IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JENKE, *et al.*, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Case No. 1:23-cv-02950-CJN

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO TRANSFER

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INTRODUCTION

Since 2014, the Department of State has charged individuals seeking to renounce their citizenship and obtain a Certificate of Loss of Nationality ("CLN") under Immigration and Nationality Act (INA) § 349(a)(5), 8 U.S.C. § 1481(a)(5), a fee of $2,350 ("renunciation processing fee"). This fee reflects the actual cost of providing CLN services to these individuals. Early this year, in *L'Association des Americains Accidentels v. U.S. Department of State*, No. 20-cv-03573 (TSC) (D.D.C.), the district court rejected claims by a group of individual plaintiffs and an association, L'Association des Americains Accidentels ("AAA"), that the $2,350 renunciation processing fee violated the Administrative Procedure Act ("APA"), the Fifth Amendment, and statutory authority. *L'Association des Americains Accidentels v. U.S. Dep't of State*, 656 F. Supp. 3d 165 (D.D.C. 2023), *appeal filed,* No. 23-5034 (D.C. Cir. Feb. 16, 2023). Unsatisfied with this decision, AAA recruited new individuals to challenge the fee on the same grounds with one twist: these individuals have already paid the fee and now seek a refund of the difference between the current fee ($2,350) and $450, the amount to which the Department recently proposed to reduce the fee through notice-and-comment rulemaking. Both the statute of limitations and *res judicata* bar these new claims. Even if the claims were not barred, they still fail. The APA does not waive sovereign immunity for money damages, and Plaintiffs cannot seek a fee refund in district court under the Little Tucker Act because venue is not proper. The Court should, therefore, dismiss Plaintiffs' claims or, in the alternative, transfer the case to the Court of Federal Claims.

BACKGROUND

I. The CLN Process

"Expatriation is the voluntary renunciation or abandonment of nationality and allegiance." *Perkins v. Elg*, 307 U.S. 325, 334 (1939). The INA codifies the potentially expatriating acts that, if performed voluntarily and with the intent to relinquish U.S. nationality as determined by the Department of State, result in a determination of loss of U.S. nationality. *See* INA § 349(a); 8 U.S.C. § 1481(a).[1] The potentially expatriating act at issue in this case is "making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State," *id.* § 1481(a)(5), which is referred to herein as "renunciation."[2] *See, e.g.*, Errata Class Action Compl. ¶¶ 19-20, 22, 48, ECF No. 3 ("Compl.").

The § 1481(a)(5) process begins with a consular officer conducting an initial interview, often by telephone or electronically, with the potential renunciant, followed by a second, in-person interview. *See Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates*, 80 Fed. Reg. 51464-01, 51465 (Aug. 25, 2015) ("2015 Final Rule"). During these interviews, the consular officer must inform the potential renunciant of the nature and consequences of loss of nationality, determine whether the potential renunciant is a U.S.

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[1] The Department of State administers requests for CLN services under the first five of the seven potentially expatriating acts listed in the statute. *See* 8 U.S.C. § 1481(a)(1)-(5); INA § 349(a)(1)-(5). The Department of Homeland Security is responsible for procedures for cases arising under the other two subsections. *See* 8 U.S.C. § 1481(a)(6)-(7); INA § 349(a)(6)-(7).

[2] Except where otherwise noted, the term "renunciation" as used by Defendant in this brief refers to taking the oath of renunciation abroad before a U.S. diplomatic or consular officer under INA § 349(a)(5), 8 U.S.C. § 1481(a)(5). Case law sometimes uses the term "renunciation" or the phrase "renouncing U.S. citizenship" to refer to the broader act of relinquishing U.S. citizenship regardless of the section of the INA under which the individual requests a CLN.

national and whether he or she "fully intends to relinquish all the rights and privileges attendant to U.S. nationality, including the ability to reside in the United States unless properly documented as an alien," and whether the potential renunciant's taking of the oath of renunciation is voluntary or the result of coercion, undue influence, or duress.[3] 2015 Final Rule, 80 Fed. Reg. at 51465. Even after the potential renunciant takes the oath, the consular officer must document that action in multiple "consular systems . . . [and] memoranda" that are transmitted to headquarters for review by "a country officer and a senior approving officer within the Bureau of Consular Affairs." *Id.*; *see* INA § 358, 8 U.S.C. § 1501 (requiring a U.S. diplomatic or consular officer to certify in writing the facts upon which his belief that loss of nationality has occurred is based and submit that report for the approval of the Secretary of State). In many cases, such as those where the potential renunciant is a minor, presents possible mental-capacity issues, or may become stateless, this review may require consultation with the Department's legal advisers and "multiple rounds of correspondence between post and headquarters." 2015 Final Rule, 80 Fed. Reg. at 51465. Once the Overseas Citizens Services directorate within the Bureau of Consular Affairs has approved a request for a CLN, the consular officer issues the CLN in the renunciant's name. *See* INA § 358, 8 U.S.C. § 1501.

Two federal laws authorize the Department to set fees for processing requests for CLN services. *See* 22 U.S.C. § 4219; 31 U.S.C. § 9701. The "user charge" statute, 31 U.S.C. § 9701,

[3] There is a rebuttable presumption that a person who performs a potentially expatriating act does so voluntarily. INA § 349(b), 8 U.S.C. § 1481(b). But because that presumption is rebuttable and loss of citizenship is so consequential, the Department, in accordance with Supreme Court requirements against involuntary loss of nationality, nevertheless assesses voluntariness to be certain. *See, e.g.*, 7 FAM 1221(b) (noting that *Vance v. Terrazas*, 444 U.S. 252 (1980), "stated that a person cannot lose U.S. nationality unless *they* voluntarily and intentionally relinquish that status" and specifying questions to analyze a potential expatriation case); 7 FAM Exhibit 1221: Loss-of-Nationality Flow Chart ("[I]t is [still] necessary to develop the case and assess voluntariness and intent.").

