UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

L'ASSOCIATION DES AMÉRICAINS ACCIDENTELS, ET AL. *Plaintiffs* *v.* **U.S. DEPARTMENT OF STATE, ET AL.** *Defendants.*	Civil Action No. 20-cv-3573-TSC **ORAL ARGUMENT REQUESTED PER LCvR 78.1**

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL DISMISSAL AND SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

> *Nature has given to all men the right of relinquishing the society in which birth or accident may have thrown them; and of seeking subsistence and happiness elsewhere; and it is believed that this right of emigration, or expatriation, is one of those inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive, or devest their posterity.*
>
> - *Murray v. McCarty*, 16 Va. 393, 396–97 (1811)

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INTRODUCTION

The right to voluntarily renounce American citizenship is a fundamental right, protected by the U.S. Constitution. From the founding of the Republic, the exercise of the right to voluntarily renounce citizenship was free of charge. More than two centuries later, in March 2010, the State Department placed a $450 price tag as a precondition upon the exercise of this right. Coincidentally, the fee was imposed at the same time the Foreign Account Tax Compliance Act[1] ("FATCA") went into effect — a bulk data collection program requiring foreign financial institutions to report to the Internal Revenue Service detailed information about the accounts of U.S. citizens living abroad. *See* Complaint, ECF 1, ¶¶131-144. Five years later, in 2015, the fee was inflated more than five times to its present $2,350 (the initial and augmented fees are referred to collectively as the "Renunciation Fee") - the highest such fee levied by any country on the planet. As a result, Plaintiffs are being effectively denied their fundamental right to expatriate.

In this lawsuit, Plaintiffs – twenty "Accidental Americans"[2] and the French-based organization, L'Association des Américains Accidentels – challenge the Renunciation Fee as a precondition to exercise the right to voluntarily renounce United States citizenship under 8 U.S.C. §1481(a)(5).[3] In their Complaint, Plaintiffs allege that by levying the $450 fee in the first place and then by increasing it more than 500%, Defendants have violated Plaintiffs' fundamental rights, under the Fifth Amendment's Due Process Clause (Count I), the First Amendment (Count II), and the Excessive Fines Clause of the Eighth Amendment (Count III). In addition to the constitutional issues, Defendants'

[1] Pub. L. No. 111-147, 124 Stat. 97 (2010) (*codified at* 26 U.S.C. §§1471–74, 6038D, and other scattered sections of Title 26).
[2] The term "Accidental American" describes individuals whom the U.S. deems to be American citizens as a result of having been born in the U.S., but who have lived abroad most if not all of their lives as citizens of another country. *See* Peter J. Spiro, *Citizenship Overreach*, 38 MICH. J. INT'L L. 167, 167 (2017) (defining "accidental Americans" as "those born with U.S. citizenship but lacking meaningful social connections to the United States in adulthood […]").
[3] Plaintiffs have Article III standing to bring this suit. *See Schnitzler v. United States*, 761 F.3d 33, 40 (D.C. Cir. 2014) and Complaint, ¶50. Defendants do not contend otherwise.

actions also run afoul of the Administrative Procedure Act ("APA"), 5 U.S.C. §706 (Count IV) and customary international law (Count V).

Defendants move to dismiss Counts III and V under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP") and for summary judgment on all Counts. ECF 11. Plaintiffs oppose the motion to dismiss and motion for summary judgment and cross-move for summary judgment on Counts I, II and V. For the reasons set forth below and in the accompanying exhibits and declarations, Defendants' Partial Motion to Dismiss and Motion for Summary Judgment should be denied, and Plaintiffs' Cross-Motion for Summary Judgment should be granted.

REGULATORY SCHEME

The regulatory background of the Renunciation Fee has been described in detail in the Complaint (¶¶98-123) and in the government's Memorandum of Law in Support of Summary Judgment. ECF 11-1. Here, we need only briefly describe the events leading up to the creation and increase of the Renunciation Fee.

In 2010, Defendants issued a Notice of Proposed Rulemaking, recommending imposing a $450 fee for renunciation under 8 U.S.C. §1481(a)(5). 75 Fed. Reg. 6321 (Feb. 9, 2010). This rule became final on February 2, 2012. 77 Fed. Reg. 5177 (Feb. 2, 2012), *codified at* 22 C.F.R. §22.1 (e-CFR, June 15, 2021). Prior to this time, renunciation was free of charge. *See* Complaint, ¶¶99-107.

On August 28, 2014, Defendants increased the fee for voluntary expatriation to $2,350 through an interim final rule. 79 Fed. Reg. 51247 (Aug. 28, 2014) (the "2014 IFR"). The 2014 IFR became final on August 25, 2015. 80 Fed. Reg. 51464 (Aug. 25, 2015) (the "2015 Final Rule"). *See* Complaint, ¶¶108-118.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT[4]

Counts I, II, and V primarily involve questions of law and should be decided by the Court without any deference to the government's legal arguments. *Nat'l Oilseed Processors Ass'n v. Occupational Safety & Health Admin.*, 769 F.3d 1173, 1179 (D.C. Cir. 2014) (court performs *de novo* review of any questions of law); *Bellion Spirits, LLC v. United States*, 393 F. Supp. 3d 5, 12 (D.D.C. 2019), *appeal filed*, No. 19-5252 (D.C. Cir., Sep 25, 2019) (same).

The only factual dispute on summary judgment concerns the government's justification for the exorbitant Renunciation Fee. To the extent that the adjudication of Counts I, II and V involve this factual determination, the standard of review would be similar to that discussed in Count IV (APA). See discussion below at Section IV.A.

ARGUMENT

I. THE RENUNCIATION FEE VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Under the Fifth Amendment Due Process Clause, no "person shall be […] deprived of life, liberty, or property, without due process of law." U.S. Const., amend. V. The Supreme Court has stated that the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests," *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), including rights not explicitly mentioned in the Constitution, such as the rights to marry, have children, direct the education and upbringing of one's children, marital privacy, use contraception, bodily integrity, and to abortion. *Id*. Government restrictions on fundamental rights are subject to strict

[4] The government has also moved to dismiss Counts III and V pursuant to FRCP 12(b)(6). Rule 12(b)(6) allows a defendant to move to dismiss the complaint for failure to state a claim upon which relief can be granted. *See* ECF 11-1, at 2. The standard of review for 12(b)(6) motions is well known and does not warrant further briefing here. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Plaintiffs, below, argue that the Complaint sufficiently states claims under Counts III and V.

scrutiny and will be stricken if they are not narrowly tailored to promote a **compelling government interest**. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000).

The threshold question in this lawsuit is whether the right to voluntarily renounce American citizenship is a fundamental right. In *Glucksberg*, the Supreme Court described its "established method of substantive-due-process analysis" as having two primary features:

> First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest.

Glucksberg, supra, at 702.

Accord, McDonald v. City of Chicago, 561 U.S. 742, 767 (2010); *see also Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 702 (D.C. Cir. 2007) (applying *Glucksberg* analysis to the question whether patients have a fundamental right to experimental drugs); *Hall v. Barr*, 2020 WL 6743080, at *6 (D.D.C.), *aff'd*, 830 Fed. App'x 8 (D.C. Cir. 2020) (applying *Glucksberg* analysis to the question whether right to ninety days' notice before execution is a fundamental right.); s*ee also Obergefell v. Hodges*, 576 U.S. 644, 663 (2015)[5] (applying a more flexible substantive due process analysis to the right of same-sex marriage).

[5] The *Obergefell* majority deviated from the *Glucksberg* analysis in several aspects. *Obergefell* attenuated the role assigned to history and tradition in substantive due process analysis and did not rely on the "carful description analysis from *Glucksberg*. *See* Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147 (2015). There is some debate among scholars regarding the effects (if any) of *Obergefell* on *Glucksberg*. *See* Mark P. Strasser, *Obergefell's Legacy*, 24 DUKE J. GENDER L. & POL'Y 61 (2016); Richard S. Myers, *Obergefell and the Future of Substantive Due Process*, 14 AVE MARIA L. REV. 54, 65-69 (2016). However, this debate is largely irrelevant for the present lawsuit because, unlike the right to same-sex marriage, the right at issue here is deeply entrenched in American history and jurisprudence. Since, as we show, the right to expatriate meets the more stringent standard laid down in *Glucksberg* and *McDonald,* it easily passes muster under the more flexible analysis adopted in *Obergefell.* For the approach taken by the D.C. Circuit to substantive due process following *Obergefell*, *compare Kirwa v. United States Dep't of Defense,* 285 F.Supp.3d 257, 275 (D.D.C. 2018)(D.C. Circuit has yet to address the substantive due process inquiry since *Obergefell*) *with Sobin v. District of Columbia,* 480 F.Supp.3d 210, 222 (D.D.C. 2020)(applying *Glucksberg* analysis to substantive due process claim).

Under *Glucksberg*, the Court must determine whether the right to voluntarily renounce American citizenship is **(1)** deeply rooted in the history and traditions of the American people; and **(2)** implicit in the concept of ordered liberty.[6]

A. The Right to Expatriate is Deeply Rooted in the Nation's History and Tradition

1. *The right to expatriate: from the American Revolution until 1868*

The right to voluntarily expatriate has long been recognized in America as a natural and fundamental right. Glenda Burke Slaymaker, *The Right of the American Citizen to Expatriate*, 37 AM. L. REV. 191, 192 (1903) (hereinafter: "Slaymaker").[7] In contrast, under British common law at the time of the Declaration of Independence, there was no right to expatriate because the bond between a sovereign and its subject was deemed to be a permanent bond established by the law of nature. *Id*. In rejecting the doctrine of perpetual allegiance, the authors of the Declaration of Independence proclaimed that they were "absolved from all Allegiance to the British Crown and that all political connection between them and the state of Great Britain is and ought to be totally dissolved." THE DECLARATION OF INDEPENDENCE (U.S. 1776). *See In re Look Tin Sing*, 21 F. 905, 906-907 (C.C.D.Cal. 1884) (The right to expatriate "would seem to follow from the greater right proclaimed to the world in the memorable document in which the American colonies declared their independence and separation from the British crown, as belonging to every human being,— God-given and inalienable,— the right

[6] *Glucksberg* and related decisions require that the liberty interest at issue be carefully described. 521 U.S. at 721; *Reno v. Flores,* 507 U.S. 292, 302 (1993); *McDonald v. City of Chicago*, *supra*, 561 U.S., at 797 – 799 (Scalia, J. concurring, elaborating upon the "careful description" requirement). The right to voluntarily renounce U.S. citizenship cannot be more precisely defined. *See Timbs v. Indiana,* 139 S.Ct. 682, 688 (2019)(describing the right against excessive fines as fundamental without further description). The government suggests that the right claimed is one to renounce citizenship free of charge. ECF 11-1 at 28. Plaintiffs make no such claim. The core right at issue in Count I is the right to expatriate voluntarily *vel non.* The Renunciation Fee is an abridgment of the fundamental right to expatriate which must be examined under the strict scrutiny standard.

[7] For a comprehensive review of American judicial decisions. legislation and state practice prior to 1906, *see generally* 3 John Bassett Moore, A DIGEST OF INTERNATIONAL LAW AS EMBODIED IN DIPLOMATIC DISCUSSIONS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS, INTERNATIONAL AWARDS, THE DECISIONS OF MUNICIPAL COURTS, AND THE WRITINGS OF JURISTS, §431 *et seq.* (Gov't Printing Office, 1906) (hereinafter: "Moore").

to pursue his own happiness.").

