to pay $2,350 as a precondition to renounce their citizenship, together the amount of money the U.S. government has wrongfully collected since September 2014 to date for these renunciation services, the legality of the fee must be revisited. *See Gila River Indian Cmty. v. Schoebroek*, 2023 WL 5723400, at *12 (D. Ariz. Sept. 5, 2023) (finding "a clear and convincing need for a new determination of whether Defendants are unlawfully using Gila River water because allowing Defendants to continue their allegedly unlawful use would have an adverse impact on the public interest.").

In light of the above, Plaintiffs' claims should go forward even if this Court determines that the elements of *res judicata* are satisfied (which, again, Plaintiffs contest).[9]

[9] The grounds for supporting the fifth exception equally apply to support the second exception to *res judicata*. Under that exception, res judicata will not bar a lawsuit when:

III. This Court has subject matter jurisdiction

Under the government's third argument, this case should be dismissed because the APA does not waive sovereign immunity for "money damages." Gv't Br., at 18, *citing* 5 U.S.C. §702.[10] The government is wrong because it incorrectly characterizes the relief Plaintiffs seek as "money damages." The proper characterization of the relief being sought is "specific" relief, which is allowed under the APA. *Maryland Dep't of Hum. Res. v. Dep't of Health & Hum. Servs.*, 763 F.2d 1441, 1446 (D.C. Cir. 1985). Taking its lead from *Maryland Dep't*, the D.C. Circuit in *Am.'s Cmty. Bankers v. F.D.I.C.*, 200 F.3d 822, 829 (D.C. Cir. 2000) explained the difference between "money damages" and "specific relief": "money damages represent compensatory relief, an award given to a plaintiff as a substitute for that which has been lost;

> The issue is one of law and (a) […] (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws.

RESTATEMENT, §28.

Here, the issue is essentially one of law: *i.e.,* whether the $2,350 fee infringes upon the Constitution, and whether it is illegal under the APA and IOAA. Moreover, as discussed above, a new determination is warranted to take into account of the government's current rulemaking and to avoid inequitable collection of the fee.

[10] 5 U.S.C. §702:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief *other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

(emphasis added)

specific relief in contrast represents an attempt to restore to the plaintiff that to which it was entitled from the beginning."

In *America's Community Bankers*, the D.C. Circuit faced a nearly identical problem. There, the plaintiff challenged an assessment the Federal Deposit Insurance Corporation ("FDIC") pursuant to a statute that authorized the agency to make assessments "when necessary, and only to the extent necessary" to keep "reserves at the designated reserve ratio." *Id.*, at 825, *quoting* 12 U.S.C. §1817(b)(2)(A)(i). Plaintiffs brought suit under the APA and argued that the agency charged its members more than what its statutory authority allowed — thus entitling them to a refund — and sought to "get their money back." *Id.*, at 830. As the government does here, the FDIC argued that the court lacked jurisdiction because the plaintiff's claim was for money damages. *Id.*, at 829. The D.C. Circuit rejected that argument: "[w]here a plaintiff seeks an award of funds to which it claims entitlement under a statute, the plaintiff seeks specific relief, not damages." *Id.*

This Court has followed the D.C. Circuit's ruling in *America's Community Bankers* in at least three additional occasions. In *Steele v. United States*, 200 F. Supp. 3d 217 (D.D.C. 2016), an individual challenged the IRS's decision to charge a fee to receive a preparer tax identification number ("PTIN"). The IRS was empowered to charge fees for "each service or thing of value provided by" it, 31 U.S.C. § 9701(a), but the plaintiffs contended that the agency exceeded this authority by charging tax preparers to obtain a PTIN. *Id.*, at 220. Finding that *America's Community Bankers* was "controlling," the court held that the plaintiff's requested remedy was "not money

damages, and accordingly falls under the APA's waiver of sovereign immunity." *Id.*, at 223-224. The court further concluded that the scenario there was "no different" from *America's Community Bankers*, as the plaintiffs were seeking only what they were "entitled [to] from the beginning." *Id.*, at 225.

Most recently, in *Astakhov v. United States Citizenship & Immigr. Servs.*, 2023 WL 6479080 (D.D.C. Oct. 5, 2023), this Court applied *America's Community Bankers* and found that the APA serves as a waiver of sovereign immunity for a claim seeking a refund of a $410 filing fee to apply for employment authorization. *See also Resolute Forest Prod., Inc. v. U.S. Dep't of Agric.*, 219 F. Supp. 3d 69, 75 (D.D.C. 2016) (Refund was available remedy under for unlawful assessment of softwood lumber checkoff by United States Department of Agriculture).