authorizes agencies to establish through regulation fees for services they provide as agency services should be "self-sustaining to the extent possible." *Id.* § 9701(a); *see also* Office of Management and Budget Circular No. A-25, § 6(a)(2)(a) (providing that user charges should generally "be sufficient to recover the full cost to the Federal Government . . . of providing the service, resource, or good"). To that end, the statute requires that the charges for agency services be "fair" and "based [upon] . . . the costs to the Government; . . . the value of the service or thing to the recipient; . . . public policy or interest served; and . . . other relevant facts." 31 U.S.C. § 9701(b). In addition, 22 U.S.C. § 4219 gives the President the power to set the amount of fees to be charged for consular services provided at posts abroad. Since 1957, that presidential authority has been delegated to the Secretary of State. Exec. Order No. 10718, 22 Fed. Reg. 4632 (June 27, 1957).

II. Renunciation Processing Fee Rulemakings

A. 2010: First Renunciation Processing Fee

In 2010, the Department promulgated a Notice of Proposed Rulemaking and Interim Final Rule, which instituted, for the first time, a fee for processing a U.S. citizen's request for a CLN under 8 U.S.C. § 1481(a)(5). *Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates*, 75 Fed. Reg. 6321-01, 6324 (Feb. 9, 2010); *Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates*, 75 Fed. Reg. 36522-01, 36525 (June 28, 2010) ("2010 IFR"). The Department set the fee at $450, which, at the time, represented "less than 25 percent" of the actual cost to the government of providing the service. 2010 IFR, 75 Fed. Reg. at 36525. The Department set the fee lower than the actual cost "to lessen the impact on those who need th[e] [renunciation] service and not discourage the utilization of the service, a development the Department fe[lt] would be detrimental to national

interests." *Id.* In 2012, the Department finalized the $450 fee. *Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates*, 77 Fed. Reg. 5177-01, 5177 (Feb. 2, 2012).

B. 2014: Fee Increase

After the Department implemented the $450 renunciation processing fee, it made several improvements to its Cost of Service Model ("CoSM") to better identify and assign costs. *See 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"). The CoSM calculations revealed that the updated actual cost of processing a request for a CLN under § 1481(a)(5) was $2,350. *Id.* at 51251.

By then, demand for CLN services under INA § 349(a)(5), 8 U.S.C. § 1481(a)(5) had "increased dramatically, consuming far more consular officer time and resources." 2014 IFR, 79 Fed. Reg. at 51251. When the Department set the renunciation processing fee at $450, "[t]he total number of renunciations was . . . small and constituted a minor demand on the Department's resources." 2015 Final Rule, 80 Fed. Reg. at 51465. The increased volume of requests for CLN services—"the most time-consuming of all consular services" "[o]n a per-service basis"—convinced the Department to raise the renunciation processing fee to reflect the actual cost of providing the service. *Id.* The Department raised the fee through an Interim Final Rule in 2014. 2014 IFR, 79 Fed. Reg. at 51249. In 2015, the Department promulgated a Final Rule finalizing the fee increase.[4] 2015 Final Rule, 80 Fed. Reg. at 51464-65.

[4] Initially, the $2,350 fee applied only to renunciations under 8 U.S.C. § 1481(a)(5), but in September 2015, the Department expanded the applicability of the fee to cover any request for a CLN, regardless of the type of relinquishment at issue. *See Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates—Passport and Citizenship*

C. 2023: Proposed Fee Decrease

Early this year, in a case challenging the $2,350 renunciation processing fee, *see infra* p. 7, the Department filed a notice with the district court announcing its "intent to pursue rulemaking to reduce the fee for processing a request for a [CLN] . . . from the current amount of $2,350 to the prior amount of $450." Defs.' Notice of Intent to Pursue Rulemaking to Reduce Fee Amount at 1, *L'Association des Americains Accidentels v. U.S. Dep't of State*, No. 20-cv-03573 (D.D.C. Jan. 6, 2023) ("*L'Association* Notice").

On October 2, 2023, the Department published a notice of proposed rulemaking, proposing to change the renunciation processing fee from $2,350 to $450. *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). In the NPRM, the Department noted that, "[i]n the years since the fee was increased [from $450 to $2,350], members of the public have continued to raise concerns about the cost of the fee and the impact of the fee on their ability to renounce their citizenship." *Id.* at 67689. The Department also acknowledged that "anecdotal evidence suggests that difficulties due at least in part to stricter financial reporting requirements imposed by the Foreign Account Tax Compliance Act (FATCA), Public Law 111-147, on foreign financial institutions with whom U.S. nationals have an account or accounts may well be a factor." *Id.* In light of these concerns, "the Department has made a policy decision to help alleviate at least the cost burden for those individuals who decide for whatever reason to request CLN services." *Id.* The Department emphasized that a charge of $450 for CLN services represents merely "a fraction of the cost of providing CLN services." *Id.* It noted that the proposed fee reduction, if

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Services Fee Changes, 80 Fed. Reg. 53704-01, 53707 (Sept. 8, 2015); *see also Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates*, 83 Fed. Reg. 4423-02 (Jan. 31, 2018) (finalizing the expansion of the fee's applicability).

implemented, will bring the renunciation processing fee into alignment with several other consular services provided to U.S. citizens overseas, the fees for which are set "significantly below cost." *Id.*

In addition, the Department stated that it remains open to re-evaluating the amount of the renunciation processing fee in light of the results of future Cost of Service Models calculating the actual cost to the government of providing CLN services.

> If, in the future, the results of the CoSM indicate that the Department ought to reevaluate its approach to the fee for CLN services . . . the Department will engage its experienced consular officers and senior Department managers to help determine the appropriate level at which to set the fee, balancing the need for the U.S. Government to recoup its costs with the need to charge a fee for these services that does not deter individuals from seeking them.