To build the new nation, the United States "had to counter both politically and philosophically the competing British claim that perpetual allegiance bound those born under the crown everlastingly to it." Nancy L. Green, *Expatriation, Expatriates, and Expats: The American Transformation of a Concept*, 114 AM. HIST. REV. 307, 311 (2009) (hereinafter: "Green"); Douglas Bradburn, *The Citizenship Revolution (Jeffersonian America)*. University of Virginia Press (Kindle Location 2355) (Kindle Edition 2009) (hereinafter: "Bradburn") ("In rejecting subjecthood for citizenship, many Americans rejected the very logic of filial allegiance, opening the way for a challenge to British models of expatriation.").

After the formation of the of the United States, leading jurisdictions incorporated the right to expatriate in their laws and constitutions explicitly. In Virginia, for example, the state legislature – echoing Thomas Jefferson – enacted "A Bill Declaring Who Should Be Deemed Citizens of This Commonwealth, 18 June 1779," recognizing that all men have a "natural right" to expatriate and providing a method for doing so.[8] Likewise, the Pennsylvania Constitution of 1776 asserted "that all men have a natural inherent right to emigrate from one state to another […] whenever they think that thereby they may promote their own happiness." Vermont and Kentucky followed suit. *See* Bradburn, at 2370. In this context, "emigration" and "expatriation" was identical. *Id. See also* 5 *Annals of Congress* 351 (1797) (statement of Representative Sitgreaves regarding a 1797 expatriation bill, mentioning Virginia statute and Pennsylvania Constitution, and stating that expatriation "was a favorite idea of a republican Government not to forbid it.").

[8] The full text of the statute can be found at: https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0055.

Recognizing that expatriation is a natural right, Congress, on three different occasions, in 1794, 1797, and 1818, attempted, unsuccessfully, to enact legislation which would have provided a uniform procedure to exercise the right. *See Afroyim v. Rusk*, 387 U.S. 253, 257 (1967).

Several federal cases during the early years of the Republic, demonstrate that expatriation was viewed as natural and inalienable right. For example, both *Henfield's Case,* 11 F. Cas. 1099 (C.C.D. Pa. 1793) and *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795) involved American-born citizens who claimed that they had expatriated themselves and were no longer U.S. citizens. In *Henfield's Case*, Henfield was accused of disobeying President Washington's declaration of neutrality. However, the jury, rejecting the trial judge's instructions, adopted the Jeffersonian rule and acquitted him. *See* Bradburn, at 2592-2593 for a detailed discussion. The acquittal was celebrated as a victory for those espousing the view that voluntary expatriation is a natural right. *Id*. In *Talbot v. Jensen*, the Supreme Court recognized a right of expatriation before concluding that the defendant in the case had failed to follow the correct procedures for renouncing U.S. citizenship. *But see Murray v. Schooner Charming Betsy, The*, 6 U.S. (2 Cranch) 64, 120 (1804) (where the Court avoided ruling on the question of the nature of the right to expatriate).[9]

The right to expatriate as a natural and fundamental right found support in an array of state court decisions. For example, in *Murray v. McCarty*, 16 Va. 393, 396–97 (1811), the Supreme Court of Appeals of Virginia explained that "[n]ature has given to all men the right of relinquishing the society in which birth or accident may have thrown them" and that expatriation "is one of those inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive, or devest [*sic*] their posterity." In that same case, Judge Roane, in a separate opinion, called the right to expatriate "one of paramount authority, bestowed on us by the God of Nature […]." *Id*., at 405. *See also Juando*

[9] The issue of voluntary expatriation was discussed later in *The Santissima Trinidad,* 20 U.S (7 Wheat.) 283, 347-348 (1822), where Justice Story, assumed without deciding, that "an American citizen may, independently of any legislative act to this effect, throw off his own allegiance to his native country… .").

v. Taylor, 13 F. Cas. 1179, 1181 (S.D.N.Y. 1818) ("In this country, expatriation is conceived to be a *fundamental right* […] It is constantly exercised, and has never in any way been restrained.)(Emphasis added); *and see Alsberry v. Hawkins*, 39 Ky. 177, 178 (1839).[10]

The rule laid down in the foregoing cases was also the policy of the federal executive branch, including opinions of the Attorney General and pronouncements by the President and Secretary of State.[11]

Early legal scholars, too, embraced expatriation as a natural right. *See, for example,* 2 St. George Tucker, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE, TO THE CONSTITUTION, AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, at 96-97 (Philadelphia, Birch & Small 1803) (describing the right of expatriation as a natural

[10] *Alsberry v. Hawkins*, 39 Ky. 177, 178 (1839):

> Whatever may be the speculative or practical doctrines of feudal governments or ages--allegiance, in these United States, whether local or national, is, in our judgment, altogether conventional, and may be repudiated by the native as well as adopted citizen, with the presumed concurrence of the government, without its formal or express sanction. Expatriation may be considered a practical and fundamental doctrine of America. American history, American institutions, and American legislation, all recognize it. It has grown with our growth and strengthened with our strength. The political obligations of the citizen and the interests of the Republic may forbid a renunciation of allegiance by his mere volition or declaration at any time and under all circumstances. And therefore, the government, for the purpose of preventing abuse and securing the public welfare, may regulate the mode of expatriation. But when it has not prescribed any limitation on the right, and the citizen has, in good faith, abjured his country, and become a subject or citizen of a foreign nation, he should, as to his native government, be considered as denationalized, especially so far as his civil rights may be involved, and at least so long as that government shall seem to acquiesce in his renunciation of his political rights and obligations. The right of an American citizen to emigrate, and renounce his allegiance to the government of the Union and of his State, is universally conceded. And whenever the right has been exercised, it is presumed to have been done with the concurrence of both governments, though without the express sanction of either.

[11] *See*, *e.g.*, Letter from T. Jefferson, Sec. of State, to G. Morris, Aug. 16, 1793 ("Our citizens are certainly free to divest themselves of that character of emigration and other acts manifesting their intention, and may then become subjects of another power, and free to do whatever the subjects of that power may do."), *quoted* in 3 Moore, at 562. 8 *Opinions of the Attorney General* 166 (1856) (Caleb Cushing) (the right to expatriate was "part of the fundamental public law of the United States."); *see also* 9 *Opinions of the Attorney General* 356 (1859) (Jeremiah Sullivan Black) ("The natural right of every free person […] the privilege of throwing off his natural allegiance and substituting another allegiance in its place- the general right, in one word, expatriation, is incontestable."). In 1859 President Buchanan took the position that the right to expatriate is implicit in the U.S. Constitution's grant of power to the Congress to establish a uniform rule for naturalization. U.S. Const., art. I, §8, cl. 4. *See* Letter from Lewis Cass, Sec. of State to Mr. Wright, Min. to Prussia, July 8, 1859, *quoted* in 3 Moore at 574.

right).[12] Notably, St. George Tucker adopted this view notwithstanding the fact that Blackstone himself had followed the British common law rule of perpetual allegiance.

2. *The right to expatriate: From 1868 to the present*

In 1868, Congress first codified the right to expatriate in an "Act Concerning the Rights of American Citizens in Foreign States," ch. 249, 15 Stat. 223 (1868), *codified* as a Note to 8 U.S.C. §1481 (the "Expatriation Act"). The preamble of the Act declares unequivocally:

> **Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness [...] Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic.**

(Emphasis added). The preamble, added to the draft bill, was no innovation. Rather it reflected the longstanding notion that voluntary expatriation was a natural, fundamental right of humankind.

Despite the clear and unambiguous language of the Expatriation Act, Defendants, in their Memorandum in Support of Summary Judgment, suggest without supporting authority, that the Court read the Act's preamble to apply only to "newly naturalized U.S. citizens" who wished "to divest themselves of their original nationality." *See* ECF 11-1, at 3. Defendants argue that the Expatriation Act did not apply to a natural-born U.S. citizen's right to renounce American citizenship. Defendants are plainly wrong.

First, the government's interpretation runs contrary to the plain language of the statute which provides that "the right of expatriation is a natural and inherent right of *all* people." (Emphasis added). Nothing in the language of the preamble or the remainder of the Act limits its application to naturalized

[12] While there is scant early authority adhering to the British common law rule of perpetual alliance [*i.e.*, *Williams' Case*, 29 F. Cas. 1330 (C.C.D. Conn. 1799); *Shanks v. Dupont*, 28 U.S. 242 (1830)], these decisions did not reflect American law. *See*, for example, statement of Representative Nathaniel Banks, *Cong. Globe*, 40th Cong., 2nd Sess. 832 (1868) ("But we do not recognize this as the law of this country. It is not the law of this country. It has never been sanctioned by a solemn adjudication. Whenever it has been alluded to in the courts of the United States it has always been cited as English law, and that class of judges who recognize English law existing at the time of the American Revolution have cited it as the inferential law of this country at this time, but never, I believe, declaring it to be American law.").

citizens seeking to renounce their foreign nationality. When the plain language of a statute is clear, the Court need make no further inquiry as to its meaning. *See* Nat'l Pub. Radio, Inc. v. F.C.C., 254 F.3d 226, 230 (D.C. Cir. 2001).

Second, Defendants' narrow interpretation runs counter to common sense. According to Defendants' interpretation, only naturalized U.S. citizens have a right to renounce their former citizenship. American-born individuals, however, do not have any right,[13] let alone a natural right, to renounce their U.S. citizenship. Defendants fail to understand that, as a natural right, expatriation does not depend on whether the individual is a naturalized American wishing to renounce his foreign citizenship or a natural-born American wishing to accomplish the same result. *Ex parte Griffin*, 237 F. 445, 448 (N.D.N.Y. 1916) (recognizing that expatriation, as a natural right, must apply to both naturalized and U.S.-born individuals); *see also* Justice Iredell's statement in *Talbot v. Jansen*, *supra,* 3 U.S. (3 Dall.), at 162 (noting that a natural right has general application).

Third, the legislative history supports Plaintiffs' interpretation of the Expatriation Act. On January 29, 1868, Nathaniel Banks, the then-chairman of the House Committee on Foreign Affairs, introduced the bill that eventually became the Expatriation Act. Ironically, Banks' bill did not at first expressly refer to the right of expatriation, an omission that immediately provoked controversy within his Committee. When asked why he did not include a voluntary expatriation provision in the bill, Mr. Banks explained that including an explicit guaranty would imply that expatriation was a new right, a law only because Congress said so, as opposed to a natural right mandated by God.[14] Lucy E. Sayler,

[13] According to Defendants, ECF 11-1 at 3, the right to expatriate voluntarily exists solely by virtue of statute. Under their erroneous interpretation, the 1868 Expatriation Act did not apply to the renunciation of U.S. citizenship. Consequently, the right to expatriate voluntarily came into existence only when Congress passed the Nationality Act of 1940. This too, is incorrect. *See* discussion below.

[14] *See* also statement by Representative Godlove Orth of Indiana, *Cong. Globe*, 40th Cong. 2nd Sess., (1868), at 1103.

> We want no mere declaration of principle. We do not desire in the ninety-second year of our national existence to reaffirm the principle which lies at the foundation of our Government. With what favor would a bill be received by this House from the Committee on the Judiciary declaring every American citizen has a right to life? Suppose your Judiciary Committee were to introduce a bill here stating every American citizen is entitled to his liberty?

Under the Starry Flag: *How a Band of Irish Americans Joined the Fenian Revolt and Sparked a Crisis over Citizenship*, Harvard University Press (Kindle Locations 3320-3322) (Kindle Edition 2018) (hereinafter: "Salyer"). The Court will note that this is precisely the argument made by Defendants, namely that the right of expatriation exists by reason of statute only. *See* ECF 11-1, at 3.