Here, as in the cases cited above, Plaintiffs seek a ***refund*** of the $2,350 fee they paid to the government to renounce their U.S. citizenship. *See* Complaint, ¶42(a); ¶45; ¶54 ("Plaintiffs are entitled to the refund of the excessive portion of the Renunciation Fee, to wit $1,900."); Complaint, at pg. 13, "Prayer for Relief" ("Order Defendant to refund the amount of $1,900 to each of the Plaintiffs […]"). Put differently, Plaintiffs seek only what they were "entitled [to] from the beginning." *Steele*, 200 F. Supp. 3d at 225.

As in those cases, Plaintiffs argue that the government has exceeded its statutory authority and/or has acted in violation of the law when it collected the Renunciation Fee from Plaintiffs and that such violation entitles them to a refund.

Complaint, ¶¶44-54. Notably, both in *Steele* and the present case, the challenge to the fee was under the IOAA, 31 U.S.C. §9701.

The government's sole authority for its position is a case from this district entitled *ITServe Alliance, Inc. v. Cuccinelli*, 502 F. Supp. 3d 278 (D.D.C. 2020). To the extent that *ITServe* supports the government's reading of *America's Community Bankers*,[11] it represents a minority view in this Court. What is more, *ITServe* has been seriously criticized in a subsequent case addressing the same issue. In *Astakhov*, the Court declared that *ITServes'* "theory is incorrect and does not accurately describe the statutory provisions in *America's Community Bankers* or the bulk of cases from this district."[12]

The present case raises the question of whether the government can retain funds which originally belonged to Plaintiffs "by crying sovereign immunity." *Astakhov*, at *5. "Binding caselaw from the Circuit and persuasive authority from the district alike provide a clear answer: no." *Id*. *See also Clark v. Library of Congress*, 750 F.2d 89, 104 n. 33 (D.C. Cir. 1984) (dictum) (describing an action to compel an

[11] This issue is a clear intra-circuit split. Judge Mehta in *ITServe* explicitly noted that he disagrees with the *Steele* analysis. *ITServe*, 502 F. Supp. 3d at 286, n. 2. The *Astakhov* court specifically stated that it disagrees with *ITServe. Astakhov,* at *6.

[12] The government attempts to distinguish and derogate the holding in *Steele* by arguing that *America's Community Bankers* is a case that "concerns a specific statutory scheme setting out what fees the FDIC could assess." Gv't Br., at 19, n. 13 (characterizing *Steele* as an "outlier case"). This argument does not even leave the gate. In *America's Community Bankers*, the statute at issue had empowered the FDIC to make assessments only "when necessary, and only to the extent necessary." *Id*., at 825, *quoting* 12 U.S.C. §817(b)(2)(A)(i). This case – as well as *Steele* – also concern a specific statutory scheme setting out the criteria for setting fees, namely: the IOAA, 31 U.S.C. §9701. The same is true for *Astakhov* and *Resolute Forest* "both of which qualified the power of an agency to collect fees or assessments but did not authorize refunds in so many words." *Astakhov*, at *5. Interestingly, the government actually relies on *Astakhov* in its final argument, seeking to transfer this case to the Court of Federal Claims. Gv't Br., at 22-23. *Compare also to Nat'l Veterans Legal Servs. Program v. United States*, 968 F.3d 1340, 1349 (Fed. Cir. 2020) (interpreting the §1913 Note as granting a viable illegal exaction claim under the Little Tucker Act).

official to repay money improperly recouped as "in essence, specific relief"), *cited in Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988).

Accordingly, the APA constitutes a waiver of sovereign immunity for Plaintiffs' claims seeking a refund of that portion of the Renunciation Fee paid in excess and in violation of the law.

IV. A Little Tucker Act claim in the Court of Federal Claims does not constitute an alternative, adequate remedy for purposes of APA, §704

Under 5 U.S.C. §704, to state a valid APA claim, a plaintiff must show that "there is no other adequate remedy in a court." The government claims that Plaintiffs here cannot show that there is no other adequate remedy in court because they, in fact, do have a right to sue in the United States Court of Federal Claims under the Little Tucker Act, 28 U.S.C. §1346(a)(2).[13] Accordingly, the government moves this court to dismiss Plaintiffs' claims or, in the alternative, transfer the case to the Court of Federal Claims.

To support this argument, the government relies principally on *Astakhov*. There, too, the court was faced with an almost identical situation. The *Astakhov* Court found that the Little Tucker Act provides an adequate remedy "within the meaning of Section 704." *Astakhov*, at *7. Both the APA and the Little Tucker Act, according

[13] 28 U.S.C. §1346(a)(2):

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of […] [a]ny other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department […]

to the *Astakhov* Court, "provide Plaintiff a judicial forum for her illegal-exaction claim and, consequently, for review of the challenged agency action." *Id*.