Id.

III. The Previous Suit

In December of 2020, a group of plaintiffs, including AAA, sued the Department of State challenging the Department's imposition of the $2,350 renunciation processing fee. *See* Compl., *L'Association des Americains Accidentels v. U.S. Dep't of State*, No. 20-cv-03573 (D.D.C. Dec. 8, 2020) ("*L'Association* Compl."). The plaintiffs argued, *inter alia*, that the fee was unlawful under the APA because it was arbitrary and capricious; that it violated the Fifth Amendment's substantive due process clause; and that it violated the provisions of 31 U.S.C. § 9701. *L'Association* Compl. ¶¶ 171, 203, 205. While this challenge was still under consideration by the district court, the Department filed the aforementioned notice of its intent to pursue rulemaking to reduce the fee. *See supra* p. 6; *L'Association* Notice. Thereafter, the court ultimately disagreed with the plaintiffs' challenge to the $2,350 fee, granting summary judgment for the Department of State on all three issues. *See L'Association*, 656 F. Supp. 3d at 177-78, 180, 185.

IV. The Present Suit

Once again, as in *L'Association*, Plaintiffs claim that the $2,350 fee is unlawful under the APA because it is arbitrary and capricious, that it violates the Fifth Amendment's substantive due process clause, and that it violates the provisions of 31 U.S.C. § 9701. Compl. ¶ 45; *see also id.* at 11 (describing the cause of action as "UNLAWFUL FEE").

Although AAA is not a named plaintiff in the present suit, it has "organiz[ed] the lawsuit"[5] and is "support[ing]" it, including by soliciting prospective class members to join.[6]

Plaintiffs are four individuals who once held U.S. citizenship but have taken the oath of renunciation before a consular officer pursuant to 8 U.S.C. § 1481(a)(5) and received their CLN from the Department of State after paying the fee of $2,350. Compl. ¶¶ 11-14. Plaintiffs renounced their citizenship and obtained their CLNs between November 18, 2015, and November 15, 2022. *Id.*

STANDARD OF REVIEW

Courts should dismiss claims under Federal Rule of Civil Procedure 12(b)(1) where they lack subject-matter jurisdiction to adjudicate the claims. In a Rule 12(b)(1) challenge, plaintiffs generally "bear[] the burden of establishing jurisdiction by a preponderance of the evidence." *Bagherian v. Pompeo*, 442 F. Supp. 3d 87, 91-92 (D.D.C. 2020) (quoting *Didban v. Pompeo*,

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[5] Mithil Aggarwal and Nancy Ing, *They Paid Thousands to Give Up Their U.S. Citizenship. Now They Want a Refund*, NBC News, Oct. 4, 2023, https://perma.cc/M54V-VMRN.

[6] Google Forms, *Class Action Lawsuit to Help You Recover Overpayment by the Department of State*, https://perma.cc/4C6V-BFGE, https://docs.google.com/forms/d/e/1FAIpQLSd_XcIGmPpoFCyPy52z0_ySvqPn5QcVDs4eHWyDBb5cE0qfCg/viewform ("Class Action Form"); *see* Association des Americains Accidentels, Facebook (Oct. 5, 2023), https://perma.cc/W5JH-UW7F (requesting, in a signed post by Mr. Lehagre, that "[i]f you too have renounced American citizenship by paying $2,350, please complete this form: https://forms.gle/anpXUUcWT525ajS56").

435 F. Supp. 3d 168, 172-73 (D.D.C. 2020)). When considering a motion to dismiss pursuant to Rule 12b(b)(1), "[a] federal court may take judicial notice of 'a fact that is not subject to reasonable dispute'" if the fact "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Hurd v. D.C. Gov't*, 864 F.3d 671, 686 (D.C. Cir. 2017) (quoting Fed. R. Evid. 201(b)). Courts should dismiss claims under Federal Rule of Civil Procedure 12(b)(6) when plaintiffs have failed to plead "sufficient factual matter" that, if "accepted as true," would "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

ARGUMENT

I. Plaintiffs' Claims are Barred by the Statute of Limitations.

Plaintiffs' claims are untimely because they bring a facial challenge to a regulation more than six years after the Department of State published the rule. Pursuant to 28 U.S.C. § 2401(a), a "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." In challenges to an agency action, "[a] cause of action . . . 'first accrues,' within the meaning of § 2401(a), as soon as (but not before) the person challenging the agency action can institute and maintain a suit in court." *Alaska Cmty. Action on Toxics v. U.S. EPA*, 943 F. Supp. 2d 96, 102 (D.D.C. 2013) (quoting *Spannaus v. U.S. Dep't of Just.*, 824 F.2d 52, 56 (D.C. Cir. 1987)). Thus, "[t]he right of action first accrues on the date of the final agency action." *Harris v. Fed. Aviation Admin.*, 353 F.3d 1006, 1010 (D.C. Cir. 2004).[7] Promulgation of a rule is "unquestionably final agency action." *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 892 F.3d 332, 342 (D.C. Cir. 2018).

[7] The D.C. Circuit recently overruled previously longstanding precedent "that section 2401(a) creates a jurisdictional condition attached to the government's waiver of sovereign immunity."

Plaintiffs challenge the $2,350 renunciation processing fee. *See, e.g.*, Compl. ¶ 7 (challenging the Department's "illegal charge and unjust enrichment" and seeking "reimburse[ment] [for] the Plaintiffs and tens of thousands of other former U.S. citizens who were forced to expend $2,350"); *id.* ¶ 40 (seeking to certify a class of "all individual who have signed and submitted a [renunciation form] since September 6, 2014 and who paid the $2,350 renunciation fee"); *id.* ¶ 47 (challenging "the imposition and collection of the $2,350 fee"). Plaintiffs' claims are wholly facial, as evidenced by Plaintiffs' assertions that the $2,350 fee is unlawful in all circumstances and Plaintiffs' requested relief seeking a declaration to that effect. *See id.* ¶¶ 47-48, 53; *id.* at 13; *see also, e.g.*, *Peri & Sons Farms, Inc. v. Acosta*, 374 F. Supp. 3d 63, 76 n.8 (D.D.C. 2019).