Other members of Congress, however, insisted that the Act include a reaffirmation of the natural right of expatriation. On February 11, 1868, Representative Jehu Baker of Illinois gave a thorough summary of American jurisprudence regarding the right of U.S. citizens to voluntarily expatriate. According to Baker, what America needed was a "formal and explicit appeal to the great natural right of expatriation […] grouped together with the natural rights of life, liberty and the pursuit of happiness […]". *Cong. Globe*, 40th Cong., 2nd Sess. 1101 (1868).[15]

Finally, on February 20, 1868, Chairman Banks reintroduced his revised bill which included the above-quoted preamble which ultimately became law. As Lucy Salyer notes, the revised bill "spoke in sweeping terms of the obligation of the American government to protect all citizens, naturalized and native-born, without any exceptions […]" Salyer, Kindle Locations 3531-3532. Congress clearly intended that the purposes in including the preamble in the Act was to clarify beyond any doubt that the right to voluntarily expatriate was enjoyed both by native born Americans as well has naturalized citizens.

> […] Would we entertain it for a moment? Not at all. Our answer would be that those are principles which our ancestors declared to be 'self-evident' when they were engaged in the glorious work of founding this Republic […] Hence there is no necessity for a declaration of the right of a man to expatriate himself and it is too late for this Government to-day to place upon its statute-book such a declaration and then have the Governments of Europe taunt us by saying 'it was not till 1868 that you placed that declaration on your statute-book,' ignoring all past history on the subject, and starting out, as it were, from a new stand-point, upon a principle which we contend is as old as the American nation itself.

[15] *See also* statement by Representative Ashley, *id*., 1101-1102 ("I want a provision in the bill affirming the right of expatriation for all American citizens […] To this doctrine, the offspring of feudalism, the American people object […] We ask for the citizens and subjects of all Governments the same rights we concede to our own […]".

Fourth, Defendants' reading of the Expatriation Act in inconsistent with the judicial gloss on the Act. In *Savorgnan v. United States*, 338 U.S. 491 (1950), the Supreme Court specifically noted that the language of the Expatriation Act is "broad enough to cover, and does cover, the corresponding natural and inherent right of American citizens to expatriate themselves." *Id*., fn. 11. The Court observed that

> [t]raditionally the United States has supported the right of expatriation as a natural and inherent right of all people. Denial, restriction, impairment or questioning of that right was declared by Congress, in 1868, to be inconsistent with the fundamental principles of this Government.

See also United States v. Wong Kim Ark, 169 U.S. 649, 704 (1898) ("the right of expatriation […] must be considered […] a part of the fundamental law of the United States" [referring to the 1868 Expatriation Act and the renunciation of American citizenship]); *see also Charles Green's Son v. Salas*, 31 F. 106, 112–13 (C.C.S.D.Ga. 1887) (citing the 1868 Expatriation Act and stating, in relation to a native-born American's expatriation, that "[i]n this country expatriation is a fundamental right."); *In re Look Tin Sing*, *supra*, 21 F., at 907-908[16] (applying the Expatriation Act to U.S.-born citizens.).[17]

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[16] *In re Look Tin Sing* dealt with the interpretation of the Fourteenth Amendment in relation to a Chinese petitioner who was born in California. In its opinion the court declared:

> The United States recognize the right of everyone to expatriate himself and choose another country. This right would seem to follow from the greater right proclaimed to the world in the memorable document in which the American colonies declared their independence and separation from the British crown, as belonging to every human being,— God-given and inalienable,— the right to pursue his own happiness. The English doctrine of perpetual and unchangeable allegiance to the government of one's birth, attending the subject wherever he goes, has never taken root in this country, although there are judicial dicta that a citizen cannot renounce his allegiance to the United States without the permission of the government under regulations prescribed by law; […] But a different doctrine prevails now.

21 F. at 906-907.

[17] *See also Boyd v. Nebraska*, 143 U.S. 135, 161 (1892) ("We do not understand the contention to involve, directly, a denial of the right of expatriation, which the political departments of this government have always united in asserting […]"); *see also Briehl v. Dulles*, 248 F.2d 561, 583 (D.C. Cir. 1957) (the "Supreme Court has held that the Citizenship Act of 1907 and the Nationality Act of 1940 are to be read in the light of the declaration of policy favoring freedom of expatriation which stands unrepealed.") (internal citations omitted), *rev'd sub nom*. *Kent v. Dulles*, 357 U.S. 116 (1958); *Ex parte Griffin*, *supra*, 237 F.(applying the Expatriation Act to U.S.-born citizens); *United States v. Husband*, 6 F.2d 957, 958 (2d Cir. 1925) (same); *Est. of Lyons v. Comm'r*, 4 T.C. 1202, 1205 (1945) (applying the Act to expatriation of U.S. citizenship); *Kawakita v. United States*, 190 F.2d 506, 511 (9th Cir. 1951), *aff'd*, 343 U.S. 717 (1952) (same); *Browne v. Dexter*, 66 Cal. 39, 40 (1884) (holding that individual voluntarily expatriated and was not a U.S. citizen.).

The Executive Branch of the federal government consistently interpreted the Expatriation Act as applying with equal force to U.S.-born as well as naturalized American citizens. Thus, U.S. Attorney General George Williams, speaking for the Grant Administration, shortly after the Expatriation Act was enacted, opined that the "affirmation by Congress, that the right of expatriation is a 'natural and inherent right of all people' includes citizens of the United States as well as others and the executive should give to it that comprehensive effect." 14 *Opinions of the Attorney General*, 295, 296 (1873).[18]

Post-Expatriation Act legislation and government action further demonstrate that the right to voluntarily renounce citizenship is a deeply rooted American principle. Congress provided a uniform procedure for exercising the natural right of voluntary expatriation for the first time in the 1940 Nationality Act, Pub. L. 76-853, 54 Stat. 1137 (the "Nationality Act"). This statute largely codified the existing law of expatriation as it had been implemented by the executive branch for decades. *See* Jonathan David Shaub, *Expatriation Restored*, 55 HARV. J. ON LEGIS. 363, 398 (2018) (noting that the voluntary renunciation provision in the Nationality Act was a codification of existing law). Notably, the Nationality Act retained the preamble of the 1868 Expatriation Act.

The right to voluntarily renounce citizenship continues to be recognized in current legislation adopted as Section 349 of the Immigration and Nationality Act ("INA"), Pub. L. 89–236, 79 Stat. 911, *codified at* 8 U.S.C. §1481(a)(5), enacted in 1952. The preamble to the 1868 Expatriation Act remained part of the INA, now *codified* as a Note to 8 U.S.C. §1481. These statutes did not create the right to expatriate, as the government contends. Rather, these rules simply provided a uniform procedural

[18] *See also* Letter from Thomas F. Bayard, Sec. of State, to Col. Frey, Swiss min., May 20, 1887, *quoted* in Moore at 584:
> This Government maintaining the doctrine of voluntary expatriation has always held that its citizens are free to divest themselves of their allegiance by emigration and other acts manifesting an intention to do so […] This doctrine applies as well to native-born as to naturalized citizens […].

framework by which an individual could exercise the fundamental right in a manner reminiscent of that that set forth in the 1779 Virginia expatriation law discussed above.

Courts have also continued to view the right of expatriation as a natural and fundamental right. *See* Afroyim v. Rusk, *supra*, 387 U.S., at 258 (stating that by 1818, "no one doubted the existence of the right of voluntary expatriation […]"); Richards v. Sec'y of State, 752 F.2d 1413, 1422 (9th Cir. 1985) ("[…] expatriation has long been recognized as a right of United States citizens, not just as a limitation on citizens' rights.").[19]

Despite Defendants' protestations in the present case, contemporary practice of the State Department (the Renunciation Fee excepted) is consistent with over two centuries of United States expatriation policy. In 1998, for example, the U.S. government submitted responses to the United Nations' Commission on Human Rights, pursuant to its resolution 1998/48 of 17 April 1998, entitled "Human rights and arbitrary deprivation of nationality." In its response, the State Department emphasized that the United States "has recognized the right of expatriation as an inherent right of all people." U.N. Secretary General, Rep. on Human Rights and Arbitrary Deprivation of Nationality, ¶ 39, U.N. Doc. E/CN.4/1999/56 (Dec. 28, 1998) (citing response from the United States (Oct. 9, 1998). *See also* 7 FAM 1290(e), App'x "A", "Later Twentieth Century Developments," (where the State Department notes unequivocally: "The United States has recognized the right of expatriation as an inherent right of all people.").

In sum, actions by the executive, judiciary, and the legislature since the founding of the Republic demonstrate that the right to voluntarily expatriate is deeply rooted in our society as "old as the American nation itself." *Cong. Globe*, 40th Cong., 2nd Sess. 1103 (1868) (statement by Rep. Godlove Orth). *See also* Michelle Leigh Carter, *Giving Taxpatriates the Boot-Permanently?: The*

[19] *See also* the post-1868 cases cited above, at pg. 12.

Reed Amendment Unconstitutionally Infringes on the Fundamental Right to Expatriate, 36 GA. L. REV. 835, 853 (2002) (stating that "the strongest argument for endorsing expatriation as a fundamental right is the history and tradition of expatriation in the United States."). In point of fact, the government concedes the historical venerability of the right to expatriate in the American experience. *See* 7 FAM 1200, App'x "A" (where the State Department notes that the right to expatriate has "deep historical roots.").

B. The Right of Expatriation is Implicit in the Concept of Ordered Liberty

Not only is the right to voluntarily expatriate deeply rooted in our society, but it is also implicit in the concept of ordered liberty. The Due Process Clause "specially protects those fundamental rights and liberties which are, […] implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, *supra*, 495 F.3d, at 702 [*quoting Washington v. Glucksberg*, *supra*, 521 U.S., at 720–21]. *See Timbs v. Indiana*, *supra*, 139 S. Ct., at 689 (Protection against excessive punitive economic sanctions secured by the [Excessive Fines] Clause is … both "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition.)." As clearly stated in the Expatriation Act, the right to expatriate is "indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness."

The right to expatriate is necessary for liberty and justice both by its own virtue and because of its inherent connection to other protected liberties. An individual's right to voluntarily dissolve his allegiance with the United States serves to protect her personal liberty. As Slaymaker explains, at 192:

> The function of society is to overcome defects in individual existence, and when social, political or other environment ceases to conduce to the good of the individual, then it is that the individual may seek the society which can afford him what the conditions of his welfare and his happiness demand. It is a natural right, included within the larger right of the - pursuit of happiness which the fathers of this nation have declared to be inalienable.
> (internal quotations omitted).

In *Afroyim v. Rusk*, *supra*, 387 U.S., the Supreme Court, speaking through Mr. Justice Black, explained the central importance of citizenship under the Constitution and, in particular, under the Citizenship Clause of the Fourteenth Amendment, U.S. Const., amend. XIV, cl. 1.[20]

> There is no indication in these words of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time. Rather the Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit.

Afroyim v. Rusk, *supra*, 387 U.S., at 262.

Citizenship is the bedrock upon which other fundamental rights protected by the Constitution are predicated. As Chief Justice Warren stated in *Trop v. Dulles*, 356 U.S. 86, 102 (1958) "the expatriate has lost the right to have rights." "Citizenship," as the *Afroyim* Court declaimed, "is no light trifle [...]". The United States Constitution grants a citizen a constitutional right "to remain a citizen in a free country, *unless he voluntarily relinquishes that citizenship.*" *Afroyim v. Rusk*, *supra*, 387 U.S., at 268 (Emphasis added). Logically, the government can no sooner deprive a citizen of the right to renounce citizenship than to deprive him of the right of citizenship in the first instance. For without the right to relinquish citizenship – that is the right to disassociate with the American political system and social fabric – the right to citizenship itself (the "mother of all rights"), loses all meaning.