The present case, however, is not like *Astakhov* in this regard. The Supreme Court has concluded that, in circumstances similar to this lawsuit, the Little Tucker Act does ***not*** constitute a basis for an alternative, adequate, remedy for purposes of §704 of the APA. *Bowen*, 487 U.S. at 904. In *Bowen*, the government argued, as it does here, "that §704 should be construed to bar review of the agency action in the District Court because monetary relief against the United States is available in the Claims Court under the Tucker Act." *Id*. The Supreme Court rejected that interpretation:

> This restrictive – and unprecedented – interpretation of §704 should be rejected because the remedy available to the State in the Claims Court is plainly not the kind of "special and adequate review procedure" that will oust a district court of its normal jurisdiction under the APA.
>
> *Id*.

According to the Supreme Court, the Tucker Act remedies in the Court of Federal Claims are deficient because, among other matters, that court has no power to grant equitable relief. *Bowen*, 487 U.S. at 906.

Here, as in *Bowen*, adjudication will necessarily involve equitable relief, including and especially, declaratory relief. Indeed, Plaintiffs explicitly seek such relief in their Complaint. [*See* Complaint, at 13, "Prayer for Relief" ("[…] Declare that the Renunciation Fee in excess of $450 was and is unlawful."].

Moreover, because the 2015 Final Rule remains in effect, prospective relief may also be necessary, enjoining the government from collecting the fee in the immediate future. And, even if the 2015 Final Rule is finally rescinded and replaced with a new rule reducing the fee to $450, equitable-prospective relief would still be appropriate in light of the government's representations that "it remains open to re-evaluating the amount of the renunciation processing fee" even after lowering it to $450. Gv't Br., at 7. *See also* 88 FED. REG. 67687-01 (Oct. 2, 2023) (reserving the right to reevaluate the fee in the future and increase it yet again). In other words, the government's current position concerning the renunciation fee – coupled with its past practice of adjusting the fee when convenient – "may make it appropriate for judicial review to culminate in the entry of declaratory or injunctive relief that requires the [government] to modify future practices." *Id.*, at 905. These types of relief are totally inappropriate in a Little Tucker Act action in the Court of Federal Claims.

In other cases that have addressed similar illegal exaction claims, this Court has adjudicated them under the APA, ***not*** the Little Tucker Act. In *Steele v. United States*, for example, plaintiffs' claim was brought and adjudicated under the APA; the government did not argue, nor did the court find that the claim did not conform to §704's adequate remedy requirement. The same is true with *Resolute Forest Prod., Inc.,* 219 F. Supp. 3d at 79.

V. Mandatory transfer to the Court of Federal Claims violates Article III of the U.S. Constitution

Assuming, for the sake of argument, that the Little Tucker Act is the sole basis for federal subject matter jurisdiction in this case, the applicable venue statute – 28

U.S.C. §1402(a)(1) – may not be applied to effectively divest this Court of subject matter jurisdiction by prescribing exclusive venue for foreign residents in the U.S. Court of Federal Claims. The government argues that cited venue statute mandates that Plaintiffs bring their class-action suit in the Court of Federal Claims, an Article I court, even though Congress has created concurrent subject matter jurisdiction in the U.S. district courts established under Article III of the U.S. Constitution. By invoking §1402(a)(1) to deprive Plaintiffs of the opportunity to have their claims adjudicated by an Article III court, the government's alternative venue contravenes Article III. *See Stern v. Marshall*, 564 U.S. 462, 483 (2011) ("[…] we have long recognized that, in general, Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.").[14] As the Court noted in *Stern*, "Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges." *Id*. As applied to the Plaintiffs in this case, all of whom are, by definition, non-residents of the United States, Section 1402(a)(1) eliminates Plaintiffs' Constitutional right to have their claims adjudicated by an Article III judge – a right that Plaintiffs have neither waived nor forfeited. *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 668 (2015) (right to adjudication under Article III may be waived).

[14] There is no dispute that the present lawsuit *could* be heard by an Article I court. However, Congress cannot *compel* Plaintiffs to litigate their claims *exclusively* in an Article I court, via Section §1402(a)(1). This is even more true when such an outcome clearly discriminates between foreign residents and residents of the United States.

Accordingly, this Court should retain jurisdiction over the present case even if it determines that the Little Tucker Act is the sole basis for federal jurisdiction.

ORAL ARGUMENT REQUESTED

Pursuant to Local Rule 7(f), Plaintiffs respectfully request an oral hearing for this motion. Due to the government's ongoing rulemaking and the effects of that rulemaking, if any, on this case, oral argument may assist in clarifying matters that were not apparent at time of the filings of the motion papers.

CONCLUSION

For the foregoing reasons, Plaintiffs urge the court to deny Defendants' motion to dismiss.

Respectfully submitted,

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