As discussed above, *supra* p. 5, the Department set the renunciation processing fee at $2,350 in the 2014 IFR and finalized it in the 2015 Final Rule, which was codified on August 25, 2015. *See* 2015 Final Rule, 80 Fed. Reg. at 51464-65. Any facial challenge to the $2,350 renunciation processing fee thus accrued, at the latest, on August 25, 2015. *See, e.g.*, *Peri & Sons Farms, Inc.*, 374 F. Supp. 3d at 72. The statute of limitations to any such challenge expired six years later—on August 25, 2021. Because Plaintiffs did not bring the instant lawsuit challenging the $2,350 renunciation processing fee until October 4, 2023, their claims are time-barred.

Plaintiffs cannot claim timeliness under the D.C. Circuit's "narrow" exception for certain as-applied challenges. *Id.* at 74, 76 & n.8. Pursuant to that exception, a party may raise an otherwise untimely challenge to a regulation when an agency has "applied the challenged regulation through an order or other agency action directed at a particular party, its property, or a

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Jackson v. Modly, 949 F.3d 763, 776 (D.C. Cir. 2020) (quoting *P & V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1026 (D.C. Cir. 2008)). Instead, section 2401(a)'s time bar is non-jurisdictional. *See id*. at 778.

set of circumstances specifically affecting that party." *Id.* at 75; *see also Genuine Parts Co. v. EPA*, 890 F.3d 304, 316 (D.C. Cir. 2018). No such circumstances are present in this matter.

Nor can Plaintiffs use the publication of 2023 NPRM, which proposes reducing the renunciation processing fee from $2,350 to $450, as the accrual date of their claims. Plaintiffs do not purport to challenge the $450 fee nor anything else proposed by the 2023 NPRM. Indeed, Plaintiffs expressly cite $450 as the proper, legal amount for the fee. *See, e.g.*, Compl. ¶ 48 (alleging that any fee "in excess of $450" would be unlawful). In addition, because an NPRM does not constitute final agency action, even if Plaintiffs had posed a challenge to the NPRM, it would be neither reviewable under the APA nor ripe. *See, e.g.*, *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *Window Covering Manufacturers Ass'n v. Consumer Prod. Safety Comm'n*, 82 F.4th 1273, 1292 (D.C. Cir. 2023); *Nevada v. Dep't of Energy*, 457 F.3d 78, 85 (D.C. Cir. 2006). Thus, the mere fact that the 2023 NPRM proposes changes to the renunciation processing fee does not revive any untimely claims to that fee as it is currently formulated.

Plaintiffs' challenge to the $2,350 processing fee is therefore time-barred.

II. Plaintiffs' Claims are Barred by Res Judicata.[8]

The instant lawsuit is AAA's improper attempt to relitigate the same issues it already lost in *L'Association*. "The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as '*res judicata*.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). The doctrine of issue preclusion bars "successive litigation of an issue of fact or law actually litigated and resolved in a . . . prior judgment." *Id.* (quoting *New Hampshire v. Maine*,

[8] In this motion, Defendant advances its *res judicata* arguments based on an earlier litigation as well as materials reflecting the ways in which this suit was filed. Defendant reserves the right to file a dispositive motion on other grounds, including the merits of the Department of State's renunciation processing fee.

532 U.S. 742, 748-49 (2001)). The doctrine exists "to conserve judicial resources, avoid inconsistent results, engender respect for judgments of predictable and certain effect, and to prevent serial forum-shopping and piecemeal litigation." *Robinson v. U.S. Dep't of Educ.*, 502 F. Supp. 3d 127, 133 (D.D.C. 2020) (quoting *Hardison v. Alexander*, 655 F.2d 1281, 1288 (D.C. Cir. 1981)).

Issue preclusion applies where: 1) "the same issue now being raised [was] . . . contested by the parties and submitted for judicial determination in the prior case"; 2) "the issue [was] . . . actually and necessarily determined by a court of competent jurisdiction in that prior case"; and 3) "preclusion in the second case [does] . . . not work a basic unfairness to the party bound by the first determination." *Martin v. Dep't of Just.*, 488 F.3d 446, 454 (D.C. Cir. 2007) (quoting *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992)). The preclusion factors are satisfied here.

First, the issue raised here is whether the $2,350 renunciation processing fee is lawful. *See* Compl. ¶ 54. The plaintiffs in *L'Association* ("*L'Association* Plaintiffs") raised the same issue. *See L'Association* Compl. ¶¶ 171, 203, 205. Indeed, Plaintiffs' complaint expressly discusses *L'Association* as a recent lawsuit similarly "challenging the constitutionality and legality of the Renunciation Fee." Compl. ¶ 2.

Second, a district court granted summary judgment for the Department of State and determined that the fee was not unlawful in a final, valid judgment "actually and necessarily determin[ing]" the issue of the fee's lawfulness. *Martin*, 488 F.3d at 454 (citation omitted); *see L'Association*, 656 F. Supp. 3d at 177-78, 180, 185.

Finally, applying preclusion would not work a basic unfairness to Plaintiffs because they are in privity with the *L'Association* Plaintiffs. In the present case, AAA is employing Plaintiffs

as proxies to relitigate the same renunciation fee issue that AAA lost in *L'Association*. It is "[a] fundamental precept of common-law adjudication . . . that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies." *Montana v. United States*, 440 U.S. 147, 153 (1979) (quoting *S. Pac. R. Co. v. United States*, 168 U.S. 1, 48-49 (1897)). The Supreme Court in *Taylor v. Sturgill* provided a framework for considering when parties are in privity for the purpose of issue preclusion. *See* 553 U.S. at 893-95; *cf. id.* at 894 n.8 (noting the Court's express avoidance of the term "privity" in the opinion given that the term has taken on broader meaning than the specific nonparty preclusion categories reiterated therein). In particular, the Supreme Court recognized six general categories of relationships that justify preclusion based on a prior lawsuit involving different parties. *See id.* These categories are "meant only to provide a framework for [courts'] consideration of virtual representation, not to establish a definitive taxonomy." *Id.* at 893 n.6.