The right to voluntarily expatriate is also inherently linked to other fundamental rights such as the right to emigrate and international travel. *See* statement of Representative Nathaniel Banks, *Cong. Globe*, 40th Cong., 2nd Sess. (1868), at 832 (linking the right to emigrate to the right to expatriate); *Alsberry v. Hawkins*, *supra*, 39 Ky., 178 (same); *cf. Kent v. Dulles*, 357 U.S. 116, 125 (1958) ("right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment."); *Aptheker v. Secretary of State*, 378 U.S. 500, 505–508 (1964)

[20] The Citizenship Clause provides in relevant part: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

(limitations on right to international travel are inconsistent with Due Process Clause); *Califano v. Aznavorian,* 439 U.S. 170, 176 (1978) (international travel has been considered to be an aspect of the liberty protected by the Due Process Clause of the Fifth Amendment).

As Plaintiffs aver in Count II of their Complaint, the right to renounce citizenship is also linked to an individual's right to free speech. Historically, expatriation has been invoked as an expressive act, reflecting the renunciant's position regarding her association with the American body politic. For example, many Japanese Americans who were placed in internment camps during World War II elected to renounce their U.S. citizenship as an "expression of momentary emotional defiance in reaction to years of persecution." Minoru Kiyota, *Beyond Loyalty: The Story of a Kibei*, at 129. (University of Hawaii Press 1997).[21]

Liberty and justice both require, therefore, that this Court place the right of voluntary expatriation on the same level as "life, liberty, and the pursuit of happiness." The constitutionality of the Renunciation Fee should and must be scrutinized through the lens of the fundamental right to voluntarily expatriate. *See* William Thomas Worster, *The Constitutionality of the Taxation Consequences for Renouncing U.S. Citizenship*, 9 FL. TAX REV. 11 (2010) (arguing that voluntary expatriation is a fundamental right).

In their Memorandum in Support of Summary Judgment, Defendants cite several authorities in support of the proposition that the right to voluntary expatriation is not and should not be considered fundamental. Upon closer inspection, these authorities are misplaced. *First*, most of the cases cited by Defendants deal with claims by prisoners within the U.S. who sought to expatriate, challenging the in-person interview requirement set forth in the State Department's Foreign Affairs Manual. ECF 11-

[21] Similarly, Juan Mari Brás' renunciation of his U.S. citizenship in 1994 was an exercise of freedom of speech. By rejecting United States citizenship, "Mari Brás sought to spread his very own view of his pro-independence ideal for Puerto Rico, to express his objection to a citizenship he believes was unlawfully imposed, and to affirm his belief that Puerto Rico is a nation and his sole homeland." *Ramirez de Ferrer v. Mari Bras*, 144 D.P.R. 141, 1997 WL 870836 (S. Ct. P.R., Nov. 18, 1997) (translated from the Spanish). *See also* the discussion below in Section II concerning Count II.

1, at 27-28, citing Farrell v. Pompeo, 424 F. Supp. 3d 1 (D.D.C. 2019), *app. filed* No. 19-5357 (D.C. Cir., Dec 19, 2019); Kwok Sze v. Johnson, 172 F. Supp. 3d 112, 121 (D.D.C. 2016), *aff'd sub nom.* Kwok Sze v. Kelly, No. 16-5090, 2017 WL 2332592 (D.C. Cir. Feb. 21, 2017); Scott v. United States, 2014 WL 2807652 (E.D. Cal. June 20, 2014); Tutora v. U.S. Att'y Gen. for E. Dist. of Pennsylvania, 2017 WL 2126321 (E.D. Pa. May 16, 2017).[22] In some of these cases, the court skirted the issue by *assuming* voluntary expatriation *is* a fundamental right, yet concluding that the right was not restricted (such as Farrell v. Pompeo, *supra*). In some cases, the court has held that the citizen had failed to follow the prescribed procedures for expatriation. *See* Talbot v. Jansen, 3 U.S. (3 Dall.), *supra.* Lozada Colon v. U.S. Dep't of State, 2 F. Supp. 2d 43, 45 (D.D.C. 1998), cited by Defendants, is such an example. In other cases, the court has held that an *incarcerated* U.S. citizen has no constitutional right to renounce his U.S. citizenship *during* the course of his imprisonment (such as Kwok Sze v. Johnson, *supra*). Convicted felons are often denied a wide range of fundamental constitutional rights. *Cf.* Richardson v. Ramirez, 418 U.S. 24 (1974) (state has the power to disenfranchise persons convicted of a felony without running afoul of the Fourteenth Amendment). Here, however, Plaintiffs are neither incarcerated, nor do they challenge the in-person requirement.

In sum, no authority cited by Defendants supports their contention that the right to voluntarily expatriate is not or should not be recognized as a fundamental constitutional liberty.

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[22] Defendants cite to fn. 6 of Tutora v. U.S. Att'y Gen. for E. Dist. of Pennsylvania where the court noted that the "right to renounce is based in statute and is not rooted in the Constitution." Defendants, however, omit the remainder of the footnote which refers to Vance v. Terrazas, 444 U.S. 252, 265 (1980). The complete text of the footnote is as follows:

> The right to renounce is based in statute and is not "rooted in the Constitution." *See Vance v. Terrazas*, 444 U.S. 252, 265 (1980) ("*Nishikawa* [Nishikawa v. Dulles, 356 U.S. 129 (1958)] was not rooted in the Constitution.").

The complete text of the footnote shows that the court in Tutora misunderstood the Nishikawa and Terrazas cases. These two cases simply stand for the proposition that Congress is empowered to "prescribe the evidentiary standards to govern expatriation proceedings." When the Terrazas Court noted that "Nishikawa was not rooted in the Constitution" it was simply stating that the evidentiary guidelines set down in Nishikawa do not stem from the Constitution and that Congress can regulate these matters. Nothing in these cases stand for the proposition that the right to voluntarily expatriate is not constitutionally protected. The power of Congress to adopt procedures to effect expatriation is not in dispute.

C. The Renunciation Fee is Not Necessary to Further a Compelling Government Interest

Because the right to voluntarily expatriate is a fundamental right, any governmental burden on its exercise can be justified only if the infringement "is narrowly tailored to serve a compelling state interest." *Am. Fed'n of Gov't Emps., AFL-CIO v. United States*, 330 F.3d 513, 523 (D.C. Cir. 2003), *quoting Reno v. Flores*, *supra*, 507 U.S., at 302.

Here, the government has sought to legitimize the introduction and increase in the Renunciation Fee based on a cost-of-service analysis pursuant to a government wide policy that requires agencies to be self-sustaining. Complaint, ¶¶98-123; ECF 11-1, at 8-13. Even assuming, for argument's sake, that the government's economic analysis is accurate (which, as we explain below is not the case), this budgetary concern is not a "compelling interest" and therefore may not be used to justify the abridgement of the fundamental right to expatriate. Courts have routinely held that fiscal integrity or financial considerations are not "compelling" interests for purposes of strict scrutiny analysis. *See Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 263-68 (1974) (holding that maintaining fiscal integrity is not a compelling state interest); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) (cost saving is not a compelling interest); *Boddie v. Connecticut*, 401 U.S. 371, 382 (1971) (holding that a filing fee for divorce cases violated due process); *see also Price v. Barr*, 2021 WL 230135, at *11 (D.D.C. Jan. 22, 2021) (governmental need to raise revenue is not a compelling interest); *see also* Juan Esteban Bedoya, *Price Tags on Citizenship: The Constitutionality of the Form N-600 Fee*, 95 N.Y.U. L. REV. 1022, 1051 (2020) ("The Constitution should prioritize more important values over cost recoupment.").

Moreover, there is no statute or other source of authority that compels the government to impose a fee on voluntary renunciation. At no time has Congress directed the government to charge a fee for the exercise of the natural right to expatriate. Defendants refer to the Independent Offices Appropriations Act ("IOAA") of 1952, 65 Stat. B70, *codified* at 31 U.S.C. §9701 as the source of their

authority to impose and subsequently increase the Renunciation Fee. 31 U.S.C. §9701 provides that an agency "***may***" prescribe regulations establishing the charge for a service. *See* ECF 11-1, at 6-8.[23] The congressional intent underlying 31 U.S.C. §9701 is that "each service or thing of value provided by an agency […] is to be self-sustaining ***to the extent possible***." 31 U.S.C. §9701(a). Nothing in the IOAA requires Defendants to recoup the costs associated for a service in all circumstances. Government agencies have discretion when deciding whether or not to levy a fee.

Significantly, prior to 2010 the government never charged anything for the right to renounce citizenship for over 200 years. Even after the enactment of the IOAA, the government did not assess any charge for renunciation for nearly seven decades. Moreover, after 2010 and the passage of FATCA, a decision was made to collect a fee for voluntary expatriation, the government chose not to recoup the full cost of the service "in order to lessen the impact on those who need this service and not discourage the utilization of the service." 75 Fed. Reg. 36522 (June 28, 2010); Complaint, ¶105. Because the IOAA by its own terms does not require an imposition of a user-fee in all cases and allows for agency discretion and because the agency itself for years elected not to impose a fee, the justification relied upon by the government cannot be deemed compelling.

Defendants have also failed to establish that the imposition and subsequent increase of the fee was ***necessary*** to further the asserted interest under the IOAA. As described below in the APA section of this Brief (Section IV), Defendants' contention that they must spend substantial amounts of time to accept, process, and adjudicate 8 U.S.C. §1481(a)(5) cases is belied by the fact that the procedures under this statute are, in fact, simple, short, and straightforward.

In addition, Defendants cannot show that the Renunciation Fee is "narrowly tailored" because there are obvious less-infringing alternatives to recoup any alleged costs. For example, could have

[23] In their brief, Defendants also cite to 22 U.S.C. §4219 and Exec. Order No. 10718, 22 Fed. Reg. 4632 (1957) as authority to impose the Renunciation Fee. *See* also AR-16. The Due Process analysis is equally applicable whether Defendants' source of authority is the IOAA, 22 U.S.C. §4219 or Exec. Order 10718.

asked Congress to appropriate more money to finance the renunciation process. *See* AM. IMMIGRATION LAWYERS ASS'N, AILA ISSUE PAPER: IMMIGRATION AND THE DEPARTMENT OF HOMELAND SECURITY 4 (2004) ("AILA long has supported direct congressional appropriations to supplement the user fees that almost totally fund the USCIS today."), available at https://www.aila.org/File/DownloadEmbeddedFile/40618. Other alternatives not considered by Defendants include **(1)** making the process more efficient; **(2)** a fee scale or fee waiver program in which the State Department considers the renunciant's financial ability to pay;[24] and **(3)** a "premium process service" ("PPS").[25] *See* Complaint, at pg. 57, fn. 46. Nothing in the Administrative Record suggests that these alternatives were even considered by Defendants.[26]

Last, the Renunciation Fee is not narrowly tailored because the government does not make any distinction between simple, straightforward voluntary renunciation cases under 8 U.S.C. §1481(a)(5) and the more complicated relinquishment cases under 8 U.S.C. §1481(a)(1)-(4), (6). *See* *Price v. Barr*, *supra*, at *12 (overinclusive permit fee regime that fails to distinguish between applicants is not considered narrowly tailored.).

In their Memorandum in Support of Summary Judgment, the government cites to *Cox v. New Hampshire*, 312 U.S. 569 (1941) and *Kwong v. Bloomberg*, 723 F.3d 160 (2d Cir. 2013) for the proposition that courts "have routinely upheld fees that are directly tied to the administrative burden on the government caused by an individual's exercise of rights." ECF 11-1, at 29. *Cox* and *Kwong*, however, merely stand for the proposition that states may charge fees for exercising First and Second

[24] *See* Form I-912, Request for Fee Waiver, https://www.uscis.gov/i-912 and www.uscis.gov/forms/filing-fees/additional-information-on-filing-a-fee-waiver.

[25] Currently, only two forms/processes are eligible for PPS- Form I-129, Petition for a Nonimmigrant Worker, and Form I-140, Immigrant Petition for Alien Worker. PPS refers to a system whereby applications are processed within a shorter time in exchange for a higher fee. PPS is a major source of revenue. See U.S. Citizenship and Immigration Services Fee Schedule, 81 Fed. Reg. 73,292, 73,309 (Oct. 24, 2016) ("forecasted premium processing revenue is sufficient to cover the projected costs of providing the premium service and other permissible infrastructure investments.").