Two of the *Taylor* categories are relevant here: proxy and control.[9] Since "a party bound by a judgment may not . . . relitigat[e] through a proxy," preclusion is appropriate "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." *Taylor*, 553 U.S. at 895. Similarly, in the control category, "a nonparty is bound by a judgment if she 'assume[d] control' over the litigation in which that judgment was rendered." *Id.* (quoting *Montana*, 440 U.S. at 154). Control is evidenced having a "sufficient 'laboring oar' in the conduct of the [prior] litigation." *Montana*, 440 U.S. at 154-55

[9] The remaining categories include non-parties who (1) agreed to be bound by the previous action, (2) had a preexisting substantive legal relationship with a party to the previous action, (3) were represented in properly conducted class actions and suits brought by trustees, guardians, and other fiduciaries, and (4) fall under special statutory schemes such as bankruptcy and probate proceedings. *See Taylor*, 553 U.S. at 893–95.

(quoting *Drummond v. United States*, 324 U.S. 316, 318 (1945)); *see also id.* at 155 (finding control where nonparty had caused the earlier lawsuit to be filed; reviewed and approved the complaint; paid the attorneys' fees and costs; directed the appeal to the Montana Supreme Court; appeared and submitted a brief as *amicus* therein; directed the filing of an appeal to the Supreme Court; and "effectuated" the company's abandonment of that appeal).

Plaintiffs' claims here are precluded because AAA now seeks to "relitigat[e]" its loss in *L'Association* "through a proxy" and is exercising control over this litigation. *Taylor*, 553 U.S. at 895. AAA caused this lawsuit to be filed by recruiting the named Plaintiffs and potential class members. *See Montana*, 440 U.S. at 155. AAA President Fabien Lehagre[10] even publicly thanked the named Plaintiffs "for agreeing to join this class action," noting that "[w]ithout them, there would have been no complaint."[11] Fabien Lahagre, LinkedIn, https://perma.cc/H83P-WGMP.

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[10] *See* AAA, Home Page, https://perma.cc/ZBJ2-HZVT.

[11] This Court may take judicial notice of the existence and contents of the referenced social media posts, and links attached therein, as evidence of AAA's public statements regarding this lawsuit. "A federal court may take judicial notice of 'a fact that is not subject to reasonable dispute'" if the fact "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Hurd*, 864 F.3d at 686 (quoting Fed. R. Evid. 201(b)). Courts in this district have repeatedly confirmed that this includes the contents of publicly available webpages. *See, e.g.*, *Brink v. Cont'l Cas. Co.*, No. 11-cv-01733, 2021 WL 7907065, at *9 (D.D.C. Dec. 27, 2021) ("A court 'may take judicial notice of the contents of an Internet website,' where neither party disputes the accuracy of information on the website." (quoting *Energy Automation Sys., Inc. v. Saxton*, 618 F. Supp. 2d 807, 810 n.1 (M.D. Tenn. 2009)); *New York v. Meta Platforms, Inc.*, 66 F.4th 288, 303 (D.C. Cir. 2023) (taking judicial notice of "[t]he 'contents of webpages available through the Wayback Machine'") (quoting *Valve Corp. v. Ironburg Inventions Ltd.*, 8 F.4th 1364, 1374 (Fed. Cir. 2021)). This also includes public social media posts and press releases. *See, e.g.*, *Al-Ahmed v. Twitter, Inc.*, 603 F. Supp. 3d 857, 869 (N.D. Cal. 2022) (taking judicial notice of "the landing page of [the plaintiff's] Twitter account, a public post on the account, and a press release page"); *Lindora, LLC v. Limitless Longevity LLC*, No. 15-CV-2847-JAH (KSC), 2016 WL 6804443, at *3 (S.D. Cal. Sept. 29, 2016) (taking judicial notice of "various pages from" the parties' respective websites, "Defendant's social media accounts," and Yelp and Amazon reviews of the parties' goods and services); *Warren v. Penzone*, No. 22-cv-02200, 2023 WL 4215394, at *2 (D. Ariz. June 12, 2023) (taking judicial notice of "extrajudicial statements" by the plaintiffs in

And AAA has been collecting potential class members through social media. Class Action Form, https://perma.cc/4C6V-BFGE; *see* Association des Americains Accidentels, Facebook (Oct. 5, 2023), https://perma.cc/W5JH-UW7F (requesting, in a signed post by Mr. Lehagre, that "[i]f you too have renounced American citizenship by paying $2,350, please complete this form: https://forms.gle/anpXUUcWT525ajS56").