[26] Plaintiffs here do not concede in any way that such alternatives would necessarily cure the constitutional defect. However, Defendants have not even considered these arrangements when promulgating the Renunciation Fee.

Amendment rights "to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed." *Cox v. New Hampshire*, 312 U.S., *supra*, at 577. Both *Cox* and *Kwong* dealt with licensing fee regimes (in the context of the First and Second Amendments) aimed at curbing secondary effects- *i.e.*, public order, crime, prostitution, abuses of solicitors, etc. *Cox* and *Kwong* do not grant the government a blank check to charge fees as a condition to the exercise of a constitutional right. Indeed, the government's invocation of *Cox* and *Kwong* to justify the $2,350 Renunciation Fee is difficult to square with the longstanding rule that the government may not "impose a charge for the enjoyment of a right granted by the federal constitution." *Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 113 (1943). There, the Court concluded that the license fee was invalid because it was not "a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question." The Court in *Murdock* distinguished its ruling with its prior ruling in *Cox* where the "fee was imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors."

The present case is more like *Murdock* than *Cox* because the Renunciation Fee has not been imposed to defray expenses of secondary effects upon the public. Voluntary renunciation does not cause any such secondary effects and the government has not argued otherwise. Moreover, *Murdock* dealt with a flat fee, just like the Renunciation Fee. In contrast, the *Cox* Court upheld the constitutionality of a fee license regime which had a "range from $300 to a nominal amount." *Id*., at 576.[27]

The facts of this case demonstrate that the $2,350 fee is prohibitive and exclusionary because Plaintiffs have yet to exercise their right to renounce due to the exorbitant fee. Complaint, ¶¶21-40;

[27] *Cox* and *Kwong* are also irrelevant to Count I – a claim based on the Fifth Amendment – because they deal with licensing fees imposed as conditions to exercise First and Second Amendment rights. The Supreme Court has not applied *Cox* in the Fifth Amendment context. *Cf. United States v. Cox*, 906 F.3d 1170, 1187 (10th Cir. 2018) (where government noted that *Cox* and *Murdock* have only been applied in First Amendment context).

see also accompanying Declarations by Plaintiffs. By contrast, in Kwong, the court found that the fee was "not prohibitive or exclusionary as applied" to the plaintiffs "because they all were able to obtain the residential handgun licenses that they sought." *Id*., at 166-167.

Last, Cox, Kwong and their progeny are also inapplicable because, here, the government attempts to justify the fee by the rise in ***volume*** of voluntary renunciation applications. ECF 11-1, at 29. Nothing in Cox suggests that the government can take into consideration the volume of applications when assessing license or other types of fees, especially when the increase in volume is the direct result of government action, *i.e*., FATCA. *See* Complaint, ¶133. If anything, the rise in the volume of applications is an indication of the importance and the benefit of the service to Americans which was clearly disregarded by the government when creating and increasing the fee.

The Renunciation Fee imposed on individuals wishing to exercise their right to expatriate does not further a compelling government interest, is not narrowly tailored and, therefore, fails to pass muster under strict scrutiny analysis. Accordingly, the government's Motion for Summary Judgment on Count I should be denied and summary judgment in favor of Plaintiffs should be entered. *See* also Allison Christians, *A Global Perspective on Citizenship-Based Taxation*, 38 MICH. J. INT'L L. 193, 241 (2017) ("The imposition of a fee to renounce expressly appears to violate the fundamental right that everyone has to leave their nationality.").

II. THE RENUNCIATION FEE VIOLATES THE FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH

The First Amendment to the United States Constitution provides: "Congress shall make no law […] abridging the freedom of speech […]" U.S. Const., amend. I. Restrictions that implicate First Amendment rights are categorized as either content-based or content-neutral. Content-based restrictions — "regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content"—are subject to strict scrutiny. Reed v. Town of Gilbert, Ariz., 576 U.S. 155,

163 (2015) (burdening "speech because of the topic discussed or the idea or message expressed" is subject to "strict scrutiny.").

Plaintiffs have asserted that the act of renouncing one's citizenship is "speech" for First Amendment purposes. Complaint, ¶180. Plaintiffs have also argued that the Renunciation Fee is a content-based restriction and, therefore, subject to strict scrutiny. *Id*., ¶182. Alternatively, Plaintiffs have alleged that the Renunciation Fee would fail to pass constitutional muster even under a lesser form of scrutiny. *Id*., ¶187.

A. The Act of Renunciation is "Speech" for First Amendment Purposes

Renunciation of one's citizenship involves both conventional speech and expressive conduct. It is speech because it involves the taking of a renunciation oath by virtue of which an individual's United States' citizenship is terminated. Renunciation is also expressive conduct because it seeks to terminate one's citizenship, the quintessential "speech act."[28] While one may not necessarily agree with their political or philosophical perspectives, Plaintiffs, through the act of renunciation, wish to express their disillusionment with what they consider to be the U.S. government's unfair, arbitrary and discriminatory policies and laws affecting them. Some of the Plaintiffs wish to give vent to their political ideologies by renouncing their affiliation with the American body politic. Complaint, ¶¶ 20-40; ¶¶148-157 and *see* accompanying Declarations. Accordingly, there can be little doubt that the act of renouncing one's citizenship is "speech" for purposes of the First Amendment; no different than the "pledge of allegiance." [*Newdow v. U.S. Cong*., 328 F.3d 466, 489 (9th Cir. 2003) (analyzing First Amendment challenges to the "pledge of allegiance."), *rev'd sub nom. on different grounds Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004)]; *see also United States v. Caputo*, 201 F. Supp. 3d 65, 71 (D.D.C. 2016) (act of jumping over White House fence to make symbolic point is

[28] *See* Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 55 (1989).

"communicative in nature" within the scope of the First Amendment). Defendants do not appear to argue otherwise (*see* ECF 11-1, at 30-31 where the government merely questions the expressive nature of renunciation).

B. The Regulations Establishing and Increasing the Renunciation Fee are Content-Based and do not Satisfy Strict Scrutiny Analysis

Defendants contend that the Renunciation Fee is not a content-based regulation because it is unrelated to suppressing speech. ECF 11-1, at 31. Defendants ignore, however, the long line of cases in which the Supreme Court has "struck down statutes as being impermissibly content-based even though their primary purpose was indubitably content neutral." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 679 (1994). Here, in the context of expatriation, the highly expressive nature, historical pedigree, the legal consequence bestowed upon the renunciant, and the uniqueness of voluntary expatriation suggest that the imposition of a burdensome financial condition upon its exercise is necessarily content-based. Both historically and in modern times, renunciation of citizenship has been used by individuals to express their disillusionment with their sovereign. *See Kaufman v. Nielsen*, 896 F.3d 475 (D.C. Cir. 2018) (plaintiff wished to renounce citizenship in act of protest); *Schnitzler v. United States*, *supra*, 761 F.3d (same); *see also above,* pg. 16-17; *see also* Complaint, ¶¶146-147. *Cf.* David B. Cruz, *"Just Don't Call it Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, at 960 (2001) (arguing that mixed-sex marriage requirement should be considered a content-based regulation because of marriage's historical pedigree, legal consequences and uniqueness).

Therefore, the restriction on renunciation should be construed as content-based and subject to strict scrutiny. As discussed above in the context of Plaintiffs' substantive due process claim, the government's cost-based justification of the Renunciation Fee does not pass muster under the strict scrutiny standard. Plaintiffs are therefore entitled to summary judgment on this claim.

C. The Renunciation Fee does not Meet the Less Stringent *O'Brien* test

Even assuming that the purpose of the Renunciation Fee is unrelated to suppressing speech – *i.e.*, it is content-neutral, it should still be stricken under the less stringent *O'Brien* test. *United States v. O'Brien*, 391 U.S. 367 (1968); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). Under that test, government action that burdens speech will survive a First Amendment challenge if the following four conditions are satisfied: (1) the government acted within its constitutional power; (2) the regulation furthers an important governmental interest; (3) the government's interest is unrelated to the suppression of free expression; and (4) the restriction is no greater than is essential to furthering the government interest. *Id.*, at 296-302.

The regulations establishing and increasing the Renunciation Fee fail to meet the first, second and fourth *O'Brien* factors.[29] As for the second factor, while the Renunciation Fee may advance a *legitimate* government interest, it does not further an "important" or "substantial" government interest that justifies trampling free speech.[30] *See also* our parallel discussion above in regard to Count I, Section I.C., pg. 19-20.

Regarding the fourth *O'Brien* factor, the fee is far greater than is essential to further the alleged government interest. As discussed above (Section I.C.), there are obvious alternative means at Defendants' disposal to recoup the alleged costs related to renunciation services. Accordingly, the regulations levying and subsequently increasing the Renunciation Fee fail even intermediate scrutiny under *O'Brien*. (*See also* APA discussion below, Section IV). Consequently, Defendants' Motion for

[29] With regard to the first element, Plaintiffs have previously argued in Count I and III that the Renunciation Fee violates the Fifth and Eighth Amendments. Hence, the government lacks constitutional power to levy the Renunciation Fee. Plaintiffs here assume, without conceding, that the third *O'Brien* factor is satisfied.

[30] In *City of Erie*, the government interest that the Court found to be "undeniably important" was the regulation of "conduct through a public nudity ban and combating the harmful secondary effects associated with nude dancing." *Id.*, at 296. In *O'Brien*, the Court concluded that the regulation prohibiting the destruction of draft cards was important because it was aimed at maintaining the integrity of the Selective Service System. Here, however, in order for the fee to survive intermediate scrutiny, the Court will need to conclude, *inter alia*, that a general federal agency self-sustaining policy is a substantial and important policy for purposes of the First Amendment.

Summary Judgment on Count II should be denied and Plaintiffs' Motion should be granted.

III. PLAINTIFFS STATE A CLAIM UNDER THE EIGHTH AMENDMENT'S PROHIBITION AGAINST EXCESSIVE FINES

A. The Complaint States a Claim under the Eighth Amendment

The Eighth Amendment provides: "Excessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. (Emphasis added).

The Excessive Fines Clause is not limited only to fines that are criminal in nature but extends to civil fines as well. *Austin v. United States*, 509 U.S. 602, 610 (1993) , *accord Timbs v. Indiana*, *supra.* A fine is subject to the Excessive Fines Clause if one of the purposes of the fine is punishment. Fines calibrated for retributive or deterrent purposes are considered to have a punitive purpose. *Id*. In *Austin*, the Supreme Court held that because the "purpose of the Eighth Amendment [...] was to limit the government's power to punish," the Excessive Fines Clause may apply to civil forfeiture if that sanction "can only be explained as serving *in part* to punish." *Id*., at 609–10 (emphasis added); *see also United States v. Halper*, 490 U.S. 435, 447 (1989) ("[A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as *also* serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.") (Emphasis added).

The government contends that Plaintiffs have failed to state a claim under FRCP 12(b)(6) because **(1)** expatriation is not a crime, **(2)** the Renunciation Fee is not a fine, and **(3)** its purpose is agency recoupment of costs. ECF 11-1, at 35-36. Defendants ignore the factual allegations in the Complaint which much be accepted as true for purposes of FRCP 12(b)(6). *Jud. Watch, Inc. v. U.S. Dep't of Just.*, 410 F. Supp. 3d 216, 220 (D.D.C. 2019) (*per* Chutkan, J.).