AAA and Lehagre have repeatedly emphasized their role as the driving force behind this lawsuit and have collectively referred to themselves and Plaintiffs as "we." For example, in a LinkedIn post, Lehagre celebrated "the class-action lawsuit we filed this week against the State Department." Fabien Lehagre, LinkedIn, https://perma.cc/H83P-WGMP; *see also Peter Coppola Beauty, LLC v. Casaro Labs, Ltd.*, 108 F. Supp. 3d 1323, 1334 (S.D. Fla. 2015) (finding control likely where nonparty "controlled settlement discussions," "participated regularly in litigation strategy," and, "most telling[ly]," repeatedly referred to nonparty and party in the collective). The same LinkedIn post links to a New York Times article that quotes Lehagre and describes AAA as "spearhead[ing]" this lawsuit, which is AAA's "latest battle" related to the renunciation processing fee. Sopan Deb, *Former Americans Who Gave Up Their Citizenship Want Their Money Back*, The New York Times (Oct. 6, 2023), https://www.nytimes.com/2023/10/06/us/american-citizenship-fee-lawsuit.html; Fabien Lehagre, LinkedIn, https://perma.cc/H83P-WGMP. AAA's Google Form recruiting class members invites individuals who obtained a CLN after paying $2,350 to complete the form to join the class action because "[w]e'll probably need you." Class Action Form, https://perma.cc/4C6V-BFGE. AAA has also made numerous social media posts about the lawsuit, including posts linking to various news articles and a post declaring

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newspaper articles and social media posts), *report and recommendation adopted*, No. 22-cv-2200, 2023 WL 4205129 (D. Ariz. June 27, 2023).

"CLASS-ACTION FILED" on the day this lawsuit was filed. *See* Association des Americains Accidentels, Facebook (Oct. 4, 2023), https://perma.cc/Y26K-ACS4. And AAA linked to this "[c]lass-action" lawsuit and a press release about it on a page on its website entitled "Accidental Americans take the U.S. State Department to Court." AAA, *Accidental Americans Take the U.S. State Department to Court* (last visited Oct. 11, 2023), https://perma.cc/X9NL-LXF9 (translated by Google from French to English) (linking also to documents related to *L'Association*, No. 20-cv-03573 (D.D.C.)).[12]

AAA has also stated that they are "support[ing]" the instant lawsuit. Class Action Form, https://perma.cc/4C6V-BFGE ("This class action is supported by the Association of Accidental Americans."); Association des Americains Accidentels, Facebook (Oct. 5, 2023), https://perma.cc/W5JH-UW7F (linking to Google Form in a signed post by Mr. Lehagre). And the same lawyers who represented AAA in *L'Association* are counsel in the instant lawsuit. *See* Compl. at 2; *L'Association* Compl. at 63. This level of influence supports a finding of control. *See, e.g.*, *Montana*, 440 U.S. at 155 (finding nonparty had assumed control over prior litigation where, in part, nonparty had caused earlier lawsuit to be filed and paid legal fees); *Shuffle Tech Int'l LLC v. Sci. Games Corp.*, No. 15-cv-3702, 2017 WL 3838096, at *8 (N.D. Ill. Sept. 1, 2017) (finding nonparty had assumed control over prior litigation where nonparty procured counsel, paid legal fees, and "defended the suit for a time"). AAA had "effective choice as to the legal theories and proofs to be advanced" in *L'Association*, and Plaintiffs here are advancing those same legal theories. *Sprint Commc'ns Co. L.P. v. Charter Commc'ns, Inc.*, No. 17-cv-1734, 2021 WL

[12] Following Defendant's citation to this aspect of AAA's website in its Notice of Related Case, *see* Notice of Related Case, ECF No. 5 at 3, both links about this lawsuit have been removed from AAA's webpage. *See* AAA, *Accidental Americans Take the U.S. State Department to Court* (last visited Dec. 1, 2023), https://www.americains-accidentels.fr/page/1503405-lawsuit-against-state-department.

982726, at *3 (D. Del. Mar. 16, 2021) (citation omitted). AAA has procured counsel, collected Plaintiffs and class members, caused this lawsuit to be filed, and continues to spearhead the lawsuit. Plaintiffs are proxies for AAA's attempt to relitigate the same issues they lost in *L'Association*.

Thus, issue preclusion bars relitigation of Plaintiffs' claims. This case involves the same issues as *L'Association*, those issues were decided by the court, and Plaintiffs here are in privity with the *L'Association* plaintiffs. Applying issue preclusion against Plaintiffs does "not work a basic unfairness to the party bound by the first determination." *Martin*, 488 F.3d at 454 (quoting *Yamaha*, 961 F.2d at 254). AAA has already "had a full and fair opportunity to present its arguments" in *L'Association*. *Gulf Power Co. v. FCC*, 669 F.3d 320, 323-24 (D.C. Cir. 2012) (finding nonparty had "assumed control" over lawsuit for issue preclusion purposes). Applying issue preclusion here is consistent with the purpose of that doctrine—preventing AAA from "serial[ly] forum-shopping," demonstrating "respect for judgments of predictable and certain effect," and "conserv[ing] judicial resources." *Robinson*, 502 F. Supp. 3d at 133 (quotations omitted). AAA is "not entitled to . . . a second-bite at the apple" regarding the lawfulness of the $2,350 fee by challenging it through its recruited proxies. *Id.* at 135.

III. Plaintiffs Lack Standing to Bring Their Claims Under the APA Because They are All for Money Damages, for Which There is No Waiver of Sovereign Immunity.

Even if Plaintiffs could clear the hurdles of the statute of limitations and *res judicata*, which they cannot, their claims must be dismissed for lack of standing.

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). By the same token, the United States must also "[c]onsent to a particular remedy" in order for that remedy to be available. *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1105

(D.C. Cir. 2005). A waiver of sovereign immunity must be "unequivocally expressed" in a statute. *Hubbard v. EPA*, 982 F.2d 531, 532 (D.C. Cir. 1992) (*en banc*) (quoting *United States v. Mitchell*, 445 U.S. 535, 538 (1980)).

The APA waives sovereign immunity for only certain claims brought against the United States—those "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." 5 U.S.C. § 702 (emphasis added). As a result, plaintiffs may recover money under the APA only when the money is properly classified as "specific relief" rather than "money damages." *Bowen v. Massachusetts*, 487 U.S. 879, 901 (1988). "[M]oney damages represent compensatory relief, an award given to a plaintiff as a substitute for that which has been lost; specific relief in contrast represents an attempt to restore to the plaintiff that to which it was entitled from the beginning." *Am.'s Cmty. Bankers v. FDIC*, 200 F.3d 822, 829 (D.C. Cir. 2000).