Plaintiffs have sufficiently alleged the following: **(1)** a deterrent purpose is sufficient to bring the fee within the purview of the Eighth Amendment (Complaint, ¶192); **(2)** the Renunciation Fee is a punishment for U.S. citizens who wish to escape the burdens placed upon them by FATCA and that

the enactment of FATCA and the Renunciation Fee within the same time frame in 2010 is no coincidence (*id*., ¶193); or constitutes retribution for their political views which may be antithetical to those of the government; and **(3)** that the government's economic justification for the Fee is implausible and cannot serve as a reason for its increase (*id*., ¶198). Therefore, because the allegations in the Complaint must be assumed to be true, Defendants' Motion to Dismiss Count III should be denied. *See* Dubin v. Cty. of Nassau, 277 F. Supp. 3d 366, 402 (E.D.N.Y. 2017); *accord,* Ben's BBQ, Inc. v. County of Suffolk, 2020 WL 5900037 at *8 (Mag. E.D.N.Y, May 7, 2020), *report adopted* 2020 WL 3790349 at *1 (E.D.N.Y., July 7, 2020)(holding that even where a challenged fee is justified as a recoupment of government costs, the fee will not withstand Eighth Amendment scrutiny where it "serves a punitive purpose.").[31]

B. The Government is not Entitled to Summary Judgment on Count III

At this stage of the proceeding, the government has not proven that the Renunciation Fee is exclusively for recoupment of costs and does not have, at least in part, a punitive or deterrent purpose. There is ample evidence of which the Court may take judicial notice that the government treats overseas Americans as tax cheats and evaders deserving of punishment or deterrence. *E.g.,* Taylor Denson, *Goodbye Uncle Sam? How the Foreign Account Tax Compliance Act is Causing a Drastic Increase in the Number of Americans Renouncing Their Citizenship,* 52 HOUS. L. REV. 967, 983-984 (2015), *citing* Lynne Swanson & Victoria Feraugh, "FATCA: Simple Premise Gone Terribly Wrong," *The Hill* (July 28, 2013) (noting that Members of Congress and the Media often characterize Americans living abroad as "tax cheats, tax evaders or traitors."). At a minimum, the timing and

[31] In *Ben's BBQ* the magistrate had recommended dismissing all of plaintiff's claims except for its Eighth Amendment claim. The district court approved the magistrate's recommendations including the Eighth Amendment claim. In order to secure immediate appellate review the plaintiff voluntarily dismissed its Eighth Amendment claim with prejudice under FRCP 41(a)(2). On appeal the Second Circuit affirmed dismissal of the complaint on the remaining claims, never reaching the Eighth Amendment count. __ Fed. App'x__, 2021 WL 1748480 (2d Cir., May 4, 2021).

juxtaposition of FATCA raise a material issue as to the true motive behind the creation and increase of the Renunciation Fee. *See* Complaint, ¶¶133-135, and n. 31. Nothing in the Administrative Record supports the government's claim that the Renunciation Fee is free from ulterior motives related to FATCA. Under these circumstances – the complete implausibility of the costs (as discussed below) and FATCA – it is incumbent upon the court to determine the actual pretext for the Renunciation Fee. This claim, therefore, is not ripe for summary judgment. *Buffalo Cent. Terminal v. United States*, 886 F. Supp. 1031, 1047-48 (W.D.N.Y. 1995) (refusing to grant summary judgment on an APA claim because of credibility issues related to bad faith and pretext).

IV. THE GOVERNMENT HAS VIOLATED THE APA

A. Standard of Review under the APA

When a plaintiff invokes the APA to seek review of an agency's decision, the question ***usually*** presents a pure question of law. *See Las Americas Immigrant Advoc. Ctr. v. Wolf*, 2020 WL 7039516, at *8 (D.D.C. Nov. 30, 2020). In the APA context, the "function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Catholic Health Initiatives v. Sebelius*, 658 F. Supp. 2d 113, 117 (D.D.C. 2009) (internal quotation marks and citations omitted). Summary judgment requires the court to determine whether the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2); *Eur. Adoption Consultants, Inc. v. Pompeo*, 2020 WL 515959, at *2 (D.D.C.), *appeal dismissed*, 2020 WL 3406482 (D.C. Cir. May 28, 2020).

Beyond the plausibility of the government's rationalization for an administrative rule, summary judgment is not appropriate where the claim requires credibility determinations and issues of possible bad faith. *Kravitz v. United States Dep't of Com.*, 355 F. Supp. 3d 256, 262 (D. Md. 2018) ("Ultimately, resolution of Plaintiffs' APA claims, requires a factfinder to weigh opposing evidence in the

Administrative Record, meaning summary judgment is not proper. Given the foregoing, Plaintiffs' APA claims will proceed to trial."); *Buffalo Cent. Terminal v. United States*, *supra*, 886 F.Supp., at 1047-48 (refusing to grant summary judgment on an APA claim because of credibility issues related to bad faith and pretext); *see also Community for Creative Non-Violence v. Lujan*, 908 F.2d 992, 997 (D.C. Cir. 1990) (noting that discovery is available in APA challenges when there is a strong showing of bad faith or improper behavior or provides the only possibility for effective judicial review).

B. The Renunciation Fee is Arbitrary and Capricious

The government has failed to adequately justify the increase in the Renunciation Fee to $2,350, the highest fee charged anywhere in the world to renounce citizenship and the highest fee charged by the State Department for any for overseas American citizen services. Under section 706(2)(A) of the APA an agency decision is arbitrary and capricious if:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983). To survive arbitrary-and-capricious review, an agency action must be the product of reasoned decision-making. *Fox v. Clinton*, 684 F.3d 67, 74–75 (D.C. Cir. 2012). Thus, even though arbitrary- and-capricious review is deferential, "no deference" is owed to an agency action that is based on an agency's "purported expertise" where the agency's explanation for its action "lacks any coherence." *Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 437 F.3d 75, 77 (D.C. Cir. 2006). Defendants' justification for the five-fold increase of the Renunciation Fee (1) runs counter to the evidence before the agency; (2) lacks any coherence and plausibility; and (3) fails to consider an important aspect of the problem. As a result, Defendants' determination is not entitled

to any deference and is arbitrary and capricious.

As asserted in the Complaint, the services under 8 U.S.C. §1481(a)(5) are straightforward and simple, requiring the government to do one thing, and one thing only: Verify that the renunciant is taking the oath voluntarily with the intent to expatriate. *See* Complaint, ¶¶80-97. The government brushes this off as a mere "perception." ECF 11-1, at 16. But the government's economic analysis is so implausible that it cannot be ascribed to a mere difference in "perception."

What follows is a non-exhaustive list of clear errors and incongruencies in the government's justification for the Renunciation Fee. The list demonstrates the lack of coherency in the government's analysis and raises serious questions as to the accuracy and pretext of the Fee.

1. *The Administrative Record indicates that government staff spend approximately one hour to process and adjudicate a voluntary renunciation application*

According to the Administrative Record, government staff spent an annual total of 1,812 hours in fiscal year 2012 to process and adjudicate voluntary renunciation applications. *See* AR-331-340 which provides a chart of hours of time spent by "Foreign Service Officer" ("FSO") and "Locally Employed Staff" ("LES") for voluntary renunciation cases in 2012. According to the chart, LES spent 1,259 hours for renunciation cases and FSOs spent 553.4 hours. Taking the volume of annual applications into consideration (*i.e.*, 1,703,[32] *see* AR-190-192), the average time spent per application was approximately one hour.

This data is consistent with other publicly accessible information which indicates that government staff do not spend more than an hour on *non-renunciation* relinquishment cases under 8 U.S.C. §1481(a)(1)-(4).[33] [*See 2020 Supporting Statement for Reduction of Paperwork Reduction Act*

[32] That number, in fact, is the average number of applications between 2010-2014. See AR- 262 and Pickard Decl., ¶18. The actual number of voluntary renunciation applications for 2012 was 1,798. *Id*.

[33] Non-renunciation relinquishment cases are inherently more complicated than voluntary renunciation cases. In those types of cases, the consular officer must ensure that the commission of an expatriating act was performed as prescribed by statute. This is a non-issue for renunciation cases. *See* Complaint, ¶¶77-78. It is precisely for this reason that an individual who

Submission, Request For Determination of Possible Loss of United States Citizenship, (OMB No.1405-0178, Form DS-4079), available at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202002-1405-003 (the "2020 Supporting Statement") which provides that a "DS-4079 is reviewed for **five minutes each** by overseas Locally Employed Staff (LES) […], an overseas Foreign Service officer […], a domestic Foreign Service officer […], and a domestic Civil Service officer […]"]. *Id.* at p. 7.

Defendants have repeatedly stated that voluntary renunciation cases are "time-intensive" and "time-consuming." *See* ECF 11-1, at 17. However, not once has the government furnished the actual number of hours it takes to process a single voluntary renunciation case, from start to finish. In fact, the evidence supplied by the government completely contradicts its own counter-intuitive contention that voluntary renunciation cases are "time-intensive." One hour of direct labor to process a voluntary renunciation request is not time-intensive as the government claims; nor does it even come close to justifying a $2,350 processing fee for such requests.

2. *The government failed to provide a plausible explanation why it costs $2,350 to process renunciation applications*

The government's assertion that it costs $2,350 to process a single voluntary renunciation application is totally implausible and lacks any coherence. Defendants allege that the actual costs to the government for processing voluntary renunciation cases is determined by a Cost-of-Service Model ("CoSM"). ECF 11-1, at 7. According to Defendants, after implementing the $450 fee in 2010, they conducted a new "Overseas Time Survey" (the "Survey" or "OTS") that collected extensive data on the time spent by consular staff performing consular services at all overseas locations. *Id*., at 9.

applies for non-renunciation relinquishment must complete and submit the four-page DS-4079. The purpose of DS-4079 is to determine the expatriating act that serves as the grounds for relinquishment under 8 U.S.C. §1481(a)(1)-(4). *See* 7 FAM 1264.

Defendants have produced a highly redacted[34] version of the Survey as part of the Administrative Record. AR, at 266-330. Defendants claim that they increased the fee to $2,350 due to the results in the Survey. *Id*.

Defendants have produced the Declaration of Stacy L. Pickard (the "Pickard Decl."), the lead management analyst in the Strategic Policy & Planning Division of the Office of the Comptroller for the Bureau of Consular Affairs at the U.S. Department of State. ECF 11-2, ¶1. According to Ms. Pickard, the document entitled *Consular Cost of Service Model Data Set: Other Citizens Services* (the "Model Data Set," AR-190-192) "provides the final cost estimates used to calculate the fee for renunciation of U.S. citizenship." Pickard Decl., ¶12. The Model Data Set is attached here as **Exhibit A.** The Model Data Set includes three types of costs. These cost data are, as we show, completely incomprehensible.

Direct Renunciation Services: According to the Model Data Set, the direct costs incurred in performing activities associated with "Loss and Renunciation of U.S. Citizenship and Nationality" totaled $1,375,231 ("Direct Renunciation Services"). AR-190. These services include "reviewing requests to renounce U.S. citizenship, including verifying the individual's identity, verifying that the individual has performed a potentially expatriating act (taking the oath of renunciation is one such act),

[34] The Administrative Record is heavily redacted, especially the Survey. Notably, the Survey is divided into several sections. Each section details the workload hours in a specific category: (1) workload by service (section 4.1); (2) workload by staff type (section 4.2); (3) workload by size of post (section 4.3); (4) workload by activity (section 4.4). Workload by service includes eight different types of services and each service includes a certain number of "activities" (AR-272). For our purposes it is essential to note that renunciation of citizenship falls into "overseas citizens services" which includes 41 different activities. *Id*. However, it is impossible to glean from the Survey any information as to the time spent specifically on renunciation activities. Section 4.4. is redacted and renunciation is not even mentioned in the Survey. Counsel for Plaintiffs inquired into this matter on May 7, 2021 by contacting government counsel and requesting an unredacted version of the AR. Counsel for Defendants replied on May 12, 2021 that "none of the redacted information in Section 4.4 of the Overseas Time Survey Analysis Report was considered directly or indirectly, **because the renunciation service did not appear in any of those sections. Those sections mention only other, unrelated services**." (Emphasis added). The government's position is, to say the least, strange. How is it possible that the highest fee for consular services which is allegedly extremely time-consuming is not even mentioned in the very Survey relied upon by the government to fix the increased renunciation fee? Moreover, Section 4.4. of the OTS "displays the fifteen activities with the highest mean workload hours for each region/post size grouping." AR-298. The government thus concedes that renunciation services are not even within the 15 (out of 41) activities with the highest mean workload hours; yet it has the highest fee.

confirming that the individual is voluntarily relinquishing their U.S. nationality, and preparing the renunciation package for headquarters review." Pickard Decl., ¶13.