Plaintiffs here have not established any statutory entitlement to a certain sum of money, which is the crux of the "money damages" versus specific relief inquiry. In the seminal Supreme Court case on this issue, the Court determined that a suit to enforce a provision of the Medicaid Act requiring the government to pay certain amounts of money for Medicaid services was not a suit for money damages because it was "a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money." *Bowen*, 487 U.S. at 900. Where a statute (i) entitles a plaintiff to be paid a certain amount by the government, or (ii) requires a plaintiff to pay a certain amount to the government, suits to enforce such provisions are not suits for money damages. *See, e.g.*, *Am.'s Cmty. Bankers*, 200 F.3d at 829 ("Where a plaintiff seeks an award of funds to which it claims entitlement under a statute, the plaintiff seeks specific relief, not damages."); *Md. Dep't of Hum. Res. v. Dep't of Health & Hum. Servs.*, 763 F.2d 1441, 1446 (D.C. Cir. 1985) (holding that a suit was not for "money damages" where the plaintiff was "seeking

funds to which a statute allegedly entitles it"); *Resolute Forest Prod., Inc. v. U.S. Dep't of Agric.*, 219 F. Supp. 3d 69, 75 (D.D.C. 2016) ("[A] remedy constitutes 'relief other than money damages' when the suit is 'seeking to enforce the statutory mandate itself, which happens to be one for the payment of money.'") (quoting *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999) (emphasis in original)).[13]

A recent D.D.C. case provides the closest analogy to the case at hand. In *ITServe Alliance, Inc. v. Cuccinelli*, 502 F. Supp. 3d 278 (D.D.C. 2020) (APM), the plaintiffs sought a refund of USCIS fees which they alleged were unlawful, *id.* at 285. Plaintiffs "point[ed] to no statute that mandates the government return [what they alleged were] illegally assessed fees." *Id.* The court held, therefore, that the plaintiffs' suit "advance[d] a traditional claim for 'money damages,'" and it was therefore impermissible under the APA. *Id.* at 287 ("[B]ecause Plaintiffs' demand for the return of the excessive fees collected by USCIS is a demand for money damages, the court lacks jurisdiction as to that claim under the APA."); *see also Texas Med. Ass'n v. U.S. Dep't of Health & Hum. Servs.*, No. 6:23-CV-59-JDK, 2023 WL 4977746, at *14 (E.D. Tex. Aug. 3, 2023) (holding that the court "lack[ed] jurisdiction to order the repayment of the Plaintiffs' paid fees" which the plaintiff alleged were unlawful under the APA because "Plaintiffs' requested remedy—a 'refund' of the administrative fees paid pursuant to the Fee Guidance—does not fall within . . . [the] forms [of monetary relief allowed by the APA]").

[13] One outlier case to this consistent refrain of statutory entitlements is *Steele v. United States*, 200 F. Supp. 3d 217 (D.D.C. 2016) (RCL), in which the court held that a claim that agency fees were excessive or completely unauthorized based solely on the user charge statute was one for restitution rather than money damages, *id.* at 224. This Court should decline to follow that reasoning. The *Steele* court determined that the money sought was restitution based on the reasoning in *America's Community Bankers* and asserted that the plaintiff's claim was "nearly identical" to the claim there. *Id.* The court failed, however, to grapple with the fact that *America's Community Bankers* concerns a specific statutory scheme setting out what fees the FDIC could assess. *See id.* The court's reasoning was, therefore, incomplete and incorrect.

Similarly, the monetary relief Plaintiffs request is not premised on a statutory entitlement to be charged no more than $450 for CLN services. The APA does not provide an entitlement to be charged no more than $450 for a CLN, nor does 8 U.S.C. § 1481, which does not discuss a fee. The user charge statute, 31 U.S.C. § 9701, certainly does not entitle Plaintiffs to a fee of no more than $450, as it expressly authorizes and encourages agencies to charge the full cost of providing their services.

Plaintiffs instead base their refund request on vague assertions that a fee of more than $450 for CLN services is arbitrary and capricious, violates the spirit of the user charge statute and the statute creating the means of expatriation, and inhibits substantive due process rights for an unrecognized alleged fundamental right. *See* Compl. ¶ 45. Plaintiffs' selection of $450 as the cap for a renunciation processing fee is apparently based exclusively upon the Department of State's recent proposal to lower the renunciation processing fee to $450. But the Department's proposal to lower the fee does not render a higher fee unlawful. Because their arguments are unmoored from any statutory mandate concerning the proper amount for a renunciation processing fee, Plaintiffs do not seek restoration of "that to which [they] w[ere] entitled from the beginning."[14] *Am.'s Cmty. Banker*, 200 F.3d at 829. Rather, they seek compensation to "substitute for a suffered loss"—the loss of the opportunity to renounce at the newly-proposed lower renunciation processing fee—which is a classic form of "money damages." *Id.* at 286 (quoting *Md. Dep't of*

[14] Plaintiffs' characterization of the monetary relief they seek as equitable relief is insufficient to make it so. *See, e.g.*, *ITServe All.*, 502 F. Supp. 3d at 286 ("Plaintiffs cast the relief they seek as restitution—an equitable remedy—but that label does not control."); *Suburban Mort. Assocs. v. U.S. Dep't of Hous. & Urb. Dev.*, 480 F.3d 1116, 1124 (Fed. Cir. 2007) ("[D]ressing up a claim for money as one for equitable relief will not remove the claim from Tucker Act jurisdiction and make it an APA case.").