Management Services: The Model Data Set then lists six additional cost-generating activities in connection with renunciation ("Management Services"). These costs totaled $16,920 per year.

Other Bureau Services and ICASS: Last, the Model Data Set lists two additional cost categories: (1) "Other Bureau Support" and (2) International Cooperative Administration Support Services ("ICASS"), which total over $2.5 million in indirect cost not associated at all with the voluntary renunciation process and dwarf the costs for Direct Renunciation Services. AR-190-191; Pickard Decl., ¶¶15-16.

(1) **Direct Renunciation Services**: According to the government, it apparently costs $808 of staff time per a single application ($1,375,231÷1,703=$808). The data in the above-mentioned 2020 Supporting Statement and the Administrative Record indicate that it takes approximately **twenty-three hours** of staff time to process and adjudicate a **single** voluntary renunciation application.[35] That it takes the government 23 person-hours to process a single voluntary renunciation case defies credibility. Voluntary renunciation is a straightforward procedure, requiring the renunciant to complete two simple forms (DS-4080 and DS-4081)[36] and take an oath. Complaint, ¶89-91. The government officer records his assessment of the renunciant's state of mind and reports back to the Bureau of Consular Affairs, Office of Overseas Citizens Services in Washington, D.C. for final approval. *Id*., ¶92-95. There is nothing in the Administrative Record or in Ms. Pickard's Declaration

[35] This number is based upon information in the 2020 Supporting Statement and data in the Administrative Record. According to the Supporting Statement, the hourly rate for LES and FSO at $24.60 and $79.20, respectfully. According to the Administrative Record (AR-291), "for every 1 hour of work performed by FSO, LES performed 2.39 hours." Based on this ratio, the costs (in terms of time) by FSO are $338 ($808÷2.39= $338) and the remainder, $470, is the costs (in terms of time) by LES. This translates into 4.2 hours of FSO time per application ($338÷$79.2/hour = 4.2 hours) and 19.1 hours of LES time per application ($470÷$24.6/hour = 19.1 hours).

[36] These forms do not appear in the Administrative Record; they are publicly available at https://eforms.state.gov/Forms/ds4080.pdf & https://eforms.state.gov/Forms/ds4081.pdf. The Court is requested to take judicial notice of these simple forms *totaling* a tad more than two pages.

that sheds any light on the amount of time required to perform these presumably ministerial acts. Nor do Defendants explain how the purported 23-hour figure squares with other data indicating that the government spends less than an hour in staff time for far more complicated cases (*e.g.*, non-renunciation relinquishment cases using the DS-4079[37]); a disparity of 76 times![38]

The Court will recall that the Administrative Record indicates that staff time required to process a single voluntary renunciation application takes approximately one hour. *See above,* Section IV.A.1.

For these reasons alone, the government's motion for summary judgment should be denied. *See* Council of Parent Attorneys and Advocates, Inc. v. DeVos, 365 F.Supp.3d 28 (D.D.C.), *appeal dismissed,* 2019 WL 4565514 (D.C. Cir. 2019) (failure to adequately explain government policy is arbitrary and capricious); *see also* Immigrant Legal Res. Ctr. v. Wolf, 491 F. Supp. 3d 520, 539 (N.D. Cal. 2020) (enjoining fee DHS fee increase after finding that it failed to disclose data, relied on unexplained data, and ignored data in the record). The government's position that it takes twenty-three hours to complete a voluntary renunciation application "lacks any coherence;" nor is it entitled to any deference by the Court. Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 437 F.3d, *supra*, at 77.

(2) **Other Bureau Services**: The bulk of the costs the government wishes to allocate to the voluntary renunciation process do not relate in any manner to the voluntary renunciation process. "Other Bureau Services" and "ICASS" are "indirect costs." Total annual costs for "Other Bureau Support" are $1,566,785 and are divided into different bureau categories:

[37] Form DS-4079 comprising four pages plus explanatory material (*i.e.*, twice as long as the DS-4080 and DS-4081 forms for voluntary renunciation). https://eforms.state.gov/Forms/ds4079.pdf

[38] *See* 2020 Supporting Statement at p. 7.

	Direct Trace	Assigned	Allocated	Total
Functional Bureaus	$19,591	$161,789	$854,190	$1,035,571
Regional Bureaus	$0	$0	$52,899	$52,899
Support Bureaus	$0	$280,398	$197,917	$478,315

AR-190.[39]

Defendants have not provided any explanation, let alone a coherent one, which would justify these indirect costs which have nothing to do with voluntary renunciation. The Model Data Set does not provide any explanation as to the nature of the costs or the method used to allocate these indirect costs to voluntary renunciation services.[40] The Model merely repeats, word-for-word, that "Allocated Costs" consist of "staff time." This "staff time" is being charged by the government at $1,105,007. Yet, we are left with no explanation why this type of resource is necessary for voluntary renunciation. Absent a rational allocation formula and justification for assigning these concededly non-renunciation indirect costs to the voluntary renunciation process, the inescapable conclusion is that the overwhelming majority of the costs associated with voluntary renunciation have no rational relationship to the numbers relied upon by the State Department to justify the world's highest renunciation fee.

(3) **ICASS**: The government's allocation of ICASS costs is yet another example of how it

[39] For Functional Bureaus, **(a)** "Direct Trace Costs" ($19,591) includes *rent*; **(b)** "Assigned Costs" ($161,789) include "consular fee revenues allotted to specific activities, such as *consular training*;" and **(c)** "Allocated Costs," ($854,190) which "include a share of all other costs of these bureaus representing the *staff time those bureaus spend supporting consular activities*." *Id*. For Regional Bureaus, a $52,899 cost is listed as an "Allocated Cost" which includes "a share of all other costs of these bureaus representing the staff time those bureaus spend supporting consular activities." *Id*. (a verbatim explanation as in Functional Bureaus). For Support Bureaus, the Model Data Set lists **(a)** $280,398 in "Assigned Costs," which include "CA's contributions to FSO *residential lease* costs;" and **(b)** $197,917 in "Allocated Costs," which include "a share of all other costs of these bureaus representing the staff time those bureaus spend supporting consular activities." *Id*. In short, none of these indirect costs has anything to do with the voluntary renunciation process. Indeed, some of these remotely indirect costs are "compounded," by re-allocating them between bureau categories.

[40] There are other significant discrepancies in the Model Data Set. The first category is described as "***Loss*** and Renunciation of U.S. Citizenship and Nationality." It is unclear what the term "loss" refers to but it appears to suggest that non-renunciation relinquishment services were included in the OTS, just as suspected by Plaintiffs, yet denied by Defendants. *See* Complaint, ¶203(C); ECF 11-1, at 18-19. In addition, it appears that the glossary of terms following the Model Data Set is out of place. AR-190-192. Those terms do not correlate to the categories in the Model and appear to deal with activities in connection with the acquisition and retention of U.S. citizenship.

inflated the cost justification for the Renunciation Fee. ICASS is the principal means by which the government provides and shares the cost of common services. *See* United States Government Accountability Office, *Report to the Chairman, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Committee on Homeland Security and Governmental Affairs, United States Senate*, Jan. 2012, available at https://www.gao.gov/assets/gao-12-317.pdf (the "GAO Report"); *See also* 6 FAH-5, the *International Cooperative Administrative Support Services Handbook*. According to Defendants, the total annual costs assigned to ICASS is $1,040,730 which purports to account for approximately 26% of the total Renunciation Fee processing cost.[41] ICASS costs have nothing to do with the voluntary renunciation process and therefore cannot justify the exorbitant Renunciation Fee.

3. *The Government failed to explain why the Renunciation Fee is identical to the fee for non-renunciation relinquishment cases*

Despite the obvious differences between the two types of expatriation, *viz.* non-renunciation relinquishment (8 U.S.C. §1481(a)(1)-(4) and voluntary renunciation (8 U.S.C. §1481(a)(5)), the fees for both services are identical. *See* Complaint, ¶203(C).

The government has failed to provide any explanation for this anomaly. The sole explanation given is that "all CLN requests are quite time-consuming for consular officers and thus costly, regardless of which expatriating act in INA §349(a) [8 U.S.C. §1481(a)] is claimed." ECF 11-1, at 19.[42]

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[41] The services available through ICASS include security services, health services, information management, vehicle maintenance, shipping and customs, leasing services, furnishings, payroll services. This list continues. *Id*., at 52; 6 FAH-5 H-330. These expenses are necessarily indirect costs which have nothing to do with the actual renunciation process. The government has not provided any explanation as to the source of the ICASS charges and one is left guessing whether this charge is for health services or one of the other thirty-five listed services. *Id*. One is also left wondering whether the ICASS costs – which include residential and government rent costs (*id*., at 54)– are duplicative of the Other Bureau Service costs which also included residential and government rent costs. Last, the government has failed to provide any explanation as to the method of allocating these general costs to renunciation services.

[42] The reference is to the Certificate of Loss of Nationality, a straightforward and simple document which evidences loss of U.S. citizenship irrespective of the grounds therefor. The CLN is also known as Form DS-4083 and may be found at

4. *The Government failed to explain why more voluminous consular services that require more time per application are a mere fraction of the Renunciation Fee*

According to the Complaint (fn. 46), the charge for E visa consular services is approximately 1/10th of the Renunciation Fee, even though the process for adjudicating E visa (and similar visas) applications are far more time-consuming than voluntary renunciation cases. Moreover, it is clear that E visa applications are far more voluminous per year than voluntary renunciation applications.[43] The government has conspicuously ignored this glaring discrepancy.

A brief survey and explanation of the E-visa application process is attached here as **Exhibit B.** The discrepancy between the palpably more time-consuming visa application costs and the astronomical Renunciation Fee, suggests that something more than recoupment is at play in the expatriation context. *See* Section III above (Eighth Amendment Claim). Moreover, the government cannot simply hide behind the "deference" standard when its estimates are off the charts and are completely incoherent.

5. *The government failed to consider an important aspect of the problem by effectively ignoring the constitutional dimension of overseas Americans' expatriation rights.*

"It is black letter law that an agency acts arbitrarily and capriciously when it entirely fails to consider an important aspect of the problem." *Cath. Legal Immigr. Network, Inc. v. Exec. Off. for Immigr. Rev.*, 2021 WL 184359, at *12 (D.D.C. Jan. 18, 2021); *see also Physicians for Soc. Resp. v. Wheeler*, 956 F.3d 634, 647 (D.C. Cir. 2020) (finding policy arbitrary and capricious where it failed to consider how the policy affected certain statutory mandates). Here, the government cavalierly

https://eforms.state.gov/Forms/ds4083.pdf and is not included in the Administrative Record. In voluntary renunciation cases the government need not spend any significant time on assessing whether the renunciation was done with intent because the "execution of the Oath of Renunciation usually is sufficient evidence of intent to lose U.S. nationality." 7 FAM 1262(e); Complaint, ¶93. *See* also footnote 33 above.