Hum. Res., 763 F.2d at 1446). Thus, the APA does not waive sovereign immunity for the monetary relief that Plaintiffs seek.[15]

Because Plaintiffs cannot obtain the monetary relief they seek under the APA, they lack a legally cognizable interest in the outcome of their APA, Fifth Amendment, and statutory claims which must, therefore be dismissed. Article III of the Constitution permits courts to adjudicate only "actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317 (1988). There is no "'Case' or 'Controversy' for purposes of Article III—when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citations omitted). If a court determines that "the parties lack a legally cognizable interest in the outcome," *id.*, the court should dismiss the case under Federal Rule of Civil Procedure 12(b)(1).

Here, Plaintiffs lack a legally cognizable interest in the outcome of each of their claims because the only possible relief available is a refund of any amount that was, according to Plaintiffs, unlawfully charged. *See* Compl. ¶¶ 11-14, 40. The Plaintiffs request this refund along with a declaratory judgment that any fee for a CLN above $450 is unlawful. Compl., Prayer for Relief. But Plaintiffs' only interest in the declaratory judgment is as a basis for the requested refund; if a refund is unavailable, Plaintiffs have no otherwise cognizable interest in a declaratory judgment. Accordingly, Plaintiffs cannot seek declaratory relief merely because they "continue to dispute the lawfulness of the" renunciation processing fee. *Already, LLC*, 568 U.S. at 91. Thus, because the APA does not waive sovereign immunity for money damages, Plaintiffs lack a

[15] There is no separate monetary relief available through the Fifth Amendment or statutory claims because those claims must be analyzed under the APA's waiver of sovereign immunity as well. *See, e.g.*, *McKoy v. Spencer*, 271 F. Supp. 3d 25, 34 (D.D.C. 2017) ("[T]he APA provides a waiver of sovereign immunity for Plaintiff's First and Fifth Amendment claims, but that waiver does not apply to Plaintiff's request for money damages. To the extent Plaintiff requests money damages under those claims, those requests are dismissed.").

cognizable interest in any of their claims under the APA, and the Court should dismiss those claims.

IV. Plaintiffs' Claims Must Be Dismissed or Transferred Because Adequate Remedies Are Available in the Court of Federal Claims.

As discussed above, Plaintiffs' claims are barred by the statute of limitations and *res judicata*. Even if they were not, they must be dismissed or transferred because they can only properly be brought in the Court of Federal Claims.

Plaintiffs' claims are all premised on the APA's waiver of sovereign immunity. An APA claim is not valid, however, unless "there is no other adequate remedy in a court" for the claim the plaintiff brings. 5 U.S.C. § 704. "[T]he existence *vel non* of an adequate remedy 'is . . . an element of the cause of action created by the APA.'" *Astakhov v. U.S. Citizenship & Immigration Services*, --- F. Supp. 3d. ---, 2023 WL 6479080 at *6 (D.D.C. Oct. 5, 2023) (quoting *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 621 (D.C. Cir. 2017)). Here, the availability of review of Plaintiffs' claims in the Court of Federal Claims under the Tucker Act or the Little Tucker Act prevents Plaintiffs from bringing a valid APA claim.

As discussed above, Plaintiffs seek a refund along with a declaratory judgment that any fee for a CLN above $450 is unlawful. *See* Compl. at 13-14, Prayer for Relief. These remedies, or their reasonable equivalents, are available in the Court of Federal Claims under the Tucker Act or the Little Tucker Act.[16] The Court of Federal Claims can issue a declaratory judgment where such

[16] Whether the claims are brought under the Tucker Act or the Little Tucker Act makes no difference under the circumstances of this case. In a typical case, the Little Tucker Act adds options by permitting concurrent jurisdiction in federal district courts over suits seeking individual damages under $10,000. *See* 28 U.S.C. § 1346(a)(1); *see also Astakhov*, 2023 WL 6479080, at *7. The concurrent district court jurisdiction is not available to Plaintiffs. Plaintiffs are all non-U.S. residents, and the venue provision of the Little Tucker Act limits district court jurisdiction over

relief would be "incidental to and collateral to a claim for money damages," as it would be here. *Bobula v. U.S. Dep't of Just.*, 970 F.2d 854, 859 (Fed. Cir. 1992). It can also "review 'whether the challenged agency action is contrary to statute or devoid of administrative authority' to the same extent as a district court does in an APA case" and "affording the agency as much or as little deference as it would be entitled to in an APA suit." *Astakhov*, 2023 WL 6479080, at *6-7 (quoting *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1574 (Fed. Cir. 1996) (brackets omitted)). Where the Court of Federal Claims determines that the government has illegally exacted money from the plaintiffs, it can grant "a monetary award of the sum the Government improperly collected from [the plaintiffs]." *Id.* at *6. Thus, a claim brought under the Tucker Act or Little Tucker Act in the Court of Federal Claims would provide Plaintiffs "a judicial forum for [their] illegal-exaction claim and, consequently, for review of the challenged agency action." *Id.* at *7. Because the review in the Court of Federal Claims would be "no different from district-court review in an APA case," *id.*, Plaintiffs cannot bring their APA claims in district court, *see id.* at *8 (dismissing the plaintiff's APA claim for a refund of a fee allegedly unlawfully charged because the claim could be brought under the Tucker Act or Little Tucker Act instead with adequate remedies available). The Court should therefore dismiss all of Plaintiffs' claims or transfer them to the Court of Federal Claims.

Little Tucker Act claims to "the judicial district where the plaintiff resides." 28 U.S.C. § 1402(a)(1). Because none of the Plaintiffs reside in a judicial district in the United States, the only proper venue for their Little Tucker Act claims is in the Court of Federal Claims. *See, e.g.*, *Shaw v. United States*, 422 F. Supp. 339, 340 (S.D.N.Y. 1976) (finding that it was "clear . . . that venue d[id] not lie in th[e] district [court]" for a tax refund claim brought under 28 U.S.C. § 1346(a)(1) where the plaintiffs were not residents of the United States).

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion to dismiss Plaintiffs' Complaint or, in the alternative, transfer it to the Court of Federal Claims.

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Respectfully submitted,

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