[43] Tellingly, the Dep't of State issued 63,178 E-1/E-2 visas in 2019; 60,438 in 2018; 62,974 in 2017; 64,329 in 2016; and 59,221 in 2015. *See* https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/annual-reports/report-of-the-visa-office-2019.html. These numbers relate only to the number of visas that were issued, not the number of applications that were filed.

written off any constitutional concerns by making the self-serving statement that "the Department has not restricted or burdened the right of expatriation." 2015 Final Rule, 80 Fed. Reg., *supra*, at 51464-01. There is not an iota of evidence in the Administrative Record that shows the government considered the legal issues at stake. What is more, in allocating millions of dollars of indirect costs to the voluntary renunciation process from other overseas and domestic State Department functions, the government neglected to consider what types of costs (if any) are appropriate to take into account in burdening the exercise of the fundamental right to voluntarily expatriate. Accordingly, the regulations increasing the Renunciation Fee are arbitrary and capricious because they failed to consider an important aspect of the problem. *See* Immigrant Legal Res. Ctr. v. Wolf, *supra*, 491 F. Supp. 3d, at 541 (failure to consider important aspect was arbitrary and capricious, thereby justifying preliminary relief).

6. *The Renunciation Fee is arbitrary and capricious in that it is inconsistent with past agency practice*

The government's disregard of the constitutional dimension of its action is exacerbated by the government's failure to explain why, after 239 years, it decided to begin charging for voluntary renunciation. Even in 2010, when the government first imposed a fee on voluntary renunciation, it did not seek to recoup the full cost of providing the service. *See* 75 Fed. Reg. 36522-01, 36525 (June 28, 2010) (noting that the $450 fee represented "less than 25 percent" of the total cost to the government in 2010 for providing that service). As previously mentioned, Defendants then explained in 2010 that they did so "in order to lessen the impact on those who need this service and not discourage the utilization of the service, a development the Department feels would be detrimental to national interests." *Id*. In other words, in the past the government felt that other important factors justified providing renunciation services for free (up to 2010) or "less than 25 percent" (2010-2015).

These self-imposed limitations vanished in the 2014-2015 regulations which increased the Renunciation Fee to $2,350. The government has not explained why such considerations are no longer

relevant. In the 2014 IFR, the government contradicts its 2010 statement by declaring – devoid of any explanation or evidentiary support – that it "believes there is no public benefit or other reason for setting this fee below cost [...]". 2014 IFR at, 51251.

When an agency discards prior considerations and findings without a reasoned explanation, the action will be held to be arbitrary and capricious. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (An unexplained inconsistency in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice."), *quoting Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)); *see also Council of Parent Attorneys and Advocates, Inc. v. DeVos*, 365 F.Supp.3d, *supra*, at 50 (same); *cf.*, *Humane Society v. Locke*, 626 F.3d 1040, 1049–50 (9th Cir. 2010) (concluding that an agency acted arbitrarily and capriciously where the agency took a "seemingly inconsistent approach" with the approach it had taken previously).

Defendants' have failed to articulate any reason why prior considerations such as discouragement of the use of the service and "national interests"[44] were no longer relevant in the 2015 Final Rule. The government purports to justify the Renunciation Fee increase on the grounds of a higher volume of renunciation requests due to FATCA. Nothing in the Administrative Record supports this explanation. Among other things, the time to process an individual application would not be affected by an increase in the number of requests. Intuitively, a higher volume of requests would contribute to a *reduction* in cost per service.

Given the government's faulty financial analysis, its failure to consider important aspects of the case, its unexplained inconsistent practice and the inadequacy of the Administrative Record, the State Department's decision-making leading to the radical increase in the Renunciation Fee was

[44] Nowhere in the Administrative Record or in its submissions in this proceeding has the government elucidated what it meant by "national interests" in the context of the Renunciation Fee imposition or increase.

arbitrary and capricious in contravention of 5 U.S.C. §706(2). Finally, the Court need not to defer to the government's decision-making under the APA because the decision to increase the Renunciation Fee five-fold was not the product of its agency expertise. Rather the entire procedure is a matter of basic accounting and simple arithmetic.[45]

V. 8 U.S.C. §1481(A)(5) SHOULD BE INTERPRETED TO CONFORM TO CUSTOMARY INTERNATIONAL LAW

Plaintiffs have alleged that the right to voluntarily renounce citizenship is part of customary international law ("CIL"). Complaint, ¶¶ 208-214. Plaintiffs have further alleged that the Renunciation Fee is an impermissible burden on this right. *Id*., ¶¶215-218. The government contends that this claim should be dismissed under FRCP 12(b)(6) for "failure to identify a rule of customary international law forbidding the current renunciation processing fee." ECF 11-1, at 25. In the alternative, the government contends that they are entitled to summary judgment on this claim. *Id*.

The Complaint clearly identifies the right to voluntarily expatriate as a right under CIL. *See* Complaint, ¶209. Moreover, Plaintiffs are entitled to summary judgment on this claim because the Renunciation Fee violates the CIL right to voluntarily expatriate and 5 U.S.C. §1481(a)(5) should be made to comport with CIL.

A. The Right to Voluntarily Expatriate is Part of CIL

CIL is generally considered to be the law of the international community that "results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (1987).

[45] Plaintiffs have also alleged that the 2015 Final Rule is not in accordance with 31 U.S.C. §9701. 5 U.S.C. §706(2)(A). Complaint, ¶¶200, 205. Plaintiffs asserted that the 2015 Final Rule is inconsistent with 31 U.S. §9701 because (1) the Renunciation Fee does not truly reflect the costs to the government; and (2) the government ignored the value of the service to the recipient and the public policy or interest served. This argument is coterminous with Plaintiffs' analysis under Count IV (APA) and, thus, need not be further expounded upon here.

International treaties and conventions may also serve as a source for CIL. *See* Garland A. Kelley, *Does Customary International Law Supersede A Federal Statute?*, 37 COLUM. J. TRANSNAT'L L. 507, 511 (1999) (widely ratified human rights treaties, U.N. resolutions are sources of CIL); *Paquete Habana*, 175 U.S. 677, 700 (1900) (Customs of nations as source of CIL). In *Charming Betsy*, the Court recognized the presumption that Congress does not intend to violate CIL through legislative enactments unless it clearly states so. *Murray v. Schooner Charming Betsy, The* 6 U.S. (2 Cranch) *supra*, at 118. Therefore, Section 1481(a)(5) should, to the extent possible, be construed to be consistent with the CIL right to voluntary expatriation.

The right to voluntary expatriation is part of CIL. In fact, it is perhaps one of the oldest rights universally recognized. *See* Slaymaker, at 191-192 (describing state practice);[46] Savannah Price, *The Right to Renounce Citizenship*, 42 FORDHAM INT'L L.J. 1547 (2019) (the right to voluntarily renounce citizenship "has become an international customary right […]"); *See* also William Thomas Worster, *Human Rights Law and the Taxation Consequences for Renouncing Citizenship*, 62 ST. LOUIS U. L.J. 85, 95 (2017) ("Worster") ("[…] the right to renounce nationality is certainly widespread and consistent. This conclusion, combined with the international concern and existence of the right in the UDHR and inherently in the ICCPR, suggests that the right to renounce nationality also exists under customary international law."); *See* statement of Representative Jehu Baker, *Cong. Globe*, 40th Cong., 2nd Sess., 1101 (1868) (describing state and nation practice). *See generally* Salyer, Chapter 11, Kindle Locations 3635 to 3907.

Moreover, the international community explicitly recognized the right of expatriation as an international norm in the Universal Declaration of Human Rights of 1948 ("UDHR"), which included in Article 15 that "no one shall be [...] denied the right to change his nationality." Universal Declaration

[46] *See* also Slaymaker, at 193, discussing the origins of the right to expatriate and demonstrating its universal acceptance among the nations.

of Human Rights, art. 15, G.A. Res. 2I7A, 3 U.N. GAOR Supp. 535, 538, U.N. Doc. A/777 (1948). *See* Ficken v. Rice, 2006 WL 123931, at *6 (D.D.C., Jan. 17, 2006) (UDHR may be considered evidence of customary international law.); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 719 (9th Cir. 1992), *cert. denied,* 507 U.S. 1017 (1993) ("The Universal Declaration of Human Rights is a resolution of the General Assembly of the United Nations. As such, it is a powerful and authoritative statement of the customary international law of human rights.").

Our own government has also endorsed the notion that voluntary expatriation is not a mere domestic concern but rather is part and parcel of the law of nations. Congress unequivocally stated in the 1868 Expatriation Act, that the right to voluntary expatriation belongs to "all people." Congress relied upon international law as a foundation for the declaratory preamble of the Act. *See*, for example, statement of Representative Jehu Baker, *Cong. Globe*, 40th Cong., 2nd Sess., 1101 (1868); *see also* the statement of Philadelph Van Trump, *Cong. Globe*, 40th Cong., 2nd Sess., 1801 (1868);[47] *see also* Note, *The Right of Nonrepatriation of Prisoners of War*, 83 YALE L. J. 358, 373 (1973) ("For over a hundred years the United States has viewed expatriation as an international right of all people"). *See also* State Department response to U.N. Secretary General, Rep. on Human Rights and Arbitrary Deprivation of Nationality, *supra,* ¶ 39.

Accordingly, there can be little doubt that the right to voluntarily expatriate is part and parcel of CIL.

[47] "[…] Sir, she has not yet forgotten that one great national and universal act of expatriation which spoke this great fabric of constitutional government into being through the process of revolution. She has not yet forgotten nor has she yet recovered from a feeling of deep national chagrin and humiliation at her signal discomfiture in the war of 1812 upon this very question which we are now considering. That is the secret of all her movements […] ***In demanding a recognition of this principle as a subject of international law***, we owe to them a distinct and unequivocal legislative declaration; an open and honest avowal, not only of our future purposes, but also of our administrative policy in regard to our own citizens upon this. Question of allegiance. It should no longer remain either in doubt or obscurity." (Emphasis added).

B. 5 U.S.C. §1481(a)(5) Should be Interpreted in Such a Way as to Comport with CIL

The government argues that Plaintiffs failed to prove that there is "an absolute right under customary international law to expatriate free of a fee." ECF 11-1 at 24. However, state practice, including our own country's tradition (until 2010), demonstrates that the right to voluntarily renunciate was, historically, provided *gratis*. The government must acknowledge that the U.S. has the world's highest fee to renounce citizenship. Most countries do not assess a fee for voluntary renunciation and those that do, charge only a nominal fee. *See* the attached chart, **Exhibit "C."** This fact demonstrates that user-charges, especially expensive administrative fees, are an impermissible restriction on the exercise of the expatriation right. Worster, at 98 and 99 ("imposing burdensome administrative costs to exercise this right" is prohibited under CIL).

Because 8 U.S.C. §1481(a)(5) does not specifically authorize the government to charge a fee for voluntary renunciation, the statute should be interpreted so that it comports with CIL. Bart M.J. Szewczyk, *Customary International Law and Statutory Interpretation: An Empirical Analysis of Federal Court Decisions*, 82 GEO. WASH. L. REV. 1118, 1171 (2014) (ambiguous statutes should be interpreted to comport with CIL); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981) (court construed the INA not to authorize indefinite detention as an alternative to exclusions, because to hold otherwise would violate the fundamental principle of international custom that "human beings should be free from arbitrary imprisonment."). In order to comply with CIL, Section 1481(a)(5) should be construed either to prohibit assessment of the Renunciation Fee altogether or at a minimum to limit the charge to a reasonable and fair amount.

CONCLUSION

For all the reasons set forth above, the Court is respectfully requested to:

1. Deny Defendants' motion to dismiss Counts III and V;
2. Deny Defendants' motion for summary judgment as to Counts I-V;
3. Grant Plaintiffs' motion for summary judgment as to Counts I-II and V.

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Respectfully submitted,

/s/ L. Marc Zell